

化學武器(公約)條例草案
政府就草案委員會於 2003 年 2 月 17 日
舉行的第九次會議提出的意見/問題所作的回應

《條例草案》第 5(f)條

第 5(f)條禁止的作為

議員要求當局列明《化學武器(公約)條例草案》(《條例草案》)第 5(f)條所禁止的作為，以及檢視該等作為是否已為《刑事訴訟程序條例》第 89 條所涵蓋。

2. 《條例草案》第 5(f)條差不多完全重現《化學武器公約》(《公約》)第一條第 1 款(d)項。兩項條文載列如下：

- 《條例草案》第 5(f)條：“[任何人不得]以任何方式協助、鼓勵或誘使任何人從事《公約》禁止的任何活動。”
- 《公約》第一條第 1 款(d)項：“[本公約每一締約國承諾在任何情況下決不：...]以任何方式協助、鼓勵或誘使任何一方從事本公約禁止一締約國從事的任何活動。”

3. 我方律師指出，《公約》第一條第 1 款(d)項禁止的作為，取決於按照國際法對有關條文的詮釋。根據《維也納條約公約》第 31 條，詮釋條約必須真誠地根據條約用詞的上文下理及條約的宗旨和目的，以有關字眼的一般涵義詮釋。

4. 《公約》的序言說明，各締約國“決心採取行動以切實促進嚴格和有效國際監督下的全面徹底裁軍，包括禁止和消除一切類型的大規模毀滅性武器...[及]深信徹底而有效地禁止發展、生產、獲取、儲存、保有、轉讓、和使用化學武器及銷毀此種武器是朝着實現這些共同目標邁出的必要步驟。”

5. 考慮到：

- (a) 《公約》已清楚訂明其目的，在於切實嚴格、徹底和有效地禁止涉及化學武器的不同形式的活動；
- (b) 《公約》第一條第 1 款(d)項用語的一般涵義(我們已在早前提交的其中一份文件內解釋)；及
- (c) 《條例草案》第 5(f)條差不多完全重現《公約》第一條第 1 款(d)項，

我們認為要詳盡地列出《條例草案》第 5(f)條所有可能被禁止的作為並不切實可行。

6. 議員亦要求我們列出“鼓勵 (encourage)”一詞的司法解釋。在立法會法律顧問所指的法庭案例¹中，法院裁定“鼓勵 (encouragement) 不一定相當於協助 (aiding) 和教唆 (abetting)”，並可能涵蓋無意圖的作為。該法庭案例亦指某人可能會因其在場、其被誤解的言辭、其姿勢或因為其默不作聲，而非故意地鼓勵他人。基於上述司法解釋，我方律師同意“鼓勵 (encourage)”的含義較“協助和教唆、慫使及促致 (aiding, and abetting, counseling and procuring)”更廣。另一個法庭裁決²認為“鼓勵 (encourage)”一詞僅解作“激發 (incite)”。

其他司法管轄區的處理方法

7. 議員表示，由於《公約》的行文並非以適切普通法為依據，因此《條例草案》不需要完全重現《公約》的字眼。議員注意到英國的《*Chemical Weapons Act*》並無類似《條例草案》第 5(f)條的條文，因而要求政府在考慮是否保留

¹ *Coney* (1882)8 QBD534 (獲 *Clarkson*(1971)55 Cr App. Rep. 445 批准，並於 *The Queen v Lau Mei-wah, Lam Chi-kwan* 1991 No. 551 (Criminal)Court of Appeal 中引用)。

² *Wilson v Danny Quastel (Rother hite) Ltd.* [1966] IQB125(就《*Betting, Gaming and Wagering Act*》而言(該法令禁止賭博場所的持牌人鼓勵其他人在該處所內賭博。)該法庭裁決又指“...[“鼓勵 (encourage)”一詞]並非“解作使受鼓勵，而是激發某人賭博。除非被指稱受到激發的人士，曾接到以說話或文字方式的激發，否則不構成有人受到激發。”

