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Paper for the House Committee meeting on 6 January 2017

Report of the Subcommittee on Public Health (Animals and Birds) (Animal Traders) (Amendment) Regulation 2016 (Commencement) Notice

Purpose

This paper reports on the deliberations of the Subcommittee on Public Health (Animals and Birds) (Animal Traders) (Amendment) Regulation 2016 (Commencement) Notice.

Background

2. The Public Health (Animals and Birds) (Animal Traders) (Amendment) Regulation 2016 (L.N. 64 of 2016) ("Amendment Regulation"), which was published in the Gazette on 20 May 2016 and tabled before the Fifth Legislative Council ("LegCo") on 25 May 2016, amends the Public Health (Animals and Birds) (Animal Traders) Regulations (Cap. 139B) ("Regulations") in order to strengthen the regulation of animal trading and dog breeding activities through licensing arrangements. Salient amendments include:

- (a) revising the licensing scheme such that any person who sells, or offers to sell, dogs must obtain an Animal Trader Licence ("ATL") or a one-off permit, whereas any person who keeps for breeding and sells, or offers to sell, a dog, must obtain a dog breeder licence, viz. a dog breeder licence (category A) ("DBLA")¹ or a dog breeder licence (category B) ("DBLB")²;

¹ A DBLA is for any individual who keeps four or fewer female dogs for breeding purposes at one premises, and sells, or offers to sell, those breeding dams or their offspring.

² A DBLB is for any person who keeps a number of female dogs for breeding purposes up to the limit provided for in the licence at one premises, and sells, or offers to sell, those breeding dams, their offspring or dogs from other approved sources.

- (b) revising the maximum penalty for any person who sells, or keeps for breeding and sells, a dog without a licence or a one-off permit to a fine at level 6 (i.e. \$100,000), and the maximum penalty for contravention of a condition attached to a licence or permit to a fine at level 5 (i.e. \$50,000);
- (c) stipulating that the Director of Agriculture, Fisheries and Conservation ("DAFC") may refuse to grant or renew, or may cancel, a licence if he is not satisfied that the applicant or licensee is a suitable person to carry out the regulated activity;
- (d) empowering DAFC to exempt a person from the requirement to obtain an ATL if DAFC is satisfied that the person is conducting genuine rehoming activities for animal welfare purposes on a non-profit-making basis; and
- (e) prohibiting the sale of dogs by a licensee or permit holder to a person under the age of 16, and the maximum penalty for contravention is a fine at level 5 (i.e. \$50,000).

The Commencement Notice

3. Section 1 of the Amendment Regulation provides that it shall come into operation on a day to be appointed by the Secretary for Food and Health ("SFH") by notice published in the Gazette. On 25 November 2016, the Administration published the Public Health (Animals and Birds) (Animal Traders) (Amendment) Regulation 2016 (Commencement) Notice (L.N. 176 of 2016) ("Commencement Notice") in the Gazette stipulating that SFH has appointed 20 March 2017 as the day on which the Amendment Regulation is to come into operation.

The Subcommittee

4. At the House Committee meeting on 2 December 2016, Members formed a subcommittee to study the Commencement Notice. The scrutiny period of the Commencement Notice has been extended from the Council meeting of 14 December 2016 to that of 18 January 2017 by resolution of the Council passed at its meeting of 7 December 2016. The membership list of the Subcommittee is in the **Appendix**. Under the chairmanship of Dr Elizabeth QUAT, the Subcommittee has held one meeting with the Administration.

Deliberations of the Subcommittee

Compliance with requirements under the licensing regime

5. Mr Jeremy TAM has expressed concern whether DAFC will refuse to grant or renew, or even cancel, a licence if the land leases and deeds of mutual covenant ("DMCs") in relation to the premises on which dogs are kept for breeding and sale contain provisions forbidding the keeping of dogs/animals. According to the Administration, in general, it is the responsibility of the applicant/licensee to ensure compliance with all the requirements imposed under the relevant legal documents relating to the premises concerned, including the relevant provisions in DMCs. Application of the relevant requirements set out in DMCs and ensuring their compliance are outside the ambit of the Agriculture, Fisheries and Conservation Department ("AFCD")'s regulatory power for the licensing regime as provided for under the Public Health (Animals and Birds) Ordinance (Cap. 139). That said, if there is evidence to indicate that any breach of the relevant provisions in the relevant DMCs may affect the suitability of the premises concerned to be used for the regulated activity (breeding of dogs in the present case) or the compliance with the relevant requirements relating to the regulated activity, depending on the circumstances of the particular case, it may be one of the relevant factors for DAFC to take into account when considering whether to grant, renew or cancel the licence.

