

EXPLANATORY NOTE ON DRAFT ILLUSTRATIVE MODEL LEGISLATION FOR THE INCORPORATION OF THE CWC INTO DOMESTIC LAW

Part I: Preliminary

Includes the general provisions of the Act (title, object of Act, commencement, application and definitions). In particular -

- Section 3 includes definitions of some key terms used in the Act, as well as catch-all provision (s.3(2)), thereby ensuring that any term used in the Act has the same meaning as in the Chemical Weapons Convention (CWC).
- Section 5 specifies that the application of the Act extends to all places under Australia jurisdiction or control as required by Article VII of the Convention.
- Section 6 spells out clearly that the Act applies extra territoriality to all Australians anywhere (cf: the requirement in Article VII(l): "any activity .. undertaken anywhere by nationals possessing [a State Party's] nationality").

Part II: Penal provisions

Section 7 is the key provision of this Act and reproduces almost verbatim the language of Article I of the Convention. Its effect is to incorporate, in accordance with Article VII, into domestic law the obligation to criminalise activities prohibited by Article I.

Sections 8-12 are ancillary provisions to Section 7 and relate to issues such as penalties for offences, prosecution, forfeiture of prohibited material and evidentiary issues. Note that there are also prohibitions in other areas of the Act relating to non compliance with the verification regime (particularly with respect to Schedule I matters: see Part III, Division 3 of the Act)

Part III: Verification and non-proliferation regime

This part provides for both the challenge inspection and industry verification regimes.

Division 1 has general provisions relating to -

- designation of inspectors.
- the making of false or misleading statements to, or obstruction of, inspectors and the National Authority.
- breaches of confidentiality (cf: Article VII(6)).

Division 2 covers the operation of challenge inspections in Australia:

- Sections 23 and 24 set out two options for undertaking a challenge inspection (by consent or by use of warrant).

Division 3 covers the routine declaration and inspection obligations for Schedule 1, 2 and 3 facilities and Other Chemical Production Facilities (Article VI). These provisions follow the terms of the Convention very closely. The information required to be submitted is listed in Schedules C to J of the Act (Although there is no reason why this information could not alternatively be prescribed by Regulation in the same form as found in the Act's schedules).

Part IV: Miscellaneous

Section 47 allows for the delegation of the Minister's powers under the Act to National Authority officers.

Section 48 provides for the power of the Governor-General to make regulations for the purposes of the Act; an illustrative and non-exhaustive list is included in the Section, for example -

- the possession of old chemical weapons can be regulated by Regulations; and
- the designation of a Single Small Scale Facility or other Schedule 1 facility can be done by regulation.

Other matters not covered by the Act

(a) Privileges and immunities of the OPCW

Article VIII (48-51) requires States Parties to grant the OPCW certain privileges and immunities, both in its own right as an international legal subject and with respect to its staff and persons accredited to it. This obligation is distinct from the obligation to grant privileges and immunities to inspectors pursuant to Part II of the Verification Annex, which is treated separately in Section 16 and Schedule B of the Act.

In Australia's case, the obligation to grant the OPCW privileges and immunities can be satisfied by use of the *International Organisations (Privileges and Immunities) Act*, under which the OPCW could be declared to be an international organisation for the purposes of that Act. Most UN bodies and other international organs are declared under the same Act with the result that both the organisation and its officials are granted such privileges and immunities as are required by the Convention.

Most States would have similar existing legislation which could be used for the purposes of Article VIII (48-51).

(b) Transfers of chemicals to third States and Non-States Parties

Regulations under the *Customs Act* could be promulgated so as to prohibit the exportation of Schedule 1 chemicals to countries which are not parties to the Convention (although there are also specific penal provisions in the Act in relation to their transfer).

Regulations under the *Customs Act* could be promulgated so as to prohibit without permission the exportation of Schedule 2 chemicals (Part VII (C) of the Verification Annex) and Schedule 3 chemicals (Part VIII (C) of the Verification Annex).

(Alternatively, these prohibitions relating to the transfer of Schedules chemicals could be incorporated into the Act).

(c) Destruction and verification of CW/CWPF

No legislative provision has been made for this, since it would be unlikely that the majority of non-CW possessors would require putting in place such legislation in order to comply with the Convention. Even if there were a technical requirement to comply with Articles IV and V of the CWC, this could in most cases be adequately achieved by Executive direction rather than by legislation.

(d) National Authority

Strictly speaking, there is no obligation to legislate for the establishment of a National Authority to satisfy the requirements of Article VII. However, it is probably inevitable that a reference is made to the National Authority in the Act, at least in the definitions section, and for other practical purposes (in particular, inspection purposes). Similarly, it may also help to include a reference to a Director of the National Authority in the Act.

(e) Information on National Programs related to Protective Purposes

Article X (4) requires each State Party to provide annually to the Technical Secretariat information on its protective purposes program. This obligation has not been included in the Draft on the assumption that this declaration will be provided from Government sources.

(f) Penalties

Reference is made throughout the Draft both to imprisonment and to fines for breaches of the legislation; in the latter case, while no monetary figures have been set, it would be envisaged that, for example, a section 7 breach would result in a severe monetary fine (cf: a \$200,000 fine for the breach of a similar provision in the *Crimes (Biological Weapons) Act*).

In addition to these two forms of penalty, it may be that corporations could also be penalised by Governments having the power of imposing bans on Corporations producing and/or exporting specific chemicals in circumstances where they have knowingly violated the provisions of the legislation.