

立法會
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Administration)

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**Bills Committee on
Public Health and Municipal Services
(Amendment) Bill 2001**

**Minutes of meeting
held on Wednesday, 23 May 2001 at 8:30 am
in the Chamber of the Legislative Council Building**

Members Present : Hon Fred LI Wah-ming, JP (Chairman)
Hon Cyd HO Sau-lan
Hon Andrew CHENG Kar-foo
Hon Tommy CHEUNG Yu-yan, JP
Hon Michael MAK Kwok-fung
Dr Hon LO Wing-lok
Hon Audrey EU Yuet-mee, SC, JP

Members Absent : Hon WONG Yung-kan
Hon WONG Sing-chi

Public Officers Attending : Mr David LAU
Principal Assistant Secretary for the Environment and Food (A) 2

Mr W H CHEUK
Assistant Director (Headquarters)
Food and Environmental Hygiene Department

Dr Y Y HO
Consultant (CM) (RAC)
Food and Environmental Hygiene Department

Mr Lawrence PENG
Senior Government Counsel
Department of Justice

Mr W S YIP
Senior Assistant Law Officer
Department of Justice

Attendance by Invitation : Hong Kong Federation of Restaurants and Related Trades

Mr NG Tak-leung
Chairman

Mr David MA
Vice-Chairman

Chiu Chow Overseas Food Trade Merchants Association

Mr CHEUNG Sing-hung
Chairman

Hong Kong Catering Industry Association

Mr Peter T S LO

Karaoke Concern Group

Mr Anthony LOK

Clerk in Attendance : Mrs Constance LI
Chief Assistant Secretary (2)5

Staff in Attendance : Mr Stephen LAM
Assistant Legal Adviser 4

Miss Betty MA
Senior Assistant Secretary (2)1

Action

I. Meeting with deputations

The Chairman welcomed the deputations and invited them to express views on the Bill.

Hong Kong Federation of Restaurants and Related Trades

2. Mr NG Tak-leung said that he supported the Bill in principle and welcomed the direction that the Administration should take enforcement actions against those unlicensed food business which had no intention or were not qualified to apply for a licence. However, Mr NG said that there should be an effective mechanism to prevent the abuse of power by the Director of Food and Environmental Hygiene (DFEH) in issuing closure orders and that there should be an appeal channel for the aggrieved.

Chiu Chow Overseas Food Trade Merchants Association

3. Mr CHEUNG Sing-hung said that he did not object to the Administration's control over unlicensed food establishments in order to protect public health, but he questioned the need for DFEH to issue a closure order on licensed food premises since no serious food incidents had occurred in licensed premises in past years. He was also concerned about any possible abuse of powers by DFEH. He considered it unfair that the control over licensed food premises was more stringent than that for unlicensed premises, as the closing of unlicensed food establishments had to go through court procedures under the proposed section 128B, while DFEH would be empowered under the proposed section 128C to close the licensed ones without having to go to the court.

4. Mr CHEUNG suggested that before enforcing the closure order, the Food and Environmental Hygiene Department (FEHD) should give warnings to food establishments and require them to rectify the situations within a specified period. If no improvement was found after the time limit, FEHD should then apply to the court to close the food premises. He also suggested shortening the time for processing a food business licence.

Hong Kong Catering Industry Association

5. Mr Peter LO said that he held similar views as Mr CHEUNG Sing-hung. He said that it should be prosecution's responsibility to provide evidence against the defendant, and that any benefit of doubt should go to the defendant. However, the proposed section 128C empowered DFEH to close a food establishment on grounds that it posed an immediate health hazard to the public, without going through the court procedures. He expressed concern that the aggrieved could only

Action

seek appeals or remedies after the execution of a closure order. Mr LO further said that the Bill should set out concrete objective conditions for DFEH to rescind a closure order automatically after a food establishment had made the necessary improvements. He suggested that the Administration might consider issuing a partial closure order to close only those parts where contamination was suspected, instead of closing the whole establishment.

Karaoke Concern Group

6. Mr Anthony LOK said that he generally supported the Administration's proposal to tighten control over illegal or unlicensed food establishments. However, he sought clarification as to whether selling sashimi or siu mei without the necessary permit by a licensed food establishment would also be subject to a closure order. He also supported Mr Peter LO's suggestion of issuing a partial closure order so that the food establishment concerned would only need to close the contaminated parts and continue operation in the unaffected areas. He also asked if the procedure for re-entering closed food premises to carry out rectification works could be simplified.

