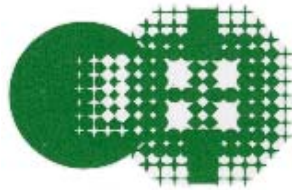


**DIRECT INVESTIGATION REPORT**

**FIRE SAFETY REGULATORY MEASURES**

**May 2010**



**Office of The Ombudsman**

**Hong Kong**

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# EXECUTIVE SUMMARY

## Direct Investigation on Fire Safety Regulatory Measures

### Background

The Cornwall Court fire in August 2008 aroused concern over fire safety especially on food premises, which entertain members of the public in large numbers. The Ombudsman, therefore, initiated in June 2009 a direct investigation to examine:

- (a) the procedures and practices in enforcement of regulatory measures for fire safety applicable to all premises;
- (b) the administration of arrangements for fire safety in licensing food premises; and
- (c) the mechanism for monitoring compliance with fire safety on food premises.

### Our Findings

#### *Roles and Responsibilities of Relevant Departments*

2. The Fire Services Department (“FSD”) is responsible not only for fire-fighting and rescue, but also for promotion of fire safety and protection on all premises.

3. The Food and Environmental Hygiene Department (“FEHD”) is the licensing authority for food premises. It issues licences to food premises which meet health, fire safety and other requirements.

#### *FSD’s Statutory Certification System*

4. By law, owners of premises have to keep their fire service installations or equipment (“FSI”) in efficient working order at all times. They also have to engage registered contractors (“RCs”) to inspect their FSIs once every 12 months. After inspection, the RC has to report the results to the owner on a certificate, commonly known as FS251, within 14 days, with a copy to FSD.

#### *Loose and Ineffective Monitoring*

5. FSD manually checks FS251s received against those previously received to identify premises with overdue inspection. However, this procedure is labour-intensive and the results prone to human errors. Moreover, FSD finds it difficult to prove whether and when RCs have submitted their FS251s. As a result, only four prosecutions have been brought in the past seven years against RCs for non-submission or late submission of FS251s.

6. FSD is developing a computer system for generating lists of premises with overdue inspection of FSI. It is also considering legislative amendment to require its endorsement of FS251s before RCs issue them to owners of premises. These would facilitate the Department's monitoring of the inspections.

#### *Lack of Transparency*

7. Under the current regulatory mechanism, owners of premises have no statutory obligation to display FS251s. The state of fire safety of premises is therefore not readily known to users of premises and they are unable to play a part in reporting defects. FSD is considering legislative amendment to require conspicuous display of FS251s, which would provide a strong incentive for owners to arrange timely inspection and proper maintenance of their FSI. Pending the legislative amendment, it encourages owners to display their FS251s.

#### *Inadequate Follow-up on FS251s Received*

8. FSD classifies FS251s received into high or low priority cases by the nature and severity of the defects reported therein. For high priority cases, FSD aims to inspect the premises immediately to determine if enforcement action is necessary. For low priority cases, FSD merely issues advisory letters to urge the owners to rectify the defects.

9. Each year, about 80% of cases are classified as high priority, and about 20% as low priority. However, FSD manages to inspect only 60% of cases, which means that at least about 20% of high priority cases are not checked by FSD. Low priority cases are even more likely to be taken lightly by owners, as FSD will not take further action after issuing advisory letters.

10. FSD should certainly inspect all high priority cases and conduct random checks on low priority cases.

#### *RCs to be Gatekeepers*

11. Currently, the law requires RCs to merely inspect FSI and report results to FSD. The onus is on FSD to ensure that owners rectify the defects reported.

12. It would be desirable for FSD to require RCs to make good FSI before submitting FS251s to the Department. With RCs acting as gatekeepers, FSD can better utilise its resources in monitoring compliance by RCs and owners of premises.

#### *Low Prosecution Rate*

13. FSD has initiated only a very small number of prosecutions, not only with regard to RC's non-submission or late submission of FS251s, but also to owners' failure to check FSI annually and obstruction to or locking of means of escape. The average annual figures for the past seven years were less than one, five and 29 respectively. More rigorous action by FSD is called for.

#### *Gaps in Coordination and Communication*

14. By law, FSD may prosecute any person causing obstruction to or locking means of escape. For cases of serious obstruction caused by suspected unauthorised building works, FSD is

to refer them to the Buildings Department (“BD”) for follow-up as building safety issues, apart from taking its own enforcement action. However, of the 1,289 cases referred to BD between October 2008 and October 2009, none was followed up by FSD.

15. FSD should enhance communication with BD to facilitate decision on the enforcement action to be taken on each case.

### ***Licensing and Inspection of Food Premises***

#### *Omission in Licence Conditions*

16. An applicant for a new food business licence has to produce evidence showing that health, fire safety and other requirements have been met. However, once issued, the licence only requires the licensee to comply with food hygiene conditions. It does not specify any fire safety requirements.

17. Such inconsistency is inconceivable, given the importance of fire safety and FEHD’s wide powers to impose conditions in licences. This may invite arguments that non-compliance with fire safety requirements does not constitute a breach of licence.

#### *Deficiency in Renewal of Licence*

18. Food business licences are renewable every 12 months. In processing applications for renewal, FEHD neither requires from the licensee any documentary evidence of, nor arranges with FSD to inspect the food premises for, continued compliance with fire safety requirements.

19. In a complaint case handled by this Office, the complainant applied for a new food business licence to operate a restaurant in a multi-storey building. FEHD rejected his application, as the FS251 of the building was long overdue and FSD had not taken any action. However, the existing restaurants in the same building had no problem in getting licences renewed.

