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**Paper for the House Committee Meeting
of the Legislative Council
on 2 March 2001**

**Legal Service Division Report on
Public Health and Municipal Services
(Amendment) Bill 2001**

Object(s) of the Bill

To amend the Public Health and Municipal Services Ordinance (Cap. 132) ("the Ordinance") to provide for—

- (a) the making of closure order in respect of premises on which specified activities are conducted without licence, permit or permission under the Ordinance;
- (b) making of closure order in respect of premises the use of which poses an immediate health hazard; and
- (c) consequential amendments.

LegCo Brief Reference

2. EFB CR 10/8/7 issued by the Environment and Food Bureau on 14 February 2001.

Date of First Reading

3. 28 February 2001.

Comments

Unlicensed food establishments

4. Under the existing statutory scheme, the licensing authority, the Food and Environmental Hygiene Department ("the Department") has, in the first instance, to prosecute the operator of an unlicensed food establishment by summons and secure a conviction before applying to a magistrate's court ("the court") for a Prohibition Order prohibiting the use of the premises or vessel for a purpose specified in the order. The Department can apply for a closure order in respect of the premises or vessel only if the Prohibition Order has been breached and the operator convicted. According to LegCo Brief, the whole process may take as long as nine months.

5. To tackle the problem of unlicensed food establishments more effectively, the Administration proposes to add new section 128B to the Ordinance to empower the Director of Food and Environmental Hygiene ("the Authority") to apply to the court direct for a closure order in respect of unlicensed premises which are used to conduct activities mentioned in new section 128A(1). The activities mentioned in new section 128A(1) include the use of premises—

- (a) as food premises that are required to be licensed under the Food Business Regulation (Cap. 132 sub. leg.);
- (b) for sale of restricted food specified in Schedule 2 to the Food Business Regulation;
- (c) as a slaughterhouse that is required to be licensed under the Slaughterhouses Regulation (Cap. 132 sub. leg.);
- (d) as a milk factory that is required to be licensed under section 14 of the Milk Regulation (Cap. 132 sub. leg.); and
- (e) on which any frozen confection as defined in section 3 of the Frozen Confections Regulation (Cap. 132 sub. leg.) is manufactured.

The court shall rescind the closure order on specified grounds. It is an offence for a person, other than a public officer in the course of his duty, to enter or remain on any closed premises. The Authority may dispose of any perishable food that requires to be immediately disposed of or animal that is found on the premises. The owner may submit a claim against the Authority for the return of the same with payment of expenses incurred in the removal and storage of it, if necessary.

Unhygienic food establishments

6. Under regulations 19 and 24 of the Prevention of the Spread of Infectious Diseases Regulations (Cap. 141 sub. leg.), the Director of Health is empowered to isolate and disinfect any premises including food establishments. However, the Regulations cannot be invoked to deal with food hygiene incidents caused by factors other than infectious diseases.

7. To tighten the control on unhygienic food establishments, the Administration proposes to add new section 128C to the Ordinance to empower the Authority to make a closure order to close premises immediately, if he is satisfied that any activity conducted on the premises poses immediate health hazard. The term "immediate health hazard" is defined under new section 128A(3) to include—

- (a) because of the location, construction or state of the premises, the condition of the premises is such that it renders any food supplied from or handled or sold on the premises to be so contaminated or tainted that it is unfit for human consumption;
- (b) the water used in preparing food or in washing utensils comes from a contaminated or unapproved source, rendering any food supplied from or handled or sold on the premises to be unfit for human consumption;
- (c) as shown from inspection findings, data from epidemiological investigation or other laboratory evidence, any food supplied from or handled or sold on the premises is contaminated with pathogens, biotoxins, chemicals or other substances rendering the food unfit for human consumption; and
- (d) the premises are infested with vermin to such extent that any food supplied from or handled or sold on the premises is contaminated or tainted, and becomes unfit for human consumption.

