

**Bills Committee on
Genetically Modified Organisms (Control of Release) Bill**

**List of follow-up actions arising from the discussion
at the meeting on 21 December 2009**

This paper seeks to respond to the issues raised at the meeting of the Bills Committee on Genetically Modified Organisms (Control of Release) Bill (the Bill) held on 21 December 2009, which are listed at Appendix I of the letter dated 22 December 2009 from the Bills Committee Secretariat –

(1) To review and amend Parts 5 and 6 of the Bill since the matters to be regulated by the Bill might be different from those covered by the Protection of Endangered Species of Animals and Plants Ordinance (Cap. 586), the basis from which the relevant provisions were modelled after. To also respond to the following concerns on individual clauses -

- (a) clause 26(3) as drafted might pre-empt future amendments to the confidentiality of information. Consideration might be given to deleting the clause and if not, there might be a need to include in the clause the different time frames for various requests, and the condition that not entering the information would not be contrary to the public interest;
- (b) the criterion of “critical condition” should be expressly provided in clauses 28 and 29 to justify the power to search without warrant;
- (c) consideration should be given to replacing the word “exclusively” under clause 29(2)(b) with “mainly” as it might be difficult to identify premises used exclusively as a dwelling house;
- (d) “reasonable grounds” or phrases to this effect should be used to replace the word “reason” in clauses 28, 29, 32 and 33 to more accurately reflect the legislative intention, and to ensure consistency with clause 30(1);
- (e) clause 30(2) as drafted had pre-empted the magistrate to specify the duration of, time and/or date for the execution of a search warrant. Consideration should be given to amending the clause leaving these matters to the magistrate who issued the warrant;
- (f) clause 31(1) might have conferred an authorized officer extensive power to seize, remove and detain any thing that appeared to be or to contain evidence of the commission of an offence. To advise whether similar provisions could also be found in other ordinances, apart from Cap. 586;

- (g) the scope of clause 33 should be confined to an offence under clauses 5, 7 or 23. Consideration should also be given to combining clauses 28 and 33; and
 - (h) the rationale for empowering the Director to sell certain things immediately after seizure under clause 34, which might run contrary to the objective of the Bill to control release of genetically modified organisms into the environment.
- (2) To review clause 39 to clarify the Administration's intention on the identity of an aggrieved person, other than an applicant, who would have the right to appeal to the Administrative Appeal Board.
- (3) To provide the wordings of the undertakings which the Secretary for the Environment would deliver at the resumption of the Second Reading debate on the Bill.

2. We have reviewed Parts 5 and 6 (i.e., clauses 27 to 38 of the Bill) of the Bill, and proposed amendments along the line as suggested by Members in para 1(a) to (h) above. We will deal with the amendments one by one as set out in the ensuing paragraphs.

Para 1(a) of the list of follow-up actions – confidential information and the register

3. Clause 14 of the Bill sets out the procedural requirements for making a non-disclosure request. Clause 15, with proposed CSAs incorporated, provides that two criteria must be met if certain information submitted for a GMO approval application or variation request is not to be entered in the register (i.e. entering the information would adversely affect the applicant's interest, and not entering the information would not be contrary to the public interest). The mechanism for reviewing the Director's decision and the appeal mechanism are provided in clauses 16 and 39 respectively.

4. Clause 26 sets out the contents of the register. Clause 26(1) provides that the register must contain, among other things, every GMO approval application, every variation request and any information received by the Director for the purposes of the application or request. If a member of the public reads clause 26(1), he or she would expect to find in the register, without exception, all the information submitted to the Director for the

purposes of a GMO approval application and variation request. This is inconsistent with clauses 14 to 16 under which some of the information submitted would not be entered in the register. For the sake of clarity and avoiding inconsistencies among different clauses, it is necessary to insert clause 26(3) to clarify that the register would not contain "confidential information" (i.e., information that is not to be entered in the register according to the decision of the Director or the Administrative Appeals Board (AAB)).

5. It is worth reiterating that the powers for deciding on a non-disclosure request are provided in clause 15 (Director's decision), clause 16 (review of Director's decision) and clause 39 (appeal to AAB). The Director does not have power under clause 26(3) to vary the decision on the non-disclosure request.

6. The criteria for deciding on a non-disclosure request are set out in clause 15(2). The time frames for deciding on such a request, reviewing the Director's decision and lodging an appeal are set out in clauses 15, 16 and 39. It is not necessary to repeat the information in clause 26.

