

**ILLUSTRATIVE MODEL LEGISLATION FOR THE INCORPORATION OF THE
CHEMICAL WEAPONS CONVENTION INTO DOMESTIC LAW**

Prepared by the Commonwealth Secretariat

EXPLANATORY MEMORANDUM

INTRODUCTION

The preparation of this Illustrative Model Legislation for the incorporation of international legal obligations under the Chemical Weapons Convention (CWC) into the domestic law of a common law jurisdiction was undertaken in response to a decision by Commonwealth Heads of Government at their Meeting in Cyprus in October 1993 which emphasised the desirability of all Commonwealth countries becoming party to the Convention so as to bring the Convention into force at the earliest possible date.

This continues the Secretariat's practice of preparing "accession kits" for the assistance of Commonwealth governments, illustrating inter alia the nature of the legislation that would be required by a State to enable it to satisfy its obligations under selected Conventions.

This particular model is drawn from material originally prepared by the Government of Australia, designed to assist South-East Asian and South Pacific governments. It has been prepared on the basis of Australia's own legal system which may well be different to the legal systems of some other States in significant respects. For example:

- Australia has no entrenched Bill of Rights and relies on the Common Law and some implementing legislation of the guarantee of particular rights and freedoms. Some States which do have an entrenched Bill of Rights guaranteeing such things as the inviolability of private property may need to include specific provisions in their legislation to deal with any potential conflict - particularly in relation to the possibility of inspections of private facilities by the Organisation for the Prohibition of Chemical Weapons' (OPCW) Inspectorate;
- Australia is a federation and so the legislation must apply in all jurisdictions. Other non-federal States will not have to include provisions in the legislation to cover any ambiguity about the scope of application of the legislation;
- Australia does not possess chemical weapons or chemical weapons production facilities. Consequently, the Illustrative Model Legislation makes no reference to the need to destroy such items. CW possessor States may need more detail in their legislation to fulfil their Convention obligations.

PART I: PRELIMINARY

The first Part of the Illustrative Model Legislation (Sections 1-6) contains the general introductory provisions that are generally contained in Acts of the Australian Parliament - i.e. the Title, Commencement, Definitions, Objects of the Legislation and Scope of Application.

Both the explanatory preamble and Section 4 indicate that the purpose of the legislation is to give effect to Australia's obligations as a Party to the Chemical Weapons Convention.

Section 3(1) identifies and defines some key words used throughout the Illustrative Model Legislation. Section 3(2) provides a "catch-all" to ensure that any words in the Illustrative Model Legislation which also appear in the Convention but which are not defined in 3(1) are

accorded their Convention meaning. (The same approach is used in Section 8(3) of the *Crimes (Biology Weapons) Act 1976*).

Sections 5 and 6 deal with the extent of the application of the legislation in order to give effect to obligations arising from Article VII(1) of the Convention. Article VIII(1)(a)-(c) obligates States Parties to prohibit any violation of the Convention anywhere under its jurisdiction, not permit any violation of the Convention anywhere under its control and extend penal sanctions to the acts or omissions of its nationals which contravene the Convention wherever those acts or omissions occur. Section 5 of the Illustrative Model Legislation applies the legislation to all Australian territory and to all Australian aircraft, ships and vessels - (these craft are already recognised in international law to be subject to the jurisdiction of the flag State). Section 6 of the Illustrative Model Legislation extends the application of the legislation to the acts or omissions of Australian nationals anywhere. Although the extension of jurisdiction extra-territorially to cover acts and omissions of nationals outside a State's territory is not common in the domestic law of States it is certainly not a new concept. For example Australia already adopts extra-territorial jurisdiction for the acts or omissions of its nationals in other States in Section 5 of the *Crimes (Biological Weapons) Act 1976* and Section 6(2) of the *Geneva Conventions Act 1957-1973*.

PART II: PENAL PROVISIONS

Part II of the Illustrative Model Legislation contains 7 provisions (Sections 7-13). In these provisions, violations of the legislation are identified and penal sanctions are imposed for acts which constitute a violation.

Section 7 is the key provision in the Illustrative Model Legislation because it identifies and enumerates the general scope of acts which are prohibited under the legislation.¹ Article VII(1)(a) of the Convention obligates States Parties to enact penal legislation with respect to acts prohibited under the Convention. Prohibited acts under the Convention are principally listed in Article I. The language of Section 7 reproduces, almost verbatim, Article I of the Convention and the effect of Section 7 satisfies the requirements of Article VII by criminalising these prohibited acts.