20. Such renewal of licences without compliance with fire safety requirements gives the public a false assurance of safety. The practice also differs from those for other premises such as clubs and karaoke establishments where applicants for renewal of licensee have to submit certificates to prove that all FSI on the premises are in working order and FSD officers inspect the premises before renewal of licence. FEHD should take steps to ensure that the premises meet fire safety requirements when licences are renewed.

#### *Inadequate Inspection*

21. There are currently about 22,000 licensed food premises. FSD aims to conduct a surprise inspection on each food premises every five years. Between 2006 and 2009, the number of surprise inspections conducted by FSD each year ranges from 78 to 513, falling seriously below its target. Such a small number of surprise inspections could hardly spur licensed food operators to maintain fire safety on their premises at all times.

## **Recommendations**

22. Based on the above, The Ombudsman makes 11 recommendations to FSD and FEHD, including the following:

- (a) FSD should expedite the setting up of its computer system and the legislative amendment to enable prompt identification of owners of premises and RCs failing to comply with statutory requirements;
- (b) FSD should promote conspicuous display of FS251s on premises, while considering legislative measures for mandatory display;
- (c) FSD should inspect all high priority cases and conduct random checks on low priority cases;
- (d) FSD should consider requiring RCs to make good FSI before submitting FS251s to the Department;
- (e) where warranted, FSD should step up prosecution against owners of premises for failure to check FSI, RCs for failure to submit FS251s and owners/users for causing obstruction or locking means of escape;
- (f) FSD should work out with BD procedures whereby the latter will inform the former of action taken after receipt of referral of cases of serious obstruction, and should itself follow up on such cases by taking enforcement action where necessary;
- (g) FEHD should impose conditions in food business licences for compliance with fire safety requirements;
- (h) FEHD should work out arrangements with FSD to ensure that food premises meet fire safety requirements before approving their applications for licence renewal; and
- (i) FSD should comprehensively review its frequency of surprise inspections and manpower requirements.

**Office of The Ombudsman**  
**May 2010**

# ***1***

## ***INTRODUCTION***

### **BACKGROUND**

**1.1** The Cornwall Court fire in August 2008<sup>1</sup> aroused immense public concern over the fire safety of licensed premises, especially those patronised by members of the public in large numbers. Generally, the public assumes that because those premises are licensed by proper authorities, fire safety must have been assured through the licensing process. While this assumption is correct for most kinds of licensed premises, this is not so for one category most frequented by the public, namely, food premises including restaurants and bars.

**1.2** The Fire Services Department (“FSD”) is an emergency service responsible for fire-fighting and rescue. It gives fire protection advice to the public. It also draws up fire safety policies and formulates fire safety measures for its staff and the public to follow.

**1.3** The Food and Environmental Hygiene Department (“FEHD”) is the licensing authority for all food premises. It issues a licence only when the applicant has fulfilled all the health, fire safety and other requirements. However, when the licence is renewed in subsequent years, the fire safety requirements are not revisited. Basically the licensee needs only satisfy FEHD on the health requirements. This means that some licensed food premises can continue to operate even when the original licensing requirements on fire safety are no longer complied with. In other words, members of the public patronise such premises under a false sense of security.

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<sup>1</sup> *On 10 August 2008, a fire broke out in Cornwall Court in Mongkok, which was a commercial/residential building. The fire took almost six hours to put out and claimed four lives.*

## **PURPOSE AND AMBIT**

**1.4** On 2 June 2009, The Ombudsman declared under section 7(1)(a)(ii) of The Ombudsman Ordinance (Cap. 397) a direct investigation into the fire safety regulatory measures for food premises enforced by FSD and FEHD. The investigation covers the following aspects:

- (a) the procedures and practices in enforcement of regulatory measures for fire safety applicable to all premises;
- (b) the administration of arrangements for fire safety in licensing food premises; and
- (c) the mechanism for monitoring compliance with fire safety on food premises.

## **METHODOLOGY**

**1.5** We have sought and studied information from FSD and FEHD, including departmental procedures, guidelines, case files and statistical data, and met with their representatives for clarification and elaboration. We have also taken reference from the Buildings Department (“BD”), which is responsible for building safety, and the Home Affairs Department (“HAD”), which licenses clubs and karaoke establishments, where food services may or may not be provided. Furthermore, we have studied relevant Legislative Council papers.

## **PUBLIC VIEWS**

**1.6** We have openly invited submissions from the public. One citizen has written to express views.

## **INVESTIGATION REPORT**

**1.7** On 18 March 2010, we forwarded a Draft Investigation Report to the Director of Fire Services (“DFS”) and the Director of Food and Environmental

Hygiene (“DFEH”) for comments. Having duly considered and incorporated their views, we issued this Final Report on 7 May 2010.

# 2

## ***REGULATORY MEASURES FOR FIRE SAFETY IN GENERAL***

### **OVERVIEW**

**2.1** Fire safety of all premises, including food premises, is regulated under the Fire Services Ordinance (Cap. 95) (“FSO”) by FSD. Current measures include:

- (a) a statutory certification system, whereby fire service installations or equipment (“FSI”) must be checked annually by registered contractors (“RCs”), with the results to be reported to FSD;
- (b) direct inspection of premises by FSD, to detect obstruction and/or locking of means of escape; and
- (c) enforcement action by FSD, through issuance of advisory or warning letters, statutory notices (**para. 2.4**) and, where warranted, prosecution.