第 5(f)條時，參考英國所採用的方法。

8. “禁止化學武器組織籌備委員會”執行秘書曾在 1996 年 5 月發出一份名為《Model National Implementing Legislation》的文件，該文件提及，“基本禁令必然是《公約》第一條所述的禁令。法例應涵蓋第一條第 1 款提及的每一項活動，包括通常由國家，而非個人從事的活動。最方便的做法是以刑事法例重現《公約》第一條第 1 款。”上述文件夾附的法令範本載有的相關條文，完全重現《公約》第一條第 1 款(d)項。

9. 據我們所知，在實行普通法的司法管轄區中，起碼有下述國家在其為履行《公約》而制定的本地法例中，重現《公約》第一條第 1 款(d)項（包括使用“協助、鼓勵或誘使（assist, encourage or induce）”等字）：

- (i) 加拿大 - 《*Chemical Weapons Convention Implementation Act 1995*》第 6 條
- (ii) 新加坡 - 《*Chemical Weapons (Prohibition) Act 2000*》第 8 條
- (iii) 新西蘭 - 《*Chemical Weapons (Prohibition) Act 1996*》第 6 條

附件載有相關條文，供議員參閱。

10. 英國方面，《*Accessories and Abettors Act 1861*》第 8 條規定，“任何人如協助（aids），教唆（abets），慫使（counsels）或促致（procures）他人做[任何可被起訴的罪行]，無論根據普通法或任何已通過的法例或將被通過的法例是否一項罪行，該人士將如同主要犯人般被審問、起訴和懲罰”。據我們所知，英國政府自九一一事件後，已採取措施加強對大規模毀滅性武器的管制。《*Anti-terrorism, Crime and Security Act 2001*》第 50(1)條訂明，“任何人協助（aids），教唆（abets），慫使（counsels）或促致（procures），或激發（incite）任何非英國籍人士在該國境外作相關的作為，即屬犯罪”。而第 50(2)條訂明，“為此目的，相關的作為是指該作為，如由英國籍人士作出，會違反...《*Chemical Weapons Act 1996*》第二條（涉及化

學武器的罪行) ”。

11. 基於我們在以前提交的文件以及上文第 5 至 10 段內提及的考慮因素，我們仍然認為《條例草案》第 5(f)條應予保留，以重現《公約》第一條第 1 款(d)項全文。保留第 5(f)條可確保香港完全履行《公約》規定的主要責任，並確保條文更清晰及具透明度。

《條例草案》第 5 條及第 29(2)條。

12. 議員問及，控方就《條例草案》第 5 條所述罪行，向疑犯提出訴訟前，須證明哪些構成罪行的要素，以及控方的舉證責任。

13. 我方律師指出，可有不同程度的嚴格法律責任。在某些情況下，整項罪行的法律責任都是嚴格的，即控方無須就罪行的任何要素證明犯罪意念。在另外一些案例中，嚴格法律責任只適用於罪行其中一項要素，即控方須就罪行其他要素證明犯罪意念³。就《條例草案》第 5 條而言，除了無須證明被告人知道有關物品是化學武器外，控方須證實有關罪行的每一項要素。舉例來說，《條例草案》第 5(a)條訂明，任何人不得使用化學武器。控方須證明被告人曾使用武器以及該武器是化學武器，但就無須證明被告人知道該武器是化學武器。

工商及科技局
二零零三年二月

³ 見 Gammon (Hong Kong) Ltd. V.A.G. [1984] 2 W.L.R. 437。

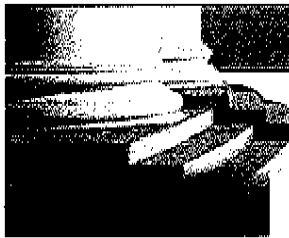


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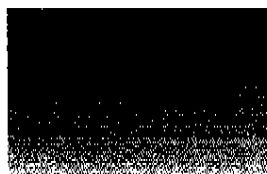
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Chemical Weapons Convention Implementation Act

1995, c. 25

An Act to implement the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction

[Assented to 13th July, 1995]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

Short title

1. This Act may be cited as the *Chemical Weapons Convention Implementation Act*.

INTERPRETATION

Definitions

2. (1) In this Act,

"Convention"
« *Convention* »

