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Bills Committee on Hazardous Chemicals Control Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Hazardous Chemicals Control Bill (the Bills Committee).

Background

2. The Stockholm Convention is a global treaty to protect human health and the environment from potentially harmful persistent organic pollutants (POPs)^{Note1} by restricting the manufacture and use of POPs with a view to ultimately eliminating them. The Rotterdam Convention aims to promote shared responsibility and cooperative efforts among the contracting parties in the international trade of certain hazardous chemicals and pesticides in order to protect human health and the environment from potential harm. A mandatory Prior Informed Consent (PIC) Procedure has been introduced to monitor and control the import and export of certain hazardous chemicals and disseminate national importing decisions to the contracting parties.

3. The Stockholm Convention became effective to the People's Republic of China (PRC), including the Hong Kong Special Administrative Region (HKSAR), on 11 November 2004. While the Rotterdam Convention became applicable to PRC on 20 June 2005, this has not been applied to HKSAR because the latter is not in a position to fully comply with Rotterdam Convention without the necessary legislation. In order for HKSAR to comply with the Stockholm Convention and the Rotterdam Convention with respect to non-pesticide hazardous chemicals^{Note2}, the Administration proposes to introduce a Bill to regulate non-pesticide hazardous chemicals that are subject to either Convention.

^{Note1} Persistent organic pollutants (POPs) are chemicals that remain intact in the environment for long periods, move long distances in global environment, and accumulate in fatty tissue of living organisms. POPs may be carcinogenic and could cause damage to the human nervous system, reproductive system and immune system. The extent of damage would depend on the contamination levels of POPs, the frequency and duration of exposure.

^{Note2} Non-pesticide hazardous chemicals refer to chemical, other than a pesticide, that has potentially harmful or adverse effects on human health or the environment.

The Bill

4. The Bill aims to regulate the manufacture, export, import and use of non-pesticide hazardous chemicals, including those that are subject to the regulation of the Rotterdam Convention on PIC Procedure for Certain Hazardous Chemicals and Pesticides in International Trade which was adopted on 10 September 1998 or the Stockholm Convention on POPs which was adopted on 22 May 2001.

The Bills Committee

5. At the House Committee meeting held on 26 May 2006, Members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon CHOY So-yuk, the Bills Committee has held 10 meetings. The membership list of the Bills Committee is in **Appendix I**. Apart from examining the Bill with the Administration, the Bills Committee has also put a notice on the LegCo website to invite public views on the Bill but has received no response so far.

Deliberations of the Bills Committee

6. The Bills Committee generally supports the policy intent of the Bill to regulate hazardous chemicals (including POPs) given the health hazards associated with the exposure to these chemicals and their cumulative effects. In the course of deliberation, members have raised concerns on the implementation of international agreements in Hong Kong, addition of new convention and non-convention chemicals, scope of the control regime, liability of the Government and public officers, liability of employers and service of notices etc.

Implementation of international agreements in Hong Kong

7. The Bills Committee notes that there are various methods through which international agreements^{Note³} are applied to Hong Kong. According to the Legal Adviser, the prevailing approach is to expressly set out the relevant parts of an international agreement which have the force of law in Hong Kong in local legislation, often in a Schedule, with or without adaptation. Under this approach, the provisions of international agreements which have the force of law in Hong Kong as enacted by the Legislative Council (LegCo) are clear and certain. However, in the case of the Bill and the then Waste Disposal (Amendment) Bill 2005, the Administration has only included a general reference clause to the international agreements concerned without a clearly defined scope. This might create uncertainty and ambiguity, particularly when future amendments to the agreements concerned would have the force of law in

Note³ International agreements include international agreements entered into between Hong Kong and other jurisdiction as well as international agreements entered into by the Central People's Government and applied to Hong Kong.

Hong Kong without undergoing the law-making process where adaptation could be made to suit local needs in Hong Kong. It is pointed out that the scope of the Stockholm Convention and the Rotterdam Convention is wider than the Bill, and that implementation of these is provided under various ordinances other than the Bill. The affected trades might encounter difficulties in identifying the Convention requirements as the relevant provisions under the two Conventions applicable to Hong Kong are not set out in the Bill.

