



中華人民共和國香港特別行政區政府總部食物及衛生局
Food and Health Bureau, Government Secretariat
The Government of the Hong Kong Special Administrative Region
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Dear Mr LAM,

Food Safety Bill

Thank you for your letter of 27 July 2010.

Our response to the questions raised in your letter are set out in the attached note. Please feel free to let us know if you have further questions.

Yours sincerely,


(Kevin YEUNG)
for Secretary for Food and Health

Response to questions from Assistant Legal Advisor on the Food Safety Bill

1. Clause 2(1)

Definition of “food”

This clause is modelled on the definition of “food” in the current Public Health and Municipal Services Ordinance (Cap.132). Other than Cap.132, it is also common to refer to articles and substances in Hong Kong Ordinances and subsidiary legislation, such as section 152 of Chinese Medicine Ordinance (Cap. 549), section 60 of Shipping and Port Control Ordinance (Cap. 313), section 29(1)(ea) of Pharmacy and Poisons Ordinance (Cap. 138), reg. 8 of Pharmacy and Poisons Regulations (Cap. 138A).

In the context of the definition of “food”, our intention is to cover all ingredients (including food additives) in preparing food or drink, such as salt, preservatives, etc. For example, ground cinnamon is a substance, but cinnamon stick could be an article, and both may be used as ingredients.

Definition of “food transport operator”

Under the Food Safety Bill, a food transport operator means a person who transports food under a contract of carriage but at no time has any proprietary interest in the food. It is not important what form that proprietary interest takes, whether it is a legal interest or an equitable interest. If a person has an equitable interest that is a proprietary interest in the food, the person will not be a food transport operator under the current definition. It is therefore not necessary to refer to an equitable interest in the definition.

2. Clause 3(3)

Our intention is that the Food Safety Bill should not apply to live aquatic products kept in captivity for propagation or promotion of growth, such as fish fry and oyster spat, because these live aquatic products are at the time not yet intended for human consumption. We have therefore added clause 3(3).

3. Clauses 4(2) and 5(2)

Whether a person has reasonable excuse depends on the facts of each individual

case and is ultimately a decision of the Court. “Reasonable” is a well-established concept in common law. As the law cannot provide for all possibilities, such as the circumstantial factors of the individual cases, it is necessary in many cases to provide flexibility for the Court to decide whether an excuse is reasonable from the angle of an average person, based on all the circumstances of the case. A plausible example of “reasonable excuse” for both Clauses 4(2) and 5(2) may be when a partner of a registered partnership suddenly ceased. The remaining partners are not able to complete a new registration immediately.

4. Clauses 6(1) and 6(4)

The Director may consider exempting a person or a class of persons from the requirement to be registered under Part 2 of the Food Safety Bill when the situation warrants and that it would not cause an undue threat to public health. For example, we are considering exempting exhibitors in major food exhibitions in Hong Kong from registration as food importers or distributors. This is because organisers of these exhibitions generally possess detailed information of exhibitors, and exhibitors would only import small quantities of food over a short period of time for exhibition purposes. However, we do not consider it necessary to specify the criteria for the Director to exercise this power of exemption, so as to leave flexibility for the Director to consider each case according to the circumstances. That said, the Director would exercise caution and take into account the possible impact of such exemption on public health in considering whether to grant an exemption.

5. Clause 7(2)

Where the Food Safety Bill applies to partnerships, it will also apply to limited partnerships formed under the Limited Partnership Ordinance (Cap.37). We do not consider it necessary to specifically include a provision to this effect. As a matter of fact, there is no such explicit reference to limited partnerships in many current statutory provisions when referring to partnerships, for example, section 7 of the Pawnbrokers Ordinance (Cap. 166) and section 7 of the Karaoke Establishments Ordinance (Cap. 573).

6. Clauses 7(3)(c) and 11(2)(b)

For example, the Director may require an applicant to submit a copy of the Business Registration Certificate, or a proof of identity, such as a copy of the Hong Kong Identity Card, to accompany his application for registration or

renewal.

7. Clauses 8(2)(a) and 8(2)(b)

Pursuant to section 7 of the Partnership Ordinance (Cap 38), every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner. An act done by a partner not for the purpose of the business of the partnership does not bind the firm and other partners.

As a partnership is not a legal person, the Food Safety Bill requires a partner authorised by the partnership to register on behalf of the partnership. However, clause 7(2) explicitly provides that in such case, if registration is granted, it is expressed to be granted to that person on behalf of the partnership.

When determining an application for registration under clauses 8(2)(a) and 8(2)(b), the Director should take into account the contraventions or previous revocations of the partnership or of the partner when representing the partnership, not the wrongful acts of the partner in his personal capacity or in the capacity of a partner of another partnership.

