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Report of the Bills Committee on
Chemical Weapons (Convention) Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Chemical Weapons (Convention) Bill.

Background

2. The "Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction" (the Convention), which came into force on 29 April 1997, is an international treaty that aims at banning the development, production, use and retention of chemical weapons.

3. As the People's Republic of China is a signatory to the Convention, the Central People's Government (CPG) has from 1 July 1997 extended the application of the Convention to the Hong Kong Special Administrative Region (HKSAR) under Article 153 of the Basic Law. To provide for the necessary legal authority to fully fulfil the requirements of the Convention in HKSAR, the Administration proposes enacting new legislation and has therefore introduced the Chemical Weapons (Convention) Bill (the Bill) into the Legislative Council (LegCo) on 7 November 2001.

The Bill

4. The object of the Bill is to implement the Convention in HKSAR by controlling chemical weapons and certain chemicals capable of being used as chemical weapons. The full text of the Convention (including Schedule 1 chemicals, Schedule 2 chemicals and Schedule 3 chemicals i.e. the so-called "Scheduled chemicals") is set out in Schedule 1 to the Bill.

5. The Bill mainly provides for the legal authority to:

(a) ban the use, development, production, possession and transfer of chemical weapons;

(b) seize chemical weapons found in HKSAR for disposal in accordance with the provisions in the Convention;

(c) control and monitor the production and related activities pertinent to scheduled chemicals and unscheduled discrete organic chemicals;

(d) require the submission of information from manufacturers, research and medical institutions, testing laboratories, etc. for the purposes of compiling annual declarations to the Secretariat of the Convention; and

(e) enable the inspection teams sent by the Secretariat of the Convention to conduct inspections of facilities in HKSAR.

The Bills Committee

6. The House Committee agreed at its meeting on 9 November 2001 to form a Bills Committee to study the Bill. The Bills Committee first met on 18 April 2002 and Hon Cyd HO Sau-lan was elected Chairman. The membership list of the Bills Committee is in **Appendix I**. The Bills Committee has held a total of 15 meetings.

Deliberations of the Bills Committee

7. Whilst appreciating the need to fulfil the requirements of the Convention in HKSAR, the Bills Committee has examined the need for enacting new legislation in this regard. Given that the general public is not familiar with chemical weapons, the Bills Committee has also examined in depth the chemicals covered by the Bill and the impact of the Bill on the general public as well as industrial and other establishments that need to acquire or use chemicals. In this connection, the Bills Committee has examined the following issues:

(a) Need for enacting new legislation;

(b) Chemicals covered by the Bill;

(c) Prohibited activities under the Bill;

(d) Requirement to report the finding of a chemical weapon;

(e) Proposed permit and documentation requirements in respect of permitted activities involving the Scheduled chemicals;

(f) Circumstances under which a permit is required;

(g) Application fee for a permit;

(h) Appeals against decision of the Director-General of Trade and Industry;

(i) Delegation of power to the Clerical Officer Grade;

(j) Powers of seizure, detention and forfeiture by the Commissioner of Customs and Excise;

(k) "In-country escorts" to accompany the inspection team;

(l) Declaration to the Organization for the Prohibition of Chemical Weapons on riot control agents;

(m) Basic Law implications;

(n) Deletion of the text of the Convention from the Bill; and

(o) Staffing resources for the implementation of the Bill.

Need for enacting new legislation

8. The Bills Committee notes that at present, the import and export of scheduled chemicals are already subject to licensing control administered by the Trade and Industry Department (TID) under the Import and Export Ordinance (Cap. 60) (the IE Ordinance) and the Import and Export (Strategic Commodities) Regulations. Moreover, the Weapons of Mass Destruction (Control of Provision of Services) Ordinance (Cap. 526) also prohibits the provision of services intended to assist the development, production, acquisition and stockpiling of chemical, biological and nuclear weapons. The Bills Committee is concerned whether it is necessary to enact new legislation to fulfil the requirements of the Convention in HKSAR. The Bills Committee is advised by the Administration that the control under the existing legislation fall short of the requirements of the Convention because the existing legislation do not impose control on the use, production or possession of Scheduled chemicals, which the Bill does.

Chemicals covered by the Bill

9. The Bills Committee notes that "chemical weapons" in the context of both the Convention and the Bill refer to:

(a) toxic chemicals[1] and their precursors[2] except where intended for purposes not prohibited under the Convention[3], as long as the types and quantities are consistent with such purposes;

(b) munitions and devices specifically designed to cause death or other harm through the toxic properties of toxic chemicals specified in item (a) above and which would be released as a result of the employment of the munitions and devices;

(c) any equipment specifically designed for use directly in connection with the employment of the munitions and devices specified in item (b) above.

10. The Bills Committee notes that toxic chemicals and their precursors are listed in the three Schedules annexed to the Convention (the Scheduled chemicals). By virtue of the qualifier "except where intended for purposes not prohibited under this Convention" mentioned in item (a) above, Scheduled chemicals intended for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes, are not regarded as chemical weapons. In other words, peaceful activities involving the Scheduled chemicals are not prohibited per se, although they might be subject to certain documentation requirements.

Prohibited activities under clause 5(a), (b), (c), (d) and (e)

11. The Bills Committee notes that all the core prohibitions of the Convention have been reflected in clause 5 of the Bill. A person who contravenes clause 5 commits an offence and is liable on conviction on indictment to imprisonment for life (Clause 29(1)).

12. Under clause 5(a), (b), (c), (d) and (e) of the Bill, no person shall use, develop or produce a chemical weapon; have a chemical weapon in his possession; participate in the transfer of a chemical weapon; engage in military preparations, or in preparations of a military nature, intending to use a chemical weapon.

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1 "Toxic chemical" refers to any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

2 "Precursor" refers to any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.

3 "Purposes not prohibited under this Convention" is defined in the Convention to mean -
(a) industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;
(b) protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;
(c) military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;
(d) law enforcement including domestic riot control purposes.

