

立法會
Legislative Council

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(These minutes have been seen by the
Administration)

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

**Minutes of meeting
held on Friday, 1 June 2001 at 8:30 am
in the Chamber of the Legislative Council Building**

Members Present : Hon Fred LI Wah-ming, JP (Chairman)
Hon WONG Yung-kan
Hon Andrew CHENG Kar-foo
Hon Tommy CHEUNG Yu-yan, JP
Dr Hon LO Wing-lok
Hon Audrey EU Yuet-mee, SC, JP

Members Absent : Hon Cyd HO Sau-lan
Hon Michael MAK Kwok-fung
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

Mr Lawrence PENG
Senior Government Counsel
Department of Justice

Mr W S YIP
Senior Assistant Law Officer
Department of Justice

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

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I. The Administration's response to issues raised at the last meeting
(LC Paper Nos. CB(2)1699 and 1703/00-01(01))

At the invitation of the Chairman, Principal Assistant Secretary for the Environment and Food (A)2 (PAS(EF)(A)2) briefed members on the Administration's response to issues raised at the last meeting:

- (a) The Administration would propose amendments to section 128A(3)(b) to state more clearly the circumstances under which "water source" would be regarded as "contaminated source".
- (b) The Administration was prepared to introduce amendments to the proposed new section 128B to state clearly that licensed premises, which sold restricted food such as sashimi without a permit, would not be subject to a closure order under this section.
- (c) The Administration would propose amendments to sections 128B and 128C that the closure order would not operate to prevent human habitation on the premises, if the premises were used for the purpose of human habitation before the date of application or making of a closure order.
- (d) The Administration had considered carefully and had sought legal advice on members' suggestion of stipulating a maximum period for a court hearing under the proposed new section 128C. The Administration concluded that it would be inappropriate to require an

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appeal under the proposed section 128C to be heard within a specified period.

- (e) The Administration was prepared to allow further appeal against the magistrate's decision under the proposed new section 128C.

2. PAS(EF)(A)2 said that the draft Committee Stage amendments (CSAs) had been provided for members' consideration.

Order nisi and the appeal mechanism

3. Mr Tommy CHEUNG said that he hoped that the Bill could specify the time limit for a hearing to be held under section 128C to ensure an early hearing. He clarified that he was only concerned about early hearings, rather than the provision of further appeals which often took a long time to process.

4. On Mr Tommy CHEUNG's suggestion, Ms Audrey EU raised the concern that whether a closure order should be enforced or cancelled if a hearing could not be arranged within the specified time limit. She suggested that the order could either be suspended pending arrangement for a hearing, or a call-over hearing should be arranged within a few days so that the court might decide to fix another date to hear the case. This was to give the appellant the earliest opportunity to state his position in court. However, if the operator of the food establishment did not turn up at the hearing, the order would become absolute. Mr Tommy CHEUNG said that he preferred the call-over hearing option. He said that if the Administration did not amend the clause, he would consider moving CSAs on his own.

5. Mr Andrew CHENG said that members did not have the intention to interfere with the Judiciary's discretion. He emphasized that the purpose of stipulating a time limit for a hearing was to give the appellant an opportunity of an early hearing if he so wished.

6. Senior Assistant Law Officer of Department of Justice (SALO) advised that section 128C(20) of the Bill provided that the aggrieved could appeal against the closure order within seven days after the closure order had been made. However, members' suggestion was to require the Authority to seek confirmation from the court within a time limit regarding the closure order issued. This would bring a drastic change to the original version. He said that Members would have to consider whether the court could confirm the order if the operator of the food establishment did not show up at the hearing or refused to accept a summons for that purpose.

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7. Ms Audrey EU clarified that her suggestion was to require the Authority to issue the order nisi and take the initiative to seek the court's confirmation on the order within three to seven days. The order nisi should state the time and place for the court hearing should the operator wish to make a defence. If the operator was absent from the hearing, it should be taken to mean that he gave up his right of defence, and it would be up to the court to decide whether or not the order should continue to be in force.

8. Senior Government Counsel (SGC) sought clarification on member's suggestion as to whether the order would remain in force if the case required a second hearing. Ms Audrey EU said that the court could decide during that first hearing whether the order should continue or not. She was of the view that unless the operator could produce strong evidence that improvement had already been made, it was unlikely for the court to rescind the order in the first hearing.

9. SGC advised that the effect of member's suggestion would have no difference from the existing proposal because the Administration also intended to close the food premises upon the issue of the closure order and allowed seven days for the concerned party to lodge an appeal. Ms Audrey EU pointed out that members' suggestion would ensure that the case would be filed in the court automatically and that the aggrieved needed not be bothered with the procedure to lodge an appeal if he wished to do so. With the proposed mechanism, the court would have the responsibility to deal with the order because it was only an order nisi.

