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Report of the Bills Committee on Pesticides (Amendment) Bill 2013

Purpose

This paper reports on the deliberations of the Bills Committee on the Pesticides (Amendment) Bill 2013 ("the Bill").

Background

2. The Stockholm Convention on Persistent Organic Pollutants ("the Stockholm Convention") and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade ("the Rotterdam Convention") (referred collectively as "the two Conventions") are international treaties aimed at protecting human health and the environment from persistent organic pollutants and hazardous chemicals, including pesticides and other industrial chemicals. The People's Republic of China is a signatory to the two Conventions. The Central People's Government ("CPG") has applied the Stockholm Convention and the Rotterdam Convention to the Hong Kong Special Administrative Region ("HKSAR") since 11 November 2004 and 26 August 2008 respectively. The Hazardous Chemicals Control Ordinance (Cap. 595) ("HCCO") was enacted in 2007 to comply with the requirements of the two Conventions in respect of non-pesticide hazardous chemicals.

3. At present, the import, manufacture, sale and supply of pesticides is regulated under the Pesticides Ordinance (Cap. 133) ("the Ordinance"). The Director of Agriculture, Fisheries and Conservation ("DAFC") is obliged to maintain a register of pesticides. Section 7(1) of the Ordinance provides that a person must not import, manufacture, sell or supply

registered pesticides except under a licence issued by DAFC. For pesticides that are not listed on the register ("unregistered pesticides"), section 8(1) of the Ordinance prohibits their import, manufacture, sale, supply or possession except under a permit issued by DAFC. Pesticides in transit or being transhipped are exempted from the requirements of the Ordinance. Separately, under the Import and Export Ordinance (Cap. 60), each shipment of pesticides entering or leaving HKSAR is required to be covered by an import or export licence, except if it is in transit or it is an air transshipment cargo.

The Bill

4. The Bill seeks to amend the Ordinance and its subsidiary legislation to -

- (a) implement the requirements of the two Conventions;
- (b) apply the Ordinance to the Government of HKSAR;
- (c) protect public officers from liability while exercising powers and performing functions under the Ordinance;
- (d) rationalize the powers of entry for inspection;
- (e) provide that appeals against certain decisions of DAFC under the Ordinance be made to the Administrative Appeals Board instead of the Chief Executive;
- (f) remove the ribbing requirement of pesticides containers; and
- (g) make related, consequential and miscellaneous amendments.

The Bills Committee

5. At the House Committee meeting on 8 February 2013, Members agreed to form a Bills Committee to study the Bill. Under the chairmanship of Hon SIN Chung-kai, the Bills Committee has held eight meetings with the Administration and received views from the public at one of those meetings. The membership list of the Bills Committee is in **Appendix I**. A list of the deputations and individuals who have submitted views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

Regulatory regime on pesticides

Pesticides covered under the Bill

6. Some members have expressed concern about the health hazard posed by some commonly used pesticides such as the herbicide paraquat dichloride (also known as Gramoxone) and urged the Administration to step up their regulation. They have also sought information from the Administration on the reasons for not including the regulation of paraquat dichloride under the Bill and whether other commonly used pesticides were covered under the Bill.

7. The Administration has explained that Hong Kong has in place a comprehensive regulatory regime on pesticides. All pesticides are subject to regulation under the Ordinance by a system of registration and the issuance of licence or permit. All pesticides intended for sale in Hong Kong must be registered with DAFC. In practice, the Agriculture, Fisheries and Conservation Department ("AFCD") would only register pesticides categorized as slightly or moderately hazardous by the World Health Organization ("WHO"). AFCD would also impose supply and retail sale restrictions on the formulation and concentration of such pesticides. Pesticides categorized as extremely hazardous by WHO are not allowed to be registered. A person must not import, manufacture, sell or supply registered pesticides except under a licence issued by DAFC. For unregistered pesticides, the Ordinance prohibits the import, manufacture, sale, possession and supply of such pesticides, except under a permit issued by DAFC. Permits are issued for specific pesticides, and are valid for an initial six-month period which can be renewed on a six-monthly basis. A permit holder is required to demonstrate competence in storing, handling and using the pesticide concerned. At present, all pesticides listed under the two Conventions are unregistered pesticides in Hong Kong and are already subject to permit control under the Ordinance. The Ordinance, however, falls short of regulating the export or use of Convention-regulated pesticides as required by the two Conventions. Hence the Bill is introduced to amend the Ordinance so as to comply with the requirements of the two Conventions in this regard.