## **STATUTORY CERTIFICATION SYSTEM**

### **Fire Service Installations or Equipment**

**2.2** Regulation 8(a) of the Fire Service (Installations and Equipment) Regulations requires owners of premises to keep their FSI in efficient working order at all times. Regulation 8(b) requires owners to have such FSI inspected by an RC once every 12 months. In these regulations, FSI generally refers to installations or equipment manufactured or used for the purposes of extinguishing, attacking, preventing or limiting a fire, or facilitating the evacuation from any premises in case of fire.

**2.3** After an inspection of FSI, the RC records the results in a Certificate of FSI commonly known as FS251. The RC has to record in the FS251 the work done, such as inspection, installation, repair or maintenance, and the defective FSI identified. Under regulation 9, the RC has to issue the FS251 to the person on whose instruction the work was undertaken (normally the owner of FSI) within 14 days, with a copy to FSD. Signing an FS251 with false or misleading information knowingly is an offence subject to a fine upon conviction. However, the RC has no obligation in law to rectify the defects found.

### **Fire Hazard Abatement Notice**

**2.4** When fire hazard is detected, FSD may issue a Fire Hazard Abatement Notice (“FHAN”) under section 3 of the Fire Services (Fire Hazard Abatement) Regulation, requiring the person, by reason of whose act, default or sufferance the fire hazard arises or continues, to rectify the situation within a specified period. Failing to comply with the FHAN will result in prosecution, or, if non-compliance continues after prosecution, in an order to require such person to comply with the FHAN or prohibit the use of the premises for specific purposes.

### **Monitoring Compliance**

#### *Compliance by Owners*

**2.5** FSD manually checks FS251s received against those previously received to identify premises with FSI not inspected in the preceding 12 months by an RC. However, given the large number of premises involved (**para. 2.14**), the

procedure is labour-intensive and the results prone to human errors. Further, the monitoring mechanism is incapable of tracking those who have never engaged an RC. FSD is developing a computer system for automatically generating lists of premises with overdue inspection of FSI. The system is expected to be ready by 2011.

**2.6** FSD issues warning letters to owners of premises with overdue inspection of FSI, requiring them to rectify the situation in 28 days. They are liable to prosecution if the warning is not heeded. FSD may initiate direct prosecution without having issued any warning letter, if the FSI is found to be defective in a fire, or to be defective or lack annual maintenance during FSD inspection. For food premises, FSD will initiate direct prosecution for overdue inspection of FSI observed during its inspections.

**2.7** The number of prosecutions initiated by FSD against owners of premises for failing to comply with regulations 8(a) and 8(b) of the Fire Service (Installations and Equipment) Regulations (**para. 2.2**) was 22 in 2003, two in 2004, one in 2008 and seven in 2009. There was no prosecution between 2005 and 2007. The defendants in all prosecution cases were convicted.

### ***Compliance by RCs***

**2.8** FSD prosecutes RCs who do not send FS251s to the Department or do so beyond the statutory period of 14 days (**para. 2.3**). Between 2003 and 2009, FSD initiated four prosecutions against RCs.

**2.9** When asked about the low rate of prosecution, FSD explained that it is difficult to prove beyond reasonable doubt whether and when RCs have submitted their FS251s, as the FS251s might have been lost or their delivery delayed in the post. FSD is considering legislative amendment to require its endorsement of FS251s before RCs issue them to owners of premises. Such legislative amendment, however, will take time.

### **Transparency of FS251s**

**2.10** Currently, owners of premises have no statutory obligation to display their FS251s. As such display helps to remind and urge owners to maintain their FSI properly, FSD encourages owners to do so. FSD is considering legislative amendment requiring owners to display their FS251s conspicuously.

## Follow-up Action on FS251s Received

**2.11** Some FS251s received by FSD indicate that the FSI of the premises are defective (**para. 2.3**). Upon receipt of those FS251s, FSD classifies cases into high or low priority by the nature and severity of the defects<sup>2</sup>.

**2.12** For high priority cases, FSD inspects the premises immediately. Where fire hazard is found, FSD issues FHANs (**para. 2.4**). Follow-up checks will be conducted to ensure compliance.

**2.13** For low priority cases, FSD only issues advisory letters to urge the owners to rectify the defects. No verification visit is conducted or follow-up action taken after the letters are issued.

**2.14** Each year from 2003 to 2009, about 80% of cases with defective FSI are classified as high priority and about 20% as low priority. FSD aims to inspect at least 60% of all cases with FSI defects reported in FS251s. For those with no defect reported, FSD intends to select 5% for random inspection. Since January 2009, FSD has deployed additional manpower for inspections. The number of FS251s received, premises inspected and enforcement action taken by FSD between 2003 and 2009 is shown in **Figure 1**.

**Figure 1: FS251s Received, Premises Inspected and Enforcement Action Taken by FSD**

	2003	2004	2005	2006	2007	2008	2009
(a) FS251s received by FSD	120,612	125,477	130,788	122,358	124,678	143,229	146,767
(b) FS251s with report of defects (as % of (a) above)	11,411 (9.4%)	12,437 (10%)	14,449 (11%)	15,053 (12.3%)	16,131 (12.9%)	18,033 (12.6%)	19,207 (13%)
(c) Premises with defects reported, inspected by FSD (as % of (b) above)	1,080 (9.5%)	1,087 (8.7%)	1,458 (10.1%)	2,202 (14.6%)	1,751 (10.9%)	1,924 (10.7%)	11,555 (60.2%)
(d) Premises with no defect reported	109,201	113,040	116,339	107,305	108,547	125,195	127,560

<sup>2</sup> Cases are classified as high priority when the defects involve one or more of the following six systems: sprinkler system, fire alarm system, fire hydrant/hose reel system, street fire hydrant system, smoke extraction system and dry riser system.

