

(English translation)

Annex

**Bills Committee on Pesticides (Amendment) Bill 2013
Supplementary information requested by the Bills Committee
at the meeting on 9 May 2013**

Purpose

At its meeting on 9 May 2013, the Bills Committee had a focused discussion on Clause 5 (the proposed new section 3A¹) and Clause 18 (the proposed new section 19B²) of the Pesticides (Amendment) Bill 2013 (the Bill). The Bills Committee agreed that the Pesticides Ordinance (Cap. 133) (the Ordinance) as amended by the Bill should expressly apply to the Government, and requested the Administration to further elaborate on the justifications for incorporating sections 3A(2) and 19B. The Bills Committee also suggested the Administration to consider amending section 3A with reference to section 4 of the Lifts and Escalators Ordinance (Cap. 618) (LEO). This paper sets out the Administration's response to the issues raised.

Background

2. Under the existing Ordinance, there is no provision stating that the Ordinance applies 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

¹ Subsection (1) of the proposed new section 3A provides that the Pesticides Ordinance applies to the Government. Subsection (2) of the section provides 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. Subsection (3) provides that no prescribed fee is payable by the Government.

² Subsection (1) of the proposed new section 19B provides that a public officer is not personally liable for an act done or omitted to be done by the public officer in good faith in the exercise of a power or in the performance of a function under the Ordinance. Subsection (2) provides that subsection (1) does not affect the liability of the Government for the act or omission.

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”³.

3. In preparing the Bill, the Administration has 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 parallel, as the 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 proposed to expressly exempt the Government and public officers discharging official duties from any criminal liability. We have also proposed to expressly exempt public officers from personal liability for any act done or omitted to be done by the public officer in good faith in the exercise of a power or in the performance of a function under the Ordinance. The proposed exemption is limited in scope in that it only applies to any act done or omitted to be done by the public officer in good faith and the provision expressly preserves the Government’s civil liability for acts or omissions of public officers. The above proposals are reflected in the proposed new sections 3A and 19B respectively.

4. The above approach is in line with that adopted in the Hazardous Chemicals Control Ordinance (Cap. 595) (HCCO), which was enacted in 2007 to regulate non-pesticide hazardous chemicals to meet the requirements of the Stockholm Convention on Persistent Organic

³ 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.”

Pollutants and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (the two Conventions).

Criminal Liability of the Government and Public Officers

5. The offence provisions of the Ordinance are set out in section 17 of the Ordinance. These include contravention of the requirements for applying a licence or permit under sections 7 and 8, contravention of any conditions of a licence or permit by the licence or permit holder, failure to comply with a direction given by the Director of Agriculture, Fisheries and Conservation (DAFC), and obstruction of an enforcement officer in the exercise of any power under the Ordinance. The highest penalty level among the offence provisions upon conviction is a fine of \$50,000 and imprisonment for one year. The offences in the Ordinance are generally regulatory in nature, and the provisions are directed to ensure a certain standard of conduct and care of the concerned people to prevent future harm.

6. Our policy intention is that the Government and public officers in carrying out duties in the service of the Government should not be held criminally liable for any offence under the Ordinance. This approach in handling the contravention of regulatory provisions by government departments or public officers is in line with that adopted in most other common law jurisdictions. According to the findings of a study conducted by the Government in 2007 on the legislation of other common law jurisdictions overseas, most of the jurisdictions studied have retained the concept of not imposing any criminal liability on the Government and public officers.

7. In respect of the proposed exemption of the Government from criminal liability, the Government is different from general commercial entities in that the Government does not have commercial incentive for not complying with the statutory requirements of the Ordinance. Besides, the enforcement of criminal offence provisions on the Government through prosecution in court would raise question of efficacy because –

- (a) the Government as the law enforcer of the Ordinance, if being a regulated entity concurrently, will have a dual role which is self-conflicting;
- (b) the Government is not an entity and cannot be imprisoned, and any fine imposed on the Government would come from the public coffer; and
- (c) it involves the legal policy as to whether one government department should prosecute another government department.

8. Based on the above reasons, we have proposed in the Bill that the Government is not liable to be prosecuted for an offence under the Ordinance.

9. In respect of public officers in the conduct of government duties, we propose that they should not be held criminally liable for offences under the Ordinance. Public officers differ from employees of the general commercial entities in that they do not have commercial incentive or pressure from the employer for not complying with the requirements of the Ordinance in performing their duties. Moreover, the offence provisions in the Ordinance are mainly related to the requirements for applying licence or permit under sections 7 and 8 of the Ordinance, contravention of any of the conditions of the licence or permit by its holder, as well as failure to comply with a direction given by DAFC, etc. As government departments will put in place internal procedural guidelines and supervisory mechanism to ensure that officers follow the guidelines when performing their duties, we believe the exemption of public officers from criminal liability in relation to these offence provisions will not affect the operation of the Ordinance. As for the offence provision concerning obstruction of an enforcement officer in the exercise of any power under the Ordinance, the Government has established internal mechanism to ensure that the departments concerned will cooperate with the enforcement department, and hence enforcement of the Ordinance will not be affected.