Discussion

7. Responding to Mr Michael MAK's concern that some operators did not really want to apply for a licence, Mr NG Tak-leung said that some unlicensed food establishments might not be equipped with proper water supply and washing facilities. He further said that some operators only intended to operate on a temporary basis to make money and had no intention to apply for a licence. However, he considered that genuine operators were willing to comply with the licensing requirements, but some might have encountered technical or procedural difficulties in their application. He agreed in principle that DFEH should close those unlicensed premises without proper water supply. He was of the view that licensed food establishments should not be subject to more stringent control than the unlicensed premises.

8. Mr Audrey EU sought clarification on the deputations' comments that licensed food establishments were subject to more stringent control than the unlicensed ones under the Bill. Mr CHEUNG Sing-hung said that licensed establishments were already subject to frequent inspections and FEHD should have detailed record of licensed establishments. He considered that there should be more stringent control on the unlicensed establishments instead. In response to Ms EU's question on whether the trade agreed to the circumstances which were regarded as posing "immediate health hazard" in the proposed section 128A(3), Mr NG Tak-leung said that the trade did not object to imposing closure orders on illegal or unlicensed food establishments if they posed immediate health hazard.

Action

The trade's main concern was that the closure orders should go through proper court procedures to guard against abuse of power or human errors.

9. Mr Tommy CHEUNG sought the views of the deputations on the definition of "reasonable cause" and "immediate health hazard" in section 128C(1). He asked whether the trade knew about any food incidents which would fall within these definitions.

10. In response, Mr NG Tak-leung said that sometimes FEHD over-reacted to some isolated food poisoning cases which were not necessarily caused by the food provided or the hygiene conditions of the food establishments. He requested the Administration to verify these cases carefully and to safeguard the trade's interests in drafting the Bill. Mr Peter LO pointed out that the proposed section 128C was harsh on licensed food establishments because they would be subject to immediate closure by DFEH, while the unlicensed premises would be given seven days' notice to go to the court under section 128B. Besides, the definition of "immediate health hazard" under the proposed section 128A was too wide, since the four circumstances described in section 128A(3) were only examples and were not exhaustive. He considered it more appropriate to deal with these unhygienic situations by the existing Demerit Point System which permitted revocation/suspension of licence.

11. Dr LO Wing-lok asked whether the deputations considered the four circumstances which were regarded to pose "immediate health hazard" under section 128A(3) were reasonable. Mr NG Tak-leung said that "the location, construction or state of the premises" in section 128A(3)(a) was quite ambiguous. He considered that there should not be much problem with the "location" or the "state" of licensed premises, as these premises had gone through elaborated licensing procedures and were monitored by the relevant government departments. As for food contamination, he said that this should be substantiated by scientific data and laboratory results if a closure order was to be issued.

12. Mr Peter LO also pointed out that the Bill did not allow the operator to seek independent professional opinion to refute the laboratory results of the Administration before execution of a closure order.

13. Mr CHEUNG Sing-hung emphasized that the Bill would have significant implications on the trade, but the medium and small food establishments generally did not have much understanding of the legislative intent and contents of the Bill. In view of the recent economic downturn, Mr CHEUNG suggested delaying the implementation of the Bill so that the trade could have more time to understand the measures proposed in the Bill. Mr David MA of Hong Kong Federation of Restaurants and Related Trades added that a closure order should only be issued

Action

based on substantive evidence that a particular food establishment actually posed immediate health hazard to the public. He said that in the case of contamination of water source, it should affect more than one food establishment, and the Administration should not just close the food establishment(s) concerned but should find ways to solve the problem.

14. The Chairman thanked the deputations for their views.

II. Meeting with the Administration

Views expressed by the deputations

15. The Chairman sought the Administration's response to the views expressed by the deputations, in particular the following -

- (i) the suggestion of partial closure as against complete closure of the food premises;
- (ii) the comment that the definition of "immediate health hazard" in section 128A(3)(a)-(d) was too wide; and
- (iii) justification for empowering DFEH to issue closure orders in respect of licensed food establishments, while closure orders against unlicensed food establishments were to be issued by the court.