8. The Administration's explanation is that it has made express reference to the Convention requirements in the provisions concerning permits and directions on disposal of scheduled chemicals, in order to impose a statutory duty on the "Director" (as defined in the Bill) to have regard to the requirements of the two Conventions when exercising his powers under the Bill, and to limit the exercise of powers by the Director under the Bill by expressly requiring him to exercise those powers in a manner consistent with the two Conventions. The merits of making express references to the requirements of the Conventions, compared to not making express references, is greater clarity of law, by making clear that the requirements of the two Conventions are relevant considerations for the exercise of statutory powers under the Bill. The inclusion of these provisions would also facilitate the readers' understanding on the extent to which the Director may exercise his statutory powers and shall perform his statutory duties, and whether the Director has exercised his powers and performed his duties under the Bill properly.

9. The Bills Committee however takes note of the Legal Adviser's view on the need for clear indication on the parts of the two Conventions which are applicable to the Bill to facilitate compliance, particularly when requirements of the two Conventions, such as "environmentally sound disposal" and "best practice" etc, are quite vague and required clarification. Besides, the extent of the Director's power should be ascertainable to ensure clarity and certainty of the law. A general reference to the requirements of the two Conventions is undesirable as the extent of the Director's power would be ambiguous. Members note that similar concerns have been raised by the Bills Committee on Waste Disposal (Amendment) Bill 2005 and the Administration has subsequently agreed to delete the general reference clause. To ensure consistency in the implementation of international agreements in Hong Kong, the Bills Committee has referred the subject to the Panel on Administration of Justice and Legal Services for further discussion.

10. According to the Administration, the Bill seeks to provide for the prohibition of the import, export, manufacture and use of non-pesticide hazardous chemicals except under and in accordance with an activity-based permit. It also confers upon the Director powers to issue, renew, suspend and cancel activity-based permits for the scheduled chemicals, and to impose or vary the permit conditions. The Bill thus provides a legislative framework which enables the control of hazardous chemicals in a manner consistent with the requirements of the Stockholm and Rotterdam Conventions. Although not all Convention requirements are set out in the Bill, 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 jurisdiction. Given that one of the objectives of the Bill is to enable the Stockholm and Rotterdam Conventions to be applied in Hong Kong, the Director is not prevented from having regard to the relevant requirements of the two 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. Besides, administrative law operated to impose legal constraints on the Director in exercising those discretionary powers, including the 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 consideration. It is also pointed out that there is a presumption in common law that the legislature does not intend to legislate contrary to international obligations in the absence of clear languages. Thus, any ambiguity in 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. In the light of members' comments and the fact that the Director may continue to perform his statutory functions having regard to and in a manner consistent with the Convention requirements even without express reference, the Administration would consider deleting the references to the requirements of the two Conventions.

11. The Bills Committee is concerned that if the Director is allowed to make reference to Convention requirements other than those expressly set out in the Bill in performing his statutory functions, this would imply that any subsequent changes to Convention requirements would have the force of law in Hong Kong without the need for local adaptation. The Bills Committee also notes the Legal Adviser's view that it would be an undesirable law-making process that, in response to members' request, the Administration agrees to delete the general reference clause while maintaining the view that the Director is allowed to make reference to Convention requirements other than those expressly set out in the Bill. In this connection, the Bills Committee has studied the option of putting back the general reference clause in the Bill, but considers it retrogression if the general reference clause were to be re-incorporated in the Bill.

12. The Administration's explanation is that while the Director will be given broad discretionary powers in issuing, renewing, suspending etc of permits, he is required to exercise his discretion within the powers conferred upon him by the provisions of the Bill. Moreover, in making reference to Convention requirements, he also cannot act beyond the provisions of the Bill. In this connection, the Administration is prepared to move Committee Stage amendments (CSAs) to delete the general reference clause to the two Conventions in the Bill.