"Convention" means the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, signed at Paris, France on January 13, 1993, as amended from time to time pursuant to Article XV of the Convention and portions of which are set out in the schedule to this Act;

"international inspector"
« *inspecteur international* »

"international inspector" means a person who holds a certificate issued by the Minister under section 12;

"Minister" « *ministre* »

"Minister" means such member of the Queen's Privy Council for Canada as may be designated by the Governor in Council to be the Minister for the purposes of this Act;

"National Authority"
« *autorité nationale* »

"National Authority" means the portion of the public service of Canada designated as the National Authority for

Canada under subsection 3(1);

"place" « lieu »

"place" includes any means of transport;

"prescribed" *Version anglaise seulement*

"prescribed" means prescribed by the regulations;

"representative of the National Authority" « représentant de l'autorité nationale »

"representative of the National Authority" means a representative of the National Authority designated under subsection 3(2).

Other words and expressions

(2) Unless the context otherwise requires, all words and expressions used in this Act have the same meaning as in the Convention.

Convention provisions prevail where inconsistency

(3) In the event of any inconsistency between the provisions set out in the schedule and the provisions of the Convention, the provisions of the Convention prevail.

NATIONAL AUTHORITY

National Authority

3. (1) For the purposes of implementing Canada's obligations under the Convention and of giving effect to paragraph 4 of Article VII of the Convention, the Minister may designate any portion of the public service of Canada to be the National Authority for Canada.

Representatives

(2) For the purposes of implementing Canada's obligations under the Convention, the Minister

(a) may designate persons or classes of persons to act as representatives of the National Authority; and

(b) shall furnish every representative of the National Authority with a certificate of designation.

Contents of certificate

(3) A certificate of designation must indicate the places or classes of places that the holder of the certificate is authorized to have access to for the purposes of this Act and any conditions applicable to the holder's activities under the certificate that the Minister considers advisable for those purposes.

Identification required

(4) Every holder of a certificate of designation shall, on request of the person in charge of a place to be entered by the holder under this Act, show the certificate to that person.

PURPOSE OF ACT

Implementation of Convention

4. The purpose of this Act is to implement Canada's obligations under the Convention.

HER MAJESTY

Binding on Her Majesty

5. This Act is binding on Her Majesty in right of Canada or a province.

CHEMICAL WEAPONS AND RIOT CONTROL AGENTS

Chemical weapons

6. No person shall

(a) develop, produce, otherwise acquire, stockpile or retain a chemical weapon, or transfer, directly or indirectly, a chemical weapon to anyone;

(b) use a chemical weapon;

(c) engage in any military preparations to use a chemical weapon; or

(d) assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under the Convention.

Riot control agents

7. No person shall use a riot control agent as a method of warfare.

TOXIC CHEMICALS AND PRECURSORS

Schedule 1 toxic chemicals and precursors

8. (1) Except as authorized by or pursuant to any regulations made under paragraph 18(a), no person shall produce, use, acquire or possess a toxic chemical or precursor listed in Schedule 1 of the Schedules of Chemicals set out in the Annex on Chemicals in the Convention.

Export or import

(2) Except as authorized under the *Export and Import Permits Act*, no person shall export or import a toxic chemical or precursor listed in Schedule 1 of the Schedules of Chemicals set out in the Annex on Chemicals in the Convention.

Schedule 2 toxic chemicals and precursors

9. Except as authorized under the *Export and Import Permits Act*, no person shall export or import a toxic chemical or precursor listed in Schedule 2 of the Schedules of Chemicals set out in the Annex on Chemicals in the Convention.

Schedule 3 toxic chemicals and precursors

10. Except as authorized under the *Export and Import Permits Act*, no person shall export or import a toxic chemical or precursor listed in Schedule 3 of the Schedules of Chemicals set out in the Annex on Chemicals in the Convention.