Review of registered pesticides

8. As regards members' concern about possible health risks to the public posed by the use of paraquat dichloride, which is currently a registered pesticide in Hong Kong, the Administration has advised that AFCD regularly reviews all registered pesticides, taking into account their impact posed to the environment and human beings and in accordance with the international practices and latest development. As part of its ongoing efforts to review registered pesticides, AFCD has recently reviewed the conditions for registering paraquat dichloride and diazinon. Taking into account the public concern about possible adverse impact of these two pesticides to the environment and human beings, AFCD is planning to phase out their registration. Given the frequent use of both pesticides, AFCD is formulating a plan, including liaison with the relevant stakeholders and identification of suitable replacement pesticides, to prepare for the removal of these two pesticides from the register by 2014.

9. Some members have pointed out that stakeholders, including farmers as well as importers and retailers of pesticides, are concerned about the efficacy and costs of the replacement pesticides for diazinon. They have urged the Administration to work closely with the stakeholders in identifying and promoting the use of suitable replacement pesticides. According to the Administration, the results of the experiments conducted by AFCD in 2012 have revealed that several of the tested pesticides, namely carbaryl, chlorpyrifos and malathion, have demonstrated control efficacy against the target pest comparable to diazinon and are at similar level of production cost. In the coming year, AFCD would step up promotion of the use of these alternative pesticides and introduce the concept of integrated pest management to farmers and the pest control industry through workshops and seminars.

10. Members have sought information from the Administration on pesticides that are banned in other jurisdictions, including Australia, Canada, New Zealand, the United States ("US") and the European Union ("EU"), but are sold, supplied or used in Hong Kong. According to the findings of the research conducted by the Administration, with the exception of EU, none of the pesticides that are registered in Hong Kong are banned pesticides in Australia, Canada, New Zealand and US. In the case of EU, a manufacturer's voluntary withdrawal of a pesticide's registration may also be considered to be a ban and the Administration does not have sufficient information to verify whether the pesticides banned in EU are for reasons of protecting human health or the environment. The Administration has undertaken to take into account the pesticides which are

banned in EU in the next round of review to be conducted by AFCD.

Measures to promote safe and proper use of pesticides

11. Members generally consider it necessary for the Administration to enhance its monitoring and control on the safe and proper use of pesticides by pest control practitioners and the public. Members note the concern of some members of the public who have given views to the Bills Committee about the use of pesticides in schools, parks and playgrounds and the health risks posed to young children. Hon Albert CHAN has pointed out that in some countries such as Canada, a two-tier regulatory system of pesticides is in place. In addition to legislative control at the national level, provincial/territorial jurisdictions may allow cities and towns to enact by-laws to set further conditions on the use of pesticides in residential and public spaces. Making reference to such overseas practice, Mr CHAN has suggested that consideration be given to adopting more stringent legislative control on the use of pesticides in residential areas, particularly in rural districts, with a view to enhancing protection to public health.

12. Members have made a number of suggestions to the Administration on measures to enhance safety in the use of pesticides, including standardizing the warning signs put up in public areas where pesticides have been applied to ensure that essential information such as the date/time of application, types of pesticides applied and contact number for further enquiry was included on the signage; making available appropriate leaflets on safe use of pesticides to members of the public; and making public on the Government website records of operations involving application of pesticides for better public scrutiny.

13. The Administration assures members that the current registration and licensing/permit system has been working effectively in ensuring safe and proper use of pesticides, as borne out by the fact that no major incident caused by improper storage or use of pesticides has occurred in the past. Nevertheless, in response to members' concern and suggestions, the Administration has advised that AFCD would discuss with the relevant government departments and other stakeholders to promote the safe and proper use of pesticides, particularly those that are related to the applications of pesticides, including improving the design, size and content of warning signs on the spot of pesticide application, as well as the location to place them. The enhanced safety measures, including

requirements on warning signage, would be incorporated into the respective Codes of Practice for the pest control industry, as well as the training syllabus of the relevant training bodies. As regards the suggestion of making public information on operations involving application of pesticides, the Administration has advised that given the potentially enormous amount of information involved and the difficulty in providing a precise description of the exact location where pesticides have been applied, the Administration considers it neither practicable nor cost-effective to collect such records and make them available for public inspection on the website.