Reference to paragraph 1(d) of Article I indicates the very broad scope of this provision, and in particular, the non-prescribed nature of such types of violations. It is clear that the legislation cannot list all possible violations of the Convention. Consequently, Australia is currently developing "catch-all" provisions, which will be included in separate legislation to Australia's CWC Act, to prevent intentional or reckless assistance to any nuclear, biological or chemical weapons program or their missile delivery systems, either by way of exports of goods not covered under the Customs (Prohibited Exports) Regulations or the provision of services or other assistance. This catch-all legislation, which will be in effect before Australia's CWC Act, will cover, inter alia, the possible range of violations of the offences listed in Section 7, in particular, those relating to paragraph 1(d) of Article I. Thus the "catch-all" provision will be used as a last resort to cover violations that can not readily be prescribed.

An alternative approach, in particular for a country which may prefer to cover CWC provisions separately from provisions related to transfer of nuclear, biological or missile delivery systems, would be a CWC-specific "catch-all" provision. This could be added as a subsection to a provision similar to Section 7 of the legislation.

1. It should be noted that the legislation does contain other specific prohibitions relating, for example, to non-compliance with the verification regime (including, for example, with respect to Schedule 1 matters: see Part III, Division 3 of the Illustrative Model Legislation).

Section 8 deals with penalties for violations of the legislation. The Section distinguishes corporations and individuals on the basis that corporations cannot be imprisoned. Corporations, if convicted of a violation can be fined and individuals either fined or imprisoned. The provision includes no guidelines on the anticipated range of penalties for violations (except that a person can incur a life sentence) and this omission is discussed below in Part V.

Section 9 outlines the principles by which acts of individuals can be imputed to a corporation making the corporation vicariously liable. The provision follows basic rules of the Law of Agency so that acts of or conduct by a director, servant or agent of the corporation acting within the scope of their actual or apparent authority are deemed to be acts of or conduct by the corporation.

Under Section 10, any substance or article produced in contravention of Article VII will be forfeited to the Government. Police officers are entitled to seize any such substance or article and the Government is to retain control over the substance or article. Section 9 of the *Crimes (Biological Weapons) Act 1976* contains a similar provision in relation to prohibited substances and articles under the Biological Weapons Convention.

Section 11 specifies that all offences under the legislation are indictable offences and cannot be tried summarily. The effect of this provision is that all defendants will be entitled to trial by jury. Section 80 of the Australian Constitution guarantees a right of trial by jury for all indictable offences under Commonwealth Law.

Section 12 allows the relevant Government Minister to appoint an official analyst for the purposes of analysing and identifying substances. Section 12(2) allows for a certificate issued by the analyst to be admissible as prima facie evidence as to the nature of the substance. The appointment of the analyst in this provision only relates to national verification measures and consequential legal proceedings and not to samples taken by OPCW inspectors during routine or challenge inspection procedures. Such a provision is also included in the *Crimes (Biological Weapons) Act 1976*, (Section 12).

Section 13 obligates anyone knowingly in possession of Old Chemical Weapons (as defined in paragraph 5(a) of Article II of the CWC) to report the precise location of such weapons. The failure to do so is an offence. Paragraph 9 of Article IV of the Convention obligates States Parties to report, secure and destroy any chemical weapons discovered after the initial declarations required under Article III. Section 13 is intended to help facilitate the implementation of the obligation in paragraph 9 of Article IV. It is self-evident that there can be no Convention obligation and no legislative offence for unknown "possession" of chemical weapons.²

PART III: VERIFICATION

Part III of the Illustrative Model Legislation is subdivided into three divisions dealing with the aspects of the provisions for both the challenge inspection and industry verification regimes.

