

立法會

Legislative Council

LC Paper No. LS102/07-08

**Paper for the House Committee Meeting
on 4 July 2008**

**Legal Service Division Report on
Subsidiary Legislation Gazetted on 27 June 2008**

Date of tabling in LegCo : 2 July 2008

Amendment to be made by : 15 October 2008 (or 5 November 2008
if extended by resolution)

PART I OFFICIAL LANGUAGES ORDINANCE

Official Languages Ordinance (Cap. 5)

Official Languages (Alteration of Text under Section 4D) (Advocate and Advocacy) Order (L.N. 178)

Background

Section 4D of the Official Languages Ordinance (Cap. 5) empowers the Secretary for justice to make formal alterations to the text of an Ordinance in one official language to achieve consistency between a word, expression or phrase and another word, expression or phrase where such words, expressions or phrases purport to be the equivalent of the same word, expression or phrase in the other official language in the same context. The Secretary for Justice has authorized the Law Draftsman pursuant to section 7 of the Legal Officers Ordinance (Cap. 87) to make such formal alterations.

2. This Order (except clause 21) was originally Part 2 of the Official Languages (Alteration of Text under section 4D)(Miscellaneous) Order 2007 (L.N. 136 of 2007) (the 2007 Order). The 2007 Order was laid before the Legislative Council on 4 July 2007 and a Subcommittee was formed to study that Order. At its meeting on 26 July 2007, the Subcommittee took the view that since the words “advocacy” and “advocate” relate to the legal profession and the work of legal practitioners, the relevant bodies in the legal field should be consulted before a decision was made regarding the Chinese equivalents for those words. Part 2 of the 2007 Order was therefore repealed and the Department of Justice agreed to conduct a consultation exercise. The report on the consultation results (LC Paper No.

CB(2)2283/07-08(1)) was submitted to the Panel on Administration of Justice and Legal Services in June 2008. It was circulated to the Panel on 13 June 2008. The Panel did not raise any queries and endorsed the Administration's proposal.

3. The Order is technical. It makes formal alterations to the Chinese text of various items of legislation by—

- (a) repealing “出庭代訟人”，“代言人”，“代訟人” and “出庭代言人” and substituting “訟辯人”; and
- (b) repealing “出庭代訟” and “代訟” and substituting “訟辯”.

The alterations will achieve consistency between the respective Chinese equivalents of “advocates” and “advocacy” in the Chinese text of those items of legislation and those in the Chinese text of other items of legislation.

4. The Order is to come into operation on 1 January 2009.

PART II PUBLIC MARKETS

Public Health and Municipal Services Ordinance (Cap. 132)

Public Health and Municipal Services (Markets) Declaration 2008 (L.N. 179)

Market (Cessation of Application of the Public Health and Municipal Services Ordinance) Declaration 2008 (L.N. 180)

Public Health and Municipal Services (Cessation of Designation as Public Market) Order 2008 (L.N. 181)

Public Health and Municipal Services Ordinance (Amendment of Tenth Schedule) Order 2008 (L.N. 182)

Public Health and Municipal Services (Markets) (No. 2) Declaration 2008 (L.N. 183)

Background

5. The Director of Food and Environmental Hygiene (DFEH) is empowered under section 79(1) of the Ordinance to declare a market a venue to which the Public Health and Municipal Services Ordinance (Cap. 132) (the Ordinance) applies and, under section 79(3) of the Ordinance, to designate it a public market. The management and control of a venue designated a public market will then in accordance with section 79A of the Ordinance be vested in DFEH. Consequently, the Tenth Schedule to the Ordinance, which specifies the designated public markets, must also be amended.

L.N. 179

6. By this Declaration, DFEH declares with effect from 1 August 2008 the Aldrich Bay Market at 15 Aldrich Bay Road, Hong Kong (ABM) to be a market to which the Ordinance applies. Consequentially, the Schedule to the Declaration of

Markets Notice (Cap. 132 sub. leg. AN) (the Declaration Schedule) is amended to include ABM.

