

**Chemical Weapons (Convention) Bill -
The Administration's response to comments / questions
raised at the eighth meeting of the Bills Committee
held on 21 January 2003**

Clauses 15, 16, 21, 22 and 23

(A) Powers of "seizure", "detention" and "forfeiture"

Clause 15 empowers the Commissioner of Customs and Excise (the Commissioner) to authorize in writing a member of the Customs and Excise Service or an authorized officer to enter and search any premises or places and detain and search any vessels if he reasonably suspects that there is any article which may be seized under clause 16. Clause 16 empowers a member of the Customs and Excise Services or an authorized officer to seize articles (in respect of which he reasonably suspects that an offence has been committed or which he reasonably suspects to be or to contain evidence of the commission of such an offence), vessels and vehicles (if he reasonably suspects the vessel or vehicle to have been used in connection with the commission of an offence) and require production of information, which is on a computer, in a visible and legible form (if he reasonably suspects that the information relates to an offence which has been, or may have been, committed). Clause 21 empowers the Commissioner to forfeit seized articles that are in connection with an offence and whether or not any person has been convicted of the offence; to forfeit vessels and vehicles which have been used in connection, or is the subject of, an offence; and to restore seized articles (other than a chemical weapon), vessels and vehicles which are liable to forfeiture to the owners or their authorized agents within 30 days of seizure. It also requires the Commissioner to serve a notice of seizure not later than 30 days beginning on the date of the seizure to notify the concerned owners or their agents whom were not present at time of the seizure and provides for an appeal channel to the owner concerned or his authorized agent. Clause 22 sets out how to determine applications for forfeiture. Clause 23 empowers the court to release the seized vessel or vehicle before the date of hearing of the application for forfeiture. A table summarizing the current procedures and the circumstances under which the power of "seizure" and "forfeiture" to be exercised by the Commissioner in accordance with the Bill is at **Annex I**.

2. While having no objection to provide the Commissioner with the powers to seize, detain and forfeit articles, vessels and vehicles, Members of the Bills Committee considered that "seizure", "detention" and "forfeiture" were

three different concepts and that the basis of the powers should be clearly set out in the Bill to safeguard the interest of the law enforcement authority and the owners of the seized articles, vessels and vehicles.

3. Our lawyer advises that the power of “seizure” embodies the power of “detention”, i.e. the act of seizing a thing ipso facto involves detaining the thing. If seizure and detention of the thing are subject to the same set of requirements and conditions, it is unnecessary to duplicate the requirements and conditions in the same ordinance solely for the purpose of setting out the two powers separately in the Bill. In this regard, we consider that the basis of the powers has been clearly set out and there is no need to have two separate sections for the power of seizure and the power of detention in the Bill.

(B) Time limit for detention of seized articles

4. Members also considered that the time limit for detention should be set out clearly in the Bill.

5. Upon Members’ suggestion, we have looked into the Karaoke Establishments Ordinance (KEO) (Cap. 573) and other relevant ordinance. Section 14(4) of the KEO requires that *where any thing is seized and removed under subsection (3) and no prosecution is instituted in respect of the suspected offence to which the thing relates within 6 months after the day of its seizure and removal, the authorized public officer or the Commissioner of Police or the authorized police officer shall return or arrange for the return of the thing to the operator of the karaoke establishment concerned or the person from whom it was seized and removed, as the case may be.* Section 26 of the Magistrates Ordinance (Cap. 227) states that *in any case of an offence, other than an indictable offence, where no time is limited by any enactment for making any complaint or laying any information in respect of such offence, such complaint shall be made or such information laid within 6 months from the time when the matter of such complaint or information respectively arose.*

6. Section 14(4) of the KEO relates to section 4(1) of the KEO¹ which is a summary offence. According to section 26 of the Magistrates Ordinance, the time limit for criminal proceedings of summary offence is six months. Therefore, it is reasonable and practicable to require the authorized public officer or so to return the thing to the operator of the karaoke establishment

¹ Section 4(1) of the KEO provides that *Any person who on any occasion operates, keeps, manages or otherwise has control of a karaoke establishment in respect of which none of the conditions indicated in subsection (2) have been satisfied commits an offence.*

concerned within six months after the day of seizure.