A person who is aggrieved by the order may appeal to the court against it. The Authority may also on his own initiative or on the application of any person having an interest in the premises rescind the closure order, if he is satisfied that the immediate health danger has been eliminated. If the Authority refuses to rescind the order as applied, the applicant may appeal to the court against the Authority's decision. It is an offence for a person, other than a public officer in the course of his duty, to enter or remain on any closed premises. The Authority may dispose of any perishable food that requires to be immediately disposed of or animal that is found on the premises. The owner may submit a claim against the Authority for the return of the same with payment of expenses incurred in the removal and storage of it, if necessary.

8. The Legal Service Division has raised a number of queries concerning the legal and drafting aspects of the Bill with the Administration (**Annex I**). The Administration has agreed, in its reply (**Annex II**), to certain points raised by us and agreed to move corresponding Committee Stage amendments to the Bill. Other points not agreed to are being studied.

Public Consultation

9. According to LegCo Brief, the Administration has consulted the Advisory Council on Food and Environmental Hygiene and the trade on the proposals in the Bill and the response was generally positive.

Consultation with the LegCo Panel

10. The Food Safety and Environmental Hygiene Panel was consulted about the legislative proposals at its meetings on 8 January 2001. Although members supported in principle the legislative proposals, some of them expressed concerns over the procedural safeguards against any possible abuse by the Authority to make closure order.

Conclusion

11. The Bill contains a number of important proposals. One of them is to empower the Authority to make an immediate closure order in respect of any premises the use of which for certain food business purposes constitutes an immediate health hazard. The Legal Service Division is still studying the Administration's response to our queries about the legal and drafting aspects of the Bill. Members are recommended to form a Bills Committee to study the proposals in detail both from the policy and legal point of view.

Prepared by

Lam Ping-man, Stephen
Assistant Legal Adviser
Legislative Council Secretariat
28 February 2001

LS/B/26/00-01
2869 9468
2877 5029

Secretary for Environment and Food
(Attention: Ms Eva To
Principal Assistant Secretary)
Environment and Food Bureau
10/F Citibank Tower
3 Garden Road
Central
Hong Kong

21 February 2001

BY FAX

Fax No. : 2136 3281
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Dear Ms TO,

Public Health and Municipal Services (Amendment) Bill 2001

We are scrutinizing the legal and drafting aspects of the Bill and would be grateful for your clarification of the following points-

New section 128A(1)(b)

Would it be appropriate to widen the scope of activities in the provision, which only covers sale, offer or exposure for sale, to the same extent as those covered in section 30(1) of the Food Business Regulation (Cap. 132 sub. leg.)?

New section 128A(1)(c)

Would it be appropriate to widen the scope of "premises used" to "premises used and occupied" as covered in section 9(1) of the Slaughterhouses Regulation (Cap. 132 sub. leg.)?

New section 128A(1)(d)

- (i) Why is it necessary to make reference to regulation 14(2)? There is no similar reference to relevant Regulation in new section 128A(1)(a) and (c).

- (ii) Should the reference, if necessary, be "section 14(2)" instead of "regulation 14(2)"?

New section 128A(1)(e)

Why is it necessary to make reference to section 3? There is no similar reference to relevant Regulation in new section 128A(1)(a) and (c).

New section 128A(2)

In the definition of "immediate health hazard", is it necessary to extend the activities covered in the definition to include those covered in new section 128A(1)(b) and (e), for example "offered or exposed for sale" and "manufactured"?

New section 128A(3)(b)

Is it necessary to define "unapproved source"?

New section 128B(1)

- (i) Paragraphs (a) and (b) enumerate the matters to be covered under new section 128B. The scope of paragraph (b) is clear since it is consistent with that of new section 128A(1). However, the scope of paragraph (a) appears to be ambiguous. Is paragraph (a) intended to cover the use of premises which is required to be permitted or licensed under the Food Business Regulation, the Frozen Confections Regulation or the Milk Regulation (in such case, the scope is wider than that of new section 128A(1) and paragraph (b)) or the use of premises for any purpose mentioned in new section 128A(1) (in such case, paragraphs (a) and (b) appear to overlap each other substantially)?
- (ii) Would it be appropriate to repeal "(as the case may be)" by substituting it immediately after "on any premises"?
- (iii) The activity mentioned in new section 128A(1) requires "licence" or "permission" but not "permit". Is "permit" required under paragraph (a)?