DIVISION 1: GENERAL

Consistent with the overall approach in the Illustrative Model Legislation, Section 14 specifies that Schedule 1, Schedule 2 and Schedule 3 in the legislation refer to the same Schedules as

2. Old Chemical Weapons which are buried or hidden in some other way and not known to exist either by the Government or an individual property owner are examples of the sort of scenarios beyond the scope of the Convention and the legislation. Obligations only arise after "discovery" of such weapons.

in the Convention. Section 15 refers to Designation of inspectors. The legislation provides that the Minister may, in writing, appoint a person as the Director of the National Authority for the purposes of the legislation. It also provides that the Minister may terminate such appointment at any time. Provision is made for any person who has, in accordance with the CWC, been designated by the Technical Secretariat to carry out, or assist in, inspections or visits as inspectors or inspection assistants, to be an "OPCW inspector" for the purposes of the legislation. (The designation of inspectors and inspection assistants is covered under CWC Annex 2 Part II, pages 73-74). Section 16 refers to Privileges and Immunities of OPCW Inspectors. OPCW Inspectors, for the purposes of the Legislation, enjoy such privileges and immunities as set out in Schedule B of the legislation. These privileges and immunities are distinct from the privileges and immunities of the OPCW itself, which are discussed in Part V (a), below. Section 17 refers to Identity Cards. In order to facilitate the conduct of inspections, provision is made for the Director of the National Authority to issue identity cards in a form approved by the Director to:

- (a) a National Authority Inspector;
- (b) OPCW Inspectors; and
- (c) any other class of persons prescribed by regulation.

When a person in possession of an identity card ceases to hold the office for which the card was issued, or in the case of an OPCW inspector at the conclusion of an inspection, that person shall return the card to the Director or a person nominated by the Director.

Section 18 refers to Tampering with Instruments. The CWC provides for monitoring of some facilities which produce Schedule 1 chemicals with on-site instruments (CWC Annex 2, Part VI, paragraphs 22 and 29). The OPCW inspectors may also bring approved equipment, which would be installed at the facility for the whole or part of the time of the inspection. Other approved equipment brought on site by OPCW inspectors would be moved from place to place within the facility to carry out sampling or other verification measures (CWC Annex 2, Part II, paragraphs 27 to 29).

There is also provision for the OPCW inspection team to use equipment available on site at the facility (CWC Annex 2, Part II, paragraph 30). This equipment, if being used by the inspection team, shall also be covered under "approved equipment" for the purposes of the Legislation. It is an offence for any person to interfere with an on-site instrument or with approved equipment with the intention of affecting adversely the operation of that instrument or equipment. The Illustrative Model Legislation makes provision for appropriate penalties. (See *Nuclear Non-Proliferation (Safeguards) Act 1987*, Section 28).

Section 19 deals with persons or corporations making false or misleading statements to National Authority or OPCW personnel. Provision is made for this to be an offence with appropriate penalties. In practice, the penalties under this section would not be expected to be as severe as penalties for violations under Section 7 (as set out in Section 8). In this context, it should be noted that not all unlawful activities with respect to the making of false or misleading statements will necessarily be violations under Section 7.

Section 20 deals with Obstruction of Inspectors. Provision is made for it to be an offence for a person to obstruct an OPCW inspector in the performance of a duty or function in accordance with the CWC or the exercise of a power under the legislation or regulations, with appropriate penalties (see *Nuclear Non-Proliferation (Safeguards) Act 1987*, Section 31). Section 21 deals with Confidentiality of Information. It is an offence for any person to divulge in any way or in any form to any person not authorised to receive it, information which is given in confidence to the National Authority or is obtained by the National Authority during the course of an inspection conducted by the National Authority or by OPCW inspectors (see CWC Annex 3, "Confidentiality Annex").

DIVISION 2: CHALLENGE INSPECTIONS

General Aspects

The CWC provides for challenge inspections of "any facility or location in the territory or in any other place under the jurisdiction or control" of a State Party by OPCW inspectors (CWC Article IX, paragraph 8). In practical terms, a sensitive defence facility might be the most likely target of a challenge inspection. Other possible targets would be commercial chemical companies.

Challenge Inspections may be regarded as a measure of last resort, and therefore expected to be a rare event. Although the likelihood of a challenge inspection may be low, provision still has to be made in national legislation for such an occurrence. The term "relevant power" is defined in the Illustrative Model Legislation. The definition of a "relevant power" in Section 22(2) (a) to (j) is a slightly modified version of the term as it appears in the *Nuclear Non-Proliferation (Safeguards) Act 1987*, Sections 69 and 60.

