

**Chemical Weapons (Convention) Bill -
Clauses 5(e) and 5(f)**

Clause 5(e)

Clause 5(e) of the CWC Bill provides that “*no person shall engage in military preparations, or in preparations of a military nature, intending to use a chemical weapon*”. This clause reflects the requirement under paragraph 1(c) of Article I of the Chemical Weapons Convention, except for the addition of “*or in preparations of a military nature*”. Members of the Bills Committee noted that the Convention only prohibited engagements in military preparations, and asked whether the addition of “*preparations of a military nature*” was necessary and appropriate.

2. Clause 5(e) is identical to section 2(1)(e) of the Chemical Weapons Act of the United Kingdom. The addition of “*preparations of a military nature*” serves to expand the scope of the provision to cover those preparations that are normally not regarded as military preparations but nonetheless have the characteristics of a military preparation, for example, preparations by terrorists with an intention to use a chemical weapon. We accept that the reference is not absolutely needed for the purpose of fulfilling our obligations under the Convention, but consider that it should be in the interest of public safety to retain it.

Clause 5(f)

3. Clause 5(f) provides that “*no person shall assist, encourage or induce, in any way, anyone to engage in any activity prohibited under the Convention*”. At the previous meetings of the Bills Committee, the Administration explained that clause 5(f) reflected paragraph 1(d) of Article I of the Convention. Noting that aiding, abetting etc in relation to offences were already prohibited under other legislation, Members questioned whether clause 5(f) was really needed. On drafting, Members also commented that the term “*encourage*” seemed not commonly used in local legislation, and it was not clear what “*any activity prohibited under the Convention*” referred to.

4. Section 89 of the Criminal Procedure Ordinance (Cap. 221) provides that “any person who aids, abets, counsels or procures the commission by another person of any offence shall be guilty of the like offence”. Our lawyer advises that if a person assists, encourages or induces any person to

engage in any activity prohibited under clauses 5(a) to 5(e) of the CWC Bill, then by virtue of section 89 of the Criminal Procedure Ordinance, the person may be prosecuted for the like offence.

5. The above notwithstanding, we consider it appropriate to retain clause 5(f) to expressly set out the particular prohibition prescribed in paragraph 1(d) of Article I of the Convention. The prohibitions under paragraph 1(a) to 1(d) of Article I of the Convention are the core elements of the Convention, and we believe it is appropriate to replicate the prohibitions in full in clause 5 of the CWC Bill. Clause 5(f) makes it clear that assisting, encouraging or inducing anyone to engage in any activity prohibited is a guilt likewise prohibited by the Convention. It should be retained for clarity and transparency sake.

6. The term “*encourage*” is indeed used in offence provisions in other legislation in Hong Kong. Some examples include sections 135 and 136 of the Crimes Ordinance (Cap. 200), section 5 of the Offences Against the Person Ordinance (Cap. 212), as well as section 26A of the Summary Offences Ordinance (Cap. 228) (relevant extracts of the Ordinances are enclosed). Likewise, the other two terms “*assist*” and “*induce*” used in paragraph 1(d) of Article I of the Convention and in clause 5(f) of the CWC Bill are also used in many offence provisions in local legislation.

7. As regards the phrase “*any activity prohibited under the Convention*”, following a review, we agree that it is not expressly clear as to what activities it refers to. Given that the prohibitions under the Convention are given legal effect in Hong Kong through the CWC Ordinance and such prohibitions are set out in clauses 5(a), (b), (c), (d) and (e), a clearer way of presentation would be to make reference to sections 5(a), (b), (c), (d) and (e) direct. We are prepared to propose an amendment to clause 5(f) by replacing “*any activity prohibited under the Convention*” with “*any activity prohibited under this section*”.

Clause 29

8. Members asked whether the defence provided for in clause 29(2) should be made applicable to clauses 5(e) and (f) in addition to clauses 5(a) to 5(d). Clause 29(2) provides that it would be a defence for a person charged with the offence under section 5(a), (b), (c) or (d) to prove that he neither knew nor suspected nor had reason to suspect that the article was a chemical weapon.