13. On clause 5(c), the Bills Committee has no objection to the Administration's proposal to replace "have a chemical weapon in his possession" by "acquire, stockpile or retain a chemical weapon" so as to fully replicate the prohibitions set out in the Convention. Members are however concerned whether the term "retain" is commonly used in Hong Kong legislation. The Bills Committee is advised by the Administration that the term "retain" is commonly used in Hong Kong legislation with over 200 provisions containing such a term.

14. On clause 5(e), the Bills Committee notes that the Convention only prohibits engagements in military preparations. Members therefore question whether the addition of "preparations of a military nature" in clause 5(e) is necessary and appropriate. The Bills Committee is advised by the Administration that clause 5(e) is identical to section 2(1)(e) of the Chemical Weapons Act 1996 of the United Kingdom (UK). 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. While the Administration accepts that the reference is not absolutely necessary for the purpose of fulfilling HKSAR's obligations under the Convention, it considers that it should be in the interest of public safety to retain it.

15. As a whole, the Bills Committee is concerned that while people in industrial and other establishments may be able to differentiate chemicals being used as chemical weapons from chemicals being used for peaceful purposes, members of the public who acquire or retain the Scheduled chemicals may not be able to differentiate between the two and may therefore inadvertently contravene clause 5(a), (b), (c) or (d). The Bills Committee is advised by the Administration that the chance that innocent citizens are caught by these subclauses will be extremely rare having regard to the following considerations:

(a) The Scheduled chemicals which pose high or significant risk are either hardly or not readily accessible by members of the public; and save for very few exceptions[4], the Scheduled chemicals are not known to have any household uses; and

(b) Some of the Scheduled chemicals are toxic chemicals the handling of which is beyond the ability of a layman.

The Administration considers it inconceivable that members of the public would acquire or use the Scheduled chemicals for household or other non-professional uses.

16. The Bills Committee is also advised by the Administration that as a safeguard, clause 29(2) provides that it is a defence if a person charged with an offence relating to clause 5(a), (b), (c) or (d) can prove that he neither knew nor suspected nor

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[4] Very few Scheduled chemicals might be found as an ingredient in small quantities in household products such as shampoo, but such household products cannot possibly fall within the definition of "chemical weapons".

had reason to suspect that the article involved was a chemical weapon, or he knew or suspected the article to be a chemical weapon and had taken all reasonable steps to inform an authorized officer of his knowledge or suspicion.

Prohibited activities under clause 5(f)

17. 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. The Bills Committee has examined clause 5(f) in depth, in particular the need for this subclause and whether it is appropriate to use the terms "assist", "encourage" and "induce" in this subclause.

18. The Bills Committee queries the need for clause 5(f), as the offences concerned are already covered under section 89 of the Criminal Procedure Ordinance (CPO) (Cap. 221) which 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. In this connection, the Bills Committee requests the Administration to clarify the scope of "assist", "encourage" and "induce" in clause 5(f) and that of "aids", "abets", "counsels" and "procures" in section 89 of CPO. The Bills Committee is advised by the Administration that there is judicial interpretation confirming that "assisting" has the same meaning as "aiding" and "abetting"[5], and the word "encourage", in certain context, may mean "incite"[6]; and an "inducement" may amount to a "bargain"[7] respectively. The Administration is unable to find any judicial interpretation which indicates complete overlap of the terms "encourage" and "induce" in clause 5(f) with the terms "counsel" and "procure" in section 89 of CPO. The Administration considers that it is conceivable that there may be some aspects of the first two terms that are not covered by the second two, or vice versa. The Administration therefore maintains its view that clause 5(f) should be retained to replicate in full the prohibitions prescribed in the Convention.

19. The Bills Committee is concerned that if clause 5(f) is retained, an offender would be prosecuted twice under both clause 5(f) of the Bill and section 89 of CPO. The Bills Committee is advised by the Administration that whether an offence should be prosecuted under clause 5(f) of the Bill or section 89 of CPO would have to be considered taking into account the circumstances of the case. Previous court ruling[8] held that where the legislation provides a specific offence to cover a person who assists another person to commit an offence he can only be charged with that specific offence and not as an aider and abetter of that other person. By the same token, a person, who commits an offence that could be prosecuted under both clause 5(f) of the Bill and section 89 of CPO, can only be charged under the relevant offence provision in the Bill and not under section 89 of CPO. Where a person commits an offence that is covered under either clause 5(f) or section 89 of CPO only, he will be prosecuted in accordance with the relevant legislation accordingly.

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[5] see *FUNG Sik-chung v. R. [1985] H. K. L. R. 387*

[6] see *Wilson v Danny Quastel (Rotherhithe) Ltd. [1965] a All ER 541 at 543*

[7] see *Bayspoole v Collins 40 L.J. Ch 292*

[8] *see FUNG Sik-chung v. R. [1985] H. K. L. R. 387*

20. Noting that the Chemical Weapons Act 1996 of UK does not have a provision similar to clause 5(f), the Bills Committee asks the Administration to make reference to the approach adopted by UK in considering whether clause 5(f) should be retained. The Bills Committee is advised by the Administration that in a note entitled "Model National Implementing Legislation" issued by the Executive Secretary of the Preparatory Committee for the Organization for the Prohibition of Chemical Weapons in May 1996, it was mentioned that "Each and every one of the activities mentioned in paragraph 1 of Article I should be covered by the legislation….. 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 Administration also points out that some common law jurisdictions, i.e. Canada, Singapore and New Zealand, have reproduced paragraph 1 of Article I of the Convention (including the terms "assist", "encourage" and "induce") in their local legislation on the implementation of the Convention.

21. Some members of the Bills Committee have great reservations on using the term "encourage" in clause 5(f). Members consider the meaning of the term "encourage" not precise. Members note that in a previous court case[9], the ruling held, inter alia, that encouragement 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 but a mere passive spectator of a crime would not commit a criminal offence. In another court ruling[10], 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 another court ruling[11], the term "encourage" was interpreted to merely mean "incite". Members therefore suggest that the term "encourage" be replaced by "incite". Since UK has not incorporated the term "encourage" in its domestic legislation and has not been challenged, members request the Administration to confirm whether the suggested amendment would constitute a breach of the Convention or failure to fulfil any obligation under the Convention. Whilst the Administration considers that "encourage" has a meaning similar to that of "incite" for the purpose of clause 5(f), it points out that there is no authoritative interpretation indicating a complete overlap of "encourage" and "incite". If "encourage" is replaced by "incite", there arises a risk of HKSAR being challenged for not fully discharging its obligations under paragraph 1(d) of Article I of the Convention. The Administration has not directly addressed members' question on the UK domestic legislation not mirroring the Convention. In the Administration's view, the best way to ensure compliance with the Convention is to retain the term "encourage" in clause 5(f).

