

Chemical Weapons (Convention) Bill
Follow-up to issues raised at the sixth meeting of the Bills Committee
held on 13 December 2002

Clause 2(1)

Members noted that Part 6 of the Bill did not mention petitions and wondered whether the ‘petition’ in the definition of ‘claimant’ in clause 2(1) was necessary. Having reviewed the relevant provisions, we confirm that Members’ observation is correct and will propose a CSA to delete ‘or petitions’ in the definition of ‘claimant’.

Clause 5(f)

2. Clause 5(f) of the Bill provides that no person shall *assist*, *encourage* or *induce*, in any way, anyone to engage in any activity prohibited under the Chemical Weapons Convention. Members questioned the need to have this clause since the offences concerned should already be covered under section 89 of the Criminal Procedure Ordinance (Cap. 221) which provides that any person who *aids*, *abets*, *counsels* or *procures* the commission by another person of any offence shall be guilty of the like offence. In this connection, they asked the Administration to clarify the scope of the two sets of words.

3. As regards the words used in clause 5(f) of the Bill, our lawyers advise that there is judicial interpretation confirming that ‘assisting’ has the same meaning as ‘aiding’ and ‘abetting’¹, and the word ‘*encourage*’, in certain context, may mean ‘incite’²; and an ‘*inducement*’ may amount to a ‘bargain’³ respectively. It should however be pointed out that the interpretations of ‘*encourage*’ and ‘*induce*’ above were adopted in different contexts and may or may not help in determining the meaning of these two words in clause 5(f). If these two words are to be given their ordinary meanings, according to the Oxford English Dictionary, ‘*encourage*’ means ‘inspire with courage; incite; induce; instigate; recommend; advise; and patronize and stimulate (persons or personal efforts) by assistance, reward, or expressions of favour or approval, countenance’ and ‘*induce*’ means ‘lead on, move, influence, prevail upon (any

¹ see *FUNG Sik-chung v. R.* [1985] H. K. L. R. 387

² see *Wilson v Danny Quastel (Rotherhithe) Ltd.* [1965] a All ER 541 at 543

³ see *Bayspoole v Collins* 40 L.J. Ch 292

one) to do something; and lead (a person) by persuasion or some influence or motive that acts upon the will, to some action, condition, belief’.

4. As regards the words used in section 89 of the Criminal Procedure Ordinance, our lawyers advise that ‘*aid*’, ‘*abet*’, ‘*counsel*’ or ‘*procure*’ should be given their ordinary meanings, if possible⁴. ‘*Aid and abet*’ are apt to describe the action of a person who is present at the time of the commission of an offence and takes some part therein, e.g. the lookout in a robbery⁵. If the person does the act knowingly and with intent to aid, he abets it as well and is therefore guilty of aiding and abetting. The word ‘*counsel*’ means ‘advise and solicit’. To ‘*procure*’ means to ‘produce by endeavour’. A person procures a thing by setting out to see that it happens and taking the appropriate steps to produce the happening⁶.

5. While the word ‘*assist*’ in clause 5(f) of the Bill overlaps totally with the words ‘*aid and abet*’ in section 89 of the Criminal Procedure Ordinance, we are unable to find any judicial interpretation which indicates complete overlap of the words ‘*encourage*’ and ‘*induce*’ in clause 5(f) with the words ‘*counsel*’ and ‘*procure*’ in section 89. It is conceivable that there may be some aspects of the first two words that are not covered by the second two, or vice versa.

6. In view of the above, we remain of the view that clause 5(f) should be retained to replicate in full the prohibitions prescribed in paragraph 1(d) of Article I of the Convention, which are among the core elements of the Chemical Weapons Convention. Retaining clause 5(f) will ensure that we can fulfill the particular core obligations in full, as well as ensure clarity and transparency. We note there is no common approach on this matter. For example, almost the same provision is included in the Chemical Weapons (Prohibition) Act of Australia. The Chemical Weapons Act of the United Kingdom, however, does not contain such a provision.