14. On promotion and publicity, the Administration has undertaken to step up its efforts in promoting public awareness on the safe use of household pesticides, in particular for users in rural residential areas. Appropriate leaflets and promotional materials would be provided to pesticide licensees for free distribution to their customers. To facilitate reference by users or members of the public, AFCD would include in the promotional materials alternative chemical or common names which may be used for a given pesticide and provide advice on how to identify the various common names of a given pesticide properly. AFCD would also make additional efforts in checking the pesticide labels to ensure that adequate information has been incorporated and explore with the trade to see if the instructions and cautions on the labels could be highlighted and complemented by suitable pictograms.

15. Having regard to the concern about the safe use of pesticides in schools, the Administration has agreed to step up its promotional and publicity efforts targeted at schools, including publishing a set of educational leaflets on the safe and proper use of pesticides in schools, organizing promotional campaign to deliver the messages to the relevant parties, and organizing talks to schools and their service providers. AFCD would also continue its efforts in following up cases with users of pesticides (including schools, pest control agents, etc.) upon receipt of public complaints and enquiries.

Regulation of pesticide applicators and training for the trade

16. Some members have expressed the view that the Administration should introduce a scheme to regulate applicators of pesticides to ensure that they have acquired the necessary training and enhance the standard of the trade. They consider that the Administration should work out a timetable on introducing a licensing and registration scheme for the trade

after the enactment of the Bill. Members also express the view that pesticide applicators should be required to undertake continuous professional training to ensure that they have up-to-date knowledge on the safe and proper use of pesticides.

17. The Administration has explained that it conducted a public consultation on a package of legislative proposals to amend the Ordinance in 2007, which sought to comply with the requirements of the two Conventions and at the same time introduce a pesticide product registration system and a scheme to regulate applicators of pesticides. During the public consultation, there were concerns that the combined effects of the proposals might result in small pest control companies being driven out of business due to high operational costs and that a substantial number of existing pesticide applicators would fail to be registered as the training requirement might be too high. The proposal to regulate applicators of pesticides was therefore dropped in the light of the views received. Nevertheless, to ensure the safe and proper use of the pesticides, the Administration has made continuous efforts in assisting the trade to enhance their standard of using pesticides by drawing up Codes of Practice for the relevant sectors in collaboration with the trade and strengthening the training for pest control workers. AFCD has also been working with the relevant training bodies in devising suitable training syllabus for pesticide applicators. The percentage of pest control workers who have received training in recent years has increased from 10% in 2007 to around 80% in 2011. The Administration has undertaken to keep in view the need to step up regulation on pesticide applicators as appropriate in the light of the effectiveness of the measures in enhancing the standard of the industry and will consult the relevant Panel if necessary.

18. Some members have also suggested that Government departments should take the lead to impose specific conditions on the training requirement of their pest control workers as well as those engaged by their service providers, and the private sector should also be encouraged to do the same. This will ensure that the service providers would engage properly trained workers with the necessary knowledge on the use of pesticides.

19. The Administration has advised that Government departments,

including the Leisure and Cultural Services Department and the Food and Environmental Hygiene Department ("FEHD"), are the major users of pesticides. They are aware of the importance to ensure safe and proper use of pesticides. For instance, FEHD imposes specific conditions on the training requirement of pest control workers when the service providers are invited to bid for contracts to provide pest control services. The Administration would conduct a round of briefings for the relevant departments before the Amendment Bill comes into operation to update them of the regulatory requirements and related matters. Refreshers' briefing sessions would also be organized on a periodic basis to keep them up-to-date on the regulatory requirements and related matters on the safe and proper use of pesticides. In response to the views of members and deputations, the Administration has also advised that it would consider the feasibility of a study regarding the long-term impact of pesticides on the health of pesticide applicators in collaboration with the industry.

Regulation of pesticides derived from natural products

20. Members note that some organic farms in Hong Kong use and sell pesticides derived from natural products (such as garlic) and have sought clarification on whether such pesticides fall within the ambit of the Ordinance. As explained by the Administration, the term "pesticide" is defined in section 2 of the Ordinance and includes any substance or mixture of substances used or intended to be used for pest control purpose. Any substance, including substances with multiples uses, would fall within the ambit of the Ordinance if the substance concerned is used or intended to be used as a pesticide. Organic farms are required to apply for a licence/permit if they sell natural products which purport to be pesticides (for instance, if they bear labels or advertisements on their pesticidal property). Members are concerned that operators of organic farms may not be aware that pesticides derived from natural products are subject to regulation under the Ordinance and have requested the Administration to proactively provide relevant information to organic farms. Members also consider that the existing regulatory requirements for these pesticides may be too stringent. The Administration has agreed to keep in view the development of pesticides derived from natural products and to refine the regulation on such pesticides as appropriate in consultation with the trade.