Right of Access

Section 23 specifies that an OPCW inspector or a team of OPCW inspectors shall be able, either with the consent of the occupier or owner of any facility or other location, or pursuant to a warrant issued under the legislation in respect of any facility or other location enter upon or into any facility or other location, and exercise any relevant power for a relevant challenge inspection purpose in accordance with the CWC (see subsection 59 (4) of the *Nuclear Non-Proliferation (Safeguards) Act 1987*).

Section 23 also specifies that any right granted an OPCW inspector for this purpose to be also granted to a National Authority Inspector accompanying the OPCW inspection team.

During challenge inspections, the extent of access to the inspection site and records necessary to demonstrate compliance with the provisions of the Convention will need to be negotiated by the OPCW inspection team and the inspected State Party on a "case-by-case" basis. The inspection team's power of access will be exercised in accordance with international obligations, as outlined in Section 56. In particular, the Illustrative Model Legislation specifies that the exercise of the power or discretion or the performance of the duty or function is authorised by this legislation only to the extent that the exercise or performance is not inconsistent with the country's obligations under the relevant international agreements (See Section 70 of the *Nuclear Non-Proliferation (Safeguards) Act 1987*). This is to enable the application of powers in a graduated approach, rather than an unqualified way. This applies, inter alia, to "managed access" as provided for in CWC Annex 2, Part X, paragraphs 46 to 52.

Sections 24 and 25 specify that the right of access extends to vehicles, planes and ships located within the perimeter of the facility or other location. This could conceivably include a naval base or airforce base. CWC Annex 2, Part X, paragraphs 29-31 also provides the inspection team with the right to inspect, on a "managed access" basis, vehicles leaving the facility or other location. There is a description of "managed access" in that paragraph as it relates to vehicular traffic leaving the facility.

Warrants

Sections 26 to 28 cover the legislative requirements for Warrants. In particular, where the owner or occupier of a facility refuses an OPCW inspector or an OPCW inspection team access to a facility in contravention of the legislation and where provision has been made for access by warrant, the legislation provides for the Minister, the Director of the National Authority or a National Authority Inspector to obtain a warrant from a magistrate to allow the OPCW Inspector or the OPCW Inspector or the OPCW inspection team, and the accompanying National Authority Inspector, to gain access to that facility in order to carry out the inspection. In particular, provision is made for obtaining a warrant by telephone should circumstances warrant urgent access to a facility to fulfil obligations under the CWC (Section 7).

Observer

The CWC provides for an Observer of the State Party which requested the challenge inspection to observe the conduct of the challenge inspection. The Observer may be a national of the requesting State Party or a third State Party. The Observer may be granted the same right of access to the facility undergoing the challenge inspection as that of the OPCW inspection team or may have his right of access denied or circumscribed by the inspected State Party (CWC Article IX, paragraph 12 and Annex 2, Part X, paragraph 55). It has been assumed that a National Authority representative and the owner or manager of the facility will discuss the extent of access of the Observer prior to the arrival of the inspection team at the inspection site, and that the extent of access of the Observer will be a mutually agreed decision between the National Authority representative and the owner or manager of the facility. Provision therefore has not been made in the legislation for the access of the Observer within the inspection site.

DIVISION 3: INDUSTRY VERIFICATION

General Aspects

Division 3 covers the routine declaration and inspection obligations for Schedule 1, 2 and 3 facilities and Other Chemical Production Facilities (Article VI).

In CWC Article VI and Annex 2 Parts VI, VII, VIII and IX, provision is made for routine inspections of Schedule 1 facilities, Schedule 2 facilities, Schedule 3 facilities and Other Chemical Production Facilities. As there are different provisions for routine inspections for the respective types of facilities, each is treated separately in this legislation.

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 legislation (Although there is no reason why this information could not alternatively be prescribed by Regulation in the same form as found in the legislation's Schedules).

For all routine inspections carried out by the Technical Secretariat, access to facilities should be either by consent of the owner or operator or by warrant obtained from a magistrate.

SCHEDULE 1

General Aspects

Section 29 specifies the limitations with respect to Schedule 1 chemicals, as described in Part VI of the Verification Annex of the Convention.

Section 30 specifies particular penalties associated with unlawful activities with respect to activities involving Schedule 1. Corporations, if convicted of a violation can be fined and individuals either fined or imprisoned.

Section 31 specifies declaration requirements for owners or operators of a prescribed single small scale facility (SSSF) or prescribed other facility (OF). This section should be read in conjunction with Schedule C - "Declarations for prescribed other facilities".

