



中華人民共和國香港特別行政區政府總部食物及衛生局
Food and Health Bureau, Government Secretariat
The Government of the Hong Kong Special Administrative Region
The People's Republic of China

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Miss Carrie Wong
Assistant Legal Adviser
Legal Service Division
Legislative Council Secretariat
Legislative Council

Dear Miss Wong,

Pesticides (Amendment) Bill 2013

Thank you for your letter dated 5 February 2013 seeking our clarifications on a number of issues relating to the captioned Bill. Our responses are set out in the Annex.

Yours sincerely,



(Hinny LAM)

for Secretary for Food and Health

c.c. Clerk to Bills Committee
AFCD (Attn.: Dr Thomas Sit
Mr Clive Lau
Mr Stephen Lai)
DoJ (Attn.: Ms Carmen Chu
Miss Karen Lee)

**Administration's responses to questions raised by
Assistant Legal Adviser on Pesticides (Amendment) Bill 2013**

(a) Time lapse

The Assistant Legal Adviser (ALA) notes that the Central People's Government (CPG) has applied the Stockholm Convention on Persistent Organic Pollutants (the Stockholm Convention) and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (the Rotterdam Convention) to Hong Kong in 2004 and 2008 respectively, and that the Hazardous Chemicals Control Ordinance (HCCO) (Cap. 595) has commenced operation in 2008. She comments that no information has been provided to account for the time lapse since 2008 up to the introduction of the Pesticides (Amendment) Bill 2013 (the Bill) and to explain whether there are any measures for their compliance in relation to pesticides during that time.

2. The main purpose of the Bill is to meet the requirements of the Stockholm Convention and the Rotterdam Convention. The opportunity is also taken to improve certain provisions of the Pesticides Ordinance (the Ordinance) (Cap. 133).

3. When the Administration consulted the Legislative Council (LegCo) Panel on Food Safety and Environmental Hygiene (the Panel) on 12 July 2011, we had explained to the Panel in detail the background leading to the present legislative proposal in implementing the requirements of the two Conventions. Details can be found in LC Paper No. CB(2)2305/10-11(06) and are summarised in footnote 5 of LegCo Brief. In brief, the Administration originally planned to introduce a package of legislative proposals which sought to comply with the requirements of the two Conventions and at the same time introduce a pesticide product registration system and a scheme to regulate applicators of pesticides. In 2007, the then Health, Welfare and Food Bureau conducted a public consultation on the package of legislative proposals. During the public consultation, there were concerns that the combined effects of the proposed pesticide product registration system and the proposed scheme to regulate applicators of pesticides might result in small pest control companies being driven out of business due to high operational costs and that a substantial number of existing pesticide applicators would fail to be registered as the training requirement might be too high.

4. Having regard to the possible impact on the trade, the Administration eventually decided to drop the proposed pesticide product registration system and the proposed scheme to regulate applicators of pesticides, and confine the present proposals to mainly comply with the requirements of the two Conventions. At the same time, we have taken considerable time and efforts in strengthening the training for pest control workers, developing Codes of Practice for the relevant sectors in collaboration with the trade and promoting public awareness on the safe and proper use of pesticides. The Panel supported this revised approach at its meeting on 12 July 2011. We have since then conducted another round of consultation with the stakeholders and proceeded with the preparation of the amendment bill. The Bill was eventually introduced into LegCo on 6 February 2013.

5. Notwithstanding the time lapse, as explained in the aforementioned Panel paper, the Administration attaches importance to the safe and proper use of pesticides and has already put in place a comprehensive regulatory regime. As set out in paragraphs 4 and 5 of the LegCo Brief on the Bill, at present, the importation, manufacture, sale, possession and supply of hazardous chemicals which are pesticides, are already regulated by the Ordinance. Under the Ordinance, the Director of Agriculture, Fisheries and Conservation (DAFC) must maintain a register of pesticides and a person must not import, manufacture, sell or supply registered pesticides except under a licence issued by DAFC. For pesticides not listed in the register (unregistered pesticides), the Ordinance prohibits their import, manufacture, sale, supply or possession except under a permit issued by DAFC. Currently, all pesticides covered by the Stockholm Convention and the Rotterdam Convention are unregistered pesticides in Hong Kong. In other words, they are already subject to the permit control under the Ordinance. The Ordinance, however, falls short of regulating the export or use of Convention-regulated pesticides as required by the Conventions.

6. At present, the Import and Export Ordinance (I&EO) (Cap. 60) requires that each shipment of pesticides entering or leaving Hong Kong shall be covered by an import or export licence except if it is in transit or air transshipment cargo. According to our import and export records, between 2007 and 2012, there were only nine transshipment cases involving pesticides covered by the two Conventions. Regarding the use of Convention-regulated pesticides, the possession of such pesticides, as noted above, is subject to permit control and DAFC will specify in the relevant permit the conditions on which the permit holder shall deal with the pesticides. Although the present regulatory regime for pesticides may be

relied on to regulate the export and use of Convention-regulated pesticides, our legal advice is that we need to amend the Ordinance to ensure that the control of Convention-regulated pesticides under the Ordinance is fully and explicitly in line with the requirements of the Conventions.

(b) Proposed section 2(1) on Interpretation

7. ALA notes that under the proposed section 2(1), the term “Rotterdam Convention” is defined as “the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade adopted on 10 September 1998 as amended from time to time and as applied to Hong Kong”; and the term “Stockholm Convention” is defined as “the Stockholm Convention on Persistent Organic Pollutants adopted on 22 May 2001 as amended from time to time and as applied to Hong Kong”. She has raised concern as to whether “the expression “as amended from time to time” in the definitions would imply that any subsequent changes to the two Conventions would automatically affect the provisions of the Ordinance as proposed to be amended without the need for approval by the legislature. She also comments that this may render the scope of the relevant provisions uncertain and not readily ascertainable particularly in the case of the proposed section 18A.