10. SALO considered that members' proposal would not save much time for arranging a court hearing. He explained that where a charge was instituted, the court prosecution officer would bring the case to the court the very next day. To pursue members' suggestion, the Authority would issue an order nisi and apply to court for a summons on the same day. Under the present court procedures, it was necessary to allow time for the parties concerned to prepare for the document and to engage lawyers. It would take about 14 days for the summons to be finally posted onto the premises. He pointed out that member's suggestion could only save the appellant's legal fees because the Authority would have to take the initiative to seek the court's confirmation of the order.

11. Ms Audrey EU stressed that members' suggestion was to ensure early hearing of the case and to obviate the need for the operator to make arrangements for the appeal. If the closure order was made an order nisi in the legislation, the court would have the responsibility to determine whether the order should continue or not. She suggested that the Administration could discuss with the Judiciary the date of the hearing prior to issuing the order, so that the hearing date

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could be included in the order nisi. She had no strong views if 14 days were indeed required for preparation of documents, etc. before the court hearing.

12. SALO explained that it might not be practicable for the Authority to make an urgent appointment for a court hearing before issuing a closure order. He said that if the Director of Food and Environmental Hygiene (DFEH) had to exercise his power under section 128C to close a food establishment, the situation was already very serious and there might not be time to make arrangements with the court before making a closure order. He cited the example that if an unusual number of dead chickens was found in a market in an afternoon, the Authority would have to decide on that very evening whether to close the premises the next day, and there was no time to fix a hearing with the court.

13. Mr Andrew CHENG asked whether there was legislation which stipulated a time limit for the court to make a certain decision. He agreed with Ms Audrey EU that if the aggrieved did not make a defence at the hearing on the order nisi, the order should become the order absolute. He stressed that the suggestion was not to interfere with judicial independence but rather to strike a balance between protecting public health and the right of the aggrieved.

14. SGC advised that he was not aware of any such legislation except those in the context of election. There were electoral regulations which provided that a person whose name was removed from the voters' register could appeal to a Revising Officer to have his name reinstated in the register and that a person could appeal to a Revising Officer against the result of the Election Committee subsector election. In both cases, there was a time limit within which the hearing was to be held and which the Revising Officer was required to make a ruling. The time limit was necessary. In the voters' registration appeal, the legislation had set out the date for publication of the final register. In the subsector election appeal, the legislation had set out the date of election on which a member of the Election Committee was to vote.

15. Mr Andrew CHENG suggested the Administration to consider providing similar mechanism in the Bill so that the aggrieved would be given a hearing as early as possible. SGC said that he had consulted the Legal Policy Division of the Department of Justice on the matter and was given the advice that the court should have discretion to determine the date of hearings having regard to the urgency of cases and resources available. It would be inappropriate to specify a time limit in the legislation. He explained that the specification of a time limit in the electoral regulations was an exceptional arrangement because it involved matters of substantial public interest. He would need to discuss with Department of Justice again if members insisted on the proposal. The Chairman remarked that members had no intention to interfere with the court's discretionary power but the

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Admin Administration should come up with proposals to address members' concerns.

16. Mr Tommy CHEUNG stressed that members only wanted to provide a quick channel for the aggrieved to state his case in the court. He agreed with Ms Audrey EU that if the appellant gave up his right by not turning up for the hearing, the court could rule the order absolute. The purpose of the proposed order nisi or "order to show cause" would ensure that the Administration had the responsibility to explain to the court why a closure order was issued.

17. Ms Audrey EU said that members' suggestions would not in any way affect the independence of the Judiciary. She considered that the court should have regard to public interest and make efforts to ensure that the aggrieved would be heard as early as possible. She clarified that members' proposal was only to specify a period within which the court's confirmation had to be sought on the order nisi. Such mechanism would help rectify any mistake arising from a wrong decision to close a food establishment.

18. In view of members' suggestion that the Administration should seek the court's confirmation of an order nisi, SALO asked whether members still wanted to retain the appeal channel for the aggrieved in the proposed sections 128C(7) and (20).

19. Ms Audrey EU was of the view that if the court confirmed an order nisi, the operator or parties concerned should still be allowed to appeal to the High Court against such decision. If the aggrieved party was absent in the first hearing at the Magistrate's court, he should also be allowed to apply for a review of the court's decision. She said that this would also enable the Authority to apply for a review of the court's decision.

