

**Chemical Weapons (Convention) Bill –
The Administration’s response to comments/questions
raised at the fourteenth meeting of the Bills Committee
held on 26 May 2003**

Clause 2

Following the discussion at the meeting, we have added the definitions of “in-country escort”, “inspected State Party” and “inspection team” in the CSAs.

2. Upon request of Members, the Secretary for Commerce, Industry and Technology (SCIT) agrees to state in his speech for the resumption of the second reading debate of the Bill the administrative arrangements between the Central People’s Government (CPG) and the HKSAR Government (SARG) for appointing “in-country escorts” for inspection in HKSAR, the departments from which the officials of the CPG and the SARG would be appointed as “in-country escorts” and the reasons for not prescribing the agreed arrangements in the Bill. Some speaking points for incorporation in SCIT’s speech is at **Annex I**.

Clause 5 (c)

3. Our lawyer has advised that ‘保有’ is the authentic Chinese text of the term ‘retain’ in the Convention. This Chinese rendition also appears in sections 6 and 17 of the Theft Ordinance (Cap. 210). In the Hong Kong legislation, the term ‘retain’ is also rendered as ‘保留’ , ‘保存’ , ‘扣留’ , ‘聘用’ , ‘留用’ in other context.

Clause 5(f)

4. In the preamble of the Convention, it is clearly stated that the purpose of the Convention is to effect strict, complete and effective prohibition of the dealing of chemical weapons in various forms. Given our policy to fulfill the HKSAR’s obligations under the Convention fully and effectively, we consider that we should follow the text of paragraph 1 of Article I of the Convention which are the core prohibitions of the Convention. Upon request of Members, some speaking points for incorporations into SCIT’s speech during the Second Reading debate are

prepared at **Annex II**.

Clause 15(5) and 15(6)

5. At the last meeting, a Member considered that for the sake of consistency, the power to further detain a vessel, an aircraft or a vehicle should be vested with the same person and therefore, the power to further detain a vehicle should also be vested with the Chief Secretary (CS).

6. In considering the approving authority for extending the detention period of vessels, aircrafts and vehicles, we have to take into account the seriousness of the impact on the affected parties brought by the extended detention, the frequency of seeking approval of such kind and other relevant operational needs.

7. Vessels and aircrafts usually carry a number of consignments with different owners. Also, many of the vessels and aircrafts are operated on fixed time schedules. Any delay of their trip will cause serious consequence to many parties. It is necessary that we have to consider carefully the consequence as well as other factors affecting the shipping company, airline, their agent, owner of goods, passengers and other concerned parties of a vessel or aircraft before we decide whether or not the detention period for the purpose of a search has to be extended. Because of the seriousness of the impact on the affected parties brought by the extended detention of vessels and aircrafts, we consider that the order for further detention of vessels and aircrafts should be made by the CS.

8. Compared with vessels and aircrafts, vehicles carry less goods and the goods are usually owned by only one or two parties. With limited loading capacity of vehicles in general, the financial hardship, if any, incurred to a vehicle owner and the owner of goods as a result of detention of the vehicle for examination would be far less significant than in the case of a vessel or aircraft. The heavy volume of road traffic is another factor for consideration. For the fact that there are now 25,000 - 30,000 vehicles crossing the boundary every day, the incidence of Customs officers having to stop and search a vehicle for detection of offences at Customs control points will be much higher.

For enforcing the Chemical Weapons (Convention) Ordinance, apart from the detention and search of vehicles at the Control Points, Customs officers may also be required to detain and search vehicles at any place inside HKSAR at any time of the day. It follows that there will be a lot more occasions on which the officers have to seek approval for further detention of vehicles in case of need. Under such circumstances, and from operational point of view, we consider it more appropriate and practicable to seek approval from the Commissioner for extension of detention period. Being the head of the Customs and Excise Department, it is beyond doubt that he has the knowledge to enable him to make the decision in a reasonable, responsible and timely manner.

9. In conclusion, we consider the current arrangement of which the power to further detain vessels and aircrafts and the power to further detain vehicles are vested with the CS and the Commissioner respectively appropriate.

Clauses 16(5), 21(3), 21(7) and 21(12)

10. Upon request, we have amended the new clause 21(3) in the CSAs taking into account Members' comments expressed at the meeting.

