

Hazardous Chemicals Control Bill

The Administration's Responses to Comments from the Bills Committee Chairman on 27 June 2006

Definition of "hazardous chemicals"

In assessing whether a certain chemical should be regarded as having "potentially harmful or adverse effect on human health or the environment", we will consider toxicity or ecotoxicity data that have been generated according to scientifically recognised methods. Generally speaking, when we determine whether a chemical is a hazardous chemical for the purposes of the Bill (when enacted), we will, in accordance with clause 5 of the Bill, take into account the criteria to be followed as set out in or required under the Rotterdam Convention or the Stockholm Convention in determining whether a chemical should be subject to the regulation of the Convention.

Definition of "court"

2. It is appropriate to define "court" in clause 2 of the Bill to include a magistrate. Under the Magistrates Ordinance (Cap 227), it is a magistrate, not a magistracy, that is appointed to exercise the jurisdiction under that Ordinance. Similar provisions appear in, for example, section 2 of the Import and Export Ordinance (Cap 60) and section 385 of the Securities and Futures Ordinance (Cap 571).

Definition of "premises"

3. The expression "premises" in clause 2 of the Bill is defined to include "any place and in particular any aircraft, vehicle or vessel". This definition is sufficient for our purpose and there is no need to replace the expression "aircraft, vehicle or vessel" by the expression "conveyance" in this context.

Rotterdam Convention and Stockholm Convention

4. The application of the two Conventions to the Hong Kong Special Administrative Region (HKSAR) is subject to Article 153 of the Basic Law, i.e. such application shall be decided by the Central People's Government (CPG), in accordance with the circumstances and needs of

the HKSAR, and after seeking the views of the Government of the HKSAR. In this regard, the CPG has consulted the Government on the application of the two Conventions to the HKSAR. The Stockholm Convention has been applied to the HKSAR after such consultation.

Binding Effect

5. If the criminal liability under the Bill is interpreted by the court as applying to individual public officers, any fine imposed on the public officer concerned will be payable by the public officer convicted.

Clause 6(1)

6. The term “manufacture” as defined in clause 2 of the Bill involves an intention or a deliberate act to make something. It does not cover the unintentional production and release of scheduled chemicals (i.e. by-products) 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.

Clauses 7 and 8

7. Transshipment cargo of scheduled chemicals is subject to import/export control under the Bill, i.e. activity-based import/export permits need to be obtained. The import/export permits are valid for 12 months. The import/export of each consignment of transshipment cargo (except for air transshipment cargo which is subject to a proposed trade facilitation measure) also needs consignment-based import/export licences under Cap 60. The consignment-based import and export licences are generally valid for 6 months and 28 days, respectively. The licence holder is allowed to import/export the transshipment cargo under such consignment within the validity period of the import/export licence issued. If for any reason such transshipment cargo cannot be exported within the validity period of the export licence, a new valid export licence will be necessary for exporting the said cargo.

Clause 10(4)

8. Clause 10(4)(a) seeks to reflect our policy intent that the manufacture of any Type 1 chemicals shall be prohibited except for use in laboratory-scale research purpose or as a reference standard, in which

case a permit shall be required under the Bill. This seeks to reflect the general requirement under the Stockholm Convention that the manufacture of such chemicals should be eliminated except for quantities used in laboratory-scale research or as a reference standard. Clause 10(4)(b) is drafted differently from clause 10(4)(a) because Type 2 chemicals are not subject to the same general requirement.

Clauses 11(3), 13(3), 22(3) and 23(3)

9. These provisions give DEP the power to regulate non-pesticide hazardous chemicals that are specified in the Bill in such a manner as to be more stringent than what is required under the two Conventions. One possibility is that before the Convention requirements are updated by international agreement amending or supplementing the Stockholm Convention or the Rotterdam Convention (which may be a lengthy process), we consider it necessary to adopt the more stringent measures locally in the interest of protecting human health and the environment, having regard to the circumstances of the HKSAR.

Clauses 16(2), 21(1) and 29(1)

10. A specific timeframe in these provisions is too rigid. The flexibility with “as soon as practicable” seeks to cater for the circumstances of different permit holders when it comes to returning the relevant permits to the Director of Environmental Protection etc. Our policy intent in clauses 16(2), 21(1) and 29(1) is that the permit holder shall return the relevant permit as soon as it can reasonably be done. Such flexibility should not lead to serious consequences given that the offence provision gives a person a defence of reasonable excuse. A similar provision appears in section 24 of the Waste Disposal (Chemical Waste) (General) Regulation (Cap 354C).

Clause 17(2)

11. Clause 17(1) requires the Director of Environmental Protection to issue a permit with its conditions varied to the permit holder under the circumstances mentioned in that provision. Notwithstanding clause 17(1), clause 17(2) empowers the Director to refuse to issue such a permit if the permit holder fails to return the "original" permit to the Director in accordance with clause 16 of the Bill. The expression "the Director *may refuse to issue a permit under subsection (1)* [of section 17]" in clause 17(2) means that the Director *may refuse to issue a permit*

with its conditions varied under clause 17(1). We therefore need not amend clause 17(2).

Clause 26

12. This provision imposes a strict liability offence. Given the seriousness of the offence, we do not consider it appropriate to introduce a defence of reasonable excuse.

Clause 32

13. This provision enables a public officer authorized under the Bill to enter non-domestic premises to carry out routine inspections. We do not consider it appropriate to restrict the exercise of the power in the provision to emergency circumstances.

Clause 32(1)

14. The term “reasonable time” in this provision includes normal working hours depending on the trade involved. We consider it more appropriate to use this term rather than specifying specific hours in the Bill.

Clause 34(2)(a)

15. The expression “... enter, by force if necessary ...” in this provision means “... enter by the use of reasonable force if necessary ...”.

Clause 36

16. This is a common provision in the laws of Hong Kong. It seeks to protect the individuals affected, including his/her privacy. We would make reference to the practice adopted in enforcing similar provisions in other contexts and draw up guidelines for the authorized officers as to how the trans-sexual case could be handled in a way that would respect, as far as possible, the privacy of the individuals affected.

Clause 39(4)

17. If a permit has been lost at the time when the permit holder makes an application under clause 39(1), the permit is not available to the permit holder at the time when he makes the application under that clause. If the permit is subsequently found, it should be dealt with in accordance

with clause 39(6) of the Bill.

Clause 40(4)(b)

18. Clause 40(4) provides that proceedings may be brought within 2 years after the alleged commission of the offence or 6 months after the first discovery of the alleged commission of the offence by the Director of Environmental Protection, whichever expires first. “DEP” is to be interpreted in a broad meaning, i.e., the period of 6 months shall be counted from the first discovery of the alleged commission of the offence by any member of staff of the Environmental Protection Department, acting on behalf of DEP.

Clause 41(b)

19. Clause 41(b) does not create any onus of proof on an employer. The evidence to the contrary can come from the prosecution or the defence.

Clause 44(a)(ii), (b)(ii) and (c)(ii)

20. It is not necessary to amend clause 44 as suggested, given that there is a general provision on service by post (including registered post) in the Interpretation and General Clauses Ordinance (section 8). Similar provisions could also be found in the Adoption Rules (rule 28) and the Convention Adoption Rules (rule 31).

**Environmental Protection Department
September 2006**