

Bills Committee on Pesticides (Amendment) Bill 2013

**Administration's Response to Issues Raised by the Bills Committee
and the Assistant Legal Adviser on 18 June 2013**

Purpose

At its meeting on 18 June 2013, the Bills Committee scrutinized the draft Committee Stage Amendments (CSAs) to the Pesticides (Amendment) Bill 2013 (the Bill) proposed by the Administration. Among others, the Administration has proposed to amend section 7 and the proposed new section 8 of the Pesticides Ordinance (Cap. 133) (the Ordinance) to the effect that the licence and permit requirements as respectively provided in the two sections do not apply to persons engaged in and persons assisting them in carrying out the Ordinance.

2. After deliberation, Members of the Bills Committee generally reached broad consensus on the principle that public officers playing the regulatory role in carrying out the provisions of the Ordinance should not be subject to the licensing or permit requirement and on that basis, the Bills Committee requested the Administration to consider narrowing down the scope of coverage of the proposed provisions with more specificity. The Assistant Legal Adviser (ALA) followed up on the issues raised by the Bills Committee in her letter dated 18 June 2013.

3. This note sets out the Administration's response to the issues raised and the revised amendment proposals.

Background

4. Under Clause 5 of the Bill, a new section 3A has been proposed. The originally proposed section 3A provides that the Ordinance applies to the Government and 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. The Bills Committee had a detailed and focused discussion on this provision at its meeting on 9 May 2013. After

careful consideration of the views of the Bills Committee, the Administration has subsequently agreed to propose amendment to the proposed section 3A to the effect that the Ordinance applies to the Government and that only the Government will be exempted from any liability to be prosecuted for an offence under the Ordinance. In other words, public officers may be liable to be prosecuted for an offence under this Ordinance. Details of the Administration's response are set out in LC Paper No. CB(2)1262/12-12(01).

5. In the course of carrying out the provisions of the Ordinance, public officers of the Agriculture, Fisheries and Conservation Department (AFCD), the Government Laboratory (GL) and the Customs and Excise Department (C&ED) may need to import, sell or supply registered pesticides, or import, sell, supply, be in possession of, use or export scheduled pesticides or other unregistered pesticides. For example, for the purpose of administering the pesticide registration system under the Ordinance, AFCD officers may need to import certain registered or unregistered pesticides for testing and examination with the assistance of GL, supply the pesticides concerned to farmers for field trial, and export the pesticides to laboratories outside Hong Kong for testing. AFCD officers as inspectors appointed under the Ordinance and C&ED officers may have in their possession unregistered pesticides arising from seizure and they may be involved in the auction of any pesticides forfeited in a court proceeding. These acts themselves are subject to regulation under section 7¹ or the proposed new section 8² of the Ordinance depending on

¹ Section 7(1) of the Ordinance reads:
“Save under and in accordance with a licence, no person shall-
(a) *import into or cause to be imported into Hong Kong;*
(aa) *manufacture;*
(b) *sell or offer or expose for sale; or*
(c) *supply or offer to supply,*
any registered pesticide.”

² The proposed section 8(1) of the Ordinance as amended by the Bill reads:
“Subject to Part 2 of Schedule 2, except under and in accordance with a permit, a person must not-
(a) *import into or cause to be imported into Hong Kong;*
(b) *manufacture;*
(c) *sell or offer or expose for sale;*
(d) *supply or offer to supply;*
(e) *be in possession of; or*
(f) *use,*
a scheduled pesticide or any other unregistered pesticide.

the pesticide being a registered, scheduled or other unregistered pesticide. As the Ordinance as amended by the Bill will apply to the Government and the proposed section 3A will be amended to the effect that only the Government will be exempted from any liability to be prosecuted for an offence under the Ordinance, this gives rise to legal uncertainty as to whether officers in carrying out the Ordinance will be subject to the licence and permit requirements (as the case may be).

6. According to the legal advice of the Department of Justice, if the proposed exemption of public officers acting in their official capacity in the original section 3A is removed from the Bill, subject to the availability of evidence in individual cases, public officers of AFCD, GL and C&ED who are engaged in carrying out the Ordinance may be subject to prosecution under sections 7, 8 and 17³ or other relevant provisions of the Ordinance. We therefore need to propose suitable amendments to the Bill to make it clear that public officers who are engaged in carrying out the Ordinance are not subject to the licence or permit requirement (as the case may be).

7. Accordingly, the Administration has prepared the following draft CSAs to the Bill –

- (a) amending section 7 of the Ordinance by adding a new subsection (3) to read:

“Subsection (1) does not apply to a person who-

- (a) is engaged in carrying out this Ordinance; or*
- (b) is assisting persons in carrying out this Ordinance.”*

The proposed section 8(2) of the Ordinance as amended by the Bill reads:

“Subject to Part 2 of Schedule 2, except under and in accordance with a permit, a person must not export or cause to be exported a scheduled pesticide.”