Addition of new convention and non-convention chemicals

13. The Bills Committee notes that hazardous chemicals under the control of the Bill include both convention and non-convention chemicals. The purpose of applying the same control regime to non-convention chemicals is to allow for greater flexibility in the control of non-convention chemicals for the protection of public health and the environment as it may take years for these hazardous chemicals to be

included in the Conventions. The addition of new convention and non-convention chemicals to the legislation will be subject to the negative vetting procedure.

14. As Hong Kong is under an obligation to regulate convention chemicals, members raise no objection to the use of negative vetting procedure for amendments involving the addition of convention chemicals. They however hold the view that amendments involving non-convention chemicals should be introduced in the form of positive resolution to allow more time for scrutiny. Consideration should also be given to specifying convention and non-convention chemicals in separate schedules. According to the Administration, the policy intent of the Bill is to exercise the same statutory control over hazardous chemicals regardless of whether they are covered by the two Conventions or not. It is therefore not appropriate to specify convention and non-convention chemicals in separate schedules. Notwithstanding, it has no strong views on whether amendments involving addition of non-convention chemicals should be made by of negative vetting procedure or positive resolution as prior public consultation would be conducted before these chemicals are included in Schedule 1 or 2 of the Bill. In the light of members' view, CSAs would be moved to make it clear that an amendment to Schedule 1 or 2 involving the addition or deletion of non-convention chemicals is subject to the approval of LegCo.

Scope of the control regime

15. The Bills Committee has also studied the scope of control of the Bill which aims to regulate the manufacture, export, import and use of scheduled chemicals.

16. Members note that "manufacture" in relation to a scheduled chemical includes causing the chemical to be manufactured. They point out that the expression may give a wrong impression that the Bill will cover chemicals produced unintentionally as by-products during a manufacturing process which is indeed not the policy intent. According to the Administration, the term "manufacture" involves an intention or a deliberate act to make something. It does not cover the unintentional production and release of scheduled chemicals during the manufacture of something else. Neither is this scenario covered by the expression "causing the chemical to be manufactured" in the definition. This expression aims to cover the scenario in which a person asks someone to manufacture a chemical on his behalf. In the light of members' concern, the Administration has reviewed the definition of "manufacture" to suitably carve out scheduled chemicals which are unintentionally produced as by-products during a manufacturing process.

17. Regarding the "use" of scheduled chemicals, members question whether this includes the "sale" of such chemicals. They are also concerned about the potential dangers associated with negligence on the use/possession/storage of these chemicals given the lack of control in the Bill over the "possession" of scheduled chemicals. The Administration's explanation is that neither the Stockholm Convention nor the Rotterdam Convention seeks to prohibit the mere possession of hazardous chemicals. Overseas experience also shows that the scope of regulation primarily covers manufacture, use, import and export of convention chemicals. Therefore, it may not be appropriate to expand the scope of regulation under the Bill to cover possession of

these chemicals. Besides, the extension of control over possession will carry a much wider implication as permits will be required for storage and transport of these chemicals. As possession of any scheduled chemical is an integral component of the four regulated activities (i.e. import, export, manufacture and use), the permits to be issued under the Bill will contain conditions relating to the proper possession of the chemicals. The permit will also contain conditions restricting the transfer of the chemicals to a third party. Besides, environmental pollution caused by improperly stored or handled chemicals may be dealt with under the existing environmental legislation.

18. Members are concerned as to how the Administration could deal with circumstances where scheduled chemicals from unknown source are kept together with products containing such chemicals if possession of scheduled chemicals is not subject to control under the Bill. The Administration explains that the scenario as described will be a suspicious case of illegal use of scheduled chemicals. The Administration can take immediate action to follow up the case by conducting a thorough investigation. Subject to further evidence being collected, the case may form a basis for prosecution.

Liability of the Government and public officers

19. The Bills Committee has studied the binding effect of the Bill on the Government as well as the liability of the Government and public officers in the event of non-compliance with the provisions in the Bill. According to the Administration, the Government's legal policy is that criminal liability is not imposed on the Government and public officers in respect of regulatory offences, 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.

