

**Bills Committee on Chemical Weapons (Convention) Bill
Ninth meeting on 17 February 2003**

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

1. Clause 5(f)

While the Administration maintains its view that clause 5(f) should be retained to replicate in full the prohibitions prescribed in paragraph 1(d) of Article I of the Convention (LC Paper No. CB(1)908/02-03(02)), members consider it not necessary to retain clause 5(f) if the acts prohibited are already covered under existing laws, i.e. section 89 of the Criminal Procedure Ordinance (CPO) (Cap. 221). Given that the Convention is not tailor-made for common law jurisdictions, members do not see the need to copy the exact wording from the Convention. In this connection, members note that the Chemical Weapons Act 1996 of the United Kingdom (UK) does not have a provision similar to clause 5(f).

Members note the Administration's advice that the word "*assist*" in clause 5(f) overlaps totally with the words "*aids*" and "*abets*" in section 89 of CPO, and that the Administration is unable to find any judicial interpretation which indicates complete overlap of the words "*encourage*" and "*induce*" in clause 5(f) with the words "*counsels*" and "*procures*" in section 89 of CPO. On the other hand, members note the Assistant Legal Adviser's advice that the meaning of the word "*encourage*" may not be precise enough. A man may unwittingly encourage another by his presence, by misinterpreted words, or gestures, or by his silence but a mere passive spectator of a crime will not commit a criminal offence (R v. Coney [1882] as cited in R v. LEE Chi Wai and Others [1993] (HKCA 197) by Chief Justice T L YANG).

The Administration is requested:

- (a) to set out clearly the acts prohibited under clause 5(f);
- (b) to examine whether the acts prohibited under clause 5(f) are covered under section 89 of CPO -
 - (i) if yes, please delete clause 5(f);
 - (ii) if not, please consider whether it is appropriate to use the words "*assist*", "*encourage*" and "*induce*" in clause 5(f), having regard to the fact that they are not commonly used in common law legislation and the judicial interpretation that the word "*encourage*" could cover unintentional act. Please refer to the court ruling in 1993 quoted by the Assistant Legal Adviser and any other court rulings in the past ten years, and advise on the judicial interpretation of the word "*encourage*"; and

- (c) to make reference to the approach adopted by UK, a common law jurisdiction. Its Chemical Weapons Act 1996 does not have a provision similar to clause 5(f).

2. Clauses 5 and 29(2)

The Bills Committee notes from the Administration's written response (LC Paper No. CB(1)908/02-03(02)) that contravention of any provision in clause 5 should be an offence of strict liability, but under clause 29(2), it is a defence for the person charged with the offence to prove that he neither knew nor suspected that the article was a chemical weapon. Other than this, it remains the responsibility of the prosecution to prove beyond reasonable doubt the guilt of the accused. The Administration is requested to advise on the elements constituting the offence that the prosecution needs to establish before instituting the proceedings and the onus of proof on the prosecution.

3. Clause 27

On the term "in-country escort" in clause 27, the Administration is requested:

- (a) to consider adding a definition of the term in clause 2 (Interpretation);
- (b) to clarify whether the term refers to a Mainland official or a Hong Kong Special Administrative Region Government (HKSARG) official, or both. The drafting of clause 27(4)(b) seems to imply that the "in-country escort" is not a HKSARG official; and
- (c) to set out the departments of the Central People's Government or HKSARG from which the "in-country escort" will be appointed.