³ Section 17(1) of the Ordinance reads:

“Any person who contravenes section 7 or 8 commits an offence and is liable on conviction to a fine of \$50000 and to imprisonment for 1 year.”

- (b) amending the proposed new section 8 of the Ordinance as amended by the Bill by adding a new subsection (8) to read:

“Subsections (1) and (2) do not apply to a person who-

- (a) is engaged in carrying out this Ordinance; or*
(b) is assisting persons in carrying out this Ordinance.

The above proposals in the form of draft CSAs were submitted to the Bills Committee for scrutiny and the Administration had verbally explained the need for such provisions at the meeting on 18 June 2013 along the line as set out above.

Response to the views of the Bills Committee and ALA

8. ALA has requested in her letter dated 18 June 2013 the Administration to explain the policy intention of the proposed sections 7(3) and 8(8), and to identify specifically the persons to which sections 7(1) and 8(1) will not apply. ALA has also asked the Administration to clarify whether possession of pesticides seized and detained under section 15 by an inspector or member of the Customs and Excise Service is subject to permit requirement under section 8 provided that the pesticides concerned are scheduled pesticides or other unregistered pesticides. ALA also suggested the Administration to consider whether section 7(2) or proposed section 8(3) could be adapted to provide exemption to public officers of AFCD and GL in respect of certain specific acts.

9. The policy intention of the proposed provisions and the legal advice that we have obtained have been set out in paragraphs 4-6 above. On whether possession of scheduled pesticides or other unregistered pesticides seized and detained under section 15 by an inspector or member of the Customs and Excise Service is subject to permit requirement under section 8, according to our legal advice, since the offence in section 8 of the Ordinance has not expressly mentioned the words “without lawful authority”, it appears that the “possession” of any scheduled pesticides or other unregistered pesticides seized and detained by public officers concerned may potentially be a breach of section 8. Our legal advice

also points out that depending on the circumstances of individual cases, an auction of forfeited or voluntarily surrendered pesticides can amount to a “sale” under sections 7 and 8 of the Ordinance. Based on the legal advice given to us, we are of the view that the proposed provisions are needed to make it clear that public officers who are engaged in carrying out the Ordinance are not subject to the licence or permit requirement (as the case may be).

10. Some Members had quoted the Dangerous Drugs Ordinance (Cap. 134) as an example and said that it would be absurd to conceive that a Police officer were to be prosecuted for the possession of dangerous drugs seized under lawful authority during an enforcement action. They queried the need to provide protection to public officers engaged in enforcing the Pesticides Ordinance who might be in possession of unregistered pesticides arising from seizure.

11. Our legal advice is that public officers engaged in enforcing the Ordinance who are in possession of unregistered pesticides arising from a seizure may be subject to section 8 of the Ordinance. There is no express provision in the Dangerous Drugs Ordinance providing that it applies to the Government and hence by virtue of section 66 of the Interpretation and General Clauses Ordinance (Cap. 1), it does not apply to the Government unless the court is satisfied that it is binding on the Government by “necessary implication”.

12. As regards ALA’s suggestion that the Administration may consider adapting section 7(2) or proposed section 8(3) to provide exemption to public officers of AFCD and GL in respect of certain specific acts, we are of the view that it would be more appropriate to separately deal with the arrangement for public officers in carrying out the Ordinance.

The revised amendment proposals

13. In view of the concern expressed by Members of the Bills Committee, the Administration has carefully reviewed the proposal and

considered how the proposed provisions should be narrowed down with more specificity. Our revised proposals are as follows:

(a) Appointment of “authorized officers”

Under the existing section 14 of the Ordinance, the Director of Agriculture, Fisheries and Conservation (DAFC) may appoint in writing any public officer to be an inspector⁴ for the purposes of the Ordinance. We propose that DAFC be empowered to appoint a public officer to be “an authorized officer”, which is intended to cover officers from AFCD and GL who are directly involved in the carrying out of the Ordinance such as importing, exporting or supplying pesticides (whether registered or unregistered pesticides) for testing and field trials as the circumstances require. At present, inspectors appointed by DAFC are AFCD officers serving under the Plant and Pesticides Regulatory Division and we envisage that they will be appointed as authorized officers in parallel. DAFC will also appoint officers from GL, Government Logistics Department or any other departments as the circumstances require as authorized officers.