7. However, clause 29(1) of the Bill², which clauses 15, 16 and 21 to 23 relate to, is an indictable offence and has no time limitation for criminal proceedings. Given the nature and gravity of offences under the Bill, collecting evidence to prove a case and thereby the investigation and prosecution actions might require a longer period of time to complete. Specifying a definite time limit for restoring all seized articles would have the effect of imposing a time limit for the completion of investigation. The investigation capability of the Commissioner might be unduly jeopardized as a result.

8. That said, in practice, the Commissioner will return seized articles not liable to forfeiture to the owners or their authorized agents on the conclusion of proceedings/prosecution of the case or on the conclusion of investigation if there is no prosecution action. To address Members' concern, and at the same time, not to erode the Commission's enforcement capability, we are prepared to move CSAs to give effect that the Commission shall return those seized articles not liable to forfeiture to their owners or authorized agents when the articles are no longer required for the purpose of any criminal proceedings or investigation under the Bill or any other enactment.

(C) Notice of seizure

9. In view of Members' concerns over safeguards for protecting the interest of the owners of the seized articles, vessel and vehicle, we agree to amend the relevant clauses of the Bill to give effect to the following arrangements -

- (i) the Commissioner will issue a "Notice of Seizure", within 30 days of the seizure, to the owner concerned or his authorized agent regardless of whether the articles, vessel or vehicle are seized in their presence; and
- (ii) the Commissioner will inform the owner concerned or his authorized agent of the reasons for seizure and liable to forfeiture in the 'Notice of Seizure' and that the owner may object the intention of forfeiture within 30 days from the date of the Notice.

² Clause 29(1) of the Bill provides that *A person who contravenes section 5 commits an offence and is liable on conviction on indictment to imprisonment for life.*

10. In addition to the above, the Commissioner will issue a receipt on the spot to an owner or an employee or agent of the owner when seizing the article, vessel or vehicle in their presence to acknowledge receipt of the seized articles. The receipt will include remarks notifying the owner concerned or his authorized agent that a “Notice of Seizure” listing out all seized articles which are liable to forfeiture will be issued within 30 days of the seizure. Seized articles not listed in the “Notice of Seizure” may need to be retained for a longer period of time for the sake of enforcement and will be returned on conclusion of the proceedings/prosecution or, in case of no prosecution, on conclusion of the investigation.

11. Clause 21(7) provides that the owner or his authorized agent of an article, vessel or vehicle which is liable to forfeiture, or a person who was in possession of the article, vessel or vehicle at the time of seizure, or a person who has a legal or equitable interest in the article, vessel or vehicles, may within 30 days beginning on the date of seizure give notice in writing to the Commissioner claiming that the article, vessel or vehicle is not liable to forfeiture. Such arrangement in fact is an appeal channel provided under the Bill for concerned owners to object to the Commissioner’s intention of forfeiting the seized articles, vessel or vehicle. As we mentioned in paragraph 9(i) above, the Commissioner would issue a “Notice of Seizure” to the concerned owner or his authorized agent regardless of whether they are present at time of seizure and such persons would therefore have a longer period of time for filing a claim to the Commissioner, i.e. 30 days from the date of “Notice of Seizure”, instead of 30 days from the date of seizure. We will move a CSA to amend clause 21(7) accordingly.

(D) Payment into court for release of the vessel or vehicle prior to the hearing of the application of forfeiture

12. Clause 23 provides that a court may, upon payment into court by way of security of a sum of money not less in amount than the value of the seized vessel or vehicle, release the vessel or vehicle prior to the hearing of the application for its forfeiture. Our lawyer advises that such practice is not uncommon and similar provisions are provided under a number of ordinances, such as the Copyright Ordinance (sections 138(8) and 265(8) of Cap. 528), the Trade Descriptions Ordinance (section 30D(8) of Cap. 362) and the Dutiable Commodities Ordinance (sections 48B(1) and 52(1)f Cap. 109). Relevant extracts of the ordinances are at **Annex II**. In the light of the legal opinion and given the nature and gravity of offences under the Bill, we consider it inappropriate to lower the minimum level of payment into court by way of security by the owner for getting back the seized vessel or vehicle prior to the

hearing of the application for its forfeiture as it would in effect compromise the deterring effect of the Bill.