(e) Premises with no defect reported, inspected by FSD (as % of (d) above)	5,087 (4.7%)	5,126 (4.5%)	4,989 (4.3%)	5,659 (5.3%)	5,759 (5.3%)	5,788 (4.6%)	6,913 (5.4%)
(f) FHANs issued for FSI defects	7,966	3,530	1,209	1,171	1,730	4,312	3,395
(g) Prosecutions for non-compliance with FHANs	69	9	1	10	9	8	10

*Source: FSD*

## **Monitoring of Performance of RCs**

### ***Prosecution and Disciplinary Action***

**2.15** FSD maintains a register of RCs under the Fire Service (Installation Contractors) Regulations. FSD prosecutes RCs if they commit an offence under the FSO.

**2.16** Regulation 10(1) of the Fire Service (Installation Contractors) Regulations empowers DFS to refer an RC to a disciplinary board if the RC has been convicted of an offence under the FSO, or found guilty of improper conduct or negligence in the installation, maintenance, repair or inspection of FSI, as to render him unfit to be on the register. The disciplinary board may, after an inquiry, reprimand the RC or remove him from the register. The decisions of the disciplinary board, published in the Government Gazette, can be found on FSD's website.

**2.17** Offences committed by RCs are mostly failure to notify FSD of changes in material information such as address and qualified person and failure to comply with the requirement to issue FS251s (**para. 2.3**). The number of RCs at the end of each year, those prosecuted and those brought before the disciplinary board between 2003 and 2009 are in **Figure 2**.

**Figure 2: Prosecution and Disciplinary Action against RCs by FSD**

	2003	2004	2005	2006	2007	2008	2009
a. RCs at End of Year	1,142	1,168	1,169	1,173	1,067	1,014	1,009
b. RCs Prosecuted and Convicted	16	7	6	7	4	24	7
c. RCs Brought to Disciplinary Board	16	7	6	7	4	27	8

*Source: FSD*

### ***Demerit Points System***

**2.18** FSD administers a demerit points system to determine the frequency of its inspections of RCs. The system aims to establish whether the workmanship of RCs is below par. Workmanship below par is defined as minor shortcomings not serious enough to warrant legal action or disciplinary proceedings. The system has no provision for penalty.

**2.19** FSD aims to conduct 1,000 inspections each year. In the year of 2009, the target was met. During inspections, FSD officers may give three demerit points to an RC for unsatisfactory workmanship of FSI. There is no ceiling to the demerit points incurred by an RC. FSD officers may, however, deduct demerit points incurred by a RC, as a means to encourage good workmanship.

**2.20** FSD inspects RCs with higher demerit points more frequently. The frequency of inspections is shown in **Figure 3**.

**Figure 3: Frequency of Inspections of RCs by FSD**

<b>Demerit Points</b>	<b>Frequency of Inspections</b>
0	Once every 18 months
Less than five	Once every six months
Five to ten	Once every two months
More than ten	Once every month

*Source: FSD*

**2.21** The number of RCs given demerit points between 2003 and 2009 is shown in **Figure 4**.

**Figure 4: RCs Given Demerit Points**

	2003	2004	2005	2006	2007	2008	2009
<b>RCs Given Demerit Points</b>	1	1	1	1	5	3	8

Source: *FSD*

## **MEASURES AGAINST OBSTRUCTION AND LOCKING OF MEANS OF ESCAPE**

**2.22** Besides administering the aforementioned statutory certification system, FSD is authorised to take action on obstruction and locking of means of escape, so as to ensure fire safety. Below is an outline of this measure.

### **The Law and Enforcement Action**

**2.23** Under sections 14 and 15 of the Fire Services (Fire Hazard Abatement) Regulation, it is an offence for any person to obstruct or to lock the means of escape of a premises. FSD will prosecute the person directly causing the obstruction. The defendant is subject to a fine on first conviction, and to a fine and imprisonment on subsequent conviction. If the situation persists after prosecution, FSD can apply to the court to remove the obstruction or lock.

**2.24** There are cases where FSD cannot identify the person responsible for the offences. Direct prosecution is, therefore, not possible. In such cases, FSD will issue an FHAN (**para. 2.4**) to the owner of the premises to require rectification. Follow-up checks will be conducted, and prosecution of the owner for non-compliance with the FHAN if necessary.

**2.25** FSD mainly acts on complaints from the public. In 2009, FSD received 4,712 complaints of obstruction or locking of means of escape.

**2.26** Since October 2008, besides acting on complaints, FSD has started to identify buildings with high fire risk for taking enforcement action proactively. A Special Enforcement Unit has been set up by internal redeployment for inspections of target buildings and immediate action on irregularities identified.

**2.27** The number of FHANs issued and prosecutions initiated by FSD between 2003 and 2009 is shown in **Figure 5**.

**Figure 5: FHANs Issued and Prosecutions Initiated by FSD for Obstruction or Locking of Means of Escape**

	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
a. FHANs issued for Obstruction or Locking of Means of Escape	540	601	571	449	732	1,037	1,152
b. Prosecution for Obstruction*	18	32	13	26	20	11	70
c. Prosecution for Locking of Means of Escape <sup>#</sup>	1	2	1	2	2	1	1

\* All prosecutions were convicted except two in 2009.

<sup>#</sup> All prosecutions were convicted

Source: FSD

### **Unauthorised Building Works**

**2.28** FSD and BD have agreed on ways to handle cases of serious obstruction caused by unauthorised building works. In short, FSD will refer serious suspected unauthorised building works to BD to verify whether they are indeed unauthorised and to take action under building safety law where necessary. According to FSD guidelines, the Department will issue an FHAN directly if it considers that there is imminent fire hazard or when it is certain that consulting building plans will not serve any useful purpose, e.g. erection of a metal gate across the staircase which will not be permissible under any circumstances.