8. The expression “as amended from time to time” in the two definitions is to cater for subsequent changes made to the Conventions, and the expression “as applied to Hong Kong” is to qualify the two terms to the extent that the Convention is applicable to Hong Kong. The People’s Republic of China (PRC) is signatory to both Conventions and CPG has extended the Conventions to Hong Kong in accordance with the Basic Law.

9. Accession by PRC to any subsequent changes to the Conventions would not automatically affect the provisions of the Ordinance. If the changes were to apply to Hong Kong, such will have to be extended to Hong Kong by CPG in accordance with the Basic Law. To meet the requirements arising from any subsequent changes to the Conventions as extended to Hong Kong, the Secretary for Food and Health will be empowered under the proposed section 19A of the Bill to amend the schedule by notice published in the Gazette to reflect the latest lists of Convention-regulated pesticides as applicable to Hong Kong. The notice is a piece of subsidiary legislation and subject to negative vetting procedure of LegCo. For the proposed new section 18A, which reads “the Director (i.e. DAFC) may exercise the Director’s powers under this Ordinance for the purpose of implementing the requirements of the Rotterdam Convention or

the Stockholm Convention”, it is intended to put beyond doubt that DAFC can exercise his powers under the Ordinance for the purpose of implementing the Conventions. The scope of DAFC’s powers under the Ordinance is clearly defined in the Ordinance and any changes would be subject to approval by the legislature. Hence there is no question of automatically implementing the requirements of the two Conventions without the need for approval by the legislature.

(c) Proposed section 2(4) on Interpretation

10. Under the proposed section 2(4), “air transshipment cargo” is defined as “an article in transshipment that is both imported and consigned for export in an aircraft and which, during the period between its import and export, remains within the cargo transshipment area of Hong Kong International Airport”. The proposed definition follows largely the definition of the same term in I&EO and this reflects the policy intention. ALA notes that under section 2 of I&EO, the term “consign” is defined to mean “to deliver or transmit an article into the custody of a person for the purpose of delivery or transmission of the article by that person to another specified person”. The term “consign” is not defined in the Bill and ALA asks whether this would result in or is meant to reflect any actual difference in the definitions.

11. The ordinary dictionary meaning of the term “consign” means to deliver to someone’s custody. When reading the definition of “air transshipment cargo” in the Bill with the ordinary dictionary meaning of “consign”, we consider that there is no practical difference in the interpretation of the definition when compared with that in I&EO. We therefore see no need to define “consign” in the Bill.

(d) Proposed section 3A on Ordinance applies to Government

12. ALA notes that according to the Administration, the proposed section 3A is in line with the approach adopted in HCCO. However, she notes that the Lifts and Escalators Ordinance (Cap. 618) which was enacted in 2012 contains detailed provisions on the action to be taken by the Director of Electrical and Mechanical Services in case of suspected contravention of a provision.

13. HCCO was enacted with the objective to meet the requirements of the two Conventions in respect of non-pesticide hazardous chemicals, whereas the present Bill aims to meet the requirements of the same Conventions in respect of hazardous chemicals which are pesticides. We therefore consider it appropriate to make reference to HCCO and adopt the same approach in the Bill insofar as the protection of public officers from criminal and civil liabilities is concerned.

14. In the Bill, the proposed section 3A(2) states that “neither the Government nor a public officer acting in his or her official capacity is liable to be prosecuted for an offence under [the] Ordinance”. In the proposed section 19B(1), it is stated that “a public officer is not personally liable for an act done or omitted to be done by the public officer in good faith (a) in the exercise of a power or purported exercise of a power under [the] Ordinance; or (b) in the performance of a function or purported performance of a function under [the] Ordinance”. The proposed sections 3A(2) and 19B(1) are modeled on sections 4(2) and 51(1) of HCCO respectively.

15. As stated in footnote 11 of the LegCo Brief, the Administration will adopt the following administrative mechanism to ensure public officers’ compliance with the requirements of the Ordinance –

- (a) in the event that a department or a public officer is in breach of any requirement of the Ordinance, in line with established practice, the case will be promptly brought to the attention of a senior officer in the concerned department who will require the staff concerned to take immediate action to remedy the situation and will report to the Agriculture, Fisheries and Conservation Department (AFCD) on the breach and the action taken by the department and the staff (and report to Food and Health Bureau if the breach is committed by a staff from AFCD); and
- (b) if any non-compliance is due to failure or negligence on the part of a public officer in discharging official duties, the public officer concerned may be liable to disciplinary or other actions according to the applicable civil service rules and regulations or terms of employment.

We believe the above approach would be adequate in ensuring public officers’ compliance with the requirements of the Ordinance.

(e) Updating of other provisions

15. As explained in paragraph 2 above, the main purpose of the Bill is to meet the requirements of the two Conventions. We have taken the opportunity to improve certain provisions of the Ordinance that are necessary to bring the Ordinance up-to-date.

16. ALA notes that under HCCO, there are specific offence provisions on false or inaccurate information and liability of employers and she has asked why similar provisions have not been proposed in the Bill. In this regard, we would like to point out that the Ordinance was enacted in 1977 and has been generally effective in governing the safe and proper use of pesticides. So far, AFCD has not encountered any operational problem as a result of the absence of a specific offence provision on false or inaccurate information in the Ordinance. We therefore do not see a strong need to create a specific offence on the provision of false or inaccurate information in the Bill.

**Food and Health Bureau
Agriculture, Fisheries and Conservation Department
February 2013**