Para 1(b) to the list of follow-up actions – justifying the power to search under clauses 28 and 29

7. Having considered Members' views, we will revise clause 28 as shown in **Annex A**. Clause 28, when amended, provides that an authorized officer may only exercise the power under the clause when he "*reasonably suspects*" that offences under clause 5, 7 or 23 (i.e., offences relating to the release of GMOs into the environment and import and export of GMOs intended for release) have been, are being or would be committed. This provides a more objective test as compared to the original provision; viz. the authorized officer may exercise the power when he has reason to suspect that the relevant offences have been, are being or would be committed. This power is necessary to enable an authorized officer to take appropriate enforcement action under circumstances that would require an immediate search of the transport means containing suspected GMOs that would pose adverse biosafety effects on the natural environment. For example, an authorized officer spots a moving truck carrying suspected unapproved GM plants and the truck is not equipped with proper measures to limit their contact

with the environment. To prevent the pollens of any unapproved GM plants from contaminating the surrounding environment, it is necessary for the authorized officer to stop and search the truck for the presence of any unapproved GM plants.

8. Clause 29 does not empower an authorized officer to search premises without a warrant. The clause only allows the officer to inspect premises, require production of things suspected to be GMOs and require production of documents, for the purpose of verifying compliance with the provisions of the Bill. We will also replace the words “*has reason to suspect*” by “*reasonably suspects*” to provide a more objective test for exercising the power under the clause. The revised clause 29 is at **Annex B**. This power enables an authorized officer to inspect premises to see whether requirements of the Bill are being complied with. For example, if an authorized officer spots the keeping of suspected unapproved GM plants inside a greenhouse , the officer may inspect the greenhouse to check if the greenhouse has appropriate measures to limit the contact of the plants with the outside environment. Any delayed inspection for unapproved GMOs may result in contamination of the natural environment

9. The powers vested in an authorized officer under clauses 28 and 29 are necessary for discharging the enforcement duties. In order to ensure that such powers are properly used, authorized officers (i.e. at the rank of Field Officer II or above) from Agriculture, Fisheries and Conservation Department (AFCD) will follow established operating procedures to discharge the enforcement duties under the Bill. An operation manual for enforcement officers is being drafted to provide guidelines for the authorized officers in this regard. The manual will adopt the well established procedures detailed in the Operation Manual for Enforcement Officers being used by the authorized officers of AFCD responsible for enforcing the Protection of Endangered Species of Animals and Plants Ordinance (Cap.586).

10. Before exercising the powers under clause 28 to search a vessel, vehicle, train or aircraft, an authorized officer must seek the consent from a senior officer (ranking of Senior Field Officer or above). The authorized officer will show his warrant card and explain the purposes of the search. A seizure receipt will be issued if any specimens or things are seized. A personal data note will also be issued to the person concerned if any personal

particulars are collected. When an operation is completed, the authorized officer will ask the person concerned if he has any complaint. All these procedures and requirements will be set out in the operation manual, to ensure that the authorized officer will discharge his duties in a proper and lawful way.

11. Before exercising the powers under clause 29, an authorized officer will show his warrant card and state the purpose of the visit to the owner or responsible person of the place or premises before entering and inspecting the same in which GMOs are suspected to be present. The authorized officer will also inform the person before collecting samples for purposes of verifying compliance with the Bill.

Para 1(c) to the list of follow-up actions – premises used as dwelling house purposes

12. Having considered Members' views, we will revise clause 29(2)(b) shown in **Annex B**.

Para 1(d) to the list of follow-up actions – using “reasonable grounds” to replace the word “reason” in clauses 28, 29, 32 and 33

13. Having considered Members' views, we will revise clauses, 32 and 33 as shown in **Annex C**.

Para 1(e) to the list of follow-up actions – the magistrate's power to specify details for executing the search warrant

14. Having considered Members' views, we will revise clause 30 as shown in **Annex D**.

Para 1(f) of the list of follow-up actions – power to seize, remove and detain things under clause 31(1)

15. The provisions empowering officers to seize, remove and detain any thing that "appears" to be or to contain evidence of commission of offences are also found in other Ordinances, including section 17A of the Wild Animals Protection Ordinance (Cap.170). Having considered Members' views, we will replace “appears to the officer” by “the officer reasonably suspects” as

shown in **Annex E**. Such provisions are necessary for the proper discharge of enforcement duties by an authorized officer under the Bill, in particular with respect to seizing unapproved GMOs for the protection of the natural environment against potential adverse biosafety effects resulting from their release. For example, if an authorized officer spots a moving vehicle carrying a suspected unapproved GM plant, he may stop and search the vehicle, and immediately seize the suspected GM plant to prevent its pollen from release to the environment. On the other hand, when an authorized officer finds some suspected unapproved GM flowers during import, the authorized officer would need to seize the flowers to prevent its release into the local environment.