**2.29** Between October 2008 and October 2009, the Special Enforcement Unit of FSD handled 1,289 cases of suspected unauthorised building works. Those cases were referred to BD within two to three working days. None of those cases has resulted in FSD issuing an FHAN.

### **APPLICABILITY TO FOOD PREMISES**

**2.30** FSD's fire safety measures as set out in this chapter are applicable to all premises and not only food premises. Notwithstanding the absence of specific data, one can safely assume that the Department's inadequacies in the implementation of such measures apply to food premises and other premises alike.

# 3

## ***ARRANGEMENTS FOR FIRE SAFETY IN LICENSING FOOD PREMISES***

### **OVERVIEW**

**3.1** Food premises are subject to licensing by FEHD under the Public Health and Municipal Services Ordinance (Cap. 132) (“PHMSO”). At the end of 2009, there were about 22,000 licensed food premises in Hong Kong. There are 11 types of food business licences, broadly categorised into restaurant licence<sup>3</sup> and non-restaurant licence<sup>4</sup>.

**3.2** Fire safety of food premises is monitored by:

- (a) licensing by FEHD; and
- (b) inspection and enforcement against non-compliance of fire safety requirements by FSD.

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<sup>3</sup> *Examples include general restaurant and light refreshment restaurant.*

<sup>4</sup> *Examples include bakery, cold store, factory canteen and food factory.*

## **LICENSING OF FOOD PREMISES**

**3.3** Before 2000, the two then Municipal Councils, i.e. the Urban Council and the Regional Council, were the licensing authorities for food premises. In 2000, FEHD took over such responsibilities from the two Councils.

### **Duties and Powers of FEHD**

**3.4** As licensing authority, FEHD is responsible for the granting, renewal, suspension and cancellation of food business licences. DFEH is empowered under section 31 of the Food Business Regulation to issue a licence for a food business to be carried on at a particular address.

**3.5** Under section 125(1) of the PHMSO, a food business licence shall:

- (a) be made, granted or renewed subject to such requirements, conditions or restrictions as DFEH may think fit to impose; or
- (b) be refused, suspended or cancelled at the sole discretion of DFEH.

**3.6** FEHD may consider suspending the food business licence if there is perceived fire hazard on the food premises. In this connection, FEHD requires FSD's advice that the fire safety requirements, which were issued to the licensee, have been contravened and the breach would render the premises unsafe for business operation.

**3.7** However, under section 125(1B) of the PHMSO, the renewal of such licence shall not be refused or subject to additional or alternative conditions unless notice in writing of its intention has been served by DFEH upon the licensee not less than 90 days preceding the date of expiry of the licence.

**3.8** Under section 125(9) of the PHMSO, any person dissatisfied with DFEH's licensing decision may, within 14 days after the service on him of the notice declaring the decision, appeal to the Licensing Appeals Board.

## **Granting of New Licence**

**3.9** An applicant for a new licence has to produce evidence showing that all licensing requirements issued by FEHD and other relevant department(s) have been met. This includes a Fire Services Certificate, commonly known as FS348, from FSD pursuant to section 33B of the Food Business Regulation certifying that all fire safety requirements of FSD have been complied with.

**3.10** Under a new licence, the licensee is required to comply with a set of conditions regarding food hygiene. However, there is no provision in the new licence for compliance with fire safety requirements.

**3.11** According to FEHD, the licensee has an on-going obligation to comply with the fire safety requirements of FSD. Note (2) of FS348 states that: “you are required to observe the Fire Services requirements issued to you at all times”. On the premise that fire safety should have been taken care of by FSD in this manner, FEHD considers it unnecessary to impose conditions in the licence for compliance with fire safety requirements.

**3.12** FSD pointed out that FS348 serves to certify the status of the fire safety requirements at the time of inspection as specified in the certificate. Note (2) of FS348 is a reminder to the licensee of his on-going obligation under FSO. The note itself carries no sanction for breach. It should not be regarded as a condition of the licence.

## **Renewal of Licence**

**3.13** A food business licence is to be renewed every 12 months. Before the licence expires, FEHD issues a “Notice of Renewal of Licence” to the licensee. The notice states: “this is to remind you that all the existing **requirements** and **conditions** which have been imposed on your licence are still applicable upon renewal of the licence”.

**3.14** In processing applications for licence renewal, FEHD does not require from the licensee any documentary evidence of compliance with fire safety requirements. Nor does FEHD make arrangements with FSD to inspect the food premises for continued compliance with fire safety requirements. In other words, FEHD processes applications for licence renewal without checking whether fire safety

requirements are met.

**3.15** Notwithstanding the above, since 1990, the then Urban Council and now FEHD have adopted a system for reviewing licences, which can be invoked when the operation of the food premises has been subject to wide public concern due to perceived fire hazard, public health risk, nuisance or environmental pollution. Between 2003 and 2009, FEHD rejected three applications for licence renewal under this review mechanism, all to do with unauthorised building works. FEHD is unable to provide statistics on the total number of review cases.

## **INSPECTION AND ENFORCEMENT AGAINST NON-COMPLIANCE**

### **Inspection and Enforcement by FEHD**

**3.16** FEHD officers inspect licensed food premises regularly, ranging from once in four to 20 weeks, depending on the level of health risk assessed by FEHD. When irregularities are found, FEHD will request the licensee to rectify them.