22. Members are also concerned that as the term "encourage" is not commonly used in common law legislation, the use of the term in the Bill would become a precedent. Given that the Convention is not tailor-made for common law jurisdictions, members do not see the need to adopt the exact wording from the Convention. The Administration however points out that "encourage" is not new in Hong Kong

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[9] *R v. 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*

[10] *The Queen v Most 7 QBD 244*

[11] *Wilson v Danny Quastel (Rotherhite) Ltd. [1966] 1 QB 125.*

legislation[12]. It considers that 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 Bill, the term "encourage" is used to implement the Convention in full in Hong Kong. Therefore the use of the term here would not become a precedent.

23. At the request of the Bills Committee, the Administration agrees that the Secretary for Commerce, Industry and Technology (SCIT) will state, in his speech when the Second Reading debate on the Bill is resumed, the reason for retaining the term "encourage" and that the use of the term in the Bill would not become a precedent. Some speaking points for incorporation into SCIT's speech as provided by the Administration is in **Appendix II**.

24. As regards the phrase "any activity prohibited under the Convention" in clause 5(f), the Bills Committee considers it not clear as to what activities it refers to. Given that the prohibitions under the Convention are set out in clause 5, the Administration agrees to replace "any activity prohibited under the Convention" by "any activity prohibited under this section".

Requirement to report the finding of a chemical weapon

25. The Bills Committee notes that clause 7(1) provides that where a person finds an article that the person believes may be a chemical weapon, the person shall as soon as is practicable notify a member of the Customs and Excise Service or an authorized officer of the finding, and of the whereabouts, of the article. If the person fails to do so, he is liable on conviction to a fine at $100,000 and to imprisonment for six months (clause 29(4)). The Bills Committee considers that whether a person believes that an article is a chemical weapon is a subjective test. At the suggestion of the Bills Committee, the Administration agrees to introduce an amendment to clause 7(1) by adding the word "reasonably" before "believes". With the proposed amendment, a person's legal obligation to notify the finding of a chemical weapon will only be triggered if the person has reasonable grounds to believe that the article is a chemical weapon. The amendment will also introduce an objective element into the prosecution process; prosecutors will need to prove what a reasonable man would have believed in the circumstances, rather than to prove what the person charged with the offence actually believes. The proposed amendment is intended to strike a balance between public safety on one hand, and civil liberty on the other.

26. The Bills Committee also considers it necessary to facilitate a person who finds a chemical weapon to notify a member of the Customs and Excise Service or an authorized officer. In this connection, the Bills Committee notes that "an authorized officer" means a person authorized by the Commissioner of Customs and Excise (the Commissioner) under clause 3, including any police officer of the rank of inspector or

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[12] 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).

above. As it may not always be possible for the person concerned to locate a member of the Customs and Excise Service or a police inspector at the time when he finds the article, the Bills Committee considers that clause 7 should be amended to the effect that a person may notify a police officer of the finding of an article he believes may be a chemical weapon. The Administration accepts the Bills Committee's view and agrees to amend clause 7 accordingly.

27. The Bills Committee notes the Administration's view that the probability that chemical weapons would be found in HKSAR is very low, and clause 7(1), if amended as mentioned above, will not impose any material burden on the public or industrial or other establishments.

Proposed permit and documentation requirements in respect of permitted activities involving the Scheduled chemicals

28. The Bills Committee notes that the Convention requires the State Parties to make declarations on activities involving the Scheduled chemicals. Taking account of the properties of the Scheduled chemicals and the level of potential risk of such chemicals being used in the development of chemical weapons, the Convention imposes different requirements on activities involving different categories of chemicals. Accordingly, the Bill has different permit and documentation requirements on activities involving different Scheduled chemicals and unscheduled discrete organic chemicals (UDOCs), i.e. discrete organic chemicals not listed in Schedule 1, 2 or 3 to the Convention. Having regard to the properties of the chemicals concerned, the findings of the surveys conducted in 1998 and 2001[13], as well as data captured by the existing licensing system[14], the Administration believes these requirements will not have any material burden on the general public or establishments that need to acquire or use chemicals.

29. On Schedule 1 chemicals, the Bills Committee notes that a facility operator needs to obtain a permit, make periodic reports and keep records if, in a year, he is likely to produce any Schedule 1 chemicals irrespective of the quantity, or acquire, retain, use or transfer Schedule 1 chemicals and the total amount of these chemicals exceeds 100 grams. The Bills Committee is advised by the Administration that Schedule 1 chemicals are hardly accessible by members of the public and it is highly unlikely that an ordinary person would need to acquire or use Schedule 1 chemicals for non-professional purposes. Moreover, the Administration is not aware of any production of Schedule 1 chemicals in HKSAR. The Bills Committee is also advised that from the information available, over the past few years only a handful of establishments (including research institutes, trading companies and a government department) imported and/or used two Schedule 1 chemicals for medical and research

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[13] The Administration conducted two rounds of surveys among manufacturers, traders, medical and research institutions, testing laboratories, etc. in November 1998 and June 2001 respectively. In the 1998 survey, questionnaires were sent to 638 establishments and 80% of them responded. In the 2001 survey, 87% of the 527 establishments surveyed responded.

[14] Currently the import or export of any of the Scheduled chemicals require an import or export licence under the Import and Export Ordinance.

end-uses, and the amounts involved were very small (in the range of milligrams). Little impact on the general public and industrial and other establishments envisaged.