Para 1(g) of the list of follow-up actions – power to require identification under clause 33

16. Having considered Members' request, we are of the view that the scope of clause 33 should be confined to offences under clauses 5, 7, 23, 24B and 40, instead of "an offence under the Bill" as originally provided. This is for an authorized officer to ascertain, in the course of carrying out enforcement duties, the identity and contact information of the persons suspected of committing the above-mentioned offences under the Bill. The personal identity and contact information obtained would be used for subsequent investigation into the offences and prosecution actions (such as service of a summons to the suspect), if any. The amendments to clause 33 are shown in Annex C. However, it would not be appropriate to combine clauses 28 and 33, as the subject matter and scope of the two clauses are different.

Para 1(h) of the list of follow-up actions – rationale for the Director to sell certain things

17. Having considered Members' request, we are of the view that the situation necessitating the Director to sell the seized things will rarely arise, and hence, have decided to delete this power from the Bill. Proposed revisions to clause 34 as well as the consequential amendments to clauses 35, 36, 37 and 38 are shown in **Annex F**.

Para 2 – applicability of clause 39

18. For clarity's sake, we will revise clause 39 as shown in **Annex G**.

Para 3 – Undertakings to be made by the Secretary for the Environment at the Resumption of the Second Reading debate

19. The following undertakings will be made by the Secretary for the Environment Resumption of the Second Reading Debate –

- (1) The Administration will retain information in relation to non-disclosure request for record purpose (*see our response to the list of follow-up actions arising from the discussion the meeting on 8 Dec 2009 (CB(1) 726/09-10(02))*);
- (2) A written acknowledgement of receipt of GMO approval application will be issued to the applicant in an expeditious manner and in any case less than 90 days even though a 90-day period is provided in clause 9 of the Bill, and that such performance pledge will be spelt out in the practice guidelines of the AFCD (*see our response to the list of follow-up actions arising from the discussion the meeting on 30 Nov 2009 (CB(1) 583/09-10(02))*); and
- (3) The policy intent that enforcement would mainly focus on the control of import of GMOs and target at large enterprises producing or using GMOs, and that members of the public (such as schools and hospitals) who might have inadvertently grown or kept GMOs would not be the target group of enforcement. Also, the gist of the operation manual for enforcement officers will be made available for public inspection, as well as clarification on the powers of entry and inspection in relation to premises wholly or principally used as a dwelling house (*see our response to the list of follow-up actions arising from the discussion the meeting on 27 Oct 2009 (CB(1) 311/09-10 (02))*).

Environmental Protection Department
Agriculture, Fisheries and Conservation Department
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28. Powers to search vessels, detain persons, etc.

(1) An authorized officer may stop, board and search any vessel, vehicle, train or aircraft (other than a ship of war, military vehicle or military aircraft) if the officer ~~has~~ reasonably ~~to~~ suspects that an offence under section 5, 7 or 23 has been, is being or is to be committed in or on the vessel, vehicle, train or aircraft.

(2) If an authorized officer ~~has~~ reasonably ~~to~~ suspects that a person has committed, is committing or is to commit an offence under section 5, 7 or 23, the officer may without warrant –

(a) stop and search the person, and search the property of the person, for anything that is likely to be relevant (whether by itself or together with anything else) to the investigation of the offence; and

(b) detain the person for a reasonable period while the officer inquires about the suspected commission of the offence.

29. Powers to inspect place or premises, take copies of documents, etc. for verifying compliance with this Ordinance

(1) If an authorized officer ~~has~~ reasonably ~~to~~ suspects that a GMO is being kept in any place or premises, the officer may, for the purpose of verifying compliance with this Ordinance, without notice –

- (a) enter and inspect the place or premises during reasonable hours;
- (b) require the production of, inspect and examine any thing that the officer ~~has~~ reasonably suspects ~~to believe~~ to be, or to contain, a GMO; and
- (c) require the production of, inspect, examine and take copies of any document that is related to compliance with this Ordinance, or any document that relates to the nature or origin of the GMO.

(2) Subsection (1) does not empower an authorized officer to enter –

- (a) any premises that are used ~~exclusively wholly or principally for~~ as a dwelling ~~purposes~~ house; or
- (b) any part of any premises that is used ~~exclusively wholly or principally for~~ as a dwelling ~~purposes~~ house.