Reference to the two Conventions

21. Under the proposed section 2(1), the term "Rotterdam Convention"

is defined as the Rotterdam Convention "adopted on 10 September 1998 as amended from time to time and as applied to Hong Kong"; and the term "Stockholm Convention" is defined as the Stockholm Convention "adopted on 22 May 2001 as amended from time to time and as applied to Hong Kong". Members note the concern raised by the legal adviser to the Bills Committee as to whether the use of the expression "as amended from time to time" in the proposed definitions would have the effect that any subsequent changes to the requirements of the two Conventions would affect the relevant provisions of the Ordinance without the need for corresponding legislative amendments.

22. As explained by the Administration, the expression "as amended from time to time" in the proposed two definitions is used to cater for any subsequent changes made to the two Conventions. If the changes are to apply to Hong Kong, they would have to be extended to Hong Kong by CPG in accordance with the Basic Law. To meet the requirements arising from any subsequent changes to the two Conventions as extended to Hong Kong, the Secretary for Food and Health ("SFH") will be empowered under the proposed section 19A of the Bill to amend the relevant schedule by notice published in the Gazette. The notice is a piece of subsidiary legislation subject to the negative vetting procedure of Legislative Council ("LegCo").

23. The Administration has also advised the Bills Committee that at the Conference of the Parties to the Rotterdam Convention held in Geneva on 10 May 2013, it was agreed that the pesticide "Azinphos-methyl" be added to Annex III to the Rotterdam Convention. The relevant resolution would take effect from 10 August 2013. As the change would also apply to Hong Kong, the Administration will move a Committee stage amendment ("CSA") to add "Azinphos-methyl" to Part I of Schedule 2 to the Bill so that the pesticide will be covered under the amended Ordinance, if enacted, when it comes into operation.

24. Under the proposed section 18A, DAFC may exercise his powers under the Pesticides Ordinance for the purpose of implementing the requirements of the two Conventions. As the requirements of the two Conventions have been localized in the Pesticides Ordinance (to be amended by the Bill), the legal adviser to the Bills Committee has sought clarification from the Administration on the need for referring to the requirements of the two Conventions, rather than those requirements as incorporated into the Pesticides Ordinance. The Administration has explained that 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. The scope of DAFC's powers under the Ordinance is clearly provided in the Ordinance and any changes to the scope of powers conferred to DAFC would be subject to approval by LegCo.

Application of the Ordinance to the Government

25. Members note that under the existing Ordinance, there is no provision stating that the Ordinance applies to the Government. By virtue of section 66¹ of the Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO"), an ordinance does not bind the Government unless there is an express provision to that effect or unless it appears by necessary implication that the ordinance is binding. 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".

26. The proposed section 3(1) of the Bill provides that the Ordinance as amended by the Bill is to apply to the Government. According to the Administration, it has proposed to extend the applicability of the Ordinance to the Government based on the consideration that 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. The Bills Committee supports the Administration's proposal that the Ordinance as amended by the Bill is to apply to the Government.

27. Members have enquired about the applicability of the Ordinance to CPG Offices in HKSAR ("CPG offices"). The Administration has advised that the existing Ordinance does not apply to CPG offices pursuant to section 66 of IGCO. The Administration's view is that it is unlikely that the activities engaged by CPG offices would be relevant to the Ordinance and hence there is no need to apply the Ordinance to CPG offices.

Liability of the Government and public officers

28. The Bills Committee has studied in detail the proposed exemption provisions concerning the criminal and civil liability of the Government and public officers as set out in the proposed sections 3A(2) and 19B of the

¹ 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. "

Bill respectively. Members note that the exemption provisions are in line with the approach adopted in HCCO, which is enacted for the purpose of regulating non-pesticide hazardous chemicals to meet the requirements of the two Conventions. The proposed sections 3A(2) and 19B are also modeled on the relevant provisions (i.e. sections 4 and 51) of HCCO.

Criminal liability of the Government and public officers

29. The proposed section 3A(2) proposes to expressly exempt the Government as well as public officers acting in official capacity from any criminal liability for offences under the Ordinance. The Bills Committee has requested the Administration to provide detailed justifications for incorporating the proposed section 3A(2).

