

立法會
Legislative Council

LC Paper No. CB(2)371/08-09
(These minutes have been seen
by the Administration)

Ref : CB2/BC/1/08

**Bills Committee on
Public Health and Municipal Services (Amendment) Bill 2008**

**Minutes of meeting
held on Tuesday, 18 November 2008, at 10:45 am
in Conference Room A of the Legislative Council Building**

Members present : Hon Fred LI Wah-ming, JP (Chairman)
Hon Andrew CHENG Kar-foo
Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Vincent FANG Kang, SBS, JP
Hon WONG Kwok-hing, MH
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon Alan LEONG Kah-kit, SC
Hon WONG Ting-kwong, BBS
Hon Cyd HO Sau-lan
Dr Hon LEUNG Ka-lau

Members absent : Hon WONG Yung-kan, SBS, JP
Dr Hon Joseph LEE Kok-long, JP

Public Officers attending : Item II

Prof Gabriel M LEUNG, JP
Under Secretary for Food & Health

Mrs Angelina CHEUNG FUNG Wing-ping
Principal Assistant Secretary for Food & Health (Food) 1

Dr Constance CHAN Hon-ye, JP
Controller, Centre for Food Safety
Food and Environmental Hygiene Department

Ms Leonora IP Wan-yok
Senior Government Counsel
Law Drafting Division
Department of Justice

Miss Mandy NG Wing-man
Government Counsel
Law Drafting Division
Department of Justice

Clerk in attendance : Miss Mary SO
Chief Council Secretary (2) 5

Staff in attendance : Mr Stephen LAM
Assistant Legal Adviser 4

Ms Alice LEUNG
Senior Council Secretary (2) 6

Ms Sandy HAU
Legislative Assistant (2) 5

Action

I. Election of Chairman

Mr Fred LI was elected Chairman of the Bills Committee.

II. Meeting with the Administration

[Legislative Council Brief: File Ref: FH CR 1/3231/07, LC Paper Nos. LS11/08-09, CB(2)297/08-09(02), (03) and (05)]

2. The Bills Committee deliberated (index of proceedings attached at **Annex**).

New section 78B - Additional powers in relation to food

3. Members noted that the new section 78B empowered the Director of Food and Environmental Hygiene (DFEH) to make orders ("section 78B orders") if it was necessary to prevent or reduce a possibility of danger to public health or to mitigate any adverse consequence of a danger to public health, and the orders might -

- (i) prohibit the import of any food;
- (ii) prohibit the supply of any food;

Action

- (iii) direct that any food be recalled;
- (iv) direct that any food be impounded, isolated, destroyed or otherwise disposed of; or
- (v) prohibit the carrying on of an activity in relation to any food or permit the carrying on of such activity in accordance with conditions.

4. Mr WONG Kwok-hing said that in view of the wide range of factors, referred to in paragraph 7 of the Legislative Council Brief on the Bill, that DFEH would take into consideration in making section 78B orders, an independent committee should be set up by the Administration to monitor the exercising of powers by DFEH under the new section 78B and to provide a forum for the public to voice their views/concerns on the decisions taken by DFEH in this regard.

5. The Administration responded that the Centre for Food Safety (CFS) of the Food and Environmental Hygiene Department (FEHD) regularly conducted trade consultation forums as well as public forums to listen to the views of the stakeholders and the general public on food safety issues. To further strengthen the consultative framework on food safety issues, an Expert Committee on Food Safety had been set up under CFS to advise DFEH in the formulation of food safety measures, review of food safety standards in light of international practices, trends and developments, as well as risk communication strategies. The Expert Committee comprised academics, professionals, food experts, members of the trade and consumer group, and other experts.

6. The Administration further advised that persons bound by DFEH's orders made under the new section 78B might appeal to the Municipal Services Appeals Board (MSAB) under the new section 78G. Furthermore, having regard to similar concerns expressed by the Panel on Food Safety and Environmental Hygiene at its meeting held on 23 October 2008, the Administration had drawn up a draft code of practice (CoP) to provide practical guidance in respect of the operation of the new Part VA. Views of the Department of Justice (DoJ) on the draft CoP were being sought. Subject to DoJ's views on the draft CoP, the Administration would next seek the views of the food trade and then this Bills Committee.