**3.17** Until April 2009, FEHD officers did not check irregularities relating to fire safety during their routine inspections. There was no established mechanism for referral of fire safety issues identified during routine inspections<sup>5</sup> by FEHD to FSD for action (see **paras. 3.26 and 3.27** for current arrangements).

### **Inspection and Enforcement by FSD**

**3.18** Since 1995, FSD has aimed to conduct a surprise inspection on each licensed food premises every five years. The Department had considered shortening the time frame to once a year. The plan was abandoned in view of more pressing commitments.

**3.19** In the years 2006 – 2009, FSD conducted 246, 289, 513 and 78 surprise inspections on food premises respectively. FSD explained that the decrease in the number of surprise inspections in 2009 was due to its increasing the frequency of inspections on licensed premises other than food premises, belonging to the high fire risk group.

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<sup>5</sup> However, FEHD had procedures for referral of complaints from members of the public about non-compliance with fire safety requirements to FSD.

**3.20** FSD acts on complaints from the public. In the years 2006 – 2009, the number of complaint-related inspections on food premises was 154, 560, 1,069 and 1,140 respectively.

**3.21** FSD also inspects food premises under other circumstances, for example, when there is an application for change of licensee or alteration of layout plan<sup>6</sup>. FSD has no statistics of those inspections.

### **Coordination among Departments**

**3.22** FSD used to take enforcement action against non-compliance with fire safety requirements detected on food premises. In 1992, FSD changed the practice by referring such cases to the Urban Council and the Regional Council, the then licensing authorities for food premises, for enforcement action under an “inter-departmental agreement”.

**3.23** Records show that FSD had written to the two Councils stating its intention to rely on their administrative actions for rectifying non-compliance with fire safety requirements on food premises. In its reply in June 1992, the Regional Council welcomed FSD’s information on licensed food premises failing to meet fire safety requirements, so that it might consider refusing to renew their licences. The Urban Council did not respond. In the event, no agreement was reached.

**3.24** FEHD has indicated that it has no record of the “inter-departmental agreement” mentioned above.

**3.25** In December 2006, FSD obtained legal advice that its practice of relying on another Government department’s administrative measures to rectify non-compliance with fire safety requirements on food premises might not duly discharge FSD’s own responsibilities under the FSO. FSD anticipated many practical and technical problems, including manpower shortage, but nonetheless resumed taking enforcement action itself after the Cornwall Court fire in 2008.

**3.26** After the Cornwall Court fire, an inter-departmental working group chaired by FSD was formed to strengthen the referral mechanism. The working

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<sup>6</sup> *It has been agreed between FSD and the former Urban Services Department and Regional Services Department (FEHD’s predecessors and executive departments of the then Urban Council and Regional Council) that FSD is to reassess the suitability of food premises in the event of transfer of licence or alteration of layout plan which may impact on fire safety. The system remains in force to date.*

group comprises representatives of FSD, FEHD, BD and HAD.

**3.27** The working group introduced a new mechanism for FEHD and BD to refer to FSD cases of fire hazard detected on licensed premises. This was put on trial in April 2009. In the six-month trial period, FSD received 24 referrals from BD and one from FEHD. FSD is reviewing the effectiveness of the arrangement.

# 4

## *CASE STUDY*

**4.1** The regulatory measures outlined in the previous chapters appear to be able to provide a certain level of fire safety on licensed food premises. However, a complaint case handled by this Office has revealed obvious gaps in the system.

### **THE COMPLAINT**

**4.2** In November 2006, Mr X applied for a food business licence to operate a restaurant in a multi-storey building. FEHD requested a copy of the FS251 (**para. 2.3**) in order to be satisfied with the fire safety of the building. Mr X was unable to comply since the existing FS251 for the building had expired in September 2006. He also found that FSD had not inspected the building and the owners of the buildings had made no attempt to rectify the FSI defects. In April 2007, Mr X telephoned FSD to seek remedial action. In late May 2007, Mr X learnt that FSD had issued a warning letter requiring the owners of the building to rectify the FSI defects (including the fire sprinkler system) of the building in 30 days. When Mr X checked again in July 2007, FSD replied that it had issued an FHAN (**para. 2.4**) to the owners of the building requiring rectification in 60 days as the owners failed to rectify the defects within the period stipulated in the warning letter.

**4.3** In July 2007, Mr X complained to this Office that FSD had failed to conduct timely inspection to check the FSI of the building and had extended the deadline for rectification. Those delays had hindered FEHD's licensing of his restaurant.

**4.4** Mr X further pointed out that in the same building, there were other licensed restaurants. They were allowed to continue operation and their licenses renewed, despite the defective FSI. That was because fire safety was not taken into account in licence renewal (**para. 3.14**).

## **OUR FINDINGS**

**4.5** In response to Mr X's complaint, we conducted an inquiry with FSD and FEHD.

### **FSD's Explanation**

**4.6** The sprinkler system of Mr X's restaurant was part of that of the whole building. FSD had, through FEHD, required Mr X to submit a copy of the FS251 of the building to prove that the sprinkler system of the restaurant was in order.

**4.7** However, FSD had not checked the FSI certificate of the building in question under its selective monitoring system (**paras. 2.11 – 2.14**) and was, therefore, unaware of the condition of the FSI of the building. Upon Mr X's request (**para. 4.2**), FSD conducted a site inspection and found that some FSI of the building, including the fire sprinkler system, were defective. Following normal procedures, FSD requested the owners of the building to rectify the defects by issuing a warning letter. At the end of the period stipulated in the warning letter, FSD found that the defects were still there. An FHAN was, therefore, issued.