30. According to the Administration, the Government and public officers in carrying out duties in the service of the Government should not be held criminally liable for offences under the Ordinance which are regulatory in nature. 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.

31. The Administration has further explained that the Government and public officers differ from general commercial entities and their employees in that they do not have commercial incentives for not complying with the requirements of the Ordinance. Furthermore, the enforcement of criminal offence provisions on the Government through prosecution in court would raise question of efficacy because the Government as the law enforcer of the Ordinance, if being a regulated entity concurrently, would have a dual role which is self-conflicting. The Government is not an entity and cannot be imprisoned, and any fine imposed on the Government would come from the public coffer. It also involves the legal policy as to whether one government department should prosecute another government department. As regards the justifications for the proposed exemption of public officers from criminal liability, the Administration has advised that the proposal is made also on the following grounds –

- (a) the offence provisions in the Ordinance, which are set out in section 17, are mainly related to contravention of the requirements for applying licence or permit, contravention of any conditions of a licence or permit by its holder, failure to comply with a direction given by DAFC and obstruction of an enforcement officer in the exercise of any power under the

Ordinance. As government departments will put in place internal procedural guidelines and supervisory mechanism to ensure that officers follow the guidelines when performing their duties and the Government has an established internal mechanism to ensure that the departments concerned will cooperate with the enforcement department, the Administration considers that the proposed exemption of public officers from criminal liability in relation to these offence provisions will not affect the operation or enforcement of the Ordinance; and

- (b) the Administration will adopt administrative measures² to ensure public officers' strict compliance with the statutory requirements of the Ordinance.

32. Having considered the justifications provided by the Administration, members have raised no objection to the proposed exemption of the Government from criminal liability. However, members generally consider it unfair that public officers acting in official capacity are expressly exempted from criminal liability under the Ordinance when private operators, which are mainly small-sized enterprises, and their employees are subject to criminal liability. Members note that the Lifts and Escalators Ordinance (Cap. 618) ("LEO"), which was passed by LegCo five years after HCCO in mid-2012, expressly applies to the Government, and section 4 of LEO provides that the Government is not liable to be prosecuted for an offence under that Ordinance. The effect is

² The administrative measures include the following –

- 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, in line with the established practice, the case will be promptly brought to the attention of a senior officer in the department concerned, who will require the staff concerned to take immediate action to remedy the situation, and will report to 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.

that only the Government but not public officers are exempted from criminal liability under LEO. While noting that the proposed exemption of public officers from criminal liability is in line with the approach adopted in HCCO, members are of the view that legislation should keep pace with the times and the issue of public officers' immunity from criminal liability in discharging their public duties should be considered on a case-by-case basis. Having regard to the important principle of equality before the law, the Bills Committee has requested the Administration to consider removing from the Bill the proposed exemption of public officers discharging duties from criminal liability.

33. The Administration stresses that it cannot see any reason why public officers will not comply with the requirements of the Ordinance. Nonetheless, on consideration that the Ordinance aims 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 in order to demonstrate the Government's determination in ensuring the strict compliance with the requirements of the Ordinance, the Administration has agreed to propose amendments to the proposed section 3A(2) along the lines of section 4 of LEO to the effect 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 the Ordinance. The Bills Committee has also requested the Administration to consider amending the relevant provisions of HCCO relating to criminal liability of public officers so as to bring them in line with the Administration's proposed amendments to section 3A(2) of the Bill after its enactment, so that there will be consistency between the Ordinance and HCCO in respect of the approach on criminal liability of public officers. The Administration has agreed to convey the Bills Committee's request to the Environment Bureau for consideration.

34. The Bills Committee notes that according to the legal advice of the Department of Justice ("DoJ"), if the proposed exemption of public officers acting in their official capacity is removed from the proposed section 3A(2), subject to the availability of evidence in individual cases, public officers who are engaged in carrying out the Ordinance may be subject to prosecution under sections 7, 8, 17 or other relevant provisions of the Ordinance. The Administration has explained that in the course of carrying out the provisions of the Ordinance, public officers of AFCD, the Government Laboratory ("GL"), Government Logistics Department ("GLD") 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 court proceedings. These acts themselves are subject to regulation under section 7 or the proposed section 8 of the Ordinance depending on whether the pesticide is a registered, scheduled or other unregistered pesticide. Based on the legal advice of DoJ, the Administration considers that there is a 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. The Bills Committee has discussed an alternative approach by adding the expression "without lawful authority" to section 7 or the proposed section 8 of the Ordinance. A member has expressed concern that the approach proposed by the Administration may be less all-embracing than the suggested alternative approach by adding "without lawful authority". The Administration explains that it considers the proposed approach more preferable, as the "without lawful authority" approach is not able to cover public officers of GL and GLD who are assisting AFCD in carrying out the Ordinance.