7. Ms Audrey EU said that to empower DFEH to make a section 78B order if DFEH merely had reasonable grounds to believe, at the time of making the order, that the making of the order was necessary to protect public health was too wide. Whilst recognising the need to provide DFEH with wide power to

Action

make section 78 orders to deal with food incidents, it was also necessary to ensure that DFEH would exercise such power in a prudent manner having regard to the high threshold to claim compensation from the Government for loss suffered as a result of the orders. Although it was not practical to spell out all the factors that DFEH would take into consideration in making section 78B orders, consideration should be given to at least spelling out certain important factors, such as creditable information, on which DFEH must base in making a section 78B order. Mr Alan LEONG also suggested providing guiding principles for making section 78B orders in the Bill.

Admin

8. The Administration said that the CoP, referred to in paragraph 6 above, should provide sufficient safeguard against improper use of power by DFEH provided under the new section 78B. Nevertheless, the Administration agreed to consider Ms EU and Mr LEONG's suggestions in paragraph 7 above.

9. Mr Tommy CHEUNG was of the view that the Administration should either narrow down the power provided to DFEH under the new section 78B or incorporate the CoP in the Bill so that the CoP could be subject to scrutiny by the Legislative Council. The Administration pointed out that it was rare, if any, that CoP was made part of the legislation. The Administration further pointed out that no CoP was made part of the food safety legislation in overseas jurisdictions.

Admin

10. At the request of Mr Alan LEONG, the Administration undertook to provide a comparison table between the provisions of the Bill and those of the food safety legislation of overseas jurisdictions to which reference was made in drafting the Bill.

Admin

11. Mr Andrew LEUNG also requested the Administration to provide a paper on (i) the sampling and verification procedures adopted by the Government Laboratory for food test, and (ii) whether FEHD recognised food tests conducted by private laboratories.

12. Ms Cyd HO said that separate prohibition and recall orders and compensation should be devised for food with very short shelf lives, such as fresh seafood, and food with longer shelf lives, such as packaged food.

Admin

13. The Administration responded that overseas legislation did not have separate legal provisions targeting at problem food which had short shelf lives. Ms HO disagreed, as many overseas places did not consume such a large volume and vast varieties of fresh food as Hong Kong. Ms HO requested the Administration to provide a paper on (i) the actions that were presently taken by FEHD to ensure that food with very short shelf lives would not turn bad and become unmarketable in the course of or after being seized for

Action

examination to test their fitness for human consumption, and (ii) the existing arrangements for returning seized food to the food supplier after the food concerned was tested to be not problematic, including whether compensation would be provided to the food supplier if the food concerned had turned bad and was no longer saleable, and if so, the amount.

New section 78C - Manner of making section 78B orders, service and publication

14. Members noted that the new section 78C provided for the service of section 78B orders addressed to particular persons and publication in the Gazette of notices of section 78B orders addressed to a class of persons or to all persons.

15. Mr WONG Ting-kwong said that the Administration should only publicise the serving of a section 78B order on a food supplier after the food concerned was tested to be problematic, having regard to the irreparable damage to the goodwill of the food supplier if the food concerned turned out to be not problematic in the end.

16. The Administration responded that it was incumbent upon the Administration to protect public health by notifying the public that certain food might be problematic. The Administration, however, pointed out that it would inform the public in the first instance if the food concerned turned out to be not problematic after food test.

New section 78D - Contravention of section 78B orders

17. Members noted the Administration's plan to amend the new section 78D(3)(b) to make the defence available to employees who were not in a position to make or influence a decision in relation to the relevant act or omission. This was similar to section 59(5) of the Unsolicited Electronic Messages Ordinance (Cap. 593).

