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LEGAL SERVICE DIVISION
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By Fax (2136 3281)
14 May 2013

Mr Philip CHAN, JP
Deputy Secretary for Food and Health (Food)
Food and Health Bureau
Food Branch
17/F, East Wing, Central Government Offices
2 Tim Mei Avenue, Tamar
Hong Kong

Dear Mr CHAN,

Pesticides (Amendment) Bill 2013

Subsequent to the meeting of the Bills Committee on 9 May 2013 and further to members' requests for clarification on various matters, I would be grateful if you would assist members on the following legal and drafting issues –

Public officers' exemption from personal liability

Scope of personal liability

The proposed section 3A(2) of the Bill seeks to exempt public officers acting in official capacity from criminal liability. In comparison, under section 4(2)(a) of the Lifts and Escalators Ordinance (Cap. 618) (LEO), public officers do not appear to be exempted from criminal liability.

However, section 127(1) of LEO provides that –

"A public officer, or a person acting under the direction of a public officer, does not incur any personal liability for anything done or omitted to be done by the officer or the person in good faith in the execution or purported execution of this Ordinance."

Would the Administration please clarify whether section 127(1) of LEO, in referring merely to "personal liability", should cover both the civil and criminal liability of a public officer in the specified circumstances.

Possible discrepancies between sections 3A(2) and 19B(1)

Similar to section 127(1) of LEO, the proposed section 19B(1) of the Bill also seeks to exempt the "personal liability" of a public officer in the specified circumstances. It would seem that if section 127(1) of LEO covers both the civil and criminal liability of a public officer, then the proposed section 19B(1) should also cover both the civil and criminal liability of a public officer.

If so, it appears that –

- (a) the proposed section 19B(1) may duplicate with the exemption from criminal liability in the proposed section 3A(2) insofar as it relates to a public officer;
- (b) under the proposed section 3A(2), a public officer acting in official capacity is exempted from criminal liability. However, the proposed section 19B(1) not only seeks to impose an additional requirement (i.e. the act to be done in good faith) so as to invoke the exemption, it also seeks to extend the proposed section 3A(2) exemption (which is limited to acting in official capacity) to "an act ... omitted to be done".

In view of the apparent discrepancies in subparagraph (b) above, please clarify whether a question may arise as to which of the two provisions should prevail in determining the proposed public officer's exemption from criminal liability if there is any conflict in application.

"Good faith" under the Bill and "honest belief" under HCCO

Further, in providing for an exemption for a public officer from "civil liability" under section 51(1) of the Hazardous Chemicals Control Ordinance (Cap. 595) (HCCO), the test adopted is whether the public officer did or omitted to do the act "in the honest belief" that the act or omission was required or authorized by or under this Ordinance", rather than "in good faith". Given the commonality of HCCO and the Bill, please clarify if there are any policy considerations that could explain the different formulation of the respective tests.

Reference to the Conventions

Under the proposed section 18A of the Bill, the Director may exercise his powers under the Pesticides Ordinance (Cap. 133) for the purpose of implementing "the requirements of the Rotterdam Convention or the Stockholm Convention". As the requirements of the two Conventions have already been localized in the Pesticide Ordinance (to be amended by the Bill), please clarify the need for referring to the Conventions' requirements, rather than those requirements as incorporated into the Pesticides Ordinance.

I should be grateful if you would let me have the Administration's reply in both languages by 31 May 2013.

Yours sincerely,



(Miss Carrie WONG)
Assistant Legal Adviser

c.c. Clerk to Bills Committee