Section 32 specifies that sufficient access shall be allowed for the conduct of routine inspections of SSSF or OFs, in particular, to enable the inspection team to verify, at the initial inspection, the information provided to the Technical Secretariat concerning the facility, including the limits on reaction vessels as prescribed in regulations (CWC Annex 2, Part VI, paragraphs 24 and 21) and at subsequent inspections, that the quantities of schedule 1 chemicals produced are correctly declared.

In this legislation, it has been assumed that this access will be provided with the consent of the owner or operator. In cases where this access is not provided voluntarily, the provision of warrants is specified (Sections 50 to 53).

The legislation provides for the operator or owner of a prescribed SSSF or a prescribed OF to co-operate with the National Authority in the negotiation of a facility agreement for the purposes of this Sub-section (1) in the form to be prescribed by the Director-General (CWC Annex 2, Part VI, paragraphs 25, 26, 31 and 32). This is specified in Section 32(2) of the legislation.

SCHEDULE 2

General Aspects

Section 33 defines a Schedule 2 facility, as described in Part VII of the Verification Annex of the Convention.

Sections 34 and 35 specify the declaration requirements for owners or operators of Schedule 2 facilities. These sections should be read in conjunction with Schedule E "Declarations for Schedule 2 facilities".

Section 36 refers to declarations required by any operator or owner of a facility which has produced at any time since 1 January 1946 a Schedule 2 chemical for chemical weapons purposes. This section should be read in conjunction with Schedule F "Declarations for Schedule 2 chemical weapons production facilities".

Section 37 specifies particular penalties associated with unlawful activities with respect to Schedule 2 facilities. Corporations, if convicted of a violation can be fined and individuals either fined or imprisoned.

Section 38 specifies the inspection thresholds for Schedule 2 facilities, and specifies that sufficient access shall be allowed for the conduct of routine inspections of Schedule 2 facilities, in particular, to enable the inspection team to verify, at the initial inspection, the information provided to the Technical Secretariat concerning the facility is correct. In this Legislation, it has been assumed that this access will be provided with the consent of the owner or operator. In cases where this access is not provided voluntarily, the provision of warrants is specified (Sections 50 to 53).

The legislation provides for the operator or owner of a Schedule 2 facility which is subject to inspection to co-operate with the National Authority in the negotiation of a facility agreement for the purposes of this Section in the form to be prescribed by the Director-General, unless the OPCW and the National Authority agree that a facility agreement is not needed. This is specified in Section 38(3) of the legislation.

For Schedule 2 facilities, the extent of access to the plant site and records necessary to demonstrate compliance with the provisions of the Convention will need to be negotiated by the OPCW inspection team and the inspected State Party on a "case-by-case" basis. This power of access granted to the OPCW Inspectors will be exercised in accordance with international obligations, as outlined in Section 56.

SCHEDULE 3

General Aspects

Section 39 defines a Schedule 3 facility, as described in Part VIII of the Verification Annex of the Convention.

Sections 40 and 41 specify the declaration requirements for owners or operators of Schedule 3 facilities. These sections should be read in conjunction with Schedule G - "Declarations for Schedule 3 facilities".

Section 42 refers to declarations required by any operator or owner of a facility which has produced at any time since 1 January 1946 a Schedule 3 chemical for chemical weapons purposes. This section should be read in conjunction with Schedule H - "Declarations for Schedule 3 Chemical Weapons production facilities".

Section 43 specifies particular penalties associated with unlawful activities with respect to Schedule 3 facilities. Corporations, if convicted of a violation can be fined and individuals either fined or imprisoned.

Section 44 specifies the inspection threshold for Schedule 3 facilities, and specifies that sufficient access shall be allowed for the conduct of routine inspections of Schedule 3 facilities, in particular, to enable the inspection team to verify that activities are consistent with the information provided to the Technical Secretariat and, particularly, to verify the absence of any Schedule 1 chemical, especially its production, except if in accordance with the CWC Annex 2, Part VI, paragraphs 9-12. In the development of this legislation, it has been assumed that this access will be provided with the consent of the owner or operator. In cases where this access is not provided voluntarily, the provision of warrants is specified (Sections 50 to 53).