20. Mr Andrew CHENG said that if the Administration agreed to members' suggestion, sections 128C(7) and (20) would have to be re-drafted. For example, it would need to specify the maximum period, say 21 days, for an appeal to be made.

21. ALA4 advised that members' proposal was basically a policy matter which the Administration would have to consider. Assistant Director (Headquarters) of Food and Environmental Hygiene Department (AD(HQ)) reminded members that under the Prevention of the Spread of Infectious Diseases Regulation (Cap.141), Director of Health (D of H) or Director of Agriculture, Fisheries and Conservation (DAFC) could declare a food premise disinfected and order it to be closed. He said that members might wish to consider the consistency in law, since most other legislation on criminal / civil offences did not require the authority to confirm with the court an order already issued.

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22. Mr Tommy CHEUNG commented that the power of DFEH as conferred by the proposed section 128C(1) was much wider than that of D of H or DAFC under Cap. 141, as DFEH could close a food establishment if she had "reasonable cause" to believe the establishment was posing immediate health hazard. He considered that DFEH should not be given such a wide power. He pointed out that operators of small establishments might not have the resources to lodge an appeal.

23. On the power of D of H and DAFC to close premises, AD(HQ) explained that Cap.141 only stated that DFAC had the power to announce a place infected while D of H could isolate a premise when infectious diseases were detected. However, the Bill had provided detailed descriptions on the circumstances under which DFEH might issue a closure order on a food establishment. Mr Tommy CHEUNG said that unlike Cap. 141, the Bill was not dealing with infectious diseases and DFEH was given wide power to make a closure order based on "reasonable cause".

24. Ms Audrey EU was of the view that the Bills Committee should be concerned with how best to achieve the objective of the Bill, and other legislation was only for members' reference. While she believed that DFEH would exercise his power with care, it was necessary to protect the interest of parties concerned to ensure that they had a fair chance to be heard expeditiously, even though only a small number of people might be affected.

25. Dr LO Wing-lok said that he did not see the need to introduce an order nisi since the food establishment would still be closed in the first instance. He believed that in most cases, the closure order would have been rescinded before the first hearing took place. In this connection, Mr WONG Yung-kan asked whether the first hearing was still necessary if the operator had already rectified the situation and obtained approval to re-open the premises before the hearing.

26. SALO advised that if a closure order was rescinded before the hearing, the Authority could just inform the court to withdraw the summons.

27. The Chairman requested the Administration to re-consider members' suggestions and re-draft the proposed section 128C. PAS(EF)(A)2 agreed to further discuss with the Department of Justice and the Judiciary and revert to the Bills Committee. SALO also sought members' views on the following if section 128C was to be re-drafted -

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- (a) whether it was necessary to specify in the Bill the period for the first hearing, which would normally take about 21 days;

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- (b) if an appellant absent in the first hearing was allowed to seek a review of the court's decision within seven days, he would also have the right to appeal to the High Court against the decision of the Magistrate's Court. In the latter case, it would take about two to three months for the Magistrate's court to prepare the documents, and it would be inappropriate to set a time limit for such appeals.

28. Mr Tommy CHEUNG considered that 21 days was too long as this defeated the purpose of providing the mechanism. Ms Audrey EU pointed out that the 21 days referred to by SALO was the hearing where both parties should have all the evidence and laboratory reports ready, but the first hearing was more like a call-over hearing and less supporting documents would be required. She said that it was necessary to set a time limit for the call-over hearing so that the principal magistrate would hear both parties and determine whether a second hearing was required having regard to the seriousness of the cases. She suggested that the Administration should discuss with the Judiciary the time required to issue summons for such hearings.

29. Regarding the absence of the appellant from the first hearing and the order had thus become absolute, Ms Audrey EU suggested that the appellant should be allowed to seek another hearing within a time limit. She pointed out that the magistrate could also review his own decision within 14 days under the existing mechanism. As to the time limit for further appeals, she had no strong views as the nature of such appeals was different from the first hearing. SALO noted the comments.

Partial closure

30. Mr Tommy CHEUNG requested the Administration to reconsider the proposal of partial closure of food premises. He considered that if the source of the problem, like ciguatoxin poisoning, was only confined to the fish tank, it would not be necessary to close the whole premise.

31. AD(HQ) pointed out that in the case of ciguatoxin poisoning, there would be more than one food establishment which would be affected. The Administration would not close all these premises but request them to suspend purchasing such food before the source of the contamination could be identified. He said that it would be difficult to partially close a food establishment as it would be confusing to the public. However, it might be possible to close part of a food court, or just one particular restaurant in a hotel. AD(HQ) stressed that the Government would have operational difficulty in ensuring that the partially closed part of the premises would remain so after the making of a closure order.