**4.8** When FSD officers inspected the building again in late June 2007, the position remained unchanged. In mid-July, FSD issued another FHAN requiring rectification of the defects in 60 days. The defects were eventually rectified before expiry of the FHAN.

### **FEHD's Explanation**

**4.9** FEHD explained that by law a valid FS348 from FSD (**para. 3.9**) is a prerequisite for a food business licence. However, such requirement applies only to first applications, not to licence renewal. Owners of licensed food premises are not required to produce evidence certifying compliance with fire safety requirements to FEHD after first licensing, although they have an ongoing obligation to meet those

fire safety requirements (**para. 3.11**).

## **Our Views**

**4.10** This case illustrates serious flaws in the present arrangements:

- (a) Even a high risk and hence high priority case (**para. 2.12**) such as this one, with defects in the FSI (including the fire sprinkler system), could go unnoticed by FSD until a complaint is received (**para. 4.2**).
- (b) The present system is not effective in ensuring that licensed food premises have complied with licensing requirements on fire safety. Licenses could be renewed even though serious fire risks such as a faulty sprinkler system could remain unnoticed.
- (c) The lack of fire safety checks for renewal of food licences gives rise to a most inequitable situation. The applicant for a new licence has to comply with fire safety requirements while existing operators can carry on business unchecked.

**4.11** This situation is unacceptable. It does not make sense for food premises to comply with fire safety requirements only when applying for their first licence. The premises must continue to be safe for their patrons and staff. It is a matter of public interest and social responsibility.

# 5

## ***OBSERVATIONS***

### **OVERVIEW**

**5.1** Fire safety measures are for the protection of life and property. This is particularly important for public places. The public expects regulatory measures for fire safety to be effective and premises licensed by statutory authorities to be safe for their intended purposes. Regrettably, this may not be the case.

**5.2** This investigation has found deficiencies in FSD's and FEHD's monitoring of fire safety. Our observations follow.

### **MONITORING OF FIRE SAFETY IN GENERAL**

**5.3** As mentioned in **Chapter 2**, fire safety of all premises, including food premises, is regulated through FSD's certification system and inspection and enforcement action against non-compliance (**para. 2.1**).

#### **Ineffectiveness of Certification System**

**5.4** FSD does not have an effective system for monitoring whether owners arrange timely inspection by RCs of the FSI on their premises (**para. 2.5**) and whether the RCs would make timely submission of FS251s to the Department (**para. 2.9**). Improvement to the situation is long overdue. FSD should expedite the setting up of its new computer system (**para. 2.5**) and the legislative amendment (**para. 2.9**), so that owners of premises and RCs failing to comply with the statutory requirements can be identified and approached promptly. It should also deploy adequate

manpower to take enforcement action on non-compliance by owners of premises and RCs.

### **Inadequate Follow-up on FS251s Received**

**5.5** Prior to 2009, FSD inspected only about 10% of cases with defects reported in FS251s, despite a preset target of 60% of such cases (**para. 2.14**). The target has been met since 2009. Nevertheless, as 80% of cases with defects reported fall within the high priority category (**para. 2.14**), it means that 20% of high priority cases remain unchecked by FSD.

**5.6** Furthermore, since low priority cases are not followed up by FSD after its issuance of advisory letters (**para. 2.13**), they are likely to be taken lightly by owners of premises with defective FSI. FSD should take further action to rectify the situation.

### **RCs to be Gatekeepers**

**5.7** Currently, the law only requires RCs to inspect FSI and report results to FSD. In the absence of a statutory duty for RCs to make good defective FSI (**para. 2.3**), the onus is on FSD to ensure that owners rectify the defects promptly. Cases with defective FSI will not be identified if they do not come within FSD's selective monitoring.

**5.8** We consider it worthwhile for FSD to consider requiring RCs to make good FSI before submitting FS251s to FSD. With RCs acting as the gatekeeper, FSD can better utilise its resources in monitoring compliance by RCs and owners of premises. FSD may take reference from the certification system for lifts administered by the Electrical and Mechanical Services Department<sup>7</sup> to improve its own certification system.

### **Low Prosecution Rate**

**5.9** FSD's rate of prosecution in the past few years was low, with regard to owners' failure to check FSI every 12 months (**para. 2.7**), RC's failure to submit FS251 within 14 days (**para. 2.8**), RCs' contravention of the FSO (**para. 2.17**) and

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<sup>7</sup> *In the certification system of lifts, registered lift contractors and registered lift engineers have statutory duties to maintain the safety of lifts entrusted to them by lift owners.*

owners or users causing obstruction to or locking the means of escape (**para. 2.27**). More rigorous action by FSD is called for.

### **Lack of Transparency**

**5.10** Under the current regulatory mechanism, as the state of fire safety of premises is not readily known to owners and users, they are unable to play a part in reporting defects. FSD's proposed legislative amendment to require conspicuous display of FS251s (**para. 2.10**) would be a move in the right direction, providing a strong incentive for owners to arrange timely inspection and proper maintenance of their FSI. Pending the legislative amendment, FSD should continue to encourage owners to display FS251s and increase publicity to enhance public awareness of this arrangement (**para. 2.10**).

### **Gaps in Coordination and Communication**

**5.11** FSD does not monitor cases of serious obstruction to means of escape after referring them to BD (**para. 2.29**). This is not satisfactory. It should follow up on such cases by taking enforcement action where necessary. To improve communication between the two departments, FSD should work out with BD clear procedures for FSD to be informed of the action taken by BD after receipt of referral. With this knowledge, FSD may reconsider whether and what enforcement action should be taken in the light of BD's assessment or action.