16. Assistant Director (Headquarters) of Food and Environmental Hygiene Department (AD(HQ)) gave the following response -

- (a) The proposed sections 128B and 128C applied to different situations. Section 128B dealt with unlicensed food establishments which might not necessarily pose an immediate health hazard. Section 128C was concerned with food establishments, licensed or unlicensed, which posed an immediate health hazard affecting the public.
- (b) As FEHD was the authority to issue food business licences, it would not be appropriate for FEHD to issue closure orders against food establishments which were not licensed or failed to obtain a licence. To allay worries of the trade, any closure orders on unlicensed food establishments should more appropriately be issued by the court. The procedure was already provided in existing legislation, and the proposed section 128B of the Bill only sought to shorten the time for FEHD to apply to the court for such closure orders.

Action

- (c) For closure orders made by DFEH under the proposed section 128C on grounds of immediate health hazard, any person aggrieved by such orders could lodge an appeal under section 128C(20).
- (d) For food incidents involving food contamination by bacteria, a closure order would only be made by DFEH under section 128C based on clear evidence such as inspection findings and laboratory tests. A closure order under section 128C would only be made for the purpose of protecting public health.
- (e) The Demerit Point System did not provide for immediate closure of a food establishment, and a licence could only be suspended if 15 points had been registered in a year in respect of a particular licensed food establishment.
- (f) Based on legal advice, the word "and" was used in the definition of "immediate health hazard" in section 128A(3) to mean that the definition included but not limited to the four circumstances described in section 128A(3)(a)-(d).
- (g) It was not practicable to have partial closure of food establishment as there would be enforcement difficulty causing confusion to the public.
- (h) Selling sashimi or siu mei in a licensed food establishment without the necessary endorsement or permit was separately regulated under Cap. 132. Such offences were punishable by a level 5 penalty and imprisonment of six months.

17. Mr Tommy CHEUNG said that his main concern was that DFEH should not be given too much power in respect of the making of closure order against licensed food establishments. He supported the suggestion of partial closure, so that only the fish tank or the areas affected, instead of the whole restaurant, should be closed. Mr CHEUNG also asked whether the word "permit" should be deleted from section 128B, as licensed food establishments selling sashimi or siu mei without a permit should not be subject to a closure order under the Bill.

18. AD(HQ) advised that it would be difficult to enforce a partial closure order. For example, if the immediate health hazard existed in the kitchen of the restaurant, it was impossible to just close the kitchen and let the restaurant continue its operation. He further advised that a closure order would not be issued to a

Action

licensed food establishments solely because it sold sashimi or siu mei without permit or endorsements, unless the establishment posed immediate health hazard.

19. Mr Tommy CHEUNG said that there was ambiguity in the Bill as presently drafted. He asked whether the title of section 128B should be amended to "power to close premises used without licence" instead.

20. Senior Assistant Law Officer of Department of Justice (SALO) explained that for certain types of restricted food (such as sashimi) listed in Appendix II of the Food Business Regulation, a permit rather than a licence was required if it was only for take-away. If the shop did not even apply for a permit, section 128B might apply. Mr Tommy CHEUNG said that section 128B should clearly state that it applied to those establishments which neither had a licence nor a permit.

21. SALO advised that the phrase "is required to be licensed or permitted" in section 128B(1)(b) was clear enough to show that the premises were required to have a licence or a permit. If a licensed food premises was selling food which required a permit or endorsement, it should fall within the category of "to be permitted". Assistant Legal Adviser 4 (ALA4) agreed that the proposed section 128B(1)(b) applied to two different situations where an activity was required to be licensed but not licensed, and where an activity was required to be permitted but not permitted. He suggested that the Administration might consider improving the drafting for greater clarity.

Admin

22. SALO responded that in practice, if a licensed restaurant sold sashimi without a permit, it would be prosecuted and the activity would be suspended immediately. He said that once the activity stopped, the Authority would not apply for a closure order. Nevertheless, he undertook to consider whether the drafting could be improved.

23. Mr Tommy CHEUNG reiterated that the Administration should consider the suggestion of a partial closure. In the case of ciguatera fish poisoning, he considered that it was not possible for restaurant operators to know whether ciguatera existed in any of the fish to be sold. He said that the same applied to contamination of water source. He did not agree that the operator should be held responsible for such contamination, and he considered it unfair to close a licensed food establishment on grounds that such contamination posed immediate health hazard. He said that if restaurants were informed of such contamination, food incidents could be avoided, and that an "unless order" or partial closure would be the better options to address the problem. He maintained the view that the Bill should restrict the power of DFEH in making and enforcing closure orders under section 128C.