18. As the proposed penalty level for contravening a section 78B order was set at level 6. i.e. \$100,000 and imprisonment for 12 months, Mr Tommy CHEUNG expressed concern that the court might impose penalty on the offender at, say, level 3, as a minimum. Mr CHEUNG was of the view that in fairness, lower penalty should be imposed on contravening a section 78B order involving food in small quantity, whereas higher penalty should be imposed on contravening a section 78B order involving food in larger quantity.

19. The Administration pointed out that the proposed penalty level for contravening a section 78B order was on par with that for similar offences in

Action

the Public Health and Municipal Services Ordinance (Cap. 132) and other legislation aimed at ensuring public health and product safety.

20. Assistant Legal Adviser 4 advised that past experience showed that penalties meted out by the court were generally made having regard to the severity of the cases.

Admin

21. At the request of Mr Tommy CHEUNG, the Administration undertook to provide information in writing on (i) other local legislation with the same penalty level for contravening an order made by the Administration in relation to consumer goods, and (ii) penalties meted out by the court for committing an offence in relation to food safety in the past three years.

New section 78H - Compensation

22. Members noted that if MSAB set aside or varied DFEH's orders and the court agreed that DFEH did not have reasonable grounds to make the order at the time of making the order, the person who had suffered loss as a result of the order or as a result of the exercise of a power by a public officer in relation to the order, i.e. seizing or destroying the food in question, might apply to the court for compensation not exceeding the market value of the food at the time of making the order.

23. Mr Andrew LEUNG and Mr Vincent FANG were of the view that apart from the market value of the food at the time of making the section 78B order, the person who had suffered loss as a result of the order should also be allowed to claim compensation for all costs incurred as a result of the order, such as storage and transportation costs.

24. The Administration responded that the person concerned might apply to the court for compensation for all costs incurred as a result of the section 78B order, albeit the amount of compensation should not exceed the market value of the food at the time of making the order.

25. Mr Vincent FANG said that the amount of compensation should be on the market value of the food at the time of making the order regardless of whether the food had turned bad, as retailers, such as supermarkets, would not take back food which had previously been removed from the market.

26. Mr Tommy CHEUNG said that in view of the wide power provided to DFEH under the new section 78B, the Administration should automatically reimburse all costs incurred by the food supplier for removing the food from the market, if results of food test revealed that the food concerned was not problematic.

Action

27. Mr WONG Ting-kwong said that compensation should also be provided to persons whose food products had become less fresh, albeit still saleable but at a reduced market value, as a result of the seizure by the Administration for testing of fitness for human consumption. The Administration responded that the new section 78H could cater for this situation, as the court would take into account all factors relevant to the circumstances in awarding a compensation.

Admin

28. At the request of Mr Andrew LEUNG, the Administration undertook to provide a paper on the justification for setting the amount of compensation at not exceeding the market value of the food at the making of the order.

Others

Admin

29. Mr Tommy CHEUNG requested the Administration to provide information in writing on the concerns expressed by the trade on the Bill. The Administration agreed.

III. Dates of next meetings

30. Members agreed to hold the next two meetings on the following dates -

- (a) 4 December 2008 at 2:30 pm; and
- (b) 11 December 2008 at 4:30 pm.

Members further agreed to meet deputations at the 4 December meeting, and to extend the meeting to 6:30 pm if necessary.

31. There being no other business, the meeting ended at 12:45 pm.

**Proceedings of the meeting of the
Bills Committee on Public Health and Municipal Services
(Amendment) Bill 2008
on Tuesday, 18 November 2008, at 10:45 am
in Conference Room A of the Legislative Council Building**