35. Some members have queried the need to expressly provide protection to public officers engaged in enforcing the Ordinance who may be in possession of unregistered pesticides arising from seizure. Citing the Dangerous Drugs Ordinance (Cap. 134) ("DDO") as an example, they consider it absurd to conceive that a police officer is to be prosecuted for possession of dangerous drugs seized under lawful authority during an enforcement action. The Administration has advised that in the case of DDO, there is no express provision providing that it applies to the Government and hence by virtue of section 66 of IGCO, it does not apply to the Government unless the court is satisfied that it is binding on the Government by "necessary implication". As the Ordinance to be 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, the Administration's legal advice is that public officers who are in possession of unregistered pesticides arising from seizure when enforcing the Ordinance may be subject to the proposed section 8 of the Ordinance.

36. The Administration has originally proposed to amend section 7 and the proposed section 8 of the Ordinance to the effect that the licence and permit requirements as respectively provided in these two sections do not apply to persons engaged in and persons assisting them in carrying out the Ordinance. While members generally agree to the principle that public officers in carrying out the provisions of the Ordinance (i.e. playing the regulatory role) should not be subject to the licensing or permit requirement under the Ordinance, they are concerned about the implication of such widely drafted provisions proposed by the Administration and have requested the Administration to narrow down the scope of coverage of the proposed provisions with more specificity.

37. Having regard to the request of the Bills Committee, the Administration has advised that it will delete the proposed provisions of covering persons assisting in carrying out the Ordinance and will narrow down the coverage of the proposed provisions in respect of public officers carrying out the Ordinance (i.e. the proposed sections 7(3) and 8(8)) specifically to an authorized officer appointed by DAFC (which includes officers from AFCD, GL, GLD or other government departments as circumstances require) or a member of Customs and Excise Service when exercising a power or performing a function under the Ordinance. The Administration has also advised that public officers in exercising a power under certain other ordinances may be engaged in the seizure of articles which may include pesticides (implying possession) and auction of forfeited articles. The Administration has proposed to add the proposed sections 7(4) and 8(9) to the Bill 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 Goods Ordinance (Cap. 295) and any Ordinance other than the Pesticides Ordinance. The Administration has made it clear to the Bills Committee its policy intent that only public officers playing the regulatory role in carrying out the Ordinance or other relevant ordinances will not be subject to the licensing and permit requirements, and public officers in their role as users of pesticides should still be subject to the licensing and permit requirements as the circumstances require.

38. In response to members' view, the Administration will also move CSAs to provide for a reporting mechanism in the Ordinance in the event of a contravention of the provisions of the Ordinance by government department, along the lines of subsections (3) to (7) of section 4 of LEO.

Civil liability of the Government and public officers

39. The proposed section 19B(1) 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. In response to the enquiry of the legal adviser to the Bills Committee, the Administration has clarified that the proposed section 19B(1), which seeks to exempt the "personal liability" of a public officer in the specified circumstances, is intended to cover only the civil liability, and not criminal liability, of a public officer. The regime is designed to have criminal liability separately dealt with by the proposed section 3A(2), and the proposed section 19B(1) is not intended to deal with criminal liability.

40. Some members have expressed concern on whether the proposed exemption in section 19B(1) would affect the right of any person who intends to lodge a civil claim against public officers. The Administration assures members that 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 in carrying out the Ordinance. Furthermore, the proposed 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 a civil claim lodged by a 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.

41. Members note that the proposed section 19B is basically identical to section 51 of HCCO. Section 51(1) of HCCO provides 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 authorized by or under HCCO. The test adopted for qualifying for the protection from civil liability under the proposed section 19B(1) is "in good faith". The Administration has been requested to clarify the policy consideration behind the different formulation of the respective tests.

42. The Administration has advised that 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 (a) honesty in belief or purpose; (b) faithfulness to one's duty or obligation; (c) observance of reasonable commercial standards of

fair dealing in a given trade or business; or (d) 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". The Administration considers that the term has aptly reflected its policy intention.