7. ABM is a new market and is scheduled for commissioning on 1 August 2008. The Declaration is the first of three pieces of subsidiary legislation made by DFEH in respect of ABM. Members may wish to refer to the LegCo Brief issued in respect of the subsidiary legislation relating to ABM by the Food and Health Bureau (FHB) in June 2008 for further information.

L.N. 180 to L.N. 183

8. The existing Wan Chai Market at 264 Queen's Road East, Wan Chai (the Old Market) will be replaced by the new Wan Chai Market at G/F, 258 Queen's Road East, Wan Chai (the New Market). The Old Market will be decommissioned immediately before the commission of the New Market on 1 September 2008. For the purposes of the Ordinance, DFEH has to make six pieces of subsidiary legislation. Four of them are gazetted last Friday, 27 June 2008. The remaining two will be gazetted on 4 July 2008. Members may wish to refer to the LegCo Brief issued in respect of the subsidiary legislation relating to the Old and New Markets by FHB in June 2008 for background and further information.

9. L.N. 180 declares the cessation of the Old Market to be a market to which the Ordinance applies. The Declaration Schedule is amended by repealing the entry of the Old Market. L.N. 181 cancels the designation of the Old Market as a public market. L.N. 182 amends the Tenth Schedule to the Ordinance by repealing the entry of the Old Market.

10. L.N. 183 declares the New Market to be a market to which the Ordinance applies. The Declaration Schedule is amended by adding the entry of the New Market.

11. The four legal notices are to come into operation immediately before the commencement of 1 September 2008.

12. Neither the public nor the Panel on Food Safety and Environmental Hygiene has been consulted on these five pieces of subsidiary legislation.

PART III COMMENCEMENT NOTICE

Domestic Violence (Amendment) Ordinance 2008 (17 of 2008)

Domestic Violence (Amendment) Ordinance 2008 (Commencement) Notice (L.N. 184)

13. By this Notice made under section 2 of the Domestic Violence (Amendment) Ordinance 2008 (17 of 2008) (the Amendment Ordinance), the

Secretary for Labour and Welfare has appointed 1 August 2008 as the day on which the Amendment Ordinance is to come into operation.

14. Before the enactment of the Amendment Ordinance, the Bill has been scrutinized by a Bills Committee. Members may wish to refer to the report of the Bills Committee to the House Committee (LC Paper No. CB(2)2097/07-08) for further information. The Amendment Ordinance enables injunction to be granted against molestation by spouse or former spouse, partner or former partner in cohabitation relationship, or relatives or relatives of a spouse and extend the Court's power to attach authorization of arrest.

Concluding Observation

15. No difficulties in relation to the legal and drafting aspects of the subsidiary legislation above reported have been identified.

PART IV PUBLIC HEALTH AND MUNICIPAL SERVICES

**Public Health and Municipal Services Ordinance (Cap. 132)
Food Business (Amendment) Regulation 2008 (L.N. 185)**

16. This Amendment Regulation amends the Food Business Regulation (Cap. 132 sub. leg. X) to—

- (a) require the slaughtering of all live poultry remaining at retail premises before 8:00 p.m. each day; and
- (b) require that there is no live poultry at retail premises between 8:00 p.m. each day and 5:00 a.m. the next day.

17. Offenders will be subject to cancellation of the permission, a maximum penalty of level 5, i.e. a fine of \$50,000 and imprisonment for six months.

18. Members may refer to the LegCo Brief (with no file reference on it) issued by the Food and Health Bureau in June 2008 for background information.

19. When the Administration briefed the Panel on Food Safety and Environmental Hygiene (the Panel) on the precautionary measures taken to prevent possible spread of avian flu virus among poultry at its special meeting on 16 June 2008, the Panel noted that the Administration was considering the implementation of an enhanced measure against avian flu virus, i.e. the clearing of all live poultry from the wholesale market and retail outlets every day. Deputations from the live poultry trades attending the meeting had expressed objection to the proposed measure.