(b) Public officers carrying out the Ordinance

We propose to narrow down the coverage of the proposed sections 7(3) and 8(8) specifically to an authorized officer or a member of the Customs and Excise Service (C&ES) who is –

- (i) exercising a power or purporting to exercise a power under the Ordinance or doing anything in connection with or incidental to the exercise or purported exercise of the power; or

⁴ Under the Ordinance, inspectors, as well as members of the Customs and Excise Service, are given the powers of entry, seizure and detention of any articles etc under section 15 and the proposed new section 15A.

- (ii) performing a function or purporting to perform a function under the Ordinance or doing anything in connection with or incidental to the performance or purported performance of the function.

Having regard to the concern of Members of the Bills Committee, we have decided, after careful review of our operational need, to delete the original suggestion of covering persons assisting in carrying out the Ordinance from the proposed provisions.

(c) Public officers exercising a power under other ordinances

As the Administration has explained at the meeting on 18 June 2013, public officers in exercising a power under certain ordinances⁵ may be engaged in the seizure of articles which may include pesticides (implying possession) and auction of forfeited articles. According to our legal advice, such activities may be subject to the licence or permit requirements under section 7 and proposed new section 8 under the Ordinance. We therefore see a need to provide in the Ordinance to the effect that sections 7(1) and 8(1) do not apply to such public officers engaged in exercising a power under the Import and Export Ordinance (Cap. 60), the Public Health and Municipal Services Ordinance (Cap. 132) and the Dangerous

⁵ For example, section 12 of the Dangerous Goods Ordinance (Cap. 295) provides public officers specified in that section with powers to seize, remove or detain anything (implying possession of such things which may include pesticides) with respect to which such public officers may have reasonable grounds for suspecting that any offence against Cap. 295 has been committed. Under section 18 of Cap. 295, a magistrate may make an order to forfeit to the Government any dangerous goods with respect of which any offence against Cap. 295 has been committed. Part V of the Import and Export Ordinance (Cap. 60) provides members of the Customs and Excise Service and authorized officers with powers of investigation including seizure and detention of prohibited articles (which may include pesticides) and sections 27, 28 and 30 of Cap. 60 provide for forfeiture of articles to the Government. Under section 86(1) of the Public Health and Municipal Services Ordinance (Cap. 132), authorized public officers may seize any equipment or commodity (which may include pesticides) from alleged hawker offenders and section 86D provides for the forfeiture of a commodity to the Government. Generally speaking, articles forfeited to the Government will become property of the Government and may be disposed of by the Government, including but not limited to by way of sale.

Goods Ordinance (Cap. 295) and any Ordinance other than the Pesticides Ordinance (Cap. 133).

The scope is confined to the exercise of a power or purporting to exercise a power by the public officers under the relevant ordinances or doing anything in connection with or incidental to the exercise or purported exercise of the power.

14. The above proposals are now reflected in the draft CSAs attached at the Appendix.

Two drafting suggestions by ALA

15. ALA has also provided two drafting suggestions in respect of the Chinese text of the proposed section 3A(4)(b) and in respect of items 7 and 8 of the proposed Schedule to the Pesticides Regulations (Cap. 133 sub. leg. A) (similar modification to items 13 and 14).

16. In respect of the Chinese text of the proposed section 3A(4)(b), we have in consultation with the Law Drafting Division carefully examined the original drafting and the alternative drafting helpfully suggested by ALA. We consider that the drafting currently adopted in the draft CSA aptly reflects the policy intention and therefore would not propose further changes to it.

17. In respect of item 7 of the proposed Schedule to the Pesticides Regulations, having regard to the comments of ALA, we would propose substituting item 7 as follows –

“For issue of a permit under regulation 7(1) for the purpose of importing or possessing a scheduled pesticide or any other unregistered pesticide only for re-export without re-packaging (including transshipment of a scheduled pesticide in Hong Kong).”

Advice sought

18. Subject to the support of the Bills Committee, the Administration will proceed to finalise the draft CSAs and resume Second Reading of the Bill before the end of the current legislative session.

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

Pesticides (Amendment) Bill 2013

Committee Stage

Amendments to be moved by the Secretary for Food and Health

<u>Clause</u>	<u>Amendment Proposed</u>
3(8)	<p>By adding in alphabetical order to the proposed definitions—</p> <p>“<i>authorized officer</i> (獲授權人員) means a public officer appointed to be an authorized officer under section 14;</p> <p><i>function</i> (職能) includes duty;”.</p>
5	<p>By deleting the proposed section 3A and substituting—</p> <p>“3A. Ordinance applies to Government etc.</p> <ol style="list-style-type: none">(1) This Ordinance applies to the Government.(2) Despite subsection (1), the Government—<ol style="list-style-type: none">(a) is not liable to be prosecuted for an offence under this Ordinance; and(b) is not required to pay any prescribed fee.(3) If the Director has reasonable grounds to believe that there has been or is a contravention by the Government of this Ordinance, the Director must report the matter to the Secretary for Food and Health.(4) The report must contain the advice of the Director on—<ol style="list-style-type: none">(a) whether the contravention has been terminated; and(b) if the contravention has been terminated, whether it has been terminated to the Director’s satisfaction.(5) On receiving the report from the Director, the Secretary for Food and Health must enquire into

the matter to which the report relates.