Power to enter premises without warrant

43. Section 15(3) of the Ordinance provides that an authorized officer may without warrant enter any premises or place in or upon which the officer reasonably suspects any pesticide is kept, stored, sold or offered or exposed for sale. Members note that the Administration has proposed to replace the existing section 15(3) with the proposed section 15A to confine the existing power of entry without warrant to a relevant premises for the purpose of ascertaining whether the Ordinance has been or is being complied with, with a view to enhancing protection of privacy at domestic premises. Under the proposed section 15A, an authorized officer may without a warrant enter, at any reasonable time, a relevant premises for the purposes of ascertaining whether the Ordinance has been or is being complied with. The term "relevant premises" is defined under the proposed section 15A(7) to mean any premises or place (whether domestic or not) the address of which is stated in an application for a licence or permit under the Pesticides Regulations (Cap. 133 sub leg A), or any other non-domestic premises or place. The effect of the proposed section 15A is that the power to enter domestic premises without warrant is confined to those domestic premises which are stated by licensees and permittees as their registered addresses in their licence/permit applications. AFCD will insert suitable notes in the licence and permit application forms to remind applicants that the address of any premises or place (whether domestic or not) stated in their applications would be subject to such inspection requirement.

44. Members note the concern of the legal adviser to the Bills Committee that the use of the term "routine inspection" in the heading of the proposed section 15A, i.e. "Power to enter premises etc. for routine inspection", does not tally with the content of the provision, which provides that a "reasonable suspicion" will have to be established when the power of entry without warrant is engaged. The Administration has explained that the presence of a "reasonable suspicion" to trigger the exercise of this power of entry without a warrant is provided in the existing section 15(3) and the Administration has not proposed any change to it in the proposed section 15A. The heading of the proposed section

15A seeks to give the reader a brief impression about the content of the provision and does not carry the force of law. Nevertheless, in the light of the concern of the legal adviser to the Bills Committee that the use of the term "routine inspection" may cause ambiguity, the Administration will move a CSA to change the heading to "Power to enter premises etc. without warrant". In the light of this CSA on the proposed section 15A, the Administration will also move a consequential and technical amendment to delete the word "routine" from the phrase "routine inspection" in the long title of the Bill.

Removal of the ribbing requirement

45. Members have enquired about the reasons for removing the ribbing requirement on pesticide containers. The Administration has advised that as ribs and grooves had become common features of food containers, the ribbing requirement no longer serves any useful purpose in distinguishing pesticide products from non-pesticide ones. Removal of the obsolete ribbing requirement would alleviate unnecessary burden on traders.

Offence provision on false or inaccurate information

46. Noting that both the Bill and HCCO aim to meet the requirements of the two Conventions and that there are specific offence provisions on false or inaccurate information and liability of employers under HCCO, the legal adviser to the Bills Committee has enquired why similar provisions have not been proposed in the Bill. The Administration has pointed out that the Ordinance which was enacted in 1977 has been generally effective in governing the safe and proper use of pesticides. So far, AFCD has not encountered any operational problem as a result of the absence of a specific offence provision on false or inaccurate information in the Ordinance. The Administration therefore does not see a strong need to create a specific offence on the provision of false or inaccurate information in the Bill.

Commencement arrangement

47. Members note that clause 1 of the Bill specifies that the Bill, if enacted, will come into operation six months after its gazettal. According to the Administration, this is to provide sufficient time for the trades to adapt to the new regulatory requirements.

Committee stage amendments

48. Apart from the CSAs discussed in paragraphs 23, 33, 37, 38 and 44 above, in response to the views expressed by the legal adviser to the Bills Committee, the Administration will also move CSAs to introduce textual amendments to clauses 12, 14, 18, 25 and 26 of the Bill to improve the clarity of the provisions and facilitate reference by readers. A full set of the CSAs to be moved by the Administration and agreed by the Bills Committee is in **Appendix III**.

49. The Bills Committee will not propose any amendment to the Bill.

Resumption of Second Reading debate

50. Subject to the moving of the proposed CSAs by the Administration, the Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting of 17 July 2013.

51. In response to the requests of the Bills Committee, the Administration has undertaken to follow up a number of issues to further promote the safe and proper use of pesticides, as summarized in **Appendix IV**. At the request of the Bills Committee, the Administration has agreed to include these follow-up actions in the speech to be delivered by SFH during the resumption of Second Reading debate on the Bill.