Action

24. AD(HQ) advised that if it could be established that the food of the licensed food premises came from legitimate sources, or that the seafood or pork in Hong Kong were generally contaminated by ciguatera or clenbuterol respectively, DFEH would not make a closure order against individual food establishments under section 128C, but would rather issue warnings to all restaurants to suspend the sale of such food immediately.

25. Responding to Mr Tommy CHEUNG's further question on the matter, AD(HQ) explained that it would not be possible to set out all the situations which were regarded to pose immediate health hazard under section 128C. He said that the legislative intent of the Bill and the considerations in making a closure order would be made known to the public and the trade, as the Bill would be debated in LegCo and placed on record. There should be no question that DFEH would make her decisions arbitrarily.

26. Dr LO Wing-lok remarked that ciguatera poisoning could be fatal and its hazard should not be under-stated.

27. Mr Tommy CHEUNG expressed disappointment that the Administration did not agree to consider a partial closure. The Chairman advised that members who disagreed with any part of the Bill might consider moving CSA on their own.

Administration's response to the issues raised in the last meeting
(LC Paper No. CB(2)1615/00-01(02))

Contamination of water

28. As the Administration said that it would not be practicable to set out in the Bill specific standards concerning contamination of water, Mr Andrew CHENG asked whether section 128A(3)(b) could be drafted in a manner similar to subsection (c) where inspection findings, data from investigation or laboratory evidence would be required to ascertain the contamination. The purpose was to provide a scientific and objective basis on what would be regarded as posing immediate health hazard. C(CM)(RAC) explained that water might be contaminated by a wide range of hazards of microbiological, chemical or physical origins. He said that FEHD would follow the standards on hazards set by the World Health Organization (WHO) and Codex Alimentarius Commission (CAC) which covered over 100 chemicals and microbiological bacteria. However, it would be difficult to list out all specific standards concerning contamination of water.

29. Mr Andrew CHENG suggested stating in section 128A(3)(b) that the standards of WHO and CAC would be taken as reference in defining water

Action

Admin contamination. AD(HQ) agreed to discuss with D of J whether the drafting could be improved.

Unless order

30. Mr Tommy CHEUNG sought clarification on the Administration's response to the suggestion of introducing an "unless order" in section 128C. He said that the idea was that DFEH might apply to the court for an "unless order" under section 128C, so that an operator aggrieved by the order could have the chance to present his case to the court at the earliest possible opportunity. If the court ruled in favour of the aggrieved, the order could be rescinded immediately, otherwise, the order would be enforced.

31. SALO explained that section 128C empowered DFEH to close a food establishment under exceptional circumstances and that DFEH's power was confined to the circumstances which were regarded to pose "immediate health hazard" as defined in the Bill. He said that if execution of a closure order could be delayed, the health hazard would not be "immediate".

32. Mr Tommy CHEUNG said that a food establishment would still be immediately closed in accordance with an "unless order". However, an "unless order" would ensure that the case would be heard quickly and the aggrieved could have a chance to state his case. The Authority could also produce evidence in court to support the making of a closure order.

33. AD(HQ) said that there were similar provisions in other legislation for the making of a closure order without court procedures. Under the Prevention of the Spread of Infectious Diseases Regulation (Cap.139), the Director of Health could close a food establishment without having to go to court. The Director of Agriculture, Fisheries and Conservation could also declare that certain premises were infected with avian flu and order that these premises be closed immediately. He stressed that time was of the essence in safeguarding public health, and that it would not be effective if there were too many hurdles in the process.

34. Senior Government Counsel (SGC) added that a closure order had to be enforced immediately to remove the health hazard. He expected that the order could be rescinded within two to three days after the operator had made the necessary rectification. He advised that section 128C(20) provided that the aggrieved could apply to court for an appeal against the closure order. He therefore did not see the need for introducing an "unless order" or order nisi.

35. Principal Assistant Secretary for the Environment and Food (A) 2 (PAS(EF)(A)2) said that, based on previous experience, a Magistrate's court could

Action

arrange an appeal hearing under section 128C(7) or (20) in six working days. Mr Tommy CHEUNG expressed doubts that the court could arrange quick hearing of appeals. ALA4 suggested that the Administration might consider reflecting in the Bill the time for the court to conduct hearings for appeals under section 128C.

36. SALO cited an example that a case was heard on 9 April 2001 by the Eastern Magistrate Court, after the aggrieved had submitted a summons on 3 April 2001. He said that recent experience also showed that the court could hear appeals against closure orders in six working days. He advised, however, that it was the discretion of the court to determine the date of a hearing and that it was inappropriate to specify a time limit for court hearings in the Bill.