6. The new regulation 5A of the Amendment Regulation provides that DAFC may exempt a person (including individuals and animal welfare organizations) from the requirement to obtain an ATL if DAFC is satisfied that the person is conducting genuine rehoming activities for animal welfare purposes on a non-profit-making basis. Noting that under the newly added regulation 5A(2)(c), in considering an exemption, DAFC may take into account, among others, whether the person engages the services of a registered veterinary surgeon as defined by section 2 of the Veterinary Surgeons Registration Ordinance (Cap. 529) to act as an advisor on animal health and welfare, Mr Jeremy TAM has sought clarification as to whether the person should engage a registered veterinary surgeon through an employment contract. The Administration has advised that in deciding on the exemption, DAFC may consider, inter alia, whether the person engages the services of a registered veterinary surgeon as an advisor on animal health and welfare. While there is no requirement for the applicant and the veterinary surgeon to enter into an employer-employee relationship, the parties concerned are expected to have developed and to continue to maintain a close working relationship.

Propriety and readiness to implement the enhanced regulatory regime

7. Some members, including the Chairman and Dr CHIANG Lai-wan, are supportive of implementing the enhanced regulatory regime to put dog breeding activities under licensing control. They hope that the Amendment Regulation can be put into operation as early as possible. Some other members, including Ms Claudia MO, Mr CHAN Chi-chuen and Dr CHENG Chung-tai, however oppose to the commencement of the Amendment Regulation. In their views, the new licensing regime has not been sufficiently discussed by Members of the Sixth LegCo and the community. Many issues remain unresolved, such as how inspections on domestic premises may be conducted. Pointing out the difficulty in regulating the operating conditions of breeding premises, particularly premises of hobby-breeders which in most cases are situated in residential buildings, Mr KWONG Chun-yu and Ms Claudia MO have expressed concerns about the adequacy of manpower resources of AFCD and its readiness in enforcing the licensing requirements. They question the propriety of the Administration's decision to appoint 20 March 2017 as the day on which the Amendment Regulation is to come into operation. Ms Claudia MO has also reiterated her concern that the Amendment Regulation may produce an unintended effect of legalizing private breeding of dogs. Mr CHAN Chi-chuen and Dr CHENG Chung-tai share her view that the Administration should defer the commencement of the Amendment Regulation by at least one to two years.

8. According to the Administration, a public consultation exercise was conducted from October to November 2012 to gauge public views on the proposals to regulate the breeding of dogs for sale. During the public consultation period, the Administration had invited views from the Panel on Food Safety and Environmental Hygiene ("FSEH Panel") of the Fifth LegCo, organized consultation forums and met with relevant stakeholders. In light of the views received, the Administration had revisited and refined the legislative proposals and discussed issues of concern with relevant parties (including consulting the FSEH Panel again in July 2014 on the finalized package of the legislative proposals) in order to build consensus. The Administration notes that different stakeholders may have different views on the enhanced regulatory regime. Having weighed the views received and other relevant considerations, the Government remains of the view that the finalized proposals, as framed in the Amendment Regulation³, can serve the policy objectives of enhancing animal health and welfare and strike an appropriate balance between the protection of animal welfare and the interests of pet owners and animals traders.

³ The Amendment Regulation has been scrutinized by a subcommittee formed by the Fifth LegCo. Members may refer to the Subcommittee's report (LC Paper No. CB(2)1804/15-16) for details of its deliberations.

9. The Administration has further advised that AFCD is well prepared for implementing the enhanced regulatory regime at the end of March 2017. To cope with the anticipated increase in workload, through the additional provision of seven permanent civil service posts and redeployment of staff currently engaged in duties related to the Regulations, there will be some 30 officers deployed to discharge duties in relation to the licensing of animal trading activities and enhancing the relevant control measures after commencement of the Amendment Regulation. Meanwhile, training is being carried out for the new recruits. These apart, AFCD will launch a series of publicity programme, which includes production of Announcements of Public Interest, to ensure that members of the public and relevant stakeholders (in particular the dog breeding and trading sector) are aware that the enhanced regulatory regime is to be implemented. The Administration has stressed that the licensing regime will give an anchoring point for AFCD to carry out inspection, promotion and education work concerning dog breeding activities.

10. In response to Dr CHIANG Lai-wan's enquiry about the estimated number of private dog breeders in the market, the Administration has advised that it is estimated that when the enhanced regulatory regime is in full swing, there will be about 300 to 500 private dog breeders. The Administration believes that implementation of the Amendment Regulation will not result in a significant increase in hobby-breeding activities. On the contrary, the number of private dog breeders may decrease if the hobby-breeding activities are brought under regulation. Dr CHIANG Lai-wan has requested the Administration to keep in view the effectiveness of the Amendment Regulation and report progress to the FSEH Panel on a regular basis after the implementation of the enhanced licensing regime.

11. Notwithstanding the Administration's assurance on its readiness to implement the Amendment Regulation, some members, including Ms Claudia MO, Mr CHAN Chi-chuen and Dr CHENG Chung-tai, maintain the view that the Amendment Regulation should not be brought into operation pending further consultation and discussion. Ms Claudia MO has proposed that a motion be moved by the Subcommittee Chairman to repeal the Commencement Notice. Her proposal was put to vote at the meeting on 9 December 2016 but negated by the Subcommittee. She subsequently indicated an intention to repeal the Commencement Notice in her own name⁴.