30. On Schedule 2 chemicals, the Bills Committee notes that a facility operator needs to obtain a permit, make periodic reports and keep records if he is likely to produce, process, or consume a Schedule 2 chemical in a year and the total amount of the chemical exceeds the relevant threshold[15]. The Bills Committee is advised by the Administration that Schedule 2 chemicals are not readily accessible by members of the public and it is unlikely that an ordinary person would need to acquire or use Schedule 2 chemicals for non-professional purposes. No impact on the general public envisaged. In both 1998 and 2001 surveys, only one research institute indicated that it had used two Schedule 2 chemicals for research purpose. Little impact on industrial and other establishments envisaged.

31. On Schedule 3 chemicals, the Bills Committee notes that a facility operator needs to obtain a permit, make periodic reports and keep records if he is likely to produce a Schedule 3 chemical in a year and the total amount exceeds 30 tonnes. The Administration advises that the proposed requirement only kicks in when a Schedule 3 chemical exceeding 30 tonnes is to be produced. No impact on the general public envisaged. In the 1998 survey, only one factory indicated that it had produced a Schedule 3 chemical (but the amount produced was below 30 tonnes). In the 2001 survey, no establishment indicated that it had produced a Schedule 3 chemical. Little impact on industrial establishments envisaged.

32. On UDOCs, the Bills Committee notes that a facility operator needs to make a notification and keep records if he produced in the preceding year any UDOCs and the total amount exceeded 200 tonnes; UDOCs that contain phosphorus, sulphur or fluorine and the total amount exceeded 30 tonnes. The Administration advises that the notification requirement will only be triggered when a large amount of discrete organic chemicals was produced. Little impact on the general public envisaged. The 1998 and 2001 surveys revealed that three factories had produced unscheduled discrete organic chemicals in the year before[16]. Only in one case, the total amount exceeded the threshold. Little impact on industrial establishments envisaged.

Circumstances under which a permit is required

33. The Bills Committee notes that clause 8(1) provides that the 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. Noting

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[15] The threshold for toxic chemicals listed in Schedule 2 is 100 kilograms (except one the threshold for which is 1 kilogram), and the threshold for precursors listed in the same schedule is 1 tonne.

[16] In the 1998 and 2001 surveys, 6 and 2 factories respectively indicated that they had produced hydrocarbons or inorganic gaseous chemicals (which are not subject to the controls under the Convention or the Bill). If these factories expand their products to include Scheduled chemicals or unscheduled discrete organic chemicals, they might need to obtain a permit or make a notification depending on the types and quantities of the chemicals.

the Administration's explanation that the inclusion of the words "if, in all circumstances of the case, a reasonable person would conclude that" 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, the Bills Committee requests the Administration to consider whether it would be appropriate to retain the objective test, as a reasonable person, being a outside party, may not know whether "Scheduled chemicals" are likely to be produced, used etc at the facility during a particular year. Upon review, the Administration agrees that it is reasonable to think that the operator of the facility should be in a better position than an ordinary person in determining whether the "Scheduled chemicals" that are likely to be produced, used etc at the facility during the year. The Administration therefore agrees to remove the objective test.

34. The Bills Committee also notes that clauses 30(1)(b), (2)(b) and (3)(b) of the Bill provide that a person who without, or otherwise than in accordance with, a permit, produces, or retains, uses etc the "Schedule chemicals" commits an offence. Clause 30(6) provides a statutory defence that a person could prove that he took reasonable precautions and exercised due diligence to prevent the commission of the offence under clauses 30(1)(b), 2(b) and 3(b). The Bills Committee requests the Administration to consider adding the words "intentionally or recklessly" in clauses 30(1)(b), 2(b) and 3(b), mirroring the similar provisions in section 77(1)(b) of the Chemical Weapons (Prohibition) Act 1994 of Australia. The Administration advises that clauses 30(1)(b), (2)(b) and (3)(b) are drafted on the basis that there is an objective test in clause 8(1). As the Administration has agreed to remove the objective test, it has no objection to the suggested addition of the words "intentionally or recklessly" in clauses 30(1)(b), (2)(b) and (3)(b) and the consequential deletion of clause 30(6).

Application fee for a permit

35. The Bills Committee notes that the Administration's thinking is not to impose any fee on applications for a permit under clause 9 of the Bill so as to encourage the operators concerned to make the applications. The Bills Committee considers this approach not consistent with the current Government policy that fees are charged on a cost recovery basis. In view of the small number of establishments involved, however, the fees to be charged on a cost recovery basis could be substantial. The Administration is requested to consider charging a nominal fee for applications for a permit under the Bill. Upon review, the Administration agrees that a fee should be imposed on application for permits under clause 9. Based on the latest information at 2003-04 prices, the Administration proposes to set the permit fee at $495. The Bills Committee supports this proposal and notes that the fee level is set out in the new Schedule 4 to the Bill.

Appeals against decision of the Director-General of Trade and Industry

36. The Bills Committee notes that clause 38 provides that an appeal against any decision of the Director-General of Trade and Industry (the Director) to which

clause 10(4) [17] applies may be made to the Chief Executive (CE). The Administration considers the resort to CE for appeal appropriate, as it is conceivable that important policy and political considerations, as well as sensitive information, such as intelligence obtained from other licensing/enforcement agencies of other governments may be involved in the Director's decision to grant permits and/or to impose conditions to the permits. The Bills Committee considers that the resort to CE in Council for appeal could also address these considerations. The Bills Committee also considers that it is more appropriate to provide in clause 38 that appeals may be made to CE in Council, instead of CE, having regard to the fact that the rules for handling appeals to CE in Council are set out in the Administrative Appeals Rules (Cap.1 sub. leg. A) while no specific rules are provided for handling appeals to CE. Upon review, the Administration accepts that the resort to CE in Council would also be appropriate in this case and agrees to amend clause 38 accordingly.

Delegation of power to the Clerical Officer Grade

37. Clause 4 provides that the Director may authorize in writing any public officer employed in TID in the Trade Officer Grade or in the Clerical Officer (CO) Grade, or any public officer acting in the capacity of Principal Trade Officer in TID, to exercise any of the powers and perform any of the duties conferred or imposed on the Director by the Chemical Weapons (Convention) Ordinance. Given the sensitivity of the subject matter of the Ordinance and that it is not common to provide for delegation of powers and duties to CO Grade in local legislation, the Bills Committee considers the proposed delegation of powers and duties to CO Grade not appropriate. In view of the relatively small number of permit applications expected, the Administration confirms that it could cope with a system without delegation of powers and duties to CO Grade. The Administration therefore agrees to delete the reference to CO Grade in clause 4.