For Schedule 3 facilities, the extent of access to the plant site and records necessary to demonstrate compliance with the provisions of the Convention will need to be negotiated by the OPCW inspection team and the inspected State Party on a "case-by-case" basis. This power of access granted to the OPCW Inspectors will be exercised in accordance with international obligations, as outlined in Section 56.

There shall be no Facility Agreement associated with the inspection of a Schedule 3 facility unless requested by the inspected State Party. In the legislation it has been assumed that the request for such a Facility Agreement will be with the consent of the operator or owner of a Schedule 3 facility which is subject to inspection. Therefore, it has been assumed that there will be no requirement for special legislation to ensure the co-operation of the operator or owner of a Schedule 3 facility with the National Authority in the negotiation of a facility agreement.

OTHER CHEMICAL PRODUCTION FACILITIES (OCPFs)

General Aspects

Section 45 defines an OCPF, as described in Part IX of the Verification Annex of the Convention.

Sections 46 and 47 specify the declaration requirements for owners or operators of OCPFs. These sections should be read in conjunction with Schedule J - "Declarations for Other Chemical Production Facilities".

Section 48 specifies particular penalties associated with unlawful activities with respect to OCPFs. Corporations, if convicted of a violation can be fined and individuals either fined or imprisoned.

Section 49 specifies the inspection threshold for OCPFs, and specifies that sufficient access shall be allowed for the conduct of routine inspections of OCPFs, in particular, to enable the inspection team to verify that activities are consistent with the information provided to the Technical Secretariat and, particularly, to verify the absence of any Schedule 1 chemical especially its production, except if in accordance with the CWC Annex 2, Part VI, paragraphs 9-12. In the development of this legislation, it has been assumed that this access will be provided with the consent of the owner or operator. In cases where this access is not provided voluntarily, the provision of warrants is specified (Sections 50 to 53).

For OCPFs, the extent of access to the plant site and records necessary to demonstrate compliance with the provisions of the Convention will need to be negotiated by the OPCW inspection team and the inspected State Party on a "case-by-case" basis. This power of access granted to the OPCW Inspectors will be exercised in accordance with international obligations, as outlined in Section 56.

There shall be no Facility Agreement associated with the inspection of an OCPF unless requested by the inspected State Party. In the legislation it has been assumed that the request for such a Facility Agreement will be with the consent of the operator or owner of an OCPF which is subject to inspection. Therefore, it has been assumed that there will be no requirement for special legislation to ensure the cooperation of the operator or owner of an OCPF with the National Authority in the negotiation of a facility agreement.

The CWC provides that the inspection regime for OCPFs shall start at the beginning of the fourth year after the CWC's entry into force, unless the Conference of States Parties, at its regular session in the third year after the CWC's entry into force, decides otherwise (CWC Annex 2, Part IX, paragraph 22). Therefore, Section 49 would not be required to be activated (by proclamation) until after the Conference of States Parties at its regular session in the third year after entry into force of the Convention or at some later date.

Routine Inspections by National Authority

A State Party may wish to pass legislation to enable the National Authority to conduct routine inspections of facilities, including facilities which have not made declarations under Sections 32(1), 36(1), 41 and 45, to ensure observation of the national legislation, independent of the international inspections conducted by the OPCW. States Parties may wish to consider this option in the development of their CWC enabling legislation. One such example could be a situation where the State Party had grounds for suspecting that a particular facility may not be complying with the CWC or the legislation.

While legislation would not be essential in the fulfilling of international obligations under the CWC, it would enable the National Authority to make its declarations to the Technical Secretariat with a greater level of confidence. Such legislation could be along the following lines:

"An operator or owner of a Schedule 1 facility, a Schedule 2 facility, a Schedule 3 facility, an Other Chemical Production Facility or any other facility, which the National Authority has grounds for suspecting might not be in compliance with the CWC or the legislation, should be required to allow a National Authority Inspector(s):

- (a) access to any part of the facility;
- (b) access to records or other documentation relating to the operation of the facility;
- (c) the right to have samples taken of any matter or thing (including on-site analysis of such matter or thing) in accordance with the safety regulations established at the inspection site;
- (d) to operate on-site analytical instruments.

The object of such an inspection would be, inter alia, to enable the National Authority Inspectors to verify that activities are consistent with obligations under the Convention, to verify the information provided to the National Authority and, to verify the absence of any Schedule 1 chemical, especially its production, except if in accordance with the CWC Annex 2, Part VI, paragraphs 9-12.