⁴ Ms Claudia MO will move a proposed resolution which seeks to repeal the Commencement Notice at the Council Meeting of 18 January 2017.

Inspections on licensed premises

12. The Subcommittee notes that authorized officers of AFCD will conduct regular and surprise inspections on licensed animal traders/dog breeders from time to time for compliance check. Members have expressed concerns about the practical difficulties in AFCD's regulatory work as DBLA licensees who breed dogs for sale in domestic premises may not be cooperative in allowing AFCD officers' surprise inspection of their premises, while giving prior notice of inspection will defeat the purpose for which the inspection is intended. The Legal Adviser to the Subcommittee has sought the Administration's response on how AFCD's inspections on domestic premises may be conducted at the time of the application for a licence and after the licence is granted in the light of Article 29 of the Basic Law which provides that "[t]he homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited."

13. According to the Administration, upon the commencement of the Amendment Regulation, applications for ATL, DBLA or DBLB will be subject to the statutory requirements under the amended Regulations, as well as the conditions attached to the three types of licences as provided under regulations 5(3), 5B(4) or 5C(3) of the amended Regulations. Each ATL, DBLA or DBLB is tied to a specific premises. A licensee is only allowed to carry out the regulated activities at premises specified in the relevant licence ("the licensed premises"). As explained earlier, under the amended Regulations, DAFC may refuse to grant/renew or cancel a licence if he considers that the applicant is not, or the licensee is no longer, a suitable person to hold the licence (regulations 5E(1) and 5G(1)). Furthermore, DAFC may not grant or renew a licence unless the primary enclosures, housing facilities and outdoor areas of the premises concerned conform to the required standards (regulations 5(2), 5B(3) and 5C(2)). In this regard, when considering whether to grant a licence to an applicant, DAFC may take into account all relevant circumstances to ascertain whether the stipulated requirements in relation to the premises are fulfilled and whether the applicant is a suitable person to carry out the regulated activity, after conducting an inspection on the premises related to the application.

14. The Administration has stressed that once a licence is granted, the licensed premises will be subject to regular inspections by authorized officers of AFCD to ensure continued compliance with the statutory requirements and the conditions attached to the licence. Such inspections may be conducted by prior arrangement with the licensee or surprise checks without prior notice and in any event during reasonable hours. In both cases, entry to the licensed premises, including domestic premises, will be carried out only with the consent of the licensee. A specific condition will also be attached to the licence to require the licensee to

facilitate AFCD's authorized officers to carry out the inspections by providing access to the licensed premises. Failure to comply with a request by an authorized officer to gain access to the licensed premises may be considered as a breach of this condition. Depending on particular circumstances of a case, the licensee may be liable to prosecution under regulation 13(2)(a) and/or cancellation of the licence under regulation 5G(1) of the amended Regulations.

15. The Administration further advises that an applicant may register either domestic or non-domestic premises in applying for a licence, and such person should not be exempted from inspection for compliance check simply because the regulated activities are carried out in domestic premises. Bearing in mind that (a) the power of entry and inspection will be exercisable in relation to licensed premises only (and not any other premises of the licensee); (b) a licensee is entitled to a lower expectation of privacy when he has voluntarily agreed to carry out a heavily regulated activity in the licensed premises and has expressly agreed to abide by the conditions of the licence (including regular inspection of the licensed premises); and (c) entry to licensed premises for regular and/or surprise inspections will be conducted at reasonable hours with the consent of the licensee without the use of force and for the limited purposes of ensuring compliance with the statutory requirements and licence conditions, the Administration is of the view that the power of entry and inspection is consistent with Article 29 of the Basic Law.

Follow-up actions required of the Administration

16. The Subcommittee has requested the Administration to keep in view the effectiveness of the Amendment Regulation and report progress to the FSEH Panel on a regular basis after the implementation of the enhanced licensing regime (paragraph 10 refers).

Advice Sought

17. Members are invited to note the deliberations of the Subcommittee.

**Subcommittee on Public Health (Animals and Birds) (Animal Traders)
(Amendment) Regulation 2016 (Commencement) Notice**

Membership list

Chairman Dr Hon Elizabeth QUAT, JP

Members Hon WONG Ting-kwong, SBS, JP
 Hon CHAN Hak-kan, BBS, JP
 Hon CHAN Kin-por, BBS, JP
 Hon Claudia MO
 Hon Steven HO Chun-yin, BBS
 Hon CHAN Chi-chuen
 Hon CHAN Han-pan, JP
 Hon LEUNG Che-cheung, BBS, MH, JP
 Dr Hon CHIANG Lai-wan, JP
 Hon CHU Hoi-dick
 Hon Jimmy NG Wing-ka, JP
 Hon Holden CHOW Ho-ding
 Hon CHAN Chun-ying
 Hon LUK Chung-hung
 Hon LAU Kwok-fan, MH
 Dr Hon CHENG Chung-tai
 Hon KWONG Chun-yu
 Hon Jeremy TAM Man-ho

(Total : 19 members)

Clerk Miss Josephine SO

Legal Adviser Miss Winnie LO

Date 9 December 2016