Advice sought

52. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 2
Legislative Council Secretariat
4 July 2013

Bills Committee on Pesticides (Amendment) Bill 2013

Membership list

Chairman Hon SIN Chung-kai, SBS, JP

Members Hon Tommy CHEUNG Yu-yan, SBS, JP
Hon Alan LEONG Kah-kit, SC
Hon Albert CHAN Wai-yip
Hon Steven HO Chun-yin
Dr Hon Helena WONG Pik-wan

(Total : 6 members)

Clerk Ms Amy YU

Legal Adviser Miss Carrie WONG

Bills Committee on Pesticides (Amendment) Bill 2013

A. Organizations / individuals which/who have given oral representation to the Bills Committee

1. Civic Party
2. Mr Paul Melsom
3. Pest Control Personnel Association of Hong Kong
4. South China Turf Managers Association
5. Hong Kong Cleaning Association
6. Ms Nuria Gonzalez Lorenzo

B. Organizations / individuals which/who have provided written submissions only

1. Hong Kong Pest Management Association
2. Mr Franz Nel
3. Kadoorie Farm & Botanic Garden Corporation
4. Green Lantau Association

Pesticides (Amendment) Bill 2013

Committee Stage

Amendments to be moved by the Secretary for Food and Health

<u>Clause</u>	<u>Amendment Proposed</u>
Long title	By deleting “routine”.
3(8)	By adding in alphabetical order to the proposed definitions— “ <i>authorized officer</i> (獲授權人員) means a public officer appointed to be an authorized officer under section 14; <i>function</i> (職能) includes duty;”.
5	By deleting the proposed section 3A and substituting— “ 3A. Ordinance applies to Government etc. (1) This Ordinance applies to the Government. (2) Despite subsection (1), the Government— (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— (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)”.

Pesticides (Amendment) Bill 2013

**List of follow-up actions undertaken by the Administration
to further promote the safe and proper use of pesticides**

(a) Safety measures

- To discuss with the relevant government departments and other stakeholders in the industry on ways to promote the safe and proper use of pesticides, particularly those that are related to the applications of pesticides, including the use of warning signs, such as the design, size, content of such signage and location to place them.
- To incorporate the enhanced safety measures, including requirements on warning signage, into the respective Codes of Practice for the pest control industry, as well as the training syllabus of the relevant training bodies.
- To make extra efforts in checking the labels of pesticides to ensure that adequate safety information has been included in the labels, and explore with the trade to see if the instructions and cautions on the labels could be highlighted and complemented by suitable pictograms.

(b) Promotion and publicity

- To step up promotional and publicity efforts as well as public education on the safe use of household pesticides, including publishing a wide range of educational leaflets and booklets, in particular, for users in rural residential areas. Appropriate leaflets and promotional materials would also be provided to pesticide licensees for free distribution to their customers.
- To include in the promotional materials the fact that many alternative common names have been used on a given pesticide and provide advice to members of the public to identify the various common names of a given pesticide properly.

- To step up promotional and publicity efforts targeted at schools, including publishing a set of educational leaflet targeting the safe and proper use of pesticides in schools, organising promotional campaign to deliver the messages to the relevant parties, and organising talks to schools and/or their service providers.
- To conduct a round of briefings for the relevant government departments, including the Leisure and Cultural Services Department and the Food and Environmental Hygiene Department, before the commencement of the Pesticides (Amendment) Ordinance 2013 and update them on the latest regulatory requirements and related matters. Refreshers' briefing sessions would also be organised on a periodic basis to keep them up-to-date on the regulatory requirements and related matters on the safe and proper use of pesticides.

(c) Registration and use of pesticides

- To formulate a plan with a view to phasing out paraquat dichloride and diazinon, and removing them from the register by 2014.
- To take into account the pesticides which are banned in the European Union in the next round of review conducted by AFCD.
- To introduce the concept of integrated pest management to farmers and the pest control industry through workshops and seminars.
- To keep in view the development of pesticides derived from natural products and to refine the regulation on such pesticides as appropriate.
- To keep in view the need to step up regulation of pesticide applicators as appropriate, having regard to the effectiveness of an array of measures in enhancing the standard of the industry.

(d) Others

- To continue efforts in following up cases with users of pesticides (including schools, pest control agents etc) upon receipt of public complaints and enquiries.

- To insert suitable notes in the licence and permit application forms to remind applicants that the address of any premises or place (whether domestic or not) stated in their applications would be subject to entry without a warrant by authorised officers for the purposes of ascertaining whether the Ordinance has been or is being complied with.
- To consider the feasibility on a study regarding the long-term impact of pesticides on the health of pesticide applicators in collaboration with the industry.

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