

## **Bills Committee on Pesticides (Amendment) Bill 2013**

### **Supplementary information requested by the Bills Committee at the meeting on 22 April 2013**

#### **Purpose**

At the meeting on 22 April 2013, the Bills Committee has invited the Administration to consider, by way of Committee Stage Amendments (CSAs), deleting the proposed new sections 3A<sup>1</sup> (Clause 5) and 19B<sup>2</sup> (Clause 18) in the Pesticides (Amendment) Bill 2013 (the Bill). This note sets out the Administration's response to the suggestion of the Bills Committee.

#### **Background**

2. The existing Pesticides Ordinance (Cap. 133) (the Ordinance) is silent on the applicability of the Ordinance to the Government. Section 66 of the Interpretation and General Clauses Ordinance (Cap. 1) provides that:

*“No Ordinance (whether enacted before, on or after 1 July 1997) shall in any manner whatsoever affect the right of or be binding on the State unless it is herein expressly provided or unless it appears by necessary implication that the State is bound thereby.”*

Accordingly, the Ordinance as it currently stands does not apply to the Government unless the court is satisfied that the Ordinance is binding on the Government by “necessary implication”<sup>3</sup>.

---

<sup>1</sup> The proposed new section 3A provides that the Pesticides Ordinance applies to the Government. 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.

<sup>2</sup> The proposed new section 19B provides that public officers are not personally liable for any act done or omitted to be done in exercising their powers or performing functions under the Ordinance if they act in good faith.

<sup>3</sup> The “necessary implication” test is laid down in the Privy Council's case *Province of Bombay v Bombay Municipal Corporation* [1974] AC58. In the absence of an express provision, the Government is bound by necessary implication only “if it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the [Government] were bound.”

3. In preparing the Bill, we have reviewed whether the Ordinance as amended by the Bill should expressly apply to the Government. As Government agencies in general should be governed by the same level of standards as those applicable to private operators in the distribution and availability of pesticides, we have proposed that the Ordinance as amended by the Bill should expressly apply to the Government. In addition, we have proposed to expressly exempt the Government and public officers discharging official duties from any criminal liability, given that the proposed offences under the Ordinance are regulatory in nature and there will be an administrative mechanism to ensure public officers' compliance with the statutory requirements. We have also proposed to expressly exempt public officers acting in good faith in the exercise of a power or performance of a function under the Ordinance from any civil liability. The proposed exemption is limited in scope in that it only exempts acts done in good faith and it expressly preserves the Government's civil liability for acts or omissions of public officers. These are reflected in Clauses 5 (proposed section 3A) and 18 (proposed section 19B) of the Bill respectively.

4. The above approach is in line with that adopted by the Hazardous Chemicals Control Ordinance (Cap. 595), which was enacted in 2007 to regulate non-pesticide hazardous chemicals to meet the requirements of the Stockholm Convention on Persistent Organic Pollutants and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (the two Conventions).

### **Views of the Bills Committee**

5. During the clause-by-clause scrutiny of the Bill at the Bills Committee meeting on 22 April 2013, Members of the Bills Committee expressed concern on the proposed exemption of the Government and public officers from the criminal and civil liabilities. Members were aware of the Administration's long-held policy that the Government and public officers should not be subject to prosecution and of the previous debate at LegCo Panel on Administration of Justice and Legal Services on this issue. During the discussion, Members took note that the Ordinance, as it currently stands, does not expressly apply to the Government. Accordingly, by virtue of section 66 of Cap. 1, the Ordinance does not apply to the Government unless the court is satisfied that the Ordinance is binding on the Government by "necessary implication". If the Ordinance does not expressly apply to the Government, there is no corresponding

need to have an express provision exempting the Government and public officers from criminal liability under the Ordinance. Members also took note that the Ordinance had been in force since 1977 and had been operating well despite the absence of an express provision that binds the Government.

6. After some discussions, Members of the Bills Committee considered that since the Bill was introduced to meet the requirements of the two Conventions, the focus of the amendments should not be on the applicability of the Ordinance to the Government and public officers. On that basis, the Bills Committee requested the Administration to delete the proposed sections 3A and 19B by way of CSAs. The suggestion of the Bills Committee, in effect, is to maintain the status quo, i.e. by virtue of section 66 of Cap. 1, the Ordinance does not apply to the Government unless the court is satisfied that the Ordinance is binding on the Government by “necessary implication”.

### **Response of the Administration**

7. The Administration has carefully considered the suggestion of the Bills Committee. We share Members’ views that the main objective of the Bill is to implement the requirements of the two Conventions and the opportunity has been taken to update certain provisions of the Ordinance related to regulation of pesticides. On this basis, we are prepared to consider the Bills Committee’s suggestion of deleting the proposed sections 3A and 19B by way of CSAs.

8. We note that the suggestion of the Bills Committee is essentially to maintain the status quo, i.e. by virtue of section 66 of Cap. 1, the Ordinance does not apply to the Government unless the court is satisfied that the Ordinance is binding on the Government by “necessary implication”. We are satisfied that maintaining the status quo would not affect the effectiveness of the Ordinance as amended by Bill (if enacted) in ensuring compliance with the requirements of the two Conventions and in updating certain provisions of the Ordinance related to regulation of pesticides.

9. We are also satisfied that maintaining the status quo would not affect the safe and proper use of pesticides. This is because the Ordinance has been in force since 1977 and has been operating well. In addition, the Administration will adopt the following administrative measures to ensure strict compliance with the statutory requirements of the Ordinance –

- (a) an internal circular to bureaux and departments will be issued to remind them about the statutory requirements of the Ordinance once the Bill is enacted;
- (b) 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 of AFCD); and
- (c) 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 rules and regulations or terms of employment.

10. We therefore consider the suggestion of the Bills Committee acceptable from our policy point of view.

### **Way forward**

11. On the basis that the suggestion of the Bills Committee will be reflected in its report to the House Committee, the Administration is prepared to remove the proposed sections 3A and 19B from the Bill by way of CSAs.

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