20. At its special meeting held on 27 June 2008, the Panel was briefed on the Amendment Regulation. The Amendment Regulation would come into operation on 2 July 2008 upon the resumption of the sale of live chickens. According to the Administration, banning overnight stocking of live poultry at retail outlets and requiring retail outlets to be free of any live poultry between 8:00pm each day and 5:00am could avoid accumulation of virus at the retail level. It could also help the Administration monitor whether there were smuggled chickens at the retail level.

21. Mr Fred LI expressed support for the legislative proposal and Miss CHAN Yuen-han indicated that she did not object to it. Mr Tommy CHEUNG, however, questioned the effectiveness of banning overnight stocking of live poultry at retail outlets as a measure to prevent the possible spread of avian flu virus by smuggled chickens. The Panel noted that Mr Albert CHAN had given notice of moving a motion to repeal the Amendment Regulation at the Council meeting on 9 July 2008. Deputations from the live poultry retailers and transport operators who attended the meeting expressed objection to the proposed ban. Live poultry retailers indicated that implementation of the proposed ban would very likely force most of them to cease business.

22. Members asked whether there would be any measures to complement the proposed ban and facilitate live poultry wholesalers, retailers and transport operators to run their business under the new mode of operation, such as allowing delivery service to be arranged from the wholesale market to retail outlets on a need basis (i.e. more than one-delivery of live chickens per day). The Administration explained that, at present, the wholesalers would have completed their dispatch and delivery of all their live chickens to the retailers before 7:00am everyday. The Administration would not prohibit them to arrange more than one-delivery per day. However, the daily throughput in the wholesale market would be monitored closely to guard against any over-stocking of live poultry for public health and environmental hygiene considerations.

23. Members expressed concern that the withdrawal of a majority of live poultry retailers from the market would force local farmers and wholesalers to cease their operation. As a result, live chickens would no longer be available in the market in future. The Administration explained that it would liaise with poultry importers and local farmers to adjust appropriately the number of live poultry channeled to the wholesale market if there was evidence to support that the live poultry trade had shrunk.

24. We have clarified with the Administration on certain legal and drafting points relating to the Amendment Regulation. In relation to paragraphs 5 - 10 of the Administration's reply, we agree to the Administration's legal analysis that the new requirement in the Amendment Regulation is consistent with Articles 6 and 105 (which relate to protection of private property) of the Basic Law. Copies of the correspondence are attached to this Report for Members' reference.

25. Members may note that the President has directed that Hon Albert CHAN Wai-yip's motion to repeal the Amendment Regulation is to be placed on the Agenda of the Council's meeting of 9 July 2008.

26. The Amendment Regulation came into operation on 2 July 2008.

27. No difficulties in relation to the legal and drafting aspects of L.N. 185 have been identified.

Encl.

Prepared by

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Legislative Council Secretariat
3 July 2008

LS/S/37/07-08

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By Fax (2136 3281)

30 June 2008

Mr Francis HO
Prin AS for Food and Health (Food)2
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Food Branch
20/F, Murray Building
Garden Road
Hong Kong

Dear Mr HO,

Food Business (Amendment) Regulation 2008 (L.N. 185)

We are scrutinising the legal and drafting aspects of the Amendment Regulation. We would be grateful for your clarification of the following questions.

Question 1

Paragraph 11 of the LegCo Brief on the Amendment Regulation says that a total of 469 permittees are affected, of which 260 are tenants of public markets run by the Food and Environmental Hygiene Department (FEHD) while the remaining 209 tenants are holders of fresh provision shop (FPS) licences issued by FEHD. Are the markets under The Link Management Ltd. included in the 469 permittees? If yes, are they regarded as FPSs?

Question 2

Is there any power given to the Director of FEHD in the permission, referred to under section 30(2) of the Food Business Regulation (Cap. 132 sub. leg. X), to add new conditions to or vary the conditions of such permission during its validity period?

Question 3

If the answer to Question 2 is negative, what are the legal justifications for introducing legislative amendments which add new conditions to or vary the conditions of the permission during its validity period?

