



Submissions on the Prevention and Control of Disease Bill

The Law Society refers to the request from the Chairman of the Bills Committee on the Prevention and Control of Disease Bill (“the Bill”) inviting views on the papers prepared by the Department of Justice and Health and Food Bureau and the Legal Service Division of the Legislative Council. These papers focussed on the “power of requisition” under clause 8(2)(c) and whether as drafted it complies with the property rights guaranteed under Articles 6 and 105 of the Basic Law. The paper also addressed questions on whether compensation would be provided to the owners of premises and conveyances, as well as people ordered to be quarantined or isolated for public health purposes, if they suffered financial loss as a result.

The Law Society has the following comments:

1. Part 4: Regulation

We note the Administration intends to revamp the approach of the entire statutory framework of the Ordinance as it is more than 70 years old. The Legislative Brief indicates it proposes to introduce regulations to enable the Secretary for Food and Health to make regulations to provide a “holistic plan of measures for the prevention, surveillance and control of infectious disease.....”

The Law Society notes such regulations will have significant impact on the property rights of the public and therefore recommends the draft regulations should be scrutinised before they are tabled under the negative vetting procedure.

2. Part 5 Miscellaneous

2.1 Compensation

2.2 Section 12(1) states:

*“Where any article is damaged, destroyed, seized, surrendered or is submitted to any person pursuant to this Ordinance, the Director **may** order the payment of such compensation as is just and equitable in the circumstances”*

As drafted, there are no stated principles in relation to the payment of compensation or factors to be taken into consideration; payment of compensation will be at the discretion of the Director. The “principle” of “just and equitable” is only relevant when a compensation order has been made.

We submit this clause should be redrafted as the right to compensation should not lie at the discretion of the Director.

2.3 Section 12 (2) Arbitration Ordinance

The Law Society is aware of the usual and obvious advantages of arbitration, but this form of dispute resolution may not be appropriate in these circumstances:

- Lay people do not understand arbitration well enough compared to court proceedings
- Arbitration is not always cost effective if the sums involved are not significantly large
- Arbitration awards are not binding on any subsequent claims and hence will not provide any benchmarks for other claimants
- Under existing laws, an arbitrator has no power to order consolidated actions for parties involved in the same disputes; this may produce undesirable results such that claimants involved in the same incident may obtain different compensation amounts in separate arbitration proceedings
- The confidential nature of arbitration may also mean lack of transparency so that society cannot follow/monitor how these class of cases are being determined.

We submit it would be inappropriate to have disputes over compensation claims resolved by arbitration. The disputes should be handled by the Courts and where appropriate the parties should mediate.

3. Compensation for Financial Loss

In paragraph 4 of the paper prepared by the DOJ and the Health and Food Bureau, the Administration states:

3.1 Basic Law

Compensation for requisitioning of properties in a public health emergency will therefore be provided separately in a set of regulations to be made under Clause 8 (Public Health Emergency Regulation). It is the policy intent of the Government that under the Public Health Emergency Regulation, any person who sustains losses or damage in consequence of or arising out of the exercise of any requisition power, is entitled to the use of or rent from any requisitioned property, is entitled to recover such compensation as is just and equitable in the circumstances. It will also include a provision similar to clause 12(2) providing for resolution or determination of any dispute as to whether compensation is payable or the amount of compensation”.

We have no comment on the analysis of the protection of private property rights under Articles 6 and 105 of the Basic Law. We accept there should be a threshold test to cover “deprivation” and that compensation should be just and equitable in the circumstances.

3.2 Isolation Orders

The Law Society questions the Government’s policy in relation to “Compensation for Financial Loss” as outlined in paragraph 18 of its paper:

“As regards financial loss suffered by owners of premises and conveyances ordered to be isolated, as well as people ordered to be isolated, or quarantined, no compensation will be provided for such loss since the relevant isolation or quarantine orders will only last for a short period of time so that the health authority can carry out disease control measures and/or medical surveillance to prevent the spread of disease.....we consider that notwithstanding the absence of compensation for such financial loss, any interference with property rights arising from the making of these isolation or quarantine orders meets the “fair balance requirement...””

3.2 “....people ordered to be isolated”

The Government has failed to provide any justification in relation to its refusal to provide compensation to persons who are “**....ordered to be isolated**”. There is a bald statement that such an order will be “**for a short period of time**”.

What is meant by “*a short period of time*”?

The Government intends to run a publicity campaign to advise Hong Kong citizens of the new public health measures and has a reasonable expectation that citizens will accept such provisions have been introduced for the public good. The intention is to promote compliance with the law in order to prevent the spread of virulent infectious diseases. There is an expectation by the Government that citizens will act responsibly but this policy does not encourage openness and compliance.

During the SARS outbreak the Government issued an isolation order on Block E of Amoy Gardens on 31 March 2003 for a period of 10 days (up to midnight on 9 April 2003). The order involved more than 700 persons. It is inconceivable that the people who were subject to the isolation order did not suffer emotional and mental distress for the full 10 days whilst they were held at Government Holiday Camps at Lei Yue Mun and MacLehose. This “10 day period” was a very long period of time not only for those people in quarantine but also for all Hong Kong citizens who were monitoring the news on whether the outbreak had been contained.

It is not difficult to recall the scenes on television when the residents of Amoy Gardens were forced to comply with the isolation order. The burden of the isolation order was not borne by the Government but by those individuals who had jobs and businesses, who in turn had regular outgoings to meet, such as rent/mortgage, payrolls etc.

The Government’s policy, made on behalf of the public, will only be borne by those unfortunate people covered by the isolation orders and their employers.

We submit the policy is not “fair and balanced.” There Government and society in general should acknowledge that persons, subjected to an isolation order, and who do not fall sick, should be entitled to compensation to cover financial losses. These people will have been subjected to unimaginable mental anguish during their enforced detention “for the public good”. The Government’s proposal is inequitable.

This proposal would not apply to those persons who fall ill during the isolation order as they would be entitled to sick leave per a doctor’s certificate.

4. We agree with the observations in the paper prepared by the Secretariat that:

“(a) The Administration should define “*requisition*” in the Bill (whether it embraces deprivation of and interference with property); and

(b) As Clause 8(2)(c) is silent on the details of the compensation scheme, such as whether there will be a cap on the compensation the Administration should include its compensation scheme in a regulation to be made under clause 8(2)(c).”

The Law Society of Hong Kong

10 March 2008

113572