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2869 9468
2877 5029

By Fax (2840 0467)

24 January 2008

Miss Pamela LAM
PAS for Food & Health (Health)1
Food and Health Bureau
Health Branch
19/F, Murray Building
Garden Road
Hong Kong

Dear Miss LAM,

Prevention and Control of Disease Bill

Thank you for your letter of 18 January 2008. We have the following points for your further clarification.

Definition of "premises"

Would it be preferable to cover a vehicle, for example a caravan which is used for residential purpose?

Definition of "isolation"

According to your explanation, the definition is intended to apply to animals, plants and inanimate objects which or persons who are infected or contaminated. However, the present drafting appears to apply to animals, plants and inanimate objects which or persons who may or may not be infected or contaminated. Notwithstanding your mentioning of the standard usage of the term, would it make your intention beyond doubt by adding the underlined words in paragraphs (a) and (b) of the definition as follows:-

- (a) the isolation of an area or a place which is infected or contaminated in such a manner as to prevent the spread of a disease or contamination; or
- (b) the segregation and detention of any person who or article which is infected or contaminated in such a manner as to prevent the spread of a disease or contamination.

Definition of "medical surveillance"

According to your explanation, the definition is intended to mean a public health measure applicable to persons who may have been exposed to possible source of infection to ascertain whether they are infected. However, the present drafting of the term does not appear to reflect clearly such intention. According further to your explanation, to distinguish from the meaning of "isolation", the definition of "medical surveillance" is intended to apply persons who are subject to regular monitoring but are not restricted from freedom of movement. Again, the present drafting of the term (with reference to part of the meaning of the term "surveillance" in the Quarantine and Prevention of Disease Ordinance (Cap. 141) which "means that persons subject thereto are not isolated, and that they may move about freely ...") does not appear to reflect clearly such intention. Notwithstanding your mentioning of the standard usage of the term, would it make your intention beyond doubt by further elaborating the definition?

Under the definition of "surveillance" in the Quarantine and Prevention of Disease Ordinance, the person subject to surveillance is required to sign a bond pledging himself to submit to medical examination, etc. Further under section 7(2) of the Quarantine and Prevention of Disease Ordinance, any person who being subject to surveillance fails to present himself for examination, etc. may be arrested. It is however noted that the definition of "medical surveillance" does not include the signing of such a bond. Clause 7(2)(h) empowers the Secretary for Food and Health (the Secretary) to make regulation to subject any person to medical surveillance or medical examination. But it does not say the regulation making power covers matters relating to the conditions of subjecting a person to medical surveillance. It is not clear whether it is your intention to require a person subject to medical surveillance to sign a bond. If it is your intention to do so, it appears that clause 7(2)(h) may not be wide enough to empower the Secretary to do so. Moreover, what would happen if a person subject to medical surveillance does not submit himself to medical examination, etc. (c.f. there is a power of arrest under section 7(2) of the Quarantine and Prevention of Disease Ordinance)?

Definition of "vector"

According to your explanation, in public health terms, the definition of "vector" does not include human-borne disease. However, to a layman, the term "animal" may include human. One may form such an impression especially when he compares the definition of "vector" with that of "article". The definition of "article" includes "an animal (other than a human being)" (see paragraph (a) of the definition of article). In the definition of "vector", reference is made to "an animal" but the words "other than a human being" are omitted. Therefore, it may be reasonably inferred that the reference to "an animal" in the definition of "vector" includes a human. To better reflect your intention, would it be preferable to add "but other than a human" after "including an insect"?

One more observation on the definition of "vector" is that in your explanation under clause 7(2)(d)(ii) & (iii), it says that vectors refer to living organisms, mainly insects, which are capable of transporting an infectious agent from an infected person to a susceptible person. If the definition of "vector" mainly refers to insects, would it be acceptable, in public health terms, to confine the reference to insects instead of an animal?

Clauses 3, 7(2)(m)(iii) and 7(2)(s)

According to your explanation, it seems that the power of seizure under clause 3 is general and therefore approval of the Director of Health is required; whereas the power of seizure under clauses 7(2)(m)(iii) and 7(2)(s) will be circumscribed by conditions and therefore is put under the subsidiary legislation. However, it appears that the power of seizure under clause 3 is no less circumscribed by conditions (for example, there is to be a public health risk and the article is an infectious agent, etc.) as the power of seizure under clauses 7(2)(m)(iii) and 7(2)(s). Would you further elaborate your justification?

Clause 8(2)(c)

It is appreciated that details of the compensation relating to requisitioning will be contained in subsidiary legislation. But since requisitioning of private property is an important issue, would you elaborate further your policy intent on the following points:-

- (a) Is property requisitioned, either in the manner of interference with property rights or deprivation of the owner's property, subject to compensation?

- (b) Will there be any legal redress for a person who is aggrieved at the decision to requisition his property?
- (c) Will there be an adjudicating mechanism similar to that in clause 12(2) where there is a dispute as to whether compensation is payable or the amount of compensation is sufficient? It is noted that under section 17 of the Quarantine and Prevention of Disease Ordinance, the arbitration procedure is applicable to requisitioning.
- (d) In comparison to section 16 of the Quarantine and Prevention of Disease Ordinance, the requisitioning power is wider under clause 8(2)(c) in the following respects. First, the requisitioning power under section 16 is temporary. Secondly, the requisitioning relates only to vehicles or vessels. Would you explain the justification for giving a wider requisitioning power under clause 8(2)(c)?

Clause 9

Would you give examples as to what order is likely to be made under the provision? What is its relation with section 20 of the Quarantine and Prevention of Disease Ordinance?

Clause 12(1) & (2)

Would clause 12(1) & (2) prejudice a person's right to bring judicial review proceedings against the decision of the Director of Health?

Clause 12(3)

To make your intention clear as to the application of the provision, would it be preferable to add words after "compensation" like "for articles damaged, destroyed, seized, surrendered or submitted to any person pursuant to this Ordinance"? The present drafting may cause confusion as to so long as compensation is provided for by regulations made under clause 8, even though it only relates to compensation for requisitioning, clause 12(1) will not apply.

Compensation is provided for requisitioning but compensation for damage to property is not provided for, under regulation made under clause 8. A flat is temporarily requisitioned in a public health emergency. Compensation for requisitioning is duly paid. However, the walls of the flat are damaged during the requisitioning. Does clause 12(1) apply to the claim for compensation in the scenario?

Clause 13(1)

It is appreciated that the formulation of "in good faith" and "in the honest belief" are used in statutory precedents. The question still remains whether there is any difference in the two formulations? If there is a difference, why is it preferable to use the formulation of "in good faith" in clause 13(1)?

It is appreciated that your reply in both languages could reach us at your earliest convenience.

Yours sincerely,

(Stephen LAM)
Assistant Legal Adviser

Encl

c.c. DoJ
(Attn : Mr Allen LAI, SGC) (Fax : 2869 1302)
LA
SALA1
CCS(2)5