32. Powers to take samples and carry out tests

(1) An authorized officer may, for the purpose of verifying compliance with this Ordinance or obtaining evidence of the commission of an offence under this Ordinance –

- (a) take a sample of any thing that the officer ~~has reason to believe~~ reasonably suspects to be, or to contain, a GMO;
- (b) require any person in control of such thing to provide a sample of it; and
- (c) take any photographs of the thing.

(2) An authorized officer who takes a sample under subsection (1) must issue a receipt for the sample, but is not required –

- (a) to pay for it; or
- (b) to return it to the person from whom it was taken.

(3) An authorized officer may arrange to carry out any necessary test in respect of a sample taken under subsection (1) to ascertain –

- (a) whether the sample is or contains a GMO;
- (b) if the sample is or contains a GMO –
 - (i) the identity of the GMO; and
 - (ii) the quantity and percentage of the GMO in the sample.

(4) A certificate of analysis issued by an accredited laboratory on a sample taken under subsection (1) may be tendered in evidence in any proceedings under this Ordinance and is evidence of the facts stated in it unless the contrary is proved.

(5) In this section, “accredited laboratory” (獲認可實驗室) means a laboratory accredited under the Hong Kong Laboratory Accreditation Scheme managed by the Commissioner for Innovation and Technology on behalf of the Government.

33. Power to require identification

(1) If an authorized officer ~~has~~ reasonably ~~to~~ suspects that a person has committed, is committing or is to commit an offence under section 5, 7, 23, 24B or 40 ~~this Ordinance~~, the officer may without warrant stop the person or, where the person is in or on a vessel, vehicle, train or aircraft (other than a ship of war, military vehicle or military aircraft), stop and board the vessel, vehicle, train or aircraft for the purposes of requiring that person –

(a) to state the person’s name and address; and

(b) to produce the person’s proof of identity for inspection.

(2) In this section, “proof of identity” (身分證明文件) means proof of identity within the meaning of section 17B of the Immigration Ordinance (Cap. 115).

30. Powers to enter and search place or premises on issue of warrant

(1) A magistrate may issue a warrant authorizing an authorized officer to enter and search any place or premises if satisfied by information on oath that there are reasonable grounds to suspect that –

- (a) an offence under this Ordinance has been, is being or is to be committed in or on the place or premises; or
- (b) there is in or on the place or premises any thing that is or contains evidence of the commission of an offence under this Ordinance.

(2) A warrant continues in force, unless otherwise specified in the warrant, until the purposes for which the entry is necessary have been satisfied.

(3) An authorized officer authorized by such a warrant to enter and search any place or premises –

- (a) may at the time specified in the warrant or, if no time is specified, at any time enter and search the place or premises, using necessary force; and
- (b) may remove any thing that obstructs the entry and search.

(4) An authorized officer may also detain any person found in or on the place or premises, for such period as is reasonably required to permit the search to be carried out, where the person might prejudice the purpose of the search if not so detained.

(5) An authorized officer entering any place or premises under a warrant may take with the officer such persons as may be necessary.

(6) This section does not prejudice any powers of entry and search conferred on police officers under any other law.

31. Powers to seize, remove and detain things

(1) An authorized officer may seize, remove and detain any thing ~~that appears to~~that the officer reasonably suspects to be or to contain evidence of the commission of an offence under this Ordinance.

(2) An authorized officer does not incur any civil liability in respect of anything done or omitted to be done by the officer in good faith in the exercise or purported exercise of any power under this section.

34. Director's power to ~~sell or~~ dispose of certain things immediately after seizure

(1) If any of the things specified in subsection (2) has been seized under section 31, the Director may, immediately after the seizure, ~~sell the thing or~~ dispose of ~~the thing~~ in any ~~other~~ way.

(2) The things are –

(a) any live animal –

(i) that, for any reason, it is not practicable for the Director to keep in captivity; or

(ii) that is likely to die or to be subject to unnecessary suffering if it is kept in captivity;

(b) any live plant that, for any reason, it is not practicable for the Director to keep; and

(c) any thing –

(i) that, for any reason, it is not practicable for the Director to keep; or

(ii) that is perishable.