Powers of seizure, detention and forfeiture by the Commissioner of Customs and Excise

38. The Bills Committee notes that clauses 15, 16, 21, 22 and 23 empower the Commissioner to seize, detain and forfeit articles, vessels and vehicles, and to release seized vessels and vehicles prior to hearing. While having no objection to provide the Commissioner with the powers to seize, detain and forfeit articles, vessels and vehicles, the Bills Committee considers that such 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. In this connection, the Bills Committee has examined the relevant provisions in detail and suggested a number of amendments.

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[17] Such decisions include the decision by the Director to grant a permit subject to conditions; to refuse to grant a permit; to revoke or suspend a permit; to amend conditions specified in a permit; or to add conditions to a permit.

Detention of vessel, aircraft and vehicle for search

39. The Bills Committee notes that clause 15(3) provides that 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 clause 16, stop, board, remove, detain and search the vessel, aircraft or vehicle. Noting 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, the Bills Committee considers that the two subclauses should be amended to the effect that detention of a vehicle for search should also be subject to a time limit. The Administration accepts the Bills Committee's view and proposes 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.

40. The Bills Committee however notes that the time limit for the detention of vessel and vehicle (i.e. 12 hours) is different from that for aircraft (6 hours). The Bills Committee is advised by the Administration that the length of detention period for vessel, vehicle and aircraft for search depends on its size, cargo capacity and other relevant factors, including berthing/parking time. Because of the large size and capacity to carry cargo, Customs officers usually take longer time to unload containers in a vessel than in an aircraft. Normally, Customs officers take more than 8 hours to search a vessel. Since the berthing time of a vessel is usually between 8 and 12 hours, the Bill proposes that the detention period for a vessel should not be more than 12 hours. This should avoid causing significant disruption to the port operation and substantial financial loss to the shipping company. Compared with a vessel, an aircraft is smaller in both size and cargo capacity. Normally, Customs officers are able to complete searching an aircraft within a shorter period of time than a vessel. Given that the parking time of an aircraft is about 6 hours, the Administration proposes that the detention period for an aircraft should not be more than 6 hours. As regards vehicles, the time required for detention for search hinges on factors including where a vehicle is intercepted and where the vehicle should be brought to for a safe search; irregular construction feature of a vehicle to be searched; and the number of vehicles in a convoy to be searched[18]. Customs officers would need sufficient lead-time to make arrangements for the vehicles to be taken to a certain spot where x-ray vehicle scanning system is available and for officers concerned to come to the scene to conduct a complete search. The Administration therefore considers that a longer detention period (no more than 12 hours) would be required.

41. The Bills Committee notes that under clause 15(5), the Chief Secretary for Administration (CS) has the power to further detain a vessel or an aircraft. However, under the new clause 15(6), the power to further detain a vehicle is vested with the Commissioner. Some members consider 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 CS. The Administration is of the view that in considering the approving authority for extending

[18] Customs officers may need to detain vehicles in a convoy and to search the vehicles one after another.

the detention period of vessels, aircrafts and vehicles, 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 have to be taken into account. In this connection, the Administration points out that vessels and aircrafts usually carry a number of consignments with different owners, and many of the vessels and aircrafts are operated on fixed time schedules. Any delay of their trip will cause serious consequence to many parties. Because of the seriousness of the impact on the affected parties brought by the extended detention of vessels and aircrafts, the Administration considers that the order for further detention of vessels and aircrafts should be made by the CS. On the other hand, 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. In view 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, the Administration considers it more appropriate and practicable to seek approval from the Commissioner for extension of detention period.

Detention of vessel, aircraft and vehicle for investigation

42. The Bills Committee notes that clause 21(2) provides that the Commissioner may, within 30 days of the seizure of an article, vessel or vehicle, restore the seized article (other than a chemical weapon), vessel or vehicle to the owner concerned. It seems to imply that the Commissioner may or may not do so. The Bills Committee considers that there should be a time limit for detention of a seized article, vessel or vehicle for investigation after which the Commissioner should restore those not liable to forfeiture to the owner concerned. The Administration is of the view that 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, and that 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. To address the Bills Committee's concern, and at the same time, not to erode the Commissioner’s enforcement capability, the Administration agrees to add a new subclause (5) in clause 16 to the effect that the Commissioner shall return those seized articles, vessels or vehicles not liable to forfeiture to the owners concerned when they are no longer required for the purpose of any criminal proceedings or investigation under the Bill or any other enactment.

Notice of seizure and related issues

43. The Bills Committee notes that clause 21(3) requires the Commissioner to issue a notice of seizure not later than 30 days beginning on the date of the seizure to the owner concerned who was not present at the time of the seizure. In order to protect the interest of the owner concerned, the Bills Committee considers that the notice of seizure should be issued regardless of whether the article, vessel or vehicle is seized in the owner's presence. The Administration accepts this view and agrees to amend clause 21(3) accordingly.

44. The Bills Committee also considers that the owner concerned should be informed of the following through the notice of seizure:

(a) the list of seized articles, vessels or vehicles;

(b) the reasons for the seizure;

(c) the grounds on which the seized article, vessel or vehicle is liable to forfeiture, i.e. to inform the owner concerned that it is liable to forfeiture because of the grounds provided in clause 21(1)(a) or (b);

(d) the owner concerned may, under clause 21(7), claim that the article, vessel or vehicle is not liable to forfeiture within 30 days from the date of the notice of seizure, instead of from the date of the seizure;

(e) if no notice of claim is given to the Commissioner under clause 21(7), then the article, vessel or vehicle will be forfeited to the Government under clause 21(12); and

(f) the Commissioner is required under the new clause 16(5) to restore the seized article, vessel or vehicle not liable to forfeiture to the owner concerned when it is no longer required for the purpose of any criminal proceedings or investigation under the Bill or any other enactment.