10. 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 will be issued to bureaux and departments to remind them about the statutory requirements of the Ordinance once the Bill is passed;
- (b) in the event that a department or public officer is in breach of any requirement of the Ordinance, the case will be promptly brought to the attention of a senior officer in the department concerned in line with the established practice, 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 the Food and Health Bureau if the breach is committed by a staff member 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 officer may be liable to disciplinary or other actions according to the applicable rules and regulations or terms of employment.

Civil Liability of the Government and Public Officers

11. The proposed new section 19B(1) in the Bill provides that a public officer is not personally liable for an act done or omitted to be done by the public officer in good faith in the exercise of a power or in the performance of a function under the Ordinance. The proposed exemption is limited in scope in that it only exempts acts done or omitted to be done by a public officer in good faith.

12. On the other hand, section 19B(2) expressly preserves the Government's civil liability for acts or omissions of public officers. As such, the aforesaid proposed exemption for public officers will not affect the right of any person who intends to lodge a civil claim.

Consistency with HCCO

13. The proposed sections 3A and 19B are basically in line with the relevant provisions (i.e. sections 4 and 51) of HCCO enacted for the purpose of implementing the two Conventions.

14. In fact, when scrutinising the Hazardous Chemicals Control Bill, the relevant Bills Committee was of the view that if the policy intention of the Government was to exempt the Government and public officers from criminal and civil liability, a legal provision to such effect should be expressly included in the legislation. Subsequently, the Administration accepted the views of that Bills Committee and inserted a provision on the exemption by way of Committee Stage Amendments (CSAs) in the resumption of Second Reading debate on that Bill. In preparing the current Bill, we have made reference to the related discussions and modeled on the relevant provisions of HCCO in drafting the exemption provisions in the Bill.

Discussion of the Bills Committee and the Administration's Response

15. At its meeting held on 9 May 2013, the Bills Committee had a focused discussion on sections 3A and 19B. The Bills Committee supported the Administration's proposal that the Ordinance as amended by the Bill should expressly apply to the Government. As for the proposal on the exemption of the Government and public officers from criminal and civil liability, some Members noted that the proposed sections 3A(2) and 19B were basically in line with the relevant provisions of HCCO. As the objection of both HCCO and this Ordinance is to implement the requirements of the two Conventions, individual Members considered it reasonable for the Administration to adopt the same approach in handling the issue under this Ordinance. However, some other Members had different opinions and were of the view that legislation should keep pace with the times and should be considered on a case-by-case basis. During the course of discussion, Members noted that the LEO passed by the Legislative Council in mid-2012 expressly applies to the Government, and section 4 of LEO also stipulates that the Government is not liable to be

prosecuted for an offence under that Ordinance. That section also provides for a statutory reporting mechanism in the event of a contravention of a provision of that Ordinance by the Government. The Bills Committee suggested the Administration to consider amending the proposed section 3A with reference to section 4 of LEO.

16. The Administration has carefully considered the suggestion of the Bills Committee. Based on our understanding, Members have no objection to retaining the exemption of the Government from criminal liability under the Ordinance (i.e. paragraphs 7 to 8 above).

17. As for the proposed exemption of public officers discharging duties from criminal liability under the Ordinance, the Administration has elaborated the justifications in detail as set out in paragraphs 9 to 10 above. The Administration still cannot see any reason why public officers will not comply with the requirements of the Ordinance. Nonetheless, having considered that the Ordinance is aimed to ensure the proper and safe use of pesticides and to fully meet the requirements of the two Conventions to protect public safety and the environment, and to demonstrate the Government's determination in ensuring the strict compliance with the requirements of the Ordinance, the Administration agrees in principle to remove from the Bill the proposed exemption of public officers discharging duties from any criminal liability. The details are still being considered.

18. We will also make reference to subsections (3) to (7) of section 4 of LEO and provide for a reporting mechanism in the Ordinance in the event of a contravention of the provisions of the Ordinance by government departments.

19. Members have no objection to the proposed section 3A(3), which provides that no prescribed fee is payable by the Government. Accordingly, the provision will be retained and no further amendment is needed.

20. As for the proposed new section 19B, according to our understanding, some Members were concerned as to whether the proposed exemption would affect the right of any person who intends to lodge a civil

claim. As set out in paragraph 12 above, section 19B(2) expressly preserves the Government's civil liability for acts done or omitted to be done by a public officer in good faith. As such, the proposed section 19B will not have implications for the right of any person who intends to lodge a civil claim. If the civil claim lodged by the claimant is accepted by the court, the Government generally will bear the relevant civil liability in accordance with the court decision, including compensation to the claimant. The effect of section 19B(1) is to provide that a public officer is not personally liable for an act done or omitted to be done by the public officer in good faith.

21. The proposed section 19B is basically identical to section 51 of HCCO and section 127 of LEO in providing appropriate protection for claimants and public officers. We therefore propose to retain this provision and no amendment will be suggested.

Way Forward

22. Subject to the support of the Bills Committee, the Administration will, proceed to prepare the relevant CSAs along the lines as set out in paragraphs 16 to 21 above. We will submit the draft CSAs to the Bills Committee for scrutiny later.

Food and Health Bureau
Agriculture, Fisheries and Conservation Department
June 2013