Time marker	Speaker	Subject	Action required
000000 - 000144	Mr Fred LI Ms Audrey EU Mr Andrew CHENG Mr Alan LEONG	Election of Chairman	
000145 - 000357	Chairman	Opening remarks	
000358 - 000822	Admin	Briefing on the Bill	
000823 - 000957	Chairman	Major concerns raised by the Panel on Food Safety and Environmental Hygiene at its meeting on the Bill	
000958 - 002114	Mr WONG Kwok-hing Admin Chairman	Mr WONG Kwok-hing's suggestion on the setting up of an independent committee to monitor the exercising of powers by the Director of Food and Environmental Hygiene (DFEH) under new section 78B and to provide a forum for the public to voice their views/concerns on the decisions taken by DFEH in this regard The Administration's advice of its plan to amend new section 78D(3)(b) to make the defence available to employees who were not in a position to make or influence a decision in relation to the relevant act or omission	
002115 - 003030	Mr Andrew LEUNG Admin Chairman	Mr Andrew LEUNG's request for the Administration to provide a response in writing on the following - (i) sampling and verification procedures adopted by the Government Laboratory for food test; and (ii) whether FEHD recognised food tests conducted by private laboratories	Admin to provide written responses (para. 11 of the minutes)
003031 - 004347	Ms Audrey EU ALA4 Admin Chairman	Discussion on spelling out factors on which DFEH must base in making a section 78B order.	Admin to consider (paras. 7 & 8 of the minutes)

Time marker	Speaker	Subject	Action required
004348 - 005831	Mr Tommy CHEUNG Chairman Admin ALA4	Discussion on incorporating the code of practice on the operation of new section 78B in the Bill The Administration's undertaking to provide the following information - (i) other local legislation with the same penalty level for contravening an order made by the Administration in relation to consumer goods; and (ii) penalties meted out by the court for committing an offence in relation to food safety in the past three years	Admin to provide written responses (para. 21 of the minutes)
005832 - 011514	Mr Alan LEONG Admin	Mr Alan LEONG's suggestion of providing guiding principles for making section 78B orders in the Bill The Administration's undertaking to provide a comparison table between the provisions of the Bill and those of the food safety legislation of overseas jurisdictions to which reference was made in drafting the Bill	Admin to consider (paras 7 & 8 of the minutes) Admin to provide information (para. 10 of the minutes)
011515 - 011502	Ms Cyd HO Chairman Admin	Ms Cyd HO's request for the Administration to provide a paper on - (i) the actions that were presently taken by the Food and Environmental Hygiene (FEHD) to ensure that food with very short shelf lives would not turn bad and become unmarketable in the course of or after being seized for examination to test their fitness for human consumption; and (ii) the existing arrangements for returning seized food to the food supplier after the food concerned was tested to be not problematic, including whether compensation would be provided to the food supplier if the food concerned had turned bad and was no longer saleable, and if so, the amount	Admin to provide information (para. 13 of the minutes)
011503 - 012249	Mr WONG Ting-kwong Admin	Discussion on the impact on food trade if the serving of section 78B orders was publicised before food test results became available	
012250 - 013025	Chairman Admin	Discussion on issues relating to the serving of section 78B orders and monitoring of food safety through food surveillance programme conducted by the Centre for Food Safety of FEHD	

Time marker	Speaker	Subject	Action required
013026 - 013719	Mr Vincent FANG Chairman Admin	Mr Vincent FANG's view that the amount of compensation should be on the market value of the food at the time of making the order regardless of whether the food had not turned bad	
013720 - 013805	Ms Cyd HO	Ms Cyd HO's reiteration of her request for the Administration to provide a paper on the information relating to seizure and release of food	
013806 - 014351	Mr Andrew LEUNG Admin Chairman	The Administration's undertaking to provide a paper on the justification for setting the amount of compensation at not exceeding the market value of the food at the making of the order	Admin to provide a written response (para. 28 of the minutes)
014352 - 015150	Mr Tommy CHEUNG Admin Mr Vincent FANG Chairman	Discussion on the compensation payable to the food traders if food test results revealed that the food concerned was not problematic The Administration's agreement to provide information in writing on the concerns expressed by the food trade on the Bill	Admin to provide a written response (para. 29 of the minutes)
015151 - 015444	Mr WONG Ting-kwong Admin	Mr WONG Ting-kwong's expression of view on compensation provided to persons whose food products had become less fresh as a result of the seizure by the Administration for food testing	
015445 - 020310	Chairman Mr Tommy CHEUNG Mr Vincent FANG Mr WONG Ting-kwong	Dates of next meetings	