45. The Administration agrees to amend clause 21(3) to give effect to items (a) to (f) above in respect of the seized articles, vessels and vehicles which are liable to forfeiture. The Bills Committee is concerned that the owner will have no idea of when the seized articles, vessels and vehicles not listed in the notice of seizure, i.e. those not liable to forfeiture, will be returned to him and that there is no channel for him to appeal against the Commissioner's decision to further detain the seized articles. Having considered the Bills Committee's view, the Administration considers that the Commissioner should, as an administrative practice, issue a separate notice to the owner concerned 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-

(a) 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;

(b) 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

(c) 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.

46. The Bills Committee is also concerned whether it is appropriate for the applications for restoration of the listed seized articles to be considered by the Commissioner who may always stand by his staff on the need to detain the seized articles. While appreciating that the owner concerned who is aggrieved by the Commissioner's decision may apply for judicial review, members consider that it may be too costly for the owner to do so. Even if the owner could afford the cost and applies for judicial review, the court may rule in favour of the Commissioner as he has legitimate reasons to detain the seized article, e.g. the seized article is an evidence of crime. The owner may suffer if the detention of the article has affected his business or if he has no knowledge of the article having been used by a third party to commit an offence under the Bill. The Administration is therefore requested to strike a balance between the need to detain the seized articles for investigation and the need to safeguard the interests of the owner concerned. Some members suggest that a preliminary procedure be provided well in advance of the formal hearing of the case in court, whereby the defendant is asked to confirm in writing whether the seized article is needed for inspection and if not, the seized article will be released to the owner concerned. The Administration is requested to consider this option and make reference to the provisions in the Complex Commercial Crimes Ordinance (Cap. 394), if appropriate, and to explore other options.

47. The Administration advises that there are more than 70 provisions in different ordinances containing similar powers in relation to detention of a vehicle which is suspected to be in connection with an offence. Member’s suggestion mentioned above should therefore be considered in a wider context as there might be read-across implications in policy areas other than the Bill. The Administration considers that while it is considering the review, the current provision in the Bill together with the proposed amendments should strike a reasonable balance between the need to detain seized articles for investigation and the need to safeguard the interests of the owners concerned.

Notice of claim that the seized article, vessel or vehicle is not liable to forfeiture

48. The Bills Committee notes that clause 21(7) provides that the owner concerned may, within 30 days beginning on the date of the seizure, give notice in writing to the Commissioner claiming that the seized article, vessel or vehicle is not liable to forfeiture. To be fair to the owner concerned, the Bills Committee considers that the 30-day period should be counted from the date of serving the notice of seizure, but not from the date of the seizure. The Administration accepts this view and agrees to amend clause 21(7) accordingly.

Means to serving the notice of seizure

49. The Bills Committee notes that under clause 21(6)(c), where a notice of seizure cannot be delivered to the person on whom it is to be served, the notice will be exhibited at the Customs and Excise Department (C&ED) for a period of not less than 7 days commencing within 30 days from the date of the seizure of the article, vessel or vehicle. Some members consider it not a desirable option, as it is not common for the public to go to C&ED to read notices. In the Administration's view, exhibition of such kind of notices on the Customs and Excise Notice Board is a well established practice and is well known to members of the public who maintain dealings with C&ED. Any change of the well established practice may cause unnecessary confusion and inconvenience to the public. To address the members' concern, apart from exhibiting on the Customs and Excise Notice Board, the Commissioner will also post all such notices on the internet for public access.

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

50. The Bills Committee notes that clause 23 provides that the 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, release the vessel or vehicle prior to the hearing of the application for its forfeiture. The sum of money involved could be substantial. The Bills Committee considers it unfair to the owner concerned, having regard to the fact that the seizure of the vessel or vehicle may have already affected their business and that they may not afford to pay the substantial sum of money for the release of the seized vessel or vehicle prior to the hearing. If they could not afford to pay, the seized vessel or vehicle may be detained for two years (the time limitation for criminal proceedings under clause 37). Given the nature and gravity of offences under the Bill, the Administration considers 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.

51. The Bills Committee remains concerned that the owner concerned could not afford to pay the sum of money. Members consider 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. The Administration accepts the proposed provision of the power to the court and agrees to amend clause 23 accordingly.

"In-country escorts" to accompany the inspection team

52. The Bills Committee notes that under the Convention, 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 this connection, "in-country escorts" may be specified by the inspected State Party to accompany and assist the inspection team (clause 27(4)). At the suggestion of the Bills Committee, the Administration agrees to add the definitions of "in-country escort", "inspected State Party" and "inspection team" in clause 2.

Administrative arrangement between the CPG and HKSARG for appointing "in-country escorts"

53. The Bills Committee is concerned whether the term "in-country escort" refers to a CPG official or a Hong Kong Special Administrative Region Government (HKSARG) official, or both. The Administration points out that for inspection to be conducted in HKSAR, the CPG and HKSARG have agreed that the HKSARG may, under normal circumstances, nominate HKSARG officers as "in-country escorts" for endorsement by the CPG. Where necessary, the CPG may, after consultation with the HKSARG, specify CPG officers to be "in-country escorts" along with the HKSARG officers. 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 HKSARG, "in-country escorts" would come from the Commerce, Industry and Technology Bureau, C&ED, TID and Government Laboratory (GL). Persons working in other public bodies and statutory bodies as well as members of HKSARG advisory bodies will not be nominated.

54. Some members of the Bills Committee consider that the agreed administrative arrangement between the CPG and HKSARG for appointing "in-country escorts" for inspection in HKSAR should be stated in the Bill. The Administration points out that 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. The Administration therefore considers it not necessary to prescribe in law the above administrative arrangements between the CPG and HKSARG for appointing "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.

55. In the circumstance, the Bills Committee considers that the administrative arrangements and the reasons for not prescribing the administrative arrangements in the Bill should be clearly stated in SCIT's speech when the Second Reading debate on the Bill is resumed. The Administration accepts this request. Some speaking points to be incorporated into SCIT's speech as provided by the Administration are in **Appendix III**.