~~(3) Subject to sections 35, 36 and 37, the proceeds of sale of any thing sold under subsection (1) must be paid into the general revenue.~~

35. Return and forfeiture of things seized in respect of offences under section 5, 7 or 23

(1) If a person is convicted of an offence under section 5, 7 or 23, any thing seized under section 31 in connection with the offence that is a GMO or contains a GMO is, ~~or any proceeds of sale of that thing are,~~ to be forfeited to the Government.

(2) If a person is convicted of an offence under section 5, 7 or 23, the court or magistrate may order any thing seized under section 31 in connection with the offence that is not a GMO or does not contain a GMO, ~~or any proceeds of sale of that thing –~~

(a) to be returned to the person from whom it was seized or to its owner; or

(b) to be forfeited to the Government.

(3) If an offence is prosecuted under section 5, 7 or 23 and no defendant in the proceedings is convicted of the offence, the court or magistrate may order any thing seized under section 31 in respect of which the prosecution is brought, ~~or any proceeds of sale of that thing –~~

(a) to be returned to the person from whom it was seized or to its owner; or

(b) to be forfeited to the Government.

36. Return and forfeiture of things seized in respect of offences under other sections

If an offence is prosecuted under a provision of this Ordinance other than section 5, 7 or 23, the court or magistrate may, whether or not any defendant in the proceedings is convicted of the offence, order any thing seized under section 31 in respect of which the prosecution is brought, ~~or any proceeds of sale of that thing~~ –

- (a) to be returned to the person from whom it was seized or to its owner; or
- (b) to be forfeited to the Government.

37. Return and forfeiture of things seized if no prosecution for offences

(1) If a thing has been seized under section 31 but no prosecution has been brought in respect of that thing under this Ordinance, an authorized officer may apply to the court or magistrate for an order in respect of that thing ~~or any proceeds of sale of that thing.~~

(2) On an application under subsection (1), the court or magistrate may, subject to subsection (3), order the thing concerned ~~or any proceeds of sale of that thing—~~

- (a) to be returned to the person from whom it was seized or to its owner; or
- (b) to be forfeited to the Government.

(3) The court or magistrate must, if satisfied that the owner of the thing concerned is unknown or cannot be found, order the thing concerned ~~or any proceeds of sale of that thing~~ to be forfeited to the Government.

(4) If a thing forfeited to the Government pursuant to an order under subsection (3) is ~~sold or~~ disposed of under section 38(1), a person who considers that he, she or it is aggrieved by the ~~sale or~~ disposal may complain to the court or magistrate within 6 months after the ~~sale or~~ disposal.

(5) On a complaint under subsection (4), the court or magistrate may, if satisfied as to the complainant's title to the thing concerned, order such amount of compensation to be paid to the complainant as the court or magistrate considers just.

38. Director's powers to ~~sell or~~ dispose of and to give directions on disposal of forfeited things

(1) The Director may ~~sell, or~~ dispose of in any ~~other~~ way, any thing that is forfeited to the Government under this Part in such manner as the Director thinks fit.

(2) ~~The proceeds of sale of any thing sold under subsection (1) must be paid into the general revenue.~~

~~(3)~~ — If —

- (a) a person has been convicted of an offence under section 5, 7 or 23; and
- (b) a thing in connection with the offence has been forfeited to the Government under section 35(1) or (2),

the Director may, by written notice, direct the person to dispose of the thing through repatriation or destruction.

(43) A person given a direction under subsection (32) must, subject to section 39(4), carry out the direction at the person's cost within the period specified in the notice.

(54) A person who contravenes subsection (43) commits an offence and is liable to a fine at level 6.

39. Appeals

(1) If an person applicant under a GMO approval application or variation request is aggrieved by a decision under section 10(1)(a), 11(5)(a), 12(1) or 16(3)(a), or a direction under section 12(7) ~~or 38(3)~~, the person applicant may, within 28 days after receiving notice of the decision or direction, appeal to the Administrative Appeals Board against that decision or direction.

(1A) If a person who is directed under section 38(3) to dispose of a thing is aggrieved by the direction, the person may, within 28 days after receiving notice of the direction, appeal to the Administrative Appeals Board against that direction.

(2) After lodging an appeal under subsection (1), the person applicant must, pending the Administrative Appeals Board's decision on the appeal, cause the GMO ~~that is the subject of~~ to which the appeal relates to be kept in a manner that effectively limits its contact with, and its impact on, the environment.

(3) Subsection (2) does not apply if the GMO has already been released into the environment.

(4) If an appeal is lodged against a direction referred to in subsection (1) or (1A), the applicant or person is not required to carry out the direction pending the Administrative Appeals Board's decision on the appeal.