Commerce, Industry and Technology Bureau
March 2003

Chemical Weapons (Convention) Bill

Procedures under which the Commission of Customs and Excise (CCE) exercises the powers of “seizure”, “detention” and “forfeiture”

Power to enter and search

- CCE may authorize a member of the Customs and Excise Service (C&ES) or an authorized officer in writing to enter and search a place or premises for articles that may be seized under Clause 16 if he thinks those articles would be removed or destroyed unless the place and premises are entered and searched.

(clauses 15(1) and (2))

- A member of C&ES or an authorized officer may stop, board, remove, detain and search a vessel, aircraft or vehicle if he reasonably suspects that there is in or on any vessel, aircraft or vehicle any article which may be seized under section 16 of the Ordinance.

(clause 15(3))

Note : Order made by the Chief Secretary is required if the vessel is detained for more than 12 hours or the aircraft is detained more than 6 hours.

(clauses 15(4) and (5))

Power to seize articles, vessel and vehicle

- A member of C&ES or an authorized officer may seize any article in respect of which he reasonably suspects that an offence has been committed under the Ordinance, or which he reasonably suspects to be, or to contain, evidence of the commission of such an offence.

(clause 16(1)(a))

- A member of C&ES or an authorized officer may seize any vessel or vehicle if he reasonably suspect such vessel or vehicle has been used in connection with the commission of an offence under the Ordinance.

(clause 16(1)(b))

Power to forfeit seized articles, vessel and vehicle

- The following shall be liable to forfeiture –
 - ⇒ Any seized article in connection with an offence under the Ordinance, whether or not any person has been convicted of the offence; or
 - ⇒ Any seized vessel or vehicle which has been used in connection with, or is the subject of, an offence under the Ordinance, whether or not any person has been convicted of the offence; or
 - ⇒ Any seized article which CCE believes to be a “controlled article” in accordance with section 17(7).

(clause 21(1))

- CCE may, within 30 days of the seizure, restore any article (other than a chemical weapon) or any vessel or vehicle, which is liable to forfeiture to the owner or his authorized agent.

(clause 21(2))

- If CCE is not to restore the seized articles, vessel or vehicle, he shall, not later than 30 days beginning on the date of the seizure of an article, vessel or vehicle, serve a notice of the seizure to an owner if the articles, vessel or vehicle was seized in his absence.

(clause 21(3))

- The owner or his authorized agent may give notice in writing to CCE claiming that the article, vessel or vehicle is not liable to forfeiture within 30 days beginning either on the date of the seizure or on the date of the notice of seizure.

(clause 21(7))

- If CCE receives no notice of claim on the date of expiration of the appropriate period of time, the seized article, vessel or vehicle shall be forfeited forthwith to the Government; and may be disposed of, whether by destruction or otherwise as he thinks fit.

(clause 21(12))

Determination of applications for forfeiture

- If CCE receives a notice of claim, he shall apply to a magistrate, the District Court or the Court of First Instance for forfeiture of the seized articles, vessel and vehicle.

(clause 22 (1))

- Upon the hearing, the court may order that the article, vessel or vehicle be forfeited to the Government, be delivered to the claimant subject to any condition which it may specify in the order or be disposed of in such manner and subject to any such condition as it may specify in the order.

(clause 22(10))

Power to release seized vessels and vehicles prior to hearing

- A court may, upon payment into court by way of security of a sum of money not less in amount than the values of the seized vessel or vehicle, as assessed by CCE or an authorized officer, order that the vessel or vehicle be delivered to the claimant thereof upon the condition that the vessel or vehicle be re-delivered into the custody of CCE before the date of hearing of the application (for forfeiture).