New section 128B(4)(b)

Would it be appropriate to substitute "common area" by "common parts"? The term "common parts" is defined under the Building Management Ordinance (Cap. 344).

New section 128B(6)

Paragraph 11 of the LegCo Brief (File Ref.: EFB CR 10/8/7) mentions that the closure order could be lifted through application to the court by the Director, the owner or the occupier concerned. Would the term "any person having an interest in the premises" cover persons more than "the owner or the occupier concerned"?

New section 128C(1)

Paragraph 12 of the LegCo Brief mentions that the power to close unhygienic food establishments would be exercised personally by the Director. Bearing in mind section 43 of Cap. 1 empowers a specified public officer to delegate, would it be appropriate to make it clear in the provision that the power is intended to be exercised personally by the Director alone?

New section 128C((2)(b)

Is it appropriate to substitute "common area" by "common parts"? The term "common parts" is defined under the Building Management Ordinance (Cap. 344).

New section 128C(5)

Is the term "any person having an interest in any premises" intended to cover "the owner or the occupier concerned" as mentioned in paragraph 11 of the LegCo Brief?

New FORM H

- (i) Would it be appropriate to substitute "under the Public Health and Municipal Services Ordinance (Cap. 132) ("the Ordinance")" by "the Food Business Regulation, the Frozen Confections Regulation or the Milk Regulation"?
- (ii) In Note: 2, would it be appropriate to add "to which this order relates after it has come into force" immediately after "on the premises/in the vessel*"?

New FORM I

- (i) In paragraph (b), would it be appropriate to add "/vessel/that part of the vessel" immediately after "on the premises" (otherwise the asterisk is superfluous)?
- (ii) In Note: 2, would it be appropriate to add "to which this order relates after it has come into force" immediately after "on the premises/in the vessel*"?

New FORM J

In paragraph (b), would it be appropriate to add "/vessel/that part of the vessel" immediately after "on the premises" (otherwise the asterisk is superfluous)?

In facilitating us to report on the Bill to the House Committee meeting to be held on 2 March 2001, it is appreciated that your reply, in both languages, could reach us by 26 February 2001.

Yours sincerely,

(Stephen Lam)
Assistant Legal Adviser

c.c. DoJ (Attn: Mr SUEN Wai-chung, SALD)
(Fax No. 2845 2215)

LA

Mr Stephen Lam
Assistant Legal Adviser
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central

27 February 2001

Dear Mr Lam,

Public Health and Municipal Services (Amendment) Bill 2001

Thank you for your letter of 21 February.

Our comments on the points raised in your letter regarding the legal and drafting aspects of the above bill are set out in the following paragraphs for your consideration.

(a) New section 128A(1)(b)

The proposed scope of the Bill as set out in this section should be able to cover all premises to which we wish the section to apply. We have considered whether to expand the scope to cover “possess for sale or for use in preparation of any food or article for sale” as provided in section 30(1) of the Food Business Regulation, in addition to the present wording of “sale, offer or exposure for sale”. We conclude that the present wording should be able to cover all the targeted premises of the Bill. However, in order to tally with the wording of section 30(1) of the Food Business Regulation, we are prepared to consider your suggested amendments and will discuss this further with our legal advisor and law draftsman during the scrutiny of the Bill at the Bills Committee.

(b) New section 128A(1)(c)

The present wording of “premises used” should serve the purpose and we do not see a need for adding “or occupied”. However, in order to tally with the wording of the Slaughterhouses Regulation, we are prepared to consider your suggested amendment and will discuss this further with our legal advisor and law draftsman during the scrutiny of the Bill at the Bills Committee.

(c) New section 128A(1)(d)

(i) The reference to the section number makes it clearer as to what is meant by “a business as a milk factory”. New sections 128(1)(a) and (c) are different from this section as they refer to the requirement of being licensed under the relevant

Regulations. Those provisions are sufficiently clear for reference purposes.