7. Members also asked, if clause 5(f) of the Bill were to stay, whether the offender would be prosecuted twice under both clause 5(f) of the Bill and section 89 of the Criminal Procedure Ordinance. Our lawyers have advised that whether an offence should be prosecuted under clause 5(f) of the Bill or section 89 of the Criminal Procedure Ordinance would have to be considered taking into account the circumstance of the case. As explained in para. 4 above, it is conceivable that some aspects of the first set of words in clause 5(f)

⁴ see *A. G.’s Reference (No. 1 of 1975)* [1975] Q. B. 773

⁵ see *Ferguson v. Weaving* [1951] 1 K.B. 814

⁶ see *R. v. KONG Wing-fung and Others* C. A. 429/1990

are covered by the second but some are not. Previous court ruling⁷ held that where the legislation provides a specific offence to cover a person who assists another person to commit an offence he can only be charged with that specific offence and not as an aider and abetter of that other person. By the same token, a person, who commits an offence that could be prosecuted under both clause 5(f) and section 89 of the Criminal Procedure Ordinance, can only be charged under the relevant offence provision in the Bill and not under section 89 of Criminal Procedure Ordinance. Where a person commits an offence that is covered under either clause 5(f) or section 89 of the Criminal Procedure Ordinance only, he will be prosecuted in accordance with the relevant legislation accordingly.

Clauses 5 and 29(2)

8. Members requested us to set out the rationale for the policy intent that contravention of any provision in clause 5 should be an offence of strict liability.

9. There is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal liability. Previous court rulings⁸ have affirmed that the presumption can be displaced where the statute is concerned with an issue of social concern, and public safety is such an issue; and where it can be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act. There are many examples of offences of strict liability in other local legislation, including sections 40(2A)(b) and (2B)(b) of the Buildings Ordinance (Cap. 123), section 52 of the Public Health and Municipal Services Ordinance (Cap. 132) and section 8(1)(a) of the Telecommunication Ordinance (Cap. 106).

10. The object of clause 5 of the Bill is to protect public safety by banning the use, development and possession etc. of chemical weapons. Given the significant consequence and serious threat of the prohibited acts to public safety, we consider that it would be in the public interest to create offences of strict liability so as to minimise the risk that guilty persons might escape. Nonetheless, to strike a balance between the interest of the public at large and the right of the accused, a defendant is given a statutory defence under clause 29(2) that he did not know, suspect etc that the article was a chemical weapon.

⁷ see *FUNG Sik-chung v. R.* [1985] H. K. L. R. 387

⁸ see *Gammon (Hong Kong) Ltd. v. A. G.* [1984] 2 W. L. R. 437 and *A. G. v China State Construction Engineering Corp* [1996] 1 HKC 53

Thus contravention of clause 5, taken together with clause 29(2), is an offence of strict liability to the extent that the prosecution need not prove that the defendant charged with the offence knew, suspected etc. that the article concerned was a chemical weapon. Other than this, it remains the responsibility of the prosecution to prove *beyond reasonable doubt* the guilt of the accused.

11. As pointed out before, clause 5 (except clause 5(f) for the reason explained in para. 5 above) of the Bill is modeled on section 2 of the Chemical Weapons Act of the United Kingdom, contravention of which is also an offence of strict liability and which also provides a statutory defence for the defendant.

Clause 38

12. Clause 38 provides that an appeal against any decision of the Director-General of Trade and Industry (the Director) to which clause 10(4) applies may be made to the Chief Executive (CE). We consider the resort to CE for appeal appropriate, as it is conceivable that important policy considerations, as well as sensitive information, such as intelligence obtained from other licensing/enforcement agencies of other governments may be involved in the Director's decision to grant permits and/or to impose conditions to the permits. Members at the meeting asked whether the resort to CE in Council for appeal could also address our concerns.

13. Upon review, we accept that the resort to CE in Council would also be appropriate in this case. We are prepared to move a CSA to amend clause 38 accordingly.

Commerce, Industry and Technology Bureau
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