## **LICENSING AND INSPECTION OF FOOD PREMISES**

### **Omission in Grant of Licence by FEHD**

**5.12** As mentioned in **paragraphs 3.10 – 3.11**, compliance with fire safety requirements is not a food business licence condition. This is inconceivable, given the importance of fire safety and FEHD's wide powers to impose conditions as it may think fit to impose (**para. 3.5**). The absence of provision for fire safety in the licence will give the public an impression that Government attaches little importance to fire safety. It may also invite arguments from licensees that non-compliance with fire safety requirements *per se* does not constitute a breach of licence condition. To avoid any ambiguity, FEHD should take steps to rectify the situation as a matter of

priority, seeking legal advice where necessary and taking reference from other licensing authorities (e.g. HAD for clubs and karaoke establishments<sup>8</sup>) as appropriate.

### **Impropriety in Renewal of Licence by FEHD**

**5.13** FEHD's current practice of not requiring documentary evidence on fire safety or seeking FSD's views before renewal of food business licence (**para. 3.14**) is highly unsatisfactory. It gives the public a false assurance of safety. It does not accord with its powers as licensing authority (**paras. 3.5**) and the requirements set out in the Notice of Renewal (**para. 3.13**) it issues. The practice is also at variance with those for other premises such as clubs and karaoke establishments administered by HAD, where applicants have to submit certificates to prove that all FSI on the premises (including that of the building housing the premises) are in working order and FSD officers inspect the premises before renewal of licence.

**5.14** FEHD should take steps to ensure that the premises meet fire safety requirements when the food business licence is renewed. Failing which, the application for renewal should be reviewed and refused as appropriate (**para. 3.15**). FEHD should work out arrangements with FSD to achieve this objective.

### **Inadequate Inspection of Food Premises by FSD**

**5.15** The number of surprise inspections by FSD on food premises (**para. 3.19**) falls seriously below its target (**para. 3.18**).

**5.16** We are concerned that the small number of surprise inspections could hardly spur licensed food operators to maintain fire safety on their premises at all times. FSD should comprehensively review its frequency of surprise inspections and manpower requirements.

### **Gaps in Coordination among Departments**

**5.17** The "inter-departmental agreement" to take action against non-compliance with fire safety requirements on food premises never materialised (**paras. 3.22 and 3.23**). Hence, for 16 years, a gap existed in the coordination between the then Urban and Regional Councils and FEHD on one hand, and FSD on

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<sup>8</sup> *The Standard Certificate of Compliance for clubs and Karaoke Establishment Permit issued by HAD require the grantee to: (a) provide proper maintenance of the approved means of escape; and (b) provided proper maintenance of the approved FSI.*

the other hand, over matters relating to fire safety on licensed food premises.

**5.18** FSD now has legal advice that to discharge its duties under the FSO, it should rely on enforcement action of its own rather than administrative action of another department. We are pleased that FSD has since been taking enforcement action in a more active manner (**para. 3.25**).

**5.19** The newly established referral system (**paras. 3.26 and 3.27**) facilitates FEHD's reporting of fire hazard to FSD. To enable FEHD to take action under its licensing system, FEHD and FSD should work out clear procedures for FEHD to be informed of the action taken by FSD.

## **SHARED RESPONSIBILITY FOR FIRE SAFETY**

**5.20** We consider fire safety to be not just a Government duty but a **shared responsibility**. Buildings owners, management companies, owners of licensed premises, staff and patrons, as well as RCs must all work together. FSD has a regime (**Chapter 2**) which links the parties concerned. Its effectiveness, however, depends upon mutual watchfulness, judicious use of FS251s, FHANs, prohibition orders and more frequent direct inspection and cooperation in enforcement.

# 6

## *RECOMMENDATIONS*

**6.1** Based on the above, The Ombudsman makes the following recommendations:

### **Fire Safety in General**

- (a) FSD should expedite the setting up of the computer system and the legislative amendment exercise to enable prompt identification of owners of premises and RCs failing to comply with statutory requirements (**para. 5.4**);
- (b) FSD should check all high priority cases of defects reported in FS251s (**para. 5.5**);
- (c) FSD should conduct random checks on low priority cases (**para. 5.6**);
- (d) FSD should consider requiring RCs to make good FSI before submitting FS251s to FSD (**para. 5.8**);
- (e) where warranted, FSD should step up prosecution against owners of premises for failure to check FSI, RCs for failure to submit FS251, RCs for contravention of the FSO and owners or users for causing obstruction or locking means of escape (**para. 5.9**);

- (f) FSD should promote conspicuous display of FS251s and launch publicity to educate the public on it while considering legislative measures (**para. 5.10**);
- (g) FSD should work out with BD procedures whereby the latter will inform the former of action taken after receipt of referral of cases of serious obstruction, and should itself follow up on such cases by taking enforcement action where necessary (**para. 5.11**);

### **Licensing and Inspection of Food Premises**

- (h) FEHD should impose conditions in food business licences for compliance with fire safety requirements (**para. 5.12**);
- (i) FEHD should work out arrangements with FSD to ensure that food premises meet fire safety requirements before approving their applications for licence renewal (**para. 5.14**);
- (j) FSD should comprehensively review its frequency of surprise inspections and manpower requirements (**para. 5.16**); and
- (k) FEHD and FSD should work out procedures for FEHD to be informed of action taken by FSD (**para. 5.19**).

### **ACKNOWLEDGEMENT**

**6.2** The Ombudsman thanks FSD, FEHD, BD and HAD for their cooperation throughout this investigation.

**Office of The Ombudsman**

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