(ii) The reference should be “section 14(2)” instead of “Regulation 14(2). We would consider a committee stage amendment to this effect.

(d)New section 128A(1)(e)

Similar to (c)(i) above, the reference to the section number makes it clearer as to what is meant by “frozen confection”. New sections 128(1)(a) and (c) are different as they refer to the requirement of being licensed under the relevant Regulations. Those provisions are sufficiently clear for reference purposes.

(e)New section 128A(2)

The present definition which covers “any food supplied from or handled or sold” is sufficiently wide to serve the policy intent. Such specific activities as “Offered or exposed for sale “ and “manufactured” should have been covered by the definition. However, in order to tally with the wording 128A(1) (b) and (e), we are prepared to consider your suggested amendments and will discuss this further with our legal advisor and law draftsman during the scrutiny of the Bill at the Bills Committee.

(f) New section 128A(3)(b)

It is one of the licensing requirements for food establishments to use water from a source approved by the Director of Food and Environmental Hygiene (e.g. water from the public mains). For food establishments located at areas where no public mains are available, the Director will stipulate the requirements for filtering and disinfecting the water having regard to the source(s) available at the site. There may be technical difficulty in defining this term and we prefer to maintain some flexibility by not having a legal definition.

(g)New section 128B(1)

(i) Paragraphs (a) and (b) are so worded to avoid any argument as to whether a particular activity is or is not a “use”. Paragraph (a) covers the scenario of the “use of premises” while paragraph (b) covers activities like “supply” or “manufacture”.

(ii) Your suggested amendment is agreed. We will consider moving committee stage amendments to this effect.

(iii) In practice, written permission from the Director of Food and Environmental Hygiene is either in the form of an endorsement on the relevant licence or a specific written “permit” (see attached sample). To avoid unnecessary argument, the word “permit” should be retained. You may also wish to note that there are references to “permit” in section 5 of the Milk Regulation (heading and section 5(2)) and section 5 of the Frozen Confections Regulation.

(h)New section 128B(4)(b)

“Common area” is sufficiently clear in the present context. You may wish to note that “common area” has also been used in the Air Pollution Control Ordinance (Cap. 311) and the Fire Safety (Commercial Premises) Ordinance (Cap. 502).

(i)New section 128B(6)

The term “any person having an interest in the premises” covers persons more than “the owner or the occupier concerned”. While the owner or the occupier would be the most likely parties to make application to the court to lift the closure order, we need to cater for situations where an application may be filed by a person other than the owner or occupier of the premises, say, by prospective occupier, the heir entitled to the estate if the owner is deceased or the creditor/mortgagee/liquidator concerned.

(j)New section 128C(1)

Having regard to the possible impact of an immediate closure order on a food establishment, in the LegCo brief, we thus want to bring out an important point that such power would be exercised by the Director as against a health inspector during their regular inspection. However, we do not see the need to impose any legal restriction on the Director’s power having regard to Cap. 1.

(k)New section 128C(2)(b)

See (h) above.

(l)New section 128C(5)

See (i) above.

(m)New Form H

(i) The current wording in the bill follows that of section 128. We believe that this is an easier and sufficiently clear expression in this context.

(ii) The context has made it sufficiently clear about which premises the note is referring to. Moreover, it is an offence to remove or deface a copy of the closure order affixed to any premises/vessel even before the closure order comes into force and it is therefore not appropriate to add “after it has come into force”.

(n)New Form I

(i) Your suggested amendment is agreed. We will consider moving committee stage amendments to this effect.

(ii) See (m) (ii) above.

(o)New Form J

Your suggested amendment is agreed. We will consider moving committee stage amendments to this effect.

Yours sincerely,

(Ms Eva To)
for Secretary for the Environment and Food

c.c.	D of J	(Attn: Mr Suen Wai-chung)	2845 2215
		(Attn: Mr W.S. Yip)	2180 9966
	DFEH	(Attn: Mr Warner Cheuk)	2530 1368