9. A person will only commit an offence under clause 5(e) if he has engaged in military preparations, or in preparations of a military nature, *intending to use a chemical weapon*. Given the intent element in clause 5(e),

we were of the view that there was no need to give the person charged with the particular offence a defence that he did not know that the article was a chemical weapon. Having reviewed the provision, we agree that it is possible that a person charged with the offence was not aware that the article he intended to use was a chemical weapon, and therefore it would not be inappropriate to extend the defence under clause 29(2) to such a person. Our lawyer has also advised that it is arguable whether clause 5(e), as it currently stands, should be treated as a strict liability in prosecution, i.e. it is not sure if the prosecution needs to prove that the defendant charged with the offence indeed knew that the article he used was a chemical weapon. By providing a statutory defence, the policy intention that clause 5(e) should be an offence of strict liability will stand out more clearly, thereby removing the uncertainty.

10. In respect of clause 5(f), as we will make it clear that the prohibited activities are activities covered by clauses 5(a) to 5(e) (see para 7 above), it will be logical to extend the defence in clause 29(2) to a person charged with an offence under clause 5(f) as well.

11. In sum, we are prepared to propose amendments to clause 29(2) to provide a defence for a person charged with an offence under clauses 5(e) or 5(f).

Commerce, Industry and Technology Bureau
December 2002

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Section of Enactment

Chapter : 212 Title : OFFENCES AGAINST THE PERSON ORDINANCE Gazette Number : 13 of 1999
Section : 5 Heading : **Conspiring or soliciting to commit murder** Version Date : 01/07/1997

Remarks:

Amendments retroactively made - see 13 of 1999 s. 3

All persons who within Hong Kong conspire, confederate, and agree to murder any person, whatever his nationality or citizenship and wherever he may be, and any person who within Hong Kong solicits, encourages, persuades or endeavours to persuade, or proposes to any person to murder any other person, whatever his nationality or citizenship and wherever he may be, shall be guilty of an offence and shall be liable to imprisonment for life.

(Amended 30 of 1911 ss. 2 & 5; 64 of 1983 s. 4; 13 of 1999 s. 3)

[cf. 1861 c. 100 s. 4 U.K.]

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Section of Enactment

Chapter :	200	Title :	CRIMES ORDINANCE	Gazette Number :	L.N. 229 of 1998
Section :	135	Heading :	Causing or encouraging prostitution of, intercourse with, or indecent assault on, girl or boy under 16	Version Date :	22/05/1998

(1) A person who causes or encourages the prostitution of or an unlawful sexual act with a girl or boy under the age of 16 for whom that person is responsible shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.

(Replaced 90 of 1991 s. 13. Amended 31 of 1997 s. 10)

(2) Where a girl or boy is a prostitute or has done an unlawful sexual act, a person shall be deemed for the purposes of this section to have caused or encouraged the same if that person knowingly allowed the girl or boy to consort with, or to enter or continue in the employment of, any prostitute or person of known immoral character. (Replaced 90 of 1991 s. 13)

(3) Subject to subsection (4), the persons who for the purposes of this section are to be treated as responsible for a girl or boy are-

- (a) any person who is her or his parent or legal guardian;
- (b) any person who has actual possession or control of her or him, or to whose charge she or he has been committed by her or his parent or legal guardian or by a person having the custody of her or him; and
- (c) any other person who has the custody, charge or care of her or him.

(4) In subsection (3), "parent" (父母) does not include, in relation to any girl or boy, a person deprived of her or his custody by order of a court of competent jurisdiction but, subject to that, in the case of a girl or boy who has been adopted under the Adoption Ordinance (Cap 290) means her or his adopters and in the case of a girl or boy who is illegitimate, and has not been so adopted, means her or his mother and any person who has been adjudged to be her or his putative father.

(Added 1 of 1978 s. 6. Amended 90 of 1991 s. 13)

[cf. 1956 c. 69 s. 28 U.K.]

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Section of Enactment

Chapter : 200 Title : CRIMES ORDINANCE Gazette Number : L.N. 29 of 1999
Section : 136 Heading : **Causing or encouraging prostitution of mentally incapacitated person** Version Date : 01/02/1999

(1) Subject to subsection (2), a person who causes or encourages the prostitution in Hong Kong or elsewhere of a mentally incapacitated person shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years. (Amended 90 of 1991 s. 14)

(2) A person who causes or encourages the prostitution of another is not guilty of an offence under this section if that person does not know and has no reason to suspect the other to be a mentally incapacitated person. (Replaced 90 of 1991 s. 14)

(Added 1 of 1978 s. 6. Amended 81 of 1997 s. 59)

[cf. 1956 c. 69 s. 29 U.K.]

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