Commerce, Industry and Commerce Bureau
May 2003

“In-country escorts”

Under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, it is a State Party’s obligation to grant to the inspection team sent by the Organization for the Prohibition of Chemical Weapons the requisite access to conduct inspections of the chemical facilities within its border. “In-country escorts” refer to individuals specified by the inspected State Party to accompany and assist the inspection team during the in-country period.

2. For inspection to be conducted in HKSAR, the CPG and SARG have agreed that the SARG may, under normal circumstances, nominate SARG officers as “in-country escorts” for endorsement by the CPG. Where necessary, the CPG may, after consultation with the SARG, specify CPG officers to be “in-country escorts” along with the SARG officers.

3. As we understand it, CPG officers specified as “in-country escorts” would come from the relevant departments under the State Development and Reform Commission, Ministry of Foreign Affairs and Ministry of National Defense. In the case of the SARG, “in-country escorts” would come from the Commerce, Industry and Technology Bureau, Customs and Excise Department, Trade and Industry Department and Government Laboratory.

4. According to the Convention, it is for the inspected State Party to specify ‘in-country escorts’ for inspections to be conducted in its territory. There is no further regulation of the appointment mechanism under the Convention. We consider it not necessary to prescribe in law the above administrative arrangements between the CPG and the SARG for the appointment of “in-country escorts”. Moreover, organization of government departments may change from time to time. If the government departments from which “in-country escorts” would come from were prescribed in law, any subsequent reorganization changes affecting these named government departments would entail amendments to the Ordinance. This would take time and would not conducive to the effective and efficient discharging of our obligations under the

Convention.

Meaning of ‘encourage’

We have conducted a research on previous court cases which may shed light on the judicial interpretation of the word ‘encourage’. There is a court ruling¹ holding that “*encouragement does not necessarily amount to aiding and abetting*” and could cover unintentional act. In another court ruling², there was a passage elaborating ‘encourage’ as “*to intimate, to incite to anything, to give courage, to inspirit, to embolden, to raise confidence, to make confident*”. In addition, there is a ruling³ holding that the word ‘encourage’ is interpreted to merely mean ‘incite’.

2. As can be seen from the above cases, there is no authoritative interpretation indicating a complete overlap of “encourage” and “incite”. It is possible that certain acts, e.g. intimate, inspirit etc. may be covered by “encourage” but not “incite”. Nevertheless, there is no case authority holding that the scope of “encourage” is necessarily wider than that of “incite” either. It is possible that, in certain context, “encourage” merely means “incite”.

3. Therefore, the best way to ensure our compliance with the Convention is to retain the word “encourage” in clause 5(f) of the Bill. If we replace “encourage” by “incite”, there arises a risk of us being challenged for not fully discharging our obligations under paragraph 1(d) of the Convention. On the other hand, for the purpose of clause 5(f), we consider that “encourage” has a meaning similar to that of “incite”.

4. Some Members have asked the Administration to explain how we would interpret the word “encourage”. Our explanation above that we would consider “encourage” has a meaning similar to that of “incite” under clause 5(f) should help address Members’ concern.

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 *The Queen v Most* 7 QBD 244

³ *Wilson v Danny Quastel (Rotherhite) Ltd.* [1996] 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.”

Moreover, under the judiciary system of Hong Kong, it is up to the presiding court, with the help of case law available at that particular point in time, to interpret whether the prosecution has proven that a defendant has actually committed the act of “encouragement” under the Chemical Weapons (Convention) Ordinance. The independence of our judiciary system would provide a safeguard against any arbitrary definition of the word “encourage”.

5. Some Members have also raised concern that “encourage” is rarely used in common law legislation, and the use of the term in the Bill would become a precedent.

6. In this connection, Members may wish to note that “encourage” is not new in Hong Kong legislation⁴. Besides, the wording of each piece of legislation should be determined by, inter alia, the purposes of that legislation, rather than the wording of other legislation. For the Chemical Weapons (Convention) Bill, the word “encourage” is used to implement the Chemical Weapons Convention in full in Hong Kong. Therefore the use of the word here would not become a precedent.

⁴ Examples of “encourage” can be found in *s.5 of the Offences Against the Person Ordinance (Cap 212)*, *s.26A of the Summary Offences Ordinance (Cap 228)*, *ss.53 and 54 of the Disability Discrimination Ordinance (Cap 487)*, *ss.53 and 54 of the Sex Discrimination Ordinance (Cap 480)*, *ss. 135 and 136 of the Crimes Ordinance (Cap 200)*.