

Annex

**Administration's response to issues raised by
Assistant Legal Adviser on Pesticides (Amendment) Bill 2013
in her letter dated 14 May 2013**

In her letter dated 14 May 2013, the Assistant Legal Adviser (ALA) raised a number of legal and drafting issues in relation to the Pesticides (Amendment) Bill 2103 (the Bill). This note sets out the Administration's response to the issues raised.

Public officers' exemption from personal liability

Scope of personal liability

2. ALA notes that the proposed section 3A(2)¹ in the Bill seeks to exempt public officers acting in the official capacity from criminal liability. In comparison, under section 4(2)(a) of the Lifts and Escalators Ordinance² (Cap. 618) (LEO), public officers do not appear to be exempted from criminal liability. She also notes that 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 acting in good faith in the execution of [the LEO]*". She asks the Administration to 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 specified circumstances.

3. Our legal advice has confirmed that the term "personal liability" in section 127(1) of LEO should not and is not intended by the Administration to cover criminal liability.

¹ Section 3(A)2 in the Bill reads: "*Neither the Government nor a public officer acting in his or her official capacity is liable to be prosecuted for an offence under [the Pesticides] Ordinance*".

² Section 4(2)(a) of LEO reads: "*Despite subsection (1), the Government is not liable to be prosecuted for an offence under this Ordinance*". Subsection (1) provides that the Ordinance applies to the Government.

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

4. On the assumption that the reference to “personal liability” in section 127(1) of LEO covers both the civil and criminal liability of a public officer in the specified circumstances, ALA has asked the Administration to clarify whether the proposed section 19B(1)³ in the Bill, which seeks to exempt the “personal liability” of a public officer in the specified circumstances, would cover both the civil and criminal liability of a public officer.

5. Likewise, section 19B(1) in the Bill should not and is not intended to deal with criminal liability. The regime is designed to have criminal liability separately and distinctly dealt with by section 3A(2). There is therefore no overlapping or conflict between the two sections.

“Good faith” under the Bill and “honest belief” under HCCO

6. ALA notes that section 51(1) of the Hazardous Chemicals Control Ordinance (Cap. 595) (HCCO) has provided that a public officer is not personally liable for any civil liability in respect of any act done or omitted to be done by the officer “in the honest belief” that the act or omission is required or authorised by or under HCCO. The test adopted for qualifying for the protection from civil liability under section 19B(1) in the Bill is “in good faith”. She has requested the Administration to clarify the policy consideration behind the different formulation adopted.

7. The formulation of the proposed section 19B(1) follows the prevailing drafting practice and style. The notion of “good faith” is defined in the Black’s Law Dictionary as a state of mind consisting (i) honesty in belief or purpose, (ii) faithfulness to one’s duty or obligation, (iii) observance of reasonable commercial standards of fair dealing in a given trade or business, or (iv) absence of intent to defraud or to seek unconscionable advantage. The phrase “in good faith”, which includes the concept of “honesty in belief or purpose”, is also commonly used in other legislation in Hong Kong and there are many court cases concerning “good faith”. We consider that the term has aptly reflected our policy intention.

³ Section 19B(1) in the Bill reads: “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 this Ordinance; or (b) in the performance of a function or purported performance of a function under this Ordinance”.

Reference to the Conventions

8. Under the proposed section 18A in the Bill, the Director of Agriculture, Fisheries and Conservation (DAFC) may exercise his powers under the Pesticides Ordinance for the purpose of implementing the requirements of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (the Rotterdam Convention) or the Stockholm Convention on Persistent Organic Pollutants (the Stockholm Convention). ALA comments that as the requirements of the two Conventions have been incorporated into the Pesticides Ordinance as amended by the Bill, she asks the Administration to clarify the need for referring to the requirements of the two Conventions, rather than those requirements as incorporated into the Pesticides Ordinance.

9. Under the Pesticides Ordinance as amended by the Bill, DAFC is given a range of discretionary powers for the purpose of enforcing the Ordinance to ensure the safe and proper use of pesticides. These include, for example, the power to impose such conditions as DAFC may think fit on a licence (in respect of registered pesticides) or a permit (in respect of unregistered pesticides including those subject to the two Conventions), as well as the discretion to vary the conditions of a licence or permit, to cancel or suspend a licence and to cancel a permit. As we have explained in paragraph 9 of the Administration's response to the questions previously raised by ALA (LC Paper No. CB(2)689/12-13(04)), the proposed section 18A is intended to put it beyond doubt that DAFC may exercise his powers under the Ordinance for the purpose of implementing the requirements of the two Conventions.

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