

Hazardous Chemicals Control Bill

**The Administration's Responses to Comments from
Assistant Legal Adviser in her Letters of
11 January 2007 and 15 January 2007**

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

There is no discrepancy between the drafting of section 10(4)(a)(i) and the other provisions in the Bill (i.e. sections 6(1), 7(1), 8(1), 9(1) and 13(3) as highlighted in the letter of 15 January 2007).

2. Sections 10(1) and 10(2) seek to empower the Director of Environmental Protection to issue and renew a permit, and the expression “may” is used to create the powers. Section 10(4) seeks to curtail such powers. By virtue of Section 10(4)(a), the Director is not allowed (or has no power) to issue or renew a permit authorizing the manufacture of any Type 1 chemical unless the conditions set out in that provision are satisfied. The expression “may not” is correctly used in the context.

3. According to 現代漢語八百詞, the expression “得”, when used as a verb, means “許可 (多用於法令等), ... 否定式加“不””. According to 現代漢語規範字典, the expression “得”, when used as a verb, means “許可或能夠”. These show that the expression “不得” could be used to denote prohibition, to disallow somebody to do something or to block a power. It is appropriate to render the expression “may not” in section 10(4)(a)(i) as “不得”.

4. The expression “shall not” is used in sections 6(1), 7(1), 8(1) and 9(1) which are prohibition provisions. It is appropriate to use the expression “shall not” in prohibitions. The expression “不得” in the Chinese text is correctly used to denote the prohibitions and could achieve the same legal effect as that of the corresponding English provisions.

5. As to the Chinese rendition of the expression “may not” in section 13(3), the use of the expression “不可” in the provision is appropriate and could achieve the same legal effect as that of the English provision. According to 現代漢語詞典, the expression “不得” could also mean “不可以”, whereas “不可” means “不可以” (has no power or is not allowed or permitted).

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)

6. Please refer to the Administration's responses to the list of follow-up actions arising from the discussion at the meeting of the Bills Committee on 12 January 2007.

Section 41(a) and 41(b)

7. The statutory defence available in Sections 6, 7, 8, 9 is available to any defendant, including an employee or an employer. In the case of an employee, the prosecution would need to prove the criminal intent. 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.

8. Therefore, Section 41, in effect, serves the purpose of imposing criminal liability on the principal/the employer in respect of the acts or defaults of his agent by imposing a liability which exists without any proof of criminal intent (if the same has been proved against the employee).

Binding Effect – Section 4

9. Please refer to the Administration's responses to the list of follow-up actions arising from the discussion at the meeting of the Bills Committee on 12 January 2007.

Sections 26 and 44

10. A strict liability offence is an offence which does not require the proof of mens rea by the prosecution. It is different from an absolute liability offence because mens rea, for strict liability offences, is "presumed" but is subject to rebuttal, either by an expressed statutory defence provision or in the absence of such, the common law defence of "honest and reasonable belief" (Fong Chin Yue [1995]1 HKC 21). A statutory defence provision might be in the form of "reasonable excuse".

**Environmental Protection Department
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