

**Chemical Weapons (Convention) Bill –
Replies to the questions raised by the LegCo Assistant Legal Adviser
in her letter of 6 August 2002**

Clauses 5 and 29

We shall address the questions relating to these two clauses separately.

Clauses 7 and 29(4)

2. We explained the rationale for including Clause 7(1) in the CWC Bill in a note forwarded to the Assistant Legal Adviser (ALA) on 24 November 2001. In gist, Clause 7(1) is needed to help protect public safety, and to enable the Government to prepare declarations in respect of chemical weapons and to dispose of the chemical weapons found as required by the Convention. Clause 7(1) is modeled on section 13 of Australia's Chemical Weapons (Prohibition) Act¹ (the Australian Act).

3. Clause 29(4) of the CWC Bill provides that a person who contravenes section 7(1) commits an offence and is liable on conviction to a fine at level 6 and to imprisonment for 6 months. In prescribing this penalty level, we had regard to the importance of public safety and discharge of an international obligation on one hand, and the burden on the public on the other. We believe the prescribed penalty strikes a right balance between the two. (For information, the penalty for contravention of section 13 of the Australian Act is imprisonment for 1 year.)

Clauses 8 and 30

4. Section 16 of the Australian Act provides that the operator of a facility requires a permit to operate the facility during a particular year if

¹ Section 13 of the Australian Act reads, “*if a person finds a substance or article, whether in Australia or an external Territory, or on, or in the seas above, the continental shelf adjacent to Australia or an external territory, that the person believes may be a chemical weapon, the person must immediately notify the Director [of the Chemical Weapons Convention Office] or a constable of the finding, and of the whereabouts, of the substance or article concerned*”.

“Scheduled chemicals” are *likely* to be produced or used etc at the facility during the year. Clause 8 of the CWC Bill is modelled on section 16 of the Australian Act, with a variation in wording to the effect that an operator of a facility requires a permit to operate the facility during a particular year if, “*in all circumstances of the case, a reasonable person would conclude that*” “Scheduled chemicals” are likely to be produced, used etc at the facility during the year. The modified wording is intended to provide an objective test for determining the likelihood of the production, use etc of “Scheduled chemicals”, i.e. whether a reasonable person in the same context would conclude that “Scheduled chemicals” would likely be produced, used etc. With such an objective test, we consider it appropriate to impose a strict liability for contravention of Clause 8(1), and on that basis Clauses 30(1) to (3) were drafted. It is also relevant that under Clause 30(6), a person charged with an offence under Clause 30(1) to (3) will have a defence if he can prove that he took reasonable precautions and exercised due diligence to prevent the commission of the offence.

Clauses 13 and 31

5. Under Clauses 13(2), 13(3) and 31(2), if a person fails to comply with a notice from the Director without reasonable excuse, he is liable to conviction to a fine at level 6 and imprisonment for 1 year. Pursuant to section 14A of the Criminal Procedure Ordinance, the offence under Clause 31(2) shall be triable summarily only. We do not see a compelling need to add an indictable offence provision and prescribe a different (higher) penalty level.

6. The penalty prescribed in Clause 31(2) is the maximum penalty and the court will have the discretion to impose a lower penalty. We also believe that the prescribed penalty is comparable to that for contravention of a similar offence under the Australian Act (imprisonment for 1 year).

Clause 14(1)(a)

7. Clause 14(1)(a) empowers a member of the Customs and Excise Service or an authorized officer to enter at any reasonable time and search any premises or place where a declared facility is located. “Declared facility” is defined in Clause 2(1) to mean a Schedule 1, 2 or 3 facility or any other chemical production facility, and “other chemical production facility” is in turn defined in Clause 2(1) to mean a facility covered by a notification required under Clause 11(1)(a). As explained previously, the notification requirement under Clause 11(1)(a) will only be triggered when a large amount of discrete

organic chemicals is produced. It is envisaged that there will only be very few “other chemical production facilities”.

8. For the purpose of Clause 14(1)(a), a member of the Customs and Excise Service or an authorized officer does not require a search warrant to enter and search the premises or place concerned.

9. Under Clause 15(1), a member of the Customs and Excise Service or an authorized officer, however, needs to obtain a search warrant from a magistrate for entry and search any other premises (including premises for residential use).

Clauses 28 and 34

10. Clause 28 prohibits disclosure of information except in certain specified circumstances. It is modelled on section 32 of the UK Chemical Weapons Act.

11. The addition of the words “*in the performance of duties imposed by this Ordinance*” in Clause 28(2)(c) is meant to make it explicit that disclosure of information is permitted by any officer when carrying out duties imposed by the Ordinance. Clause 28(2)(i) is added to put it beyond doubt that information obtained under the CWC Ordinance may be disclosed if it is permitted by other legislation, e.g. the Mutual Legal Assistance in Criminal Matters Ordinance.

Clause 35

12. Clause 35(1) makes it an offence if a person obstructs a member of the Customs and Excise Service or an authorized officer. The prescribed penalty is a fine at level 6 (\$100,000) and imprisonment for 6 months, which is the same as the penalty in respect of the same offence under section 11 of the Weapons of Mass Destruction (Control of Provision of Services) Ordinance.

13. The ALA invited the Administration to consider adding “willfully” before “obstructs” in Clause 35(1), as in the case of Clause 33(1)(c). Having reviewed the provision, we agree with the ALA’s suggestion and will move amendment accordingly at the committee stage.

Schedule 1

14. We are grateful to the ALA for pointing out that the new

paragraph 5bis. in Part VI of the Verification Annex to the Convention is omitted from the text and that there are a number of typographical errors in the Chinese text of the Convention. As set out in a separate note to the Clerk to Bills Committee, in view of the comments expressed by Members, we have revisited the approach of setting out the full text of the Convention in Schedule 1 to the Bill. We are prepared to propose committee stage amendments to delete the current Schedule 1 to the Bill.

15. Paragraph 5bis. provides that transfer of saxitoxin (a “Schedule 1” chemical) between State Parties shall not be subject to the requirement to notify the Technical Secretariat 30 days before the transfer and the notification shall be made by the time of transfer, if the quantities are of 5 milligrams or less and if the transfer is for medical or diagnostic purposes. The ALA asked whether Hong Kong was obliged to enact a provision to reflect this requirement.

16. As we pointed out previously, the import and export of “Scheduled chemicals” into or out of Hong Kong is subject to licensing control under the Import and Export Ordinance. The Trade and Industry Department is able to prepare, from its licensing record, notifications to the Secretariat of the Convention on transfer of “Scheduled chemicals”. There is therefore no need to reflect in the CWC Bill the notification requirement under the new paragraph 5bis in Part VI of the Verification Annex.

Commerce, Industry and Technology Bureau
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