Question 4

Is there any local legislative precedents empowering the licensing authority to add new conditions to or vary the conditions of a licence during its validity period? If yes, what are the circumstances in which such power can be exercised?

Question 5

Is a permittee, who has slaughtered a live poultry under the new section 30AA, allowed to sell the slaughtered poultry in a fresh, chilled or frozen condition? If yes, what is the legal basis for so doing?

Question 6

The term "poultry" is defined under section 2(1) of the Public Health and Municipal Services Ordinance (Cap. 132) to mean "any bird commonly used for human consumption and also any other bird which is sold or offered for sale for human consumption". Therefore, the term "poultry" is not confined to mean chickens only. In practice, what kind of poultry is now commonly sold on the permittees' premises?

In facilitating us to report on this item to the House Committee's meeting to be held on 4 July 2008, we would be grateful for your reply, in both languages, to reach us by mid-noon of 2 July 2008.

Yours sincerely,

(Stephen LAM)
Assistant Legal Adviser

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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
The People's Republic of China

Your ref.: LS/S/37/07-08
Tel No.: 2973 8232
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2 July 2008

Mr Stephen Lam
Assistant Legal Adviser
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Dear Mr. Lam,

Thank you for your letter of 30 June 2008. On the six questions raised therein, our response is set out as follows.

Question 1

2. Live poultry stalls in markets under The Link Management Ltd. are issued with fresh provision shop licences, and are therefore included in the 469 permittees.

Question 2

3. Currently, live poultry (except those on a poultry farm or in wholesale markets) is listed as “restricted food” in Schedule 2 to the Food Business Regulation (Cap 132X), and the sale of which is prohibited save with Director of Food and Environmental Hygiene’s (DFEH) written permission given under section 30 of Cap 132X. In practice, DFEH’s written permission takes the form of a permit attached to a tenancy agreement with public market tenant or a fresh provision shop licence issued under Part IV of Cap 132X.

4. Although DFEH may amend the tenancy conditions for public market stalls from time to time with immediate effect, licensing conditions of fresh provision shops could only be amended by DFEH upon renewal of the licence by giving not less than 90 days’ written notice in accordance with section 125 (1B)(a)(ii) of the Public Health and Municipal Services Ordinance (Cap 132).

Coupled with the fact that some fresh provision shops have just renewed their 12-month licence, it would take as long as 15 months to ban the overnight stocking of live poultry at all fresh provision shops if only licensing conditions were amended. This is unacceptable in view of the need to implement the new requirement of “no poultry overnight” at the retail level when retail outlets are allowed to sell live poultry again on 2 July 2008. Hence, legislative amendments are necessary.

Question 3

5. We have sought legal advice on the new requirement as reflected in the Food Business (Amendment) Regulation 2008, and have come to a conclusion that the new requirement is consistent with provisions in the Basic Law (BL).

Necessity of the new requirement

6. The new requirement is essential to the protection of public health through minimizing the risk of avian influenza outbreak at the retail level, especially after the retail sale of live poultry is resumed. Scientific research showed that when a chicken is infected by the avian influenza virus, there is an incubation period of one to five days when the virus would multiply to a sufficient number to be detectable in the excreta. The compulsory slaughtering of live poultry by 8:00 p.m. each day under the new requirement will help avoid the accumulation of virus in the environment of the retail outlets.

Feasibility of the new requirement

7. The Administration has duly considered the operational requirements of the live poultry trade in tailoring the new requirement. To allow adequate time for thorough cleansing and disinfection, permittees are required to ensure that their stalls and shops are free of any live poultry between 8:00 p.m. each day and 5:00 a.m. the next day. Whilst the new requirement will have some adverse impact on the trade’s operation, the new requirement is nonetheless feasible.

Trade has been notified well in advance

8. The Administration’s intention to impose the “no live poultry overnight” requirement was announced on 12 June 2008 and put to the trade several times during our discussion with retailers on arrangements after lifting of the “infected place order”. The trade has been given ample advance notice of the new requirement.