56. The Bills Committee notes that CPG and HKSARG have confirmed the administrative arrangements for specifying officers as "in-country escorts" in writing. However, the Administration considers it inappropriate to release the written agreement to persons outside the Administration, including the Bills Committee. While the Administration claims that this is a general practice governing the handling of the HKSARG's correspondence with all other governments, members consider that the relationship between HKSARG and CPG should be different from that between HKSARG and other governments. Given the implementation of the "one-country, two systems" in the HKSAR and the need for LegCo Members to monitor the issues arising from the agreed arrangement between CPG and HKSARG, members do not accept the Administration's view that it is inappropriate to release the written agreement to the Bills Committee. The Bills Committee agrees that this issue of concern should be referred to the LegCo Panel on Administration of Justice and Legal Services and the LegCo Panel on Constitutional Affairs for follow-up action.

Duties of "in-country escorts"

57. The Bills Committee is concerned how to ensure that officers of CPG appointed as "in-country escorts" would only perform the required duties to accompany and assist the inspection team in HKSAR, and would not perform other duties. The Administration points out that clause 27(4)(a) of the Bill and paragraph 9 of the Part I of the Convention's Annex on Implementation and Verification state that the duties of "in-country escorts" are to accompany and assist the inspection team during the in-country period. As the duties of the "in-country escorts" are well defined in both the Bill and the Convention, the Administration considers it not necessary to impose additional requirements in the Bill to govern the activities of CPG officials in HKSAR.

Public enquiries

58. In response to the Bills Committee's question, the Administration confirms that an enquiry by a HKSAR citizen or a press report by HKSAR media about from which departments the officers appointed by the CPG as "in-country escorts" come from will not contravene either the existing provisions or proposed amendments to the Official Secrets Ordinance (Cap. 521).

Declaration to the Organization for the Prohibition of Chemical Weapons (OPCW) on riot control agents

59. The Bills Committee notes that under the Convention, a State Party is required to submit a declaration to OPCW in respect of, among other things, riot control agents that it holds for riot control purposes. In this connection, the Administration advises that the Bill does not have any provision pertaining to riot control agent and that HKSARG will collect such information through administrative means and make declaration to OPCW accordingly. The Administration also confirms that none of the local law enforcement departments has imported or possessed Scheduled chemicals for law enforcement including riot control purposes, and that it is highly unlikely that they will do so in future. At the request of the Bills Committee, the Administration agrees that in an unlikely event that law enforcement departments need to import "Scheduled chemicals" for law enforcement purposes, the departments would consider providing the LegCo Panel on Security with information on the types of chemicals imported.

60. The Bills Committee notes that Article 14 of the Basic Law provides that the HKSARG may, when necessary, ask the CPG for assistance from the garrison in the maintenance of public order and in disaster relief. It seems that the garrison may possess and use controlled chemicals for law enforcement including riot control purposes. As Article 14 also provides that in addition to abiding by national laws, members of the garrison shall abide by the laws of the HKSAR, the Bills Committee is concerned whether the Chemical Weapons (Convention) Ordinance, if enacted, will apply to the garrison. The Administration confirms that it will not apply to the garrison.

Basic Law implications

61. The Bills Committee requests the Administration to clarify whether the implementation of the Convention falls under the ambit of "foreign affairs" or "defence" referred to in Articles 13 and 14 of the Basic Law. The Bills Committee is advised that while the Convention applies to the HKSAR pursuant to Article 153 of the Basic Law, it is very much incidental to the exercise of China's sovereignty in a foreign policy matter, i.e. ratification of an arms-control international treaty. The implementation of the Convention in the HKSAR (at the level or in the sense of international treaty obligation) therefore, in the Administration's view, falls within the ambit of "foreign affairs" under Article 13 of the Basic Law. On the other hand, the Bills Committee is also advised that matters of arms control (which limits what may be lawfully used in warfare) fall within the ambit of external security affairs. The Administration is therefore of the view that the implementation of the Convention in the HKSAR (at the level or in the sense of international treaty obligation) also relates to "defence" for the purposes of Article 14 of the Basic Law.

Deletion of the text of the Convention from the Bill

62. The Bills Committee notes that the full text of the Convention is attached in Schedule 1 to the Bill. Having regard to the following considerations, the Administration accepts the Bills Committee's view that the full text of the Convention should be deleted from the Bill:

(a) Since some terms used in the Bill will be expressly defined in Clause 2, the need for cross-referencing between the Bill and the Convention will be reduced;

(b) It is conceivable that the text of the Convention will be amended from time to time. To keep the Ordinance up-to-date, it is necessary to introduce legislative amendments to reflect changes to the Convention from time to time. This may not represent efficient use of resources given the availability of an alternative; and

(c) Even if the Convention is not set out in a schedule to the Ordinance, members of the public should still be able to have access to the Convention. The full text of the Convention is accessible through the Internet; it is on the website of the Organization for the Prohibition of Chemical Weapons. Upon request, the Administration could provide hard copies to members of the public.

63. The Administration will therefore propose Committee Stage amendments (CSAs) to delete the original Schedule 1 from the Bill and to set out the “Scheduled chemicals” in the Bill. As the definitions of certain critical terms such as "chemical weapons" and "toxic chemicals" are provided in the Convention, but not in clause 2 of the Bill, the Administration will also propose CSAs to add the definitions of the critical terms in clause 2.

Staffing resources for the implementation of the Bill

64. The Bills Committee notes from the LegCo Brief issued in September 2001 that the proposed legislation will generate additional workload for TID, C&ED and GL, and that additional resources have been provided to these three departments to create a total of 18 posts at an annual staff cost of $12.2 million to cope with the additional workload. The Administration is requested to provide updated information on the number, rank and duties of the posts created/to be created for the implementation of the Bill and the annual staff cost involved. The Bills Committee is advised that the respective staffing requirements of the three departments are as follows:

(a) TID

To prepare for the implementation of the Ordinance, TID has set up a team of five officers comprising one post of Trade Officer, one post of Assistant Trade Officer I, one post of Clerical Officer and two posts of Assistant Clerical Officer in June 1999. Given the number of facilities that may be subject to the permit and notification requirements under the Ordinance will be less than expected, for better utilization of resource, the team has been required to take up other related duties as well, including implementing the import and export licensing system provided under the IE Ordinance for chemicals controlled under the Convention and an international export control regime governing the transfer of chemicals. Hence, workload generated from implementation of the Ordinance will only account for part of the duties of the team - 20% for the Trade Officer, 40% for the Assistant Trade Officer I and 50% for the clerical staff. The total annual staff cost is below $ 0.67 million.