(clause 23)

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Chapter:	60	Title:	IMPORT AND EXPORT ORDINANCE	Gazette Number:	66 of 2000
Section:	29	Heading:	Power to release seized vessels and vehicles prior to the hearing	Version Date:	01/07/1997

Remarks:

Adaptation amendments retroactively made - see 66 of 2000 s. 3

(1) Where an application has been made under section 28(1) in respect of a vessel or vehicle which is liable to forfeiture, a court may, upon payment into court by way of security of a sum of money not less in amount than the value of the seized vessel or vehicle, as assessed by the Commissioner or an authorized officer, order that the vessel or vehicle be delivered to the claimant thereof upon the condition that the vessel or vehicle be re-delivered into the custody of the Commissioner before the date of hearing of the application.

(2) If-

- (a) a court has ordered under subsection (1) that a seized vessel or vehicle be delivered to the claimant thereof; and
- (b) the vessel or vehicle is not delivered into the custody of the Commissioner before the date of the hearing of the application,

the court hearing the application may, in lieu of ordering under section 28(6) or (7) that the vessel or vehicle be forfeited to the Government, order that the money paid into court under subsection (1) of this section be forfeited to the Government or returned to the person who paid it into court. (Amended 66 of 2000 s. 3)

(3) A claimant who applies for the release of a vessel or vehicle shall prior to the release of the vessel or vehicle pay to the Commissioner the reasonable cost of assessing the value of the vessel or vehicle as the court orders. (Added 62 of 1993 s. 10)

(Amended L.N. 294 of 1982; 1 of 1994 s. 12)

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Chapter: 109 Title: DUTIABLE COMMODITIES Gazette Number:
ORDINANCE
Section: 48B Heading: **Power to release seized ships, Version Date: 30/06/1997**
vehicles and aircraft prior to
hearing

(1) Where an application for forfeiture has been made under section 48A in respect of a ship, vehicle or aircraft which is liable to forfeiture, a magistrate may, on payment into court by way of security of a sum of money not less in amount than the value of the seized ship, vehicle or aircraft, as assessed by the Commissioner, order that the ship, vehicle or aircraft be delivered to the claimant on condition that the ship, vehicle or aircraft be redelivered into the custody of the Commissioner before the date of the hearing of the application.

(2) A claimant who applies for the release of a ship, vehicle or aircraft shall, prior to the release of the ship, vehicle or aircraft, pay the reasonable cost of assessing the value of the ship, vehicle or aircraft as the magistrate orders.

(3) If-

(a) a magistrate has ordered under subsection (1) that a seized ship, vehicle or aircraft be delivered to the claimant; and

(b) the ship, vehicle or aircraft is not redelivered into the custody of the Commissioner before the date of the hearing,

the magistrate hearing the application may, in lieu of ordering under section 48A(6) or (7) that the ship, vehicle or aircraft be forfeited to the Government, order that the money paid into court under subsection (1) be forfeited to the Government or returned to the person who paid it into court or the claimant. (Amended 46 of 1996 s. 24)

(Added 70 of 1993 s. 5)

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Chapter: 115 Title: IMMIGRATION Gazette Number:
ORDINANCE
Section: 49 Heading: **Security in lieu of detention** Version Date: 30/06/1997
where application made for
forfeiture of ship or vehicle

- (1) Where an application has been made under section 48, a magistrate may, on payment into court by way of security of a sum of money not less in amount than the value of the ship as assessed by the Director of Marine or the value of the vehicle as assessed by the Director, order that the ship or vehicle be delivered to the claimant, subject to a condition that it be re-delivered into the custody of the Director before the date of hearing of the application.
- (2) If a ship or vehicle which has been delivered to a claimant under subsection (1) is not re-delivered to the Director before the date of hearing of the application under section 48, the magistrate hearing the application may, in lieu of ordering that the ship or vehicle be forfeited to the Crown, order that the money paid into court under subsection (1) be forfeited to the Crown.
- (3) Save as provided in subsection (2), the magistrate hearing the application shall, at the conclusion of the proceedings, order that the amount of the money paid into court under subsection (1) shall be repaid to the person who paid it into court.

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