Hazardous Chemicals Control Bill

List of follow-up actions arising from the discussion at the meeting on 15 March 2007

The Administration's Responses

(1) Review the policy behind clauses 16(2), 17(2), 21(1), 29(1) and 39(6) and, if necessary, amend those provisions to the effect that a new permit would only be issued to the permit holder upon return of his existing permit.

We have re-considered the issue. On the variation of permit conditions by the Director under clause 13(1), our policy intent is for the variation to take effect on the day specified in the notice served under clause 14(1), and as stipulated in clause 16(1), after a variation of the conditions of a permit takes effect, the conditions of the permit shall be read subject to the variation. Where the conditions of a permit are varied under clause 13(1), the Director has a general duty to issue to the permit holder a permit with its conditions varied (clause 17(1)). As clearly stipulated in the Bill, this general duty is subject to the provision in clause 17(2), i.e., the Director may refuse to issue such a permit if the permit holder fails to return the original permit to the Director "as soon as practicable" after the variation of the conditions of the permit takes effect.

In view of members' comments, we propose to specify a timeframe of 10 working days after the variation takes effect, within which the permit holder shall return the original (old) permit to the Director under clause 16(2). This proposal would have the effect that the Director may/is entitled to refuse to issue a new permit with varied conditions to a permit holder if the permit holder fails to return the original permit required to be returned to the Director within the 10 working days after the variation of conditions takes effect.

Similarly, a timeframe of 10 working days shall be specified for the permit holder to return the permit to the Director under clause 21(1) after a cancellation of a permit takes effect, under clause 29(1) after a suspension of a permit takes effect, under clause 31(3)(a) after a partial cancellation of a permit takes effect, and under clause 31(4)(a) after a partial suspension of a permit takes effect.

(2) Review the propriety of imposing strict liability on employers under clause 41. It was also pointed out to the Administration that clause 41(a) seemed to be different from the common law position – the latter seemed to be that the employer would not be liable where the employee acted outside the course of his employment.

Clause 41 deals with the liability of employers in proceedings for or in connection with the acts of employees. Clause 41, being a clause of presumption of evidence, if it is invoked, would make the offence against the employer one of strict liability. Our policy intent is to impose appropriate liability on employers for their employees' acts. Without this provision, the employer could exonerate his responsibility by arguing that his employee acted without his authority and it would be very difficult for the prosecution to prove otherwise because the employer could have given instructions to his employee but was not present at the scene of offence. Notwithstanding, the employer will still be entitled to rely on the statutory defence. The defence would come into two layers: (i) Clause 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) Clauses 6(3), 7(3), 8(3) and 9(3), that he did not know and could not with reasonable diligence have known that the chemical was a scheduled chemical.

In light of members' concern, we propose to amend the provisions under clause 41 to the effect that if an offence against this Ordinance (if enacted) is committed by an employee, the employer

could also be held liable for that offence. It shall be a defence for the employer if he proves to the satisfaction of a court that the offence was committed without his knowledge or consent, and that he had exercised all due diligence to avoid the commission of such an offence. The proposed amendment would serve to better balance the interest between the employer and the employee.

(3) Explain the policy behind clause 44 and clause 26; and whether or not failure to receive an actual notice served under clause 44 was a defence under clause 26

Our policy intent is for clause 44 to give effect that if a notice is required or permitted to be served under this Ordinance (if enacted), the notice shall be regarded as having been duly served if the mode of service as prescribed in clause 44 has been complied with and the person required or permitted to serve the notice is regarded as having discharged his duty or exercised his right to serve the notice under this Ordinance (if enacted).

Clause 26 creates a strict liability offence. A permit holder who fails to comply with any of the directions given by the Director under clause 22 or clause 23 commits an offence under clause 26. Our policy intent is to make available the common law defence of "reasonable and honest belief" to the offence under this clause. To establish such a defence, the permit holder charged would need to establish to the satisfaction of the court (with whatever facts/evidence he might provide) that he reasonably and honestly believes that (a) no such directions had been imposed on him, or (b) he had already complied with such directions. Whether certain facts/ evidence from the permit holder could establish such a defence of "reasonable and honest belief" under clause 26 is a matter for the court to decide.

(4) Advise the rationale for not extending the proposed control regime to possession of scheduled chemicals, given that prosecution against unauthorized transfer and smuggling of scheduled chemicals might not be feasible if there was no control over the possession of such chemicals. To also provide overseas experience in respect of control over possession of convention chemicals.

