

Hazardous Chemicals Control Bill

**The Administration's Responses to Comments from
Assistant Legal Adviser in her Letter of
26 January 2007**

Section 10(4)(a)(i) and sections 6(1), 7(1), 8(1), 9(1) and 13(3)

As explained before, the expression "may not" is used in section 10(4) of the Bill to curtail the power conferred on the Director under sections 10(1) and (2). It is clear the effect of section 10(4) is that the Director has no power to issue or renew a permit under section 10(1) or (2) unless the requirements set out in section 10(4) are satisfied. It is clear the effect of section 10(4) is also that the Director is not permitted/allowed to issue a permit under section 10(1) or (2) unless the requirements set out in section 10(4) are satisfied.

2. The expression "may not" is also used in other sections (see for example, sections 11(3), 13(3), 22(3), 23(3) and 47(4)). Under each of those sections, the expression "may not" is used to curtail the power conferred on the Director under the subsection (1) of the relevant section. The effect of using the expression "may not" in those sections is also that the Director is not permitted/allowed to exercise the power conferred under subsection (1) of the relevant section in a certain way.

3. There is no inconsistency in the drafting between section 10(4) and the other provisions of the Bill in which the expression "may not" is used. There would not be any interpretation problems whether the expression "may not" is rendered as "不可" or "不得" in the context of the above-mentioned sections of the Bill. Whether the expression "may not" is rendered as "不可" or "不得", insofar as this Bill is concerned, the legal effect is the same.

Sections 10(3) and (4), 11(2) and (3), 13(2) and (3), 19(1)(d), 22(2) and (3), 23(2) and (3) and 27(1)

4. The issues relating to the references to the requirements under the Rotterdam Convention and Stockholm Convention, including the queries previously raised by the Assistant Legal Adviser, have been thoroughly discussed by the Bills Committee, most recently on 29 January 2007.

5. As discussed at the meeting on 29 January 2007, the Bill gives the Director power, *inter alia*, to issue, renew, suspend and cancel activity-based permits for the scheduled chemicals, and to impose or vary the permit conditions. The Director is entitled to take into account such factors as he considers relevant in deciding whether and how to exercise his discretion, for example, new scientific research about the harmful effects of a scheduled chemical, changing international environmental standards or practice of foreign jurisdictions. Likewise, and given that the Bill is proposed to be enacted in order to enable the Stockholm and Rotterdam Conventions to be applied in Hong Kong, and the purpose of the Bill as stated in the long title is to regulate non-pesticide chemicals that have potentially harmful or adverse effects on human health or the environment, including, specifically, non-pesticide chemicals subject to the regulation of the Stockholm and Rotterdam Conventions, the Director is not prevented from having regard to the relevant requirements of the Stockholm and Rotterdam Conventions and performing his statutory functions in a manner consistent with the Convention requirements, so long as this is not contrary to the express provisions of the Bill.

6. Moreover, we wish to explain that at common law, there is a presumption that the legislature does not intend to legislate contrary to international obligations in the absence of clear language. This is reinforced by the fact that the long title of the Bill echoes the objectives of the Stockholm Convention and the Rotterdam Convention, the former of which is to "protect human health and the environment from persistent organic pollutants" (Article 1 of the Stockholm Convention); the latter to "promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use, by facilitating information exchange about their characteristics, by providing a national decision-making process on their import and export and by disseminating these decisions to Parties" (Article 1 of the Rotterdam Convention). Thus, if there is an ambiguity in the provisions of the Bill, the provisions of the Bill would be interpreted in a manner which supports implementing the Convention requirements, insofar as the interpretation would not be inconsistent with the express provisions of the Bill.

7. That said, even though the Bill appears to confer broad discretionary powers on the Director, administrative law operates to impose legal constraints on the Director in exercising those powers, including that fact that the powers must be exercised in good faith and for proper purposes; and that the Director must not allow himself to be

influenced by irrelevant considerations.

8. In the light of Members' comments and the fact that even without express references to the requirements of the two Conventions, the Director may continue to perform his statutory functions having regard to and in a manner consistent with the Convention requirements, so long as this does not contradict the express wording of the Bill, we would consider deleting the references to the requirements of the two Conventions.

Section 41(a) and 41(b)

9. As explained before, in the case of an employer, Clause 41, being a clause of presumption of evidence (instead of presumption of elements of the offence), if it is invoked, would make the offence against the employer one of strict liability because the criminal intent of the employee (to be proved by the prosecution), is presumed. Yet, the employer will still be entitled to rely on the statutory defence. The defence would come into two layers: (i) section 41(b), that an employer could raise evidence to the contrary to rebut the presumption and that he did not know the relevant facts known to the employee; (ii) subsection 3 of Sections 6, 7, 8, or 9, that he did not know (partly overlaps with section 41(b)) and could not with reasonable diligence have known that the chemical was a scheduled chemical.

10. Whether the employee acted without the employer's authority is not a relevant consideration (see section 41(a)). Section 41(a) does not distinguish (a) the employee does what he is employed to do albeit in an unauthorized manner from (b) the employee does something which he is not employed or authorized to do at all.

11. With regard to Clause 26, the common law defence of honest and reasonable belief concerns the compliance with the directions (e.g. that a defendant honestly believes that he has done what is required by the Director). With regard to knowledge of the directions so given by the Director, it is something the prosecution has to prove and is presumed under Clause 44. Unless the prosecution has failed to satisfy the court that the presumption in Clause 44 could come into play, failure to receive an actual notice is not a defence available. In short, the defence of reasonable and honest belief is available to the offence but it does not affect the provision for the mode of service which is conclusive.

The Administration's Responses

12. As explained at the meeting on 29 January 2007, we do not consider it appropriate to expand the scope of the Bill to cover possession and transaction of such chemicals. Mere possession of scheduled chemicals after the enactment of the Bill need not be regulated. Members were content with this approach.

**Environmental Protection Department
February 2007**