

**Chemical Weapons (Convention) Bill -
The Administration's response to comments / questions
raised at the ninth meeting of the Bills Committee
held on 17 February 2003**

Clause 5(f)

Acts prohibited under clause 5(f)

Members have requested the Administration to set out the acts prohibited under clause 5(f) of the CWC Bill, and to examine whether such acts are covered by section 89 of the *Criminal Procedure Ordinance*.

2. Clause 5(f) of the CWC Bill is almost an exact copy of paragraph 1(d) of Article I of the Chemical Weapons Convention. Both provisions are re-produced below:

- clause 5(f): “[No person shall] assist, encourage or induce, in any way, anyone to engage in any activity prohibited under the Convention.”
- paragraph 1(d) of Article 1: “[Each State Party to this Convention undertake never under any circumstances...] To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.”

3. According to our lawyer, the acts prohibited under paragraph 1(d) of Article I of the Chemical Weapons Convention hinges on the interpretation of the provision from the international law perspective. In accordance with Article 31 of the *Vienna Convention of the Law of Treaties*, a treaty shall be interpreted in good faith in accordance with the ordinary meanings to be given to the terms of the treaty in context and in the light of the treaty's object and purpose.

4. In the preamble of the Chemical Weapons Convention, it is stated, inter alia, that the State Parties to the Convention “[d]etermined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction ... [and] [c]onvinced that the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of these common objectives”.

5. Having regard to:
- (a) the clearly stated purpose of the Chemical Weapons Convention which is to effect strict, complete and effective prohibition of the dealing of chemical weapons in various forms;
 - (b) the ordinary meanings of the expressions in paragraph 1(d) of Article I of the Convention (as explained in one of our earlier submissions to the Bills Committee); and
 - (c) the almost exact copy of clause 5(f) of the CWC Bill from the said paragraph in the Convention,

it is not practicable to set out exhaustively all the possible acts prohibited under clause 5(f) of the CWC Bill.

6. Members have also asked us to set out the judicial interpretation of the word “encourage”. In the case identified by the LegCo Legal Advisor¹, the ruling held, inter alia, that “*encouragement does not necessarily amount to aiding and abetting*” and could cover unintentional act. It was also stated in the case that a man might unwittingly encourage another by his presence, by misinterpreted words, or gestures, or by his silence. In light of this interpretation, our lawyer agrees that “encouragement” has a wider meaning than “aiding and abetting, counselling and procuring”. In another court ruling², the word “encourage” was interpreted to merely mean “incite”.

Approach adopted by other jurisdictions

7. Members have expressed a view that since the language of the Convention is not tailor-made for common law jurisdictions, there is no need for the CWC Bill to copy the exact wording from the Convention. Noting that the *Chemical Weapons Act* of the UK does not include a provision similar to clause 5(f) of the CWC Bill, Members have asked the Administration to make reference to the approach adopted by the UK in considering whether clause 5(f) of the CWC Bill should be retained.

¹ *Coney* (1882) 8 QBD 534 (which was approved in *Clarkson* (1971) 55 Cr. App. Rep. 445) cited in *The Queen v Lau Mei-wah, Lam Chi-kwan* 1991 No. 551 (Criminal) Court of Appeal

² *Wilson v Danny Quastel (Rotherhite) Ltd.* [1966] 1 QB 125. In the context of the Betting, Gaming and Wagering Act (which forbids the licensee of a betting office to encourage any other person on the premises to bet). The court ruling also held that “... [the word ‘encourage’] does not “mean caused to be encouraged, but inciting someone to bet. There can be no incitement of anyone unless the incitement, whether by words or written matter, reaches the man who it is said is being incited.”

8. In a note titled “Model National Implementing Legislation” issued by the Executive Secretary of the Preparatory Committee for the Organisation for the Prohibition of Chemical Weapons in May 1996, it was mentioned that “*The basic prohibitions are, of course, those that appear in Article I of the Convention. Each and every one of the activities mentioned in paragraph 1 of Article I should be covered by the legislation, including activities that are normally undertaken by States and not by individuals. The most convenient way of doing this would be to reproduce paragraph 1 of Article I of the Convention in the form of criminal legislation.*” The relevant provision in a model act annexed to the aforementioned note is an exact copy of paragraph 1(d) of Article I of the Convention.

9. As far as we know, at least the following common law jurisdictions have re-produced paragraph 1(d) of Article I of the Chemical Weapons Convention (including the words “assist, encourage or induce”) in their local legislation on the implementation of the Convention:

- Canada - section 6 of the *Chemical Weapons Convention Implementation Act 1995*
- Singapore - section 8 of the *Chemical Weapons (Prohibition) Act 2000*
- New Zealand - section 6 of the *Chemical Weapons (Prohibition) Act 1996*

A copy of the relevant provisions is at **Annex** for Members’ reference.

10. In the case of the UK, by way of background, section 8 of its *Accessories and Abettors Act 1861*, provides that “[w]hoever shall aid, abet, counsel or procure the commission of [any indictable offence], whether the same be [an offence] at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.” After the September 11 incident, we understand that the UK Government has been taking steps to strengthen controls on weapons of mass destruction. Section 50(1) of the *Anti-terrorism, Crime and Security Act 2001* of the UK provides that “a person who aids, abets, counsels or procures, or incites, a person who is not a United Kingdom person to do a relevant act outside the United Kingdom is guilty of an offence”, and section 50(2) provides that “for this purpose a relevant act is an act that, if done by a United Kingdom person, would contravene...section 2 of the *Chemical Weapons Act 1996* (offences relating to chemical weapons)”.

11. Having regard to the considerations detailed in our previous submissions and in paragraphs 5 to 10 above, we remain of the view that clause 5(f) of the Bill should be retained in order to reproduce in full the prohibitions prescribed in paragraph 1(d) of Article I of the Convention. This will ensure

that we can fulfill the particular core obligations in full, as well as ensure clarity and transparency.

Clause 5 and 29(2)

12. Members have asked about the elements constituting an offence under clause 5 that the prosecution needs to establish before instituting the proceedings against a suspect, and the onus of proof on the prosecution.

13. Our lawyer advises that there could be different extents of strict liability. In some cases, the liability for the whole offence is strict, i.e. the prosecution need not prove *mens rea* in any element of the offence. In other cases, strict liability only applies to one element of the offence, i.e. the prosecution has to prove *mens rea* in the other elements of the offence³. In the case of clause 5 of the CWC Bill, the prosecution has to prove every element of an offence except that it is not required to prove that the defendant knew that it was a chemical weapon. For example, in respect of clause 5(a) which provides that no person shall use a chemical weapon, the prosecution has to prove that the defendant used a weapon and that the weapon was a chemical weapon. It however does not need to prove that the defendant knew that it was a chemical weapon.

Commerce, Industry and Technology Bureau
February 2003

³ see *Gammon (Hong Kong) Ltd. v. A. G.* [1984] 2 W. L. R. 437

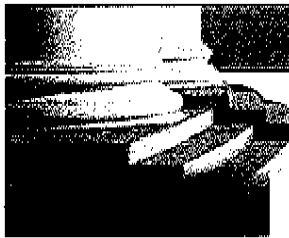


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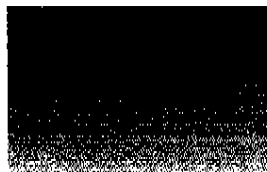
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Chemical Weapons Convention Implementation Act

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