We have carefully re-considered the issue. Our policy intent has always been to regulate the import, export, manufacture and use of non-pesticide hazardous chemicals, which is consistent with the scope of the Stockholm Convention and the Rotterdam Convention as applied to Hong Kong. Such control regime aims to effectively restricting/eliminating the hazardous chemicals at source and protecting human health and the environment by minimizing chemical exposure. Neither the Stockholm Convention nor the Rotterdam Convention seeks to prohibit the mere possession of hazardous chemicals.[1]

We have also consulted the public and in particular the trade on our legislative proposals, including the scope of regulation. We therefore do not consider it necessary or appropriate to expand the scope of regulation under the Bill to cover possession of non-pesticide hazardous chemicals.

Moreover, possession of any scheduled chemical would normally be attached to a specific activity (manufacture, import, export or use) which is subject to regulation under the HCC Bill. Regulation does not necessarily have to take the form of requiring a permit to be obtained for possession or sale/transaction of scheduled chemicals. Clause 11 of the Bill provides for permit conditions to be imposed in relation to (i) the premise at which the permitted activity is to be carried out, (ii) the intended purpose or mode of operation of the permitted activity, (iii) compliance with

[1] Insofar as the Stockholm Convention imposes requirements to manage hazardous chemical stockpiles and wastes, this will be regulated under the Waste Disposal Ordinance (Cap 354).

other relevant domestic legislation, and (iv) protection of public health and environment, to ensure that the permit holder would carry out the permitted activity properly. Similar permit conditions could be imposed in an import/export/manufacture/use permit prohibiting or restricting the transfer of the chemical to another person. Should the chemicals cause any environmental pollution because they are not properly stored or handled, such pollution may be dealt with under the existing environmental legislations, including the Air Pollution Control Ordinance (Cap 311), the Water Pollution Control Ordinance (Cap 358) and the Waste Disposal Ordinance (Cap 354).

Furthermore, our concern of human exposure to any scheduled chemicals is very different from the acute exposure to explosives, deadly poisons or inflammable/toxic gases which could be fatal. The potentially harmful effects of these scheduled chemicals on human and wildlife (e.g., cancer causing, neuron-damage or reproductive disorders) mainly result from long term environmental exposure or via bioaccumulation through the food chain. Such harmful effects would depend on the dose, duration and frequency of exposure and when the exposure occurs.

We have examined the approach adopted in the Protection of Endangered Species of Animals and Plants Ordinance (Cap 586) which regulates possession of certain types of endangered species. Reference to "possession" can be found in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which provides that contracting parties should take appropriate measures to enforce provisions of CITES, such as to penalize possession of endangered species. Neither the Stockholm Convention nor the Rotterdam Convention seeks to prohibit the mere possession of hazardous chemicals. Indeed, the subject matter between the CITES and the Stockholm Convention/Rotterdam Convention is very different – the former relates to animal and plant species, the end use of which is often the mere possession of the animal/plant in question.

On the overseas experience in respect of control over possession of convention chemicals, we have reviewed the legislative framework contained in the National Implementation Plan (NIP) for the Stockholm Convention of the European Community and 7 other countries (Australia, Canada, Finland, Germany, Japan, The Netherlands and Switzerland), and in the Toxic Substances Control Act of the USA. Their scope of regulation primarily covers manufacture, use, import and export of the Convention-chemicals. According to their NIP, none of the above countries seems to control the mere possession of hazardous chemicals.

(5) To revert to the Bills Committee on its position on the liability of the Government and the relevant public officers in the event of non-compliance with the provisions of the Bill. To also advise the liability of public officers who contravene any traffic legislation in the course of carrying out duties in the service of the Government.

Our policy intent is that the Government and public officers in the course of carrying out duties in the service of the Government will not be held criminally liable for offences under the Bill. This is in line with the Government's legal policy that in respect of regulatory offences, criminal liability is not imposed on the Government and public officers and that in the absence of an express provision, a public officer will be entitled to immunity if it can be established that compliance with the statute would prejudice the Government.

While public officers will not be held criminally liable for contravention of regulatory provisions when performing public duties, they will however be held liable for contraventions of other offences as individuals, such as corruption, murder or traffic offences. All persons, including public officers, are equal before the law and should abide by the legislation applicable to them.

The adoption of a different approach in dealing with contraventions

by government departments or public officers in respect of regulatory provisions is in line with practices in other common law jurisdictions. According to the Government's understanding, most overseas common law jurisdictions have retained the concept of not imposing criminal liability on the Government and public officers. The Government takes the view that the legal policy should be retained and that it is appropriate to keep the overall situation under review, having regard to overseas experience, and not to introduce radical changes to our long-standing approach. The Government had thorough discussions with Members on this subject at meetings of a working group formed under the Panel on Administration of Justice and Legal Services in 2005. We explained clearly our legal position and the rationale to the Panel at the meeting on 27 February 2006.

Traffic-related offences do not fall within the category of "regulatory offences" to which the above legal policy applies. The relevant legislative provisions governing traffic-related offences expressly provide that public officers in the course of carrying out duties in the service of the Government may be criminally liable for such offences.

Environmental Protection Department
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