

**Chemical Weapons (Convention) Bill -
The Administration's response to comments / questions
raised at the eleventh meeting of the Bills Committee
held on 31 March 2003**

Clauses 5 and 29

Members have asked the Administration to consider replacing the word “*encourage*” in clause 5(f) by the word “*incite*”. Having regard to the considerations detailed in our previous submission for the tenth meeting held on 3 March 2003 (see Annex), we remain of the view that clause 5(f) of the Bill, including the word “*encourage*”, should be retained to reflect fully the prohibitions prescribed in paragraph 1(d) of Article I of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.

2. Upon review, we agree with Members that clause 5(e) and 5(f) should not be added to clause 29(2).

Clauses 15, 16, 21, 22 and 23

Notice for seized articles not liable to forfeiture

3. Members were concerned that an owner of seized articles would have no idea of how long the seized articles not listed on the “Notice of Seizure” would be detained and that there was no channel for appeal against the Commissioner’s decision to further detain the seized articles.

4. For transparency sake, we agree that the Commissioner should clearly inform the owners the status of each of the seized articles (i.e. further detention or liable to forfeiture), reasons for seizure and further detention/liable for forfeiture, and channels for the owner to appeal against the Commissioner’s decision as far as practicable.

5. We are of the view that the Commissioner should, as an administrative practice, issue a separate notice to the owner informing him the list of seized articles not liable to forfeiture and the reasons for seizure and detention within 30 days of the seizure. The notice will include remarks notifying the owner concerned that-

(i) under clause 16(4), he may photograph or make any other form of

copy of the seized articles or document on application to the Commissioner and subject to such conditions as the Commissioner may impose;

- (ii) he may apply to the Commissioner for restoration of the listed seized articles. The Commissioner may consider his application on a case-by-case basis; and
- (iii) the Commissioner should return the listed seized articles to him when the articles are no longer required for the purpose of any criminal proceedings or investigation under the Bill or any other enactment.

The Criminal Justice and Police Act 2001 of the United Kingdom

6. Upon Members' request, we have looked into part 2 of the Criminal Justice and Police Act 2001 of the United Kingdom in respect of powers of seizure. The Act, among other things, aims to provide additional powers of search and seizure. Section 50(1)(c) of the Act provides that "*[Where] in all circumstance, it is not reasonably practicable for it to be determined, on those premises - (i) whether what he has found is something that he is entitled to seize, or (ii) the extent to which what he has found contains something that he is entitled to seize, [that person's powers of seizure shall include power under this section to seize so much of what he has found as it is necessary to remove from the premises to enable that to be determined.]*" Section 50(2)(c) of the Act further provides that "*[Where] in all the circumstances it is not reasonably practicable for the seizable property to be separated, on those premises, from that in which it is comprised, [that person's powers of seizure shall include power under this section to seize both the seizable property and that from which it is not reasonably practicable to separate it.]*" It is also stated that section 50 applies to each of the powers of seizure conferred by the provisions of section 29(2)(c), (d) and (e) of the Chemical Weapons Act 1996¹.

7. Given that the additional powers of seizure provided under section 50 of the Act allow enforcement officers to seize articles that might be

¹ Section 29(2)(c) provides that "*[A person who enters the premises under the authority of the warrant may] take copies of, or seize and remove, any such document.*"

Section 29(2)(d) provides that "*[A person who enters the premises under the authority of the warrant may] inspect, seize and remove any device or equipment found on the premises which he has reasonable cause to believe may be required as such evidence.*"

Section 29(2)(e) provides that "*[A person who enters the premises under the authority of the warrant may] inspect, sample, seize and remove any substance found on the premises which he has reasonable cause to believe may be required as such evidence.*"

irrelevant to an offence, the Act provides correspondingly stringent statutory requirements, such as issue of a notice of exercise of the additional powers of seizure, prompt examination of the seized articles, return of the seized articles as soon as practicable etc., with the objectives to regulating and controlling the demeanour of the enforcement officers and at the same time, protecting the interest of the owners of the seized articles.

8. However, clause 16(1) of the Bill empowers enforcement officers to seize articles only when there are reasonable grounds to suspect that such articles are in connection with an offence. Seizure of articles outside this parameter would be unlawful. As the scope of the powers of seizure provided under the Bill are narrower than those provided under the Act, we consider it inappropriate to adopt some of the regulatory provisions of the Act into the Bill.

Time limits provided under clauses 15(4) and (5)

9. Having noted that clause 15(4) and (5) provide for the time limits, and the extension of such time limits, for the detention of vessel and aircraft, Members requested us to consider amending clause 15(4) and (5) to cover the detention of vehicle and other types of seized articles.

10. Clause 15(3) provides that *subject to clause 15(4), a member of the Customs and Excise Service or an authorized officer may, if he reasonably suspects that there is in or on any vessel, aircraft or vehicle any article which may be seized under section 16, stop, board, remove, detain and search the vessel, aircraft or vehicle.* The powers of detention provided under clause 15(3) are for the sake of search. Upon review, we agree that detention of a vehicle for search should also be subject to a time limit. We propose that any vehicle should be detained for no more than 12 hours for search. If a longer period is required, the Commissioner's authorization for further period of not more than 12 hours should be sought. We are prepared to move CSAs to give effect to such changes.

11. As we mentioned above, the powers of detention provided under clause 15(3) are for the sake of search but not for investigation and prosecution. Given the difference in nature and for the considerations detailed in our previous submission, we therefore consider it inappropriate to impose a time limit for restoring seized articles as it would in effect impose a time limit for the completion of investigation.

Clause 23

12. Members considered it more appropriate to provide the court with the discretionary power to determine the level of payment after taking into account the circumstances of each case, including the views of the Commissioner. Taking into account the channel available to the Commissioner to submit his views on the level of payment to the court, we find Members' proposal acceptable and are prepared to amend clause 23 accordingly.

Clause 27

13. We confirm that all appointed "in-country escorts" are public officers from the Central People's Government and/or the HKSAR Government. Since a member of a government advisory body is not a public officer, he/she will not be appointed as an "in-country escort".

Clause 42

14. We propose to stipulate the fee for applications of permits in the form of schedule, FS be given the power to amend the fee schedule. We are prepared to move CSAs to achieve this separately. No amendment to clause 42 is required.

Schedule 2 (Consequential amendment to the Organized and Serious Crimes Ordinance (OSCO) (Cap. 455))

15. As we will not replace the word "*encourage*" by the word "*incite*", no amendment to Schedule 2 is required.

Commerce, Industry and Technology Bureau
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**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 Advisor², 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 ruling³, 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.

² *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

³ *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 offence⁴. 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.

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⁴ see *Gammon (Hong Kong) Ltd. v. A. G.* [1984] 2 W. L. R. 437