INFORMATION AND DOCUMENTS

Information and documents

11. Every person who does anything under an authorization referred to in section 8 or who produces, possesses, consumes, exports or imports a toxic chemical or precursor listed in Schedule 2 of the Schedules of Chemicals set out in the Annex on Chemicals in the Convention or who produces, exports or imports a toxic chemical or precursor listed in Schedule 3 of the Schedules of Chemicals set out in the Annex on Chemicals in the Convention or who produces a discrete organic chemical or who holds a riot control agent for riot control purposes shall

(a) provide the prescribed information, at the prescribed time and in the prescribed form, to the National Authority or to such other portion of the public service of Canada as the Minister may by order authorize to collect the information; and

(b) keep and maintain the prescribed documents in Canada, at the person's place of business or at such other place as may be designated by the Minister, in the prescribed manner and for the prescribed period and, on request by the Minister or the National

PART III

OFFENCES

Use, etc., of chemical weapons

8. —(1) Any person who —

- (a) uses a chemical weapon;
- (b) develops or produces a chemical weapon;
- (c) acquires, stockpiles or retains a chemical weapon;
- (d) transfers, directly or indirectly, a chemical weapon to another person;
- (e) engages in military preparations to use a chemical weapon;
- (f) knowingly assists, encourages or induces, in any way, another person to engage in any activity prohibited to a State Party under the Convention; or
- (g) uses a riot control agent as a method of warfare,

shall be guilty of an offence and shall on conviction be punished with —

- (i) imprisonment for a term which may extend to life imprisonment; and
- (ii) a fine not exceeding \$1 million.

(2) Nothing in subsection (1) shall apply in respect of any act done by an authorised officer, a national inspector or an international inspector under the authority of this Act or any other written law.

(3) In proceedings for an offence under subsection (1) (a), (c), (d), (e) or (g) relating to an object, it is a defence for the accused to prove that —

- (a) he neither knew nor suspected nor had reason to suspect that the object was a chemical weapon or riot control agent, as the case may be; or
- (b) as soon as reasonably practicable after he first knew or suspected it to be a chemical weapon or riot control agent, as the case may be, he took all reasonable steps to inform an authorised officer of his knowledge or suspicion.

(4) Nothing in subsection (3) shall prejudice any defence which is open to a person charged with an offence under this section to raise apart from that subsection.

Licence for use, etc., of scheduled chemical or discrete organic chemical

9. —(1) No person shall use, develop, produce, acquire, stockpile, retain or transfer a Schedule 1 chemical for a permitted purpose except under and in accordance with the conditions of a licence granted by the Director.

(2) No person shall —

LEGISLATION HISTORY

1. Act 17 of 2000 — Chemicals Weapons (Prohibition) Act 2000

Date of First Reading : 21.2.2000 (Bill No. 9/2000 published on 22.2.2000)
Date of Second and Third Readings : 25.4.2000
Date of commencement : 1.6.2000

2. Act 26 of 2001 — Statutes (Miscellaneous Amendments and Repeal) Act 2001

Date of First Reading : 11.7.2001 (Bill No. 24/2001 published on
12.7.2001)
Date of Second and Third Readings : 25.7.2001
Date of commencement : 1.9.2001 (except sections 3 and 17)
1.3.2002 (section 3)
22.8.2001 (section 17)

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CHEMICAL WEAPONS (PROHIBITION) ACT 1996

PART 2 - OFFENCES

6. Chemical weapons—

6. Chemical weapons—

- (1) Every person commits an offence who intentionally or recklessly—
- (a) Develops, produces, otherwise acquires, stockpiles, or retains chemical weapons; or
 - (b) Transfers, directly or indirectly, chemical weapons to another person; or
 - (c) Uses chemical weapons; or
 - (d) Engages in any military preparations to use chemical weapons; or
 - (e) Assists, encourages, or induces, in any way, any person to engage in any activity prohibited to a State Party under the Convention,—

and is liable on conviction on indictment to imprisonment for life or a fine not exceeding \$1,000,000.

(2) Nothing in subsection (1) of this section applies in respect of any seizure of chemical weapons by the Crown under the authority of this or any other Act.

(3) Nothing in subsection (1)(e) of this section limits the provisions of Part 4 of the Crimes Act 1961.

Cf Chemical Weapons (Prohibition) Act 1994 (Australia) No 26, s 12