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32. Mr Tommy CHEUNG remarked that as far as he knew, ciguartoxin poisoning was confined to a few restaurants or a particular group of fish. He was not convinced that "partial closure" was not feasible. Mr WONG Yung-kan agreed with Mr Tommy CHEUNG. AD(HQ) explained that if problems were found only in one particular type of food from certain sources, the Administration would not need to close the premises but would request the operator not to purchase the food from the same sources again or just to wash the tank. AD(HQ) clarified that the legal definition of "premises" included "part of the premises" and it was legally in order for the Authority to close just premises A but allow premises B to remain open even though they shared the same licence.

Committee Stage amendments proposed by the Administration
(LC Paper No.CB(2)1703/00-01(01))

Section 128B

33. PAS(EF)(A)2 advised that a new subsection (1A) was added in response to members' concern that a licensed food establishment should not be closed under section 128B because it had not obtained a permit for selling certain kind of food. ALA4 advised that while a licensed food establishment selling food requiring a permit such as sashimi without endorsement would not be subject to a closure order under section 128B, it would still be subject to the provisions in the Food Business Regulation (Cap.132 sub.leg.).

Section 128A(3)

34. PAS(EF)(A)2 said that the Administration had accepted members' suggestion and re-drafted section 128A(3)(b) to make it clear that the contamination had to be supported by inspection findings or laboratory evidence. Other miscellaneous technical amendments were also made to section 128A as discussed with ALA4. For clause 3(d)(ii), Ms Audrey EU requested the Administration to consider whether the Chinese version of the proposed section 128A(3)(b) could be improved. SGC noted the comment.

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Section 128B(4)

35. ALA4 advised that the proposed amendment to section 128B(4) would mean that a closure order would not operate if the premises were used for human habitation, for example, by the watchmen or other people. He pointed out that the arrangement was inconsistent with other provisions in section 128 (Cap.132) which stipulated that upon the making of a closure order, the watchmen or servants might not be permitted to stay on the premises.

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36. PAS(EF)(A)2 advised that the Administration had pointed out at the last meeting that there would be inconsistency, and the amendment was made after careful consideration in view of members' strong request. He stressed that the premises would not be allowed for business purpose upon the making of a closure order, although residents could stay. The Chairman advised that Ms Cyd HO had raised at the last meeting the concern about the right of the watchmen to stay in a closed premise, but other members of the Bills Committee might also wish to give their views on the suggestion. Mr Tommy CHEUNG asked whether the Administration would need to address the inconsistency in the existing section 128 of Cap. 132. He considered that the amendment to the proposed section 128B should only cater for the watchmen instead of other people.

37. Mr Andrew CHENG clarified that the concern was mainly to allow watchmen who took the closed premises as their only residence to stay. However, the amendment proposed by the Administration had the effect that any person who used the premises for human habitation could stay. He suggested that the Administration might need to revise the amendment.

38. Dr LO Wing-lok strongly requested the Administration to retain the original wording of section 128B(4) as proposed in the Bill. He considered that the proposed CSA would create a dangerous precedent that any person who claimed themselves homeless might reside in any closed premises. He was of the view that once a food establishment ceased operation, the employer and employee relationship would cease at the same time and any former employee should have no claim to stay in the premises.

39. Mr Andrew CHENG commented that it was difficult to say whether the employer and employee relationship ceased to exist if a food establishment was closed. He said that the concern was solely on humanitarian grounds that a watchman might be rendered homeless upon closure of the premises.

40. Ms Audrey EU said that if the premises were owned by somebody, the legitimate owner should have the right to stay unless there were infectious diseases and the place had to be vacated. She pointed out that the closure order aimed at discontinuation of the operation of the business but not prohibition of human habitation on the premises. She considered the proposed CSA acceptable.

II. Clause-by-clause examination

41. Members agreed to continue the clause-by-clause examination of the Bill at the next meeting.

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III. Any other business

42. PAS(EF)(A)2 said that the Administration hoped that the Second Reading debate of the Bill could resume before the end of the 2000-2001 session. The Chairman advised that the Administration should provide the revised CSAs as early as possible. Members agreed that the next meeting be scheduled for Friday, 15 June 2001 at 4:30 p.m.

Clerk 43. Mr Andrew CHENG requested the Secretariat to update the mark-up copy of the Bill showing the Administration's latest amendments.

44. There being no other business, the meeting ended at 10:45 a.m.

Legislative Council Secretariat
5 December 2001