LC Paper No. CB(1)762/02-03(01)

Bills Committee on Chemical Weapons (Convention) Bill
Seventh meeting on 9 January 2003

List of follow-up actions to be taken by the Administration

1. Clause 6(1)

Clause 6(1) provides that section 5 applies to acts done in Hong Kong, and acts done outside Hong Kong by Chinese nationals who are Hong Kong permanent residents. The Bills Committee notes that under paragraph 7 of Schedule 1 to the Immigration Ordinance (Cap. 115), a permanent resident of the Hong Kong Special Administrative Region (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. In this connection -

(a) Please advise whether the provision about the loss of permanent resident status stated in paragraph 7 of Schedule 1 to the Immigration Ordinance was enacted upon the establishment of the HKSAR in July 1997; and

(b) As Article 24 of the Basic Law does not provide for the loss of permanent resident status after the person concerned has been absent from Hong Kong for a continuous period of not less than 36 months, please advise whether the provision in paragraph 7 of Schedule 1 to the Immigration Ordinance contravenes the Basic Law and whether it has been challenged in court.

The Bills Committee also notes from the Administration's response (LC Paper No. CB(1)486/02-03(03)) that there is no mechanism to check regularly which and how many permanent residents of the 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, the Administration is obliged to verify whether he would have lost permanent resident status under the conditions specified in paragraph 7 of Schedule 1. Please 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.

2. Clauses 8 and 30

Under clause 8(1), 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 at the facility during the year. Clause 30(1), (2) and (3) provides that without, or otherwise than in accordance with, such a permit, produces "Scheduled chemicals" at that facility commits an offence and is liable on conviction to a fine and to imprisonment.

The Bills Committee notes from the Administration's response (LC Paper No. CB(1)305/02-03(01)) that clause 8 is modelled on section 16 of the Chemical Weapons (Prohibition) Act 1994 of Australia, with the addition of the words "*if, in all circumstances of the case, a reasonable person would conclude that*" to provide an objective test for determining the likelihood of the production of "Scheduled chemicals", i.e. whether a reasonable person in the same context would conclude that "Scheduled chemicals" would likely be produced. With such an objective test, the Administration considers it appropriate to impose a strict liability for contravention of clause 8(1), and on that basis, clause 30(1), (2) and (3) was drafted. In this connection, a defence provision is provided in clause 30(6) under which a person charged with an offence under clause 30(1), (2) or (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.

The Administration is invited to consider:

(a) whether it is appropriate to introduce the objective test in clause 8(1), having regard to the fact that a reasonable man, being a third party, could not know whether "Scheduled chemicals" are likely to be produced at the facility during a particular year; and

(b) adding the words "intentionally or recklessly" in clause 30(1)(b), (2)(b) and (3)(b), as provided in section 77(1)(b) of the Chemical Weapons (Prohibition) Act 1994 of Australia.

3. Clause 9

The Bills Committee notes that the Administration's current thinking is not to impose any fee on applications for a permit under 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 invited to consider charging a nominal fee for

applications for a permit under the Bill, and to provide the updated information on the staffing resources required for processing the applications.

4. Clauses 10(3), 13(2), 14(1)(e), 15(2), 21(7), 21(13)(b), 24(2), 38(1) and 43

The Bills Committee notes that the Chinese version of these clauses does not match with the English version. Please consider rephrasing either the Chinese or English version to achieve consistency in terms of syntactic and legal expressions.

Legislative Council Secretariat
10 January 2003