37. Mr Andrew CHENG asked whether the Bill could specify the time limit for the lodging of an appeal, in order to facilitate the court's consideration in arranging early hearings for these cases. The Chairman requested the Administration to further consider members' views and suggestions. SGC agreed to discuss with the Judiciary and provide a response.

Admin

Clause-by-clause examination

38. The meeting noted that the Administration had proposed some amendments to the Bill [LC Paper No. CB(2) 1615/00-01(03)].

39. PAS(EF)(A)2 said that following discussion with ALA4, the Administration now proposed some technical amendments to clauses 2 and 3 (section 128A), mainly for consistency purpose. Members did not raise any queries on these amendments.

40. The meeting continued to examine the Bill clause by clause starting from clause 3 (section 128B) onwards.

Section 128B

41. Members noted that the Administration was considering whether the drafting of section 128B(1)(b) could be improved.

42. Members did not raise any query on section 128B(2) and (3).

43. On section 128B(4)(a), Mr Andrew CHENG said that since the closure order should not operate to prevent human habitation but aimed at preventing the continuous operation of the unlicensed food business, he considered that the employee or caretaker originally residing at the food premises should be allowed

Action

to stay on the premises. He also sought clarification on the categories of people permitted to reside in a closed food establishment.

44. AD(HQ) advised that section 128B(4) was not to deprive persons (other than the employees of the operator) who normally resided at the premises, of their right of habitation. He said that in most cases, caretakers or watchmen were not really residing in the food premises but had their own home. It was only their duty to stay at the food premises overnight. The purpose of the proposed section was to prevent the operators from claiming that the premises could not be closed because certain employees were living there. SGC supplemented that section 128B(4)(a) is similar to the proviso to the existing section 128(1), and section 128(1A), of Cap. 132. However, in the case of caretakers or watchmen, they were not permitted to stay because the premises were only their work place but not their residence.

45. Mr Andrew CHENG pointed out that many caretakers of restaurants resided at the food premises even after work. AD(HQ) advised that a watchman would be regarded as an employee and should not have the right to reside in the premises upon execution of a closure order. He added that some food business were in fact "family business", and that the front area of the premises was used for business while the rear part was used as the family's residence. In these cases, the operator and his family members would be permitted to stay even after closure of the premises.

46. Mr Tommy CHEUNG asked whether anyone would be permitted to stay in a closed food premises to look after the property. AD(HQ) said that properties not related to the closure order could be taken back by the owner and any unclaimed property would be confiscated. The Bill also provided that a person might apply for permission to re-enter any closed premises to carry out rectification work.

47. Ms Cyd HO asked about the arrangement for those employees who really took the food premises as their only residence. Mr Andrew CHENG also asked whether the Administration could allow these people to stay in those parts which were not related to the operation of the food business.

48. SALO advised that enforcement of a closure order on unlicensed food establishments would be based on existing legislation (Cap. 132). He said that if the premises were used for both commercial and residential purposes, the policy was not to prevent human habitation upon closure of the premises. He advised that only those parts of the premises which were related to the food business would be closed. He pointed out that the Administration had not encountered difficulties in enforcing closure orders under section 128 of Cap. 132.

Action

49. Ms Cyd HO asked how the Administration would address the housing need of those employees who really took the food premises as their only residence. Mr Tommy CHEUNG added that some employers might not even be aware that their employees had taken the food premises as residence.

50. AD(HQ) responded that the Authority might liaise with Social Welfare Department and the Home Affairs Department to arrange temporary accommodation to those genuinely in need. SALO pointed out that section 128B dealt with unlicensed food premises which was basically illegal, in order to protect public health. He said that any person aggrieved by the closure order could apply to court to re-enter the premises.

51. Dr LO Wing-lok considered that upon closure of an unlicensed food premises, the employees concerned were no longer employed by the operator and they should no longer stay on the premises.

52. Mr Tommy CHEUNG disagreed with Dr LO. He said that the employer-employee relationship was not dependent on the licensing status of the food establishment.

53. Mr Andrew CHENG requested the Administration to consider improving the drafting of section 128B(4) to spell out clearly the arrangements for the commercial cum residential premises. He said that the closure of the food premises should not affect those people who used the premises as their only residence. The Chairman requested and the Administration agreed to consider members' views.

Admin

54. Members agreed to hold the next meeting on 1 June 2001 at 8:30 a.m.

55. The meeting ended at 10:45 a.m.