(b) C&ED

C&ED has created three posts comprising one post of Senior Trade Controls Officer and two posts of Trade Controls Officer in December 2000 and January 2002 respectively to carry out the preparatory work, such as formulation of enforcement policies and strategies and drawing up procedures and guidelines. Three more posts, including one post of Trade Controls Officer and two posts of Assistant Trade Controls Officer will be created upon the enactment of the Chemical Weapons (Convention) Ordinance. The total annual staff cost is around $2.16 million.

(c) GL

A team of three officers comprising one Senior Chemist and two Chemists has been set up since April 1999 to carry out the preparatory work. In anticipation of lesser workload than expected, one Chemist has already been redeployed to work on other duties. For implementation of the Chemical Weapons (Convention) Ordinance, the latest staffing requirements of GL are one Senior Chemist and one Chemist, with an annual staff cost of $1.6 million.

Other issue

65. Clause 6(1) provides that clause 5 applies to acts done in Hong Kong, and acts done outside Hong Kong by Chinese nationals who are Hong Kong permanent residents. In this connection, the Bills Committee seeks the Administration's advice on whether, and if so how, a permanent resident of HKSAR might relinquish his permanent resident status; as well as whether, and if so how, a Hong Kong resident of Chinese nationality might relinquish his Chinese nationality. The Administration advises that:

(a) a person who is within one of the categories listed in paragraph 2 of Schedule 1 to the Immigration Ordinance (Cap. 115) is a permanent resident of the HKSAR. There is no statutory provision for relinquishing permanent resident status; and

(b) a Hong Kong resident of Chinese nationality may relinquish his Chinese nationality by making a declaration of change of nationality in accordance with paragraph 5 of the "Explanations of some questions by the Standing Committee of the National People's Congress concerning the implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region", or by applying for renunciation of Chinese nationality under Article 10 of the Chinese Nationality Law.

66. The Bills Committee also notes that under paragraph 7 of Schedule 1 to the Immigration Ordinance, a permanent resident of HKSAR loses his permanent resident status if, being a person falling within the category in paragraph 2(d), or 2(e), or 2(f) of Schedule 1, has been absent from Hong Kong for a continuous period of not less than 36 months. The Administration confirms that under the conditions specified above, the persons concerned lose their permanent resident status automatically and that the Administration has no discretionary power to decide otherwise. The Administration also confirms that there is no mechanism to check regularly which and how many permanent residents of HKSAR would have lost permanent resident status under the conditions specified in paragraph 7 of Schedule 1 to the Immigration Ordinance. However, when a person applies for any facility or exercises his right by virtue of his permanent resident status, e.g. applying for a permanent identity card, or requesting not to have a deportation order made against him etc, the Administration is obliged to verify whether he would have lost permanent resident status under paragraph 7 of Schedule 1. The Bills Committee then requests the Administration to advise whether a mechanism is in place for the bureau or department concerned to make the verification with the Immigration Department, and whether the personal data and privacy of the persons concerned would be protected during the verification process.

67. The Bills Committee is advised by the Administration that whether a particular person has lost his permanent resident status pursuant to paragraph 7 of Schedule 1 to the Immigration Ordinance can only be determined having regard to all relevant facts including whether and when he ceases to have ordinarily resided in Hong Kong. It is a question of fact as to whether a person has ceased to have ordinarily resided in Hong Kong which may only be decided on the particular circumstances of a case. The Immigration Department therefore would not have ready information on whether or not a person has lost his permanent resident status pursuant to Paragraph 7 of Schedule 1 to the Immigration Ordinance, and each case would have to be considered on its own merit if such a need arises. The Bills Committee considers the Administration's response unclear. Members are concerned about the operational arrangement for the Administration to verify whether a permanent resident of the HKSAR would have lost permanent resident status under the conditions specified in paragraph 7 of Schedule 1 to the Immigration Ordinance, and the measures for

protecting the personal data and privacy of the persons concerned during the verification process.

68. The Bills Committee agrees that the issues of concern mentioned in paragraph 67 above be referred to the LegCo Panel on Security for follow-up action.

Committee Stage amendments

69. The Bills Committee notes the CSAs proposed by the Administration to address members' various concerns. The Bills Committee has not proposed any CSAs.

Recommendation

70. The Bills Committee has no objection to the Administration's proposal that the Second Reading debate on the Bill be resumed on 2 July 2003.

Consultation with House Committee

71. The House Committee, at its meeting on 20 June 2003, supported the recommendation of the Bills Committee in paragraph 70 above.

Council Business Division 1
Legislative Council Secretariat
24 June 2003

附錄I
Appendix I

《化學武器(公約)條例草案》委員會
Bills Committee on Chemical Weapons (Convention) Bill

委員名單
Membership List

主席 **Chairman**	何秀蘭議員	Hon Cyd HO Sau-lan
委員 **Members**	涂謹申議員	Hon James TO Kun-sun
	許長青議員, JP	Hon HUI Cheung-ching, JP
	劉江華議員	Hon LAU Kong-wah
	余若薇議員, SC, JP	Hon Audrey EU Yuet-mee, SC, JP
	(總數：5位議員) (Total : 5 Members)	
秘書 **Clerk**	陳美卿小姐	Miss Salumi CHAN
法律顧問 **Legal Adviser**	何瑩珠小姐	Miss Anita HO
日期 **Date**	2003年2月27日 27 February 2003	

Appendix II

Speaking points on the meaning of "encourage" to be incorporated into the Secretary for Commerce, Industry and Technology's speech when the Second Reading debate on the Bill is resumed

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 ruling holding that "*encouragement does not necessarily amount to aiding and abetting*" and could cover unintentional act. In another court ruling, 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 ruling 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. 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 legislation. 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.

Appendix III

Speaking points on "In-country escorts" to be incorporated into the Secretary for Commerce, Industry and Technology's speech when the Second Reading debate on the Bill is resumed

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.