New requirement unlikely to give rise to BL concerns

9. On whether the adverse impact on the permittees' business brought about by the new requirement would amount to deprivation of private property under BL 105 (assuming for the present purpose that a wide meaning is adopted for the term "deprivation" to mean any act of extinguishing the property in question and further that the economic benefit derived from the businesses carried out under the DFEH's written permission under section 30 of Cap 132X amounts to property rights protected under BL 105), we note that there will not be any formal deprivation of property under the new requirement. Nor would the new requirement give rise to any *de facto* deprivation of property given that such a *de facto* deprivation is unlikely to arise unless the property affected is left without any meaningful alternative use or the restrictions have denied all economically viable use of the property, and that from comparative constitutional jurisprudence the courts in general would be cautious to find a *de facto* deprivation. The remaining issue then is whether the new requirement would amount to disproportionate interference with private property under the fair balance or proportionality test which is arguably implicit in BL 6 and BL 105 given the public interest served by the new requirement.

10. As explained above, not only is the new requirement essential to the protection of public health, it is also reasonably practical from the permittees' point of view. The permittees have been notified well in advance, and they will also be able to carry on with their business after the new requirement has been put in place. The fact that their profits may be affected by the new requirement should not in itself invalidate the new requirement under the fair balance test. Indeed, as the permittees grow accustomed to the new requirement, and if the permittees are able to time the supply of live poultry from wholesalers properly, the permittees can carry on their businesses subject to complying with the new requirement. As detailed under question 5 below, carcass resulted from the compulsory slaughtering under the new requirement will not be rendered worthless. Permittees will still be able to sell such carcasses, as all permittees permitted to sell live poultry are now endorsed to sell fresh poultry carcass at the same time. We are therefore of the view that the new requirement strikes a reasonable balance between the public interest that it intends to serve, and the alleged interference with private property. Hence, in sum, we consider that the new requirement is consistent with BL 6 and BL 105.

Question 4

11. We have located a few examples of legislative provisions empowering an authority to add new conditions to or vary conditions from time to time. They are section 12 of Non-local Higher and Professional Education (Regulation) Ordinance (Cap 493), By-law 41F of Mass Transit Railway By-laws (Cap 556B), and section 8(7) of the Waste Disposal (Charges for Disposal of Construction Waste) Regulation (Cap 354N). They all specify that the relevant authority may from time to time vary or add permit/certificate/exemption account conditions.

Question 5

12. According to the new section 30AA of Cap 132X, a permittee (a person permitted to sell live poultry by DFEH under section 30) must ensure that all live poultry remaining at the relevant permitted premises are slaughtered by 8:00pm each day. It is the Administration's intention that all live poultry remaining at any retail outlet must be slaughtered, and how to deal with the poultry carcasses remains the permittees' decision.

13. In case a permittee wishes to sell the carcasses as food afterwards, he/she is subject to provisions in the Public Health and Municipal Services Ordinance (Cap 132) that govern the quality of food for sale, such as sections 52(1) and 54(1).

14. It should be noted that all public market stalls or FPS permitted to sell live poultry are currently endorsed to sell fresh poultry carcass at the same time. Fresh poultry carcass includes carcasses of poultry that is slaughtered at retail outlets but are refrigerated afterwards. Some public market stalls or FPS are also allowed to sell chilled poultry or frozen poultry, which are poultry subjected to refrigerating process at specified temperatures (i.e. about 4°C for chilled and -18°C for frozen poultry) immediately upon slaughtering and kept at those temperatures throughout the supply chain until the product reaches the final consumer.

15. Fresh or frozen poultry carcass are currently listed as "restricted foods" in Scheduled 2 to Cap 132X and the sale of which is prohibited save with DFEH's written permission given under section 30 of Cap 132X.

Question 6

16. Other commonly sold live poultry includes small quantities of pigeons (鴿), silky chicken (竹絲雞), guinea fowls (珍珠雞), chukars (石雞) and pheasants (雉). Live water birds such as live geese, ducks and quails are currently not available in Hong Kong.

Yours sincerely,



(Francis Ho)

for Secretary for Food and Health