20. The Legal Adviser however points out that as set out in the paper submitted by the Panel on Administration of Justice and Legal Services to the House Committee on 7 July 2006, the issue of criminal liability is a matter of policy and not a matter of constitutional or legal principle. When legislative proposals are introduced into LegCo imposing obligations which are also binding on the Government, the issue of public officers' immunity from criminal liability in discharging their public duties should be considered on a case-by-case basis. It would be for individual Bills Committees to decide whether immunity from criminal liability should be included in the Bill. If so, this should be clearly spelt out in the Bills concerned.

21. The Administration's explanation is that 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 the long-standing approach. In the event that a government department/public official is in breach of the Ordinance (if enacted), it will follow the current government practice under which the case will be promptly brought to the attention of a senior official in the concerned government department who will require the staff

concerned to take immediate action to remedy the situation. If the non-compliance of the statutory requirements is attributable to staff misconduct, the public officer concerned may be subject to disciplinary actions according to the established civil service regulations. In the light of members' concern on the need for clarity, the Administration agrees to include an express provision on the immunity of the Government and public officers to criminal liability, modeled on the CSAs to the Unsolicited Electronic Messages Bill. An express provision on the immunity of public officers to civil liability is also included under the Bill.

Liability of employers

22. The Bills Committee notes that in any proceedings against a person under the Ordinance (if enacted) for or in connection with an act of his employee, it is not a defence for that person to show that his employee acted without his authority. In the absence of evidence to the contrary, any material fact that is known to the employee is to be regarded as having been known to the employer. Members are concerned that the provisions as drafted will impose strict liability on the employer who will be held liable for the acts of the employee who has acted without his authority. These provisions are inconsistent with the common law under which an employer will be held liable for the torts of the employee only if a wrongful act is authorized by him. They also question the defence which can be made available to the employer. For instance, an employee who acts outside his course of employment to use a hazardous chemical in the possession of his employer may rely on the defence that he does not know the chemical is a scheduled chemical but the employer may not have the same defence if he knows the chemical is a scheduled chemical.

23. In this respect, the Administration explains that the policy intent is to impose appropriate liability on employers for the acts of their employees. Without these provisions, 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. He could raise evidence to the contrary to rebut the presumption and that he did not know the relevant facts known to the employee, and 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, the Administration agrees to move CSAs 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 reasonable due diligence to avoid the commission of such an offence.

Service of notices

24. Members have studied the question of whether failure to receive a notice served by the Director according to the mode of service prescribed by the Bill is a defence, given that non-compliance with any of the directions given by the Director is a strict liability offence under the Bill. The Administration's explanation is that if a notice is required or permitted to be served under the Ordinance (if enacted), it shall be regarded as having been duly served if the prescribed mode of service 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. Unless the prosecution has failed to satisfy the court that the presumption could come into play, failure to receive an actual notice is not a defence available. Notwithstanding, the common law defence of honest and reasonable belief is available to the offence but it does not affect the provision for the mode of service which is conclusive. To establish such a defence, a person has to establish to the satisfaction of the court that he reasonably and honestly believes that no such directions had been imposed on him or he had already complied with such directions. It would be up to the court to decide whether a defence of "reasonable and honest belief" has been established.

25. The Bills Committee has also examined other technical aspects of the Bill.

Recommendation

26. The Bills Committee recommends the resumption of Second Reading debate on the Bill on 11 July 2007.

Consultation with the House Committee

27. The House Committee at its meeting on 22 June 2007 supported the recommendation of the Bills Committee to resume Second Reading debate on the Bill on 11 July 2007.

Prepared by
Council Business Division 1
Legislative Council Secretariat
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**Bills Committee on
Hazardous Chemicals Control Bill**

Membership list

Chairman Hon CHOY So-yuk, JP

Members Hon SIN Chung-kai, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP

(Total : 4 Members)

Clerk Miss Becky YU

Legal Adviser Miss Monna LAI

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