- (6) If the enquiry shows that there has been a contravention referred to in subsection (3) and the contravention is likely to be repeated, the Secretary for Food and Health must take the best practicable steps to avoid the recurrence of a like contravention.
- (7) If the enquiry shows that there is a contravention referred to in subsection (3) and the contravention is continuing, the Secretary for Food and Health must take the best practicable steps to stop the contravention.”.

New

By adding—

“7A. Section 7 amended (control of registered pesticides)

After section 7(2)—

Add

- “(3) Subsection (1) does not apply to an authorized officer or a member of the Customs and Excise Service who is—
 - (a) exercising a power or purporting to exercise a power under this Ordinance or doing anything in connection with or incidental to the exercise or purported exercise of the power; or
 - (b) performing a function or purporting to perform a function under this Ordinance or doing anything in connection with or incidental to the performance or purported performance of the function.
- (4) Subsection (1) does not apply to a public officer who is—
 - (a) exercising a power or purporting to exercise a power under—
 - (i) the Import and Export

- Ordinance (Cap. 60);
- (ii) the Public Health and Municipal Services Ordinance (Cap. 132);
- (iii) the Dangerous Goods Ordinance (Cap. 295); or
- (iv) any Ordinance other than this Ordinance; or
- (b) doing anything in connection with or incidental to the exercise or purported exercise of the power.”.”.

8

In the proposed section 8, by adding—

- “(8) Subsections (1) and (2) do not apply to an authorized officer or a member of the Customs and Excise Service who is—
 - (a) exercising a power or purporting to exercise a power under this Ordinance or doing anything in connection with or incidental to the exercise or purported exercise of the power; or
 - (b) performing a function or purporting to perform a function under this Ordinance or doing anything in connection with or incidental to the performance or purported performance of the function.
- (9) Subsection (1) does not apply to a public officer who is—
 - (a) exercising a power or purporting to exercise a power under—
 - (i) the Import and Export Ordinance (Cap. 60);
 - (ii) the Public Health and Municipal Services Ordinance (Cap. 132);
 - (iii) the Dangerous Goods Ordinance (Cap. 295); or
 - (iv) any Ordinance other than this Ordinance;

or

- (b) doing anything in connection with or incidental to the exercise or purported exercise of the power.”.

New

By adding—

“10A. Section 14 substituted

Section 14—

Repeal the section

Substitute

“14. Appointment of inspectors and authorized officers

The Director may appoint in writing a public officer to be an inspector or authorized officer (or both) for the purposes of this Ordinance.”.

12

In the proposed section 15A, in the heading, by deleting **“for routine inspection”** and substituting **“without warrant”**.

12

In the proposed section 15A(3)(c), in the Chinese text, by adding “及” after the semicolon.

14

In the proposed section 16A(1)(a), by deleting “section 5(3)” and substituting “section 5(3)(b)”.

14

In the proposed section 16A(1)(d), by deleting “section 9(2)” and substituting “section 9(2)(b)”.

18

In the proposed section 19A(1)(a), in the English text, by deleting “CAS” and substituting “Chemical Abstracts Service (CAS)”.

18 By deleting the proposed section 19B(3).

20 In the proposed Schedule 2, in Part 1, by adding—

“4A. Azinphos-methyl 86-50-0”.

25(1) By deleting the proposed item 7 and substituting—

“7. For issue of a permit under regulation 7(1) for the purpose of importing or possessing a scheduled pesticide or any other unregistered pesticide only for re-export without re-packaging (including transshipment of a scheduled pesticide in Hong Kong) 700”.

25(2) In the proposed item 8, by deleting paragraph (a) and substituting—

“(a) for any purposes not specified in item 7; or”.

25(3) By deleting the proposed item 13 and substituting—

“13. For extension of a permit under regulation 7(3) for the purpose of importing or possessing a scheduled pesticide or any other unregistered pesticide only for re-export without re-packaging (including transshipment of a scheduled pesticide in Hong Kong)..... 395”.

25(4) In the proposed item 14, by deleting paragraph (a) and substituting—

“(a) for any purposes not specified in item 13; or”.

26 In the proposed item 73, in paragraph (a), by deleting “section 5(3)” and substituting “section 5(3)(b)”.

26 In the proposed item 73, in paragraph (d), by deleting “section 9(2)” and substituting “section 9(2)(b)”.