8. Clause 10(1)

For example, the Director may impose conditions on the importation of certain high-risk food, such as requiring prior notification before each consignment arrives in Hong Kong.

9. Clause 14(1)

As mentioned in paragraph 7 above, the Food Safety Bill requires a partner authorised by the partnership to register on behalf of the partnership. Therefore, a request for revocation of registration should be submitted by that partner.

10. Clause 14(5)(b)

The major purpose of the registration scheme for importers and distributors is to assist the Director in identifying and contacting a more defined group of food traders speedily in a food incident. We do not consider it necessary for a revocation to take effect in less than 30 days.

11. Clause 16(1)

The 28-day period for appeal runs from when the aggrieved person becomes aware of the decision because the aggrieved person may not necessarily have been personally notified of the decision by the Director. Clause 57 sets out the methods for giving notice where the Director is to notify a person of a decision (for example, under clause 8(3) or 12(3)). If notice is personally served on a person, the person would become aware of it at that time. If notice is made by another method, or in cases where the aggrieved person is not given notice of the decision, it would be a question of fact as to when the person becomes aware of the decision.

12. Clauses 29(1) and 29(4)

The Director may consider exempting a person or a class of persons from the requirement to keep a record under Part 3 of the Food Safety Bill when the situation warrants and that it would not cause an undue threat to public health. For example, we are considering exempting some charitable food banks from the requirement to keep records if they have mechanisms in place to ensure that the food they supply is safe. This is due to the difficulty of keeping records for food donated by the public. Doing so may also cause undue disruption to the operation of charitable food banks, as some donators of which may wish to remain anonymous.

However, we do not consider it necessary to specify the criteria for the Director to exercise this power of exemption, so as to leave flexibility for the Director to consider each case according to the circumstances. That said, the Director would exercise caution and take into account the possible impact of such exemption on public health in considering whether to grant an exemption.

13. Clause 41(2)(c)

In the process of food tracing, there may be situations in which a public officer

will have to disclose to another person what may be regarded as a trade, business or manufacturing secret. For example, a trader's source of suppliers, or a food manufacturer's list of ingredients, may be regarded as confidential information. Some situations may require such information, or part of it, to be disclosed to upstream food traders in the tracing process. Clause 41, however, lays down restrictions on a public officer in disclosing confidential information.

14. Clause 46(1)

We believe the power of entry provided by section 46 of the Food Safety Bill is sufficient for the Director to exercise his powers or perform his duties under the Food Safety Bill in relation to the registration scheme and the record keeping requirement. On the other hand, when there is a food safety concern requiring inspection of a vehicle, section 68 of Cap.132 authorises a public officer, who has reason to suspect that any vehicle, vessel or container contains any food intended for human consumption, to examine the contents of such vehicle, vessel or container, and may detain the vehicle, vessel or container or call upon it to stop. As for aircraft, we consider it unlikely that the Director will need the power of entry to carry out duties relating to the Food Safety Bill.

15. Clause 47(1)

The Food Safety Bill is concerned primarily with food businesses. It is however possible that an authorised officer may need to enter a domestic premises or a vessel, for example when it is used as a "home-office" by the relevant food trader. Under clauses 46 and 47 of the Food Safety Bill, the public officer will be authorised to enter such domestic premises or vessel if there is evidence to establish that it is used for business purposes at the material time. We consider that this power is sufficient for a public officer to carry out duties in relation to the Food Safety Bill, and is also consistent with the scope of power conferred by section 126 of Cap.132.

16. Clause 67

This clause seeks to amend the current section 67 of Cap.132 by repealing "until the contrary is proved" and substituting "unless there is evidence to the contrary". The current section 67 of Cap.132 imposes a persuasive burden on the defendant to prove that the food or substance in question is not intended for human consumption. This may raise concern over the presumption of innocence guaranteed by Article 11(1) of the Hong Kong Bill of Rights

(HKBOR) and Article 87(2) of the Basic Law.

The Court of Final Appeal's (CFA) judgments in the cases of *Lam Kwong Wai*¹ and *Ng Po On*² held that a persuasive burden can only be justified if it has a rational connection with the pursuit of a legitimate aim and if it is no more than necessary for the achievement of that aim. In the light of these judgments, we have decided to take the opportunity of enacting the Food Safety Bill to make a related amendment to section 67 of Cap.132. The amended section 67 will impose an evidential burden on the defendant to point to or adduce evidence to raise a reasonable doubt as to whether the food or substance in question is intended for human consumption, while the prosecution continues to bear the persuasive burden throughout. An evidential burden on the defendant has been held by the CFA to be consistent with the presumption of innocence.

¹ *HKSAR v Lam Kwong Wai & Another*, [2006] 3 HKLRD 808.

² *HKSAR v Ng Po On and Chan Chun Keung Eddy*, [2008] 3 HKC 1.