Access should be by consent or by warrant obtained from a magistrate. Penalties for non-compliance with this access provision should be prescribed."

PART IV: MISCELLANEOUS

Part IV of the Illustrative Model Legislation contains three Sections dealing with administrative matters pertaining to the implementation of the legislation. Section 54 allows the Minister to delegate powers under the legislation to an officer of the National Authority and thus expedite the process of administrative decision-making.

A number of provisions of the legislation will require the enactment of subsidiary legislation and Section 55 allows the Governor-General (the Head of Government invested with the Constitutional Power to authorise the enactment of legislation) to make regulations in respect of those provisions. Section 55 provides an illustrative, and therefore not an exhaustive, list of the sort of provisions which may require such regulations. The list in Section 55 includes, for example:

- the possession of old chemical weapons;
- the designation of a Single Small Scale Facility or other Schedule 1 Facility;
- the transportation of any toxic chemicals listed in Schedule 1, 2 and 3 of the Convention.

Section 56 is a general provision requiring the exercise of a power, discretion, duty or function conferred on a person by the legislation to be undertaken consistently with Australia's international legal obligations under the Convention and any other relevant international instruments.

PART V: OTHER MATTERS NOT COVERED BY THE LEGISLATION

(a) PRIVILEGES AND IMMUNITIES OF THE OPCW

Paragraphs 48 to 51 of Article VIII of the Convention requires States Parties to extend certain privileges and immunities to the OPCW both in its own right as an international organisation with legal personality and with respect to its staff and representatives of States Parties accredited to it. This Convention obligation is consistent with the UN Charter obligation in Articles 104 and 105 that Members extend to the UN Organisation similar privileges and immunities.

Australia does not need to include provisions in the legislation granting privileges and immunities to the OPCW because the obligation will be satisfied under the *International Organisations (Privileges and Immunities) Act 1963*. Most UN bodies and other international organisations Australia deals with are declared to be international organisations for the purposes of the Act and are granted privileges and immunities accordingly. Consistent with this approach it is likely that the OPCW will be declared to be a relevant international organisation and added to the list under the Act. As a consequence, both the OPCW as an organisation and designated personnel would be covered in accordance with the Convention obligation. Like Australia most other States Parties to the Convention (particularly UN Members) will already have some legislative arrangement for the granting of privileges and immunities and may well be able to utilise such arrangements to meet the Convention obligations under Article VIII.

The Article VIII obligation to extend privileges and immunities to the OPCW is distinct from the obligation to grant privileges and immunities to OPCW inspectors pursuant to Part II of the Verification Annex. The Australian legislation deals with this obligation as a separate issue in Section 16 and Schedule B of the legislation. Schedule B lists the specific privileges and immunities to be extended to the inspectors while they are working in Australia.

(b) TRANSFERS OF CHEMICALS TO THIRD STATES AND NON-STATES PARTIES

Specific Provisions related to chemicals in Schedules 1, 2 and 3.

A State Party may only transfer (export) a Schedule 1 chemical to another State Party, and only if it is to be used for research, medical, pharmaceutical or protective purposes. Chemicals transferred shall not be transferred to a third State.

Under the provisions of the CWC, three years after entry into force of the Convention, a Schedule 2 chemical will only be transferred to or received from States Parties. During the interim three year period, each State Party will require an end-use certificate for transfers of a Schedule 2 chemical to States not Party to the CWC.

When transferring a Schedule 3 chemical to States not Party to the CWC, each State Party shall adopt the necessary measures (for example, an end-use certificate) to ensure that the Schedule 3 chemical will only be used for purposes not prohibited by the CWC. Five years after entry into force, the Conference of States Parties shall consider the need to adopt other measures for transfer of Schedule 3 chemicals.

Regulations under an existing *Customs Act* could be promulgated so as to prohibit the exportation of Schedule 1 chemicals to any country which is not Party to the Convention (although there are also specific penal provisions in the Illustrative Model Legislation in relation to their transfer).

Regulations under an existing *Customs Act* could be promulgated so as to prohibit without permission the exportation of Schedule 2 chemicals (CWC Annex 2, Part VII (C)) and Schedule 3 chemicals (CWC Annex 2, Part VIII (C)). Alternatively, these prohibitions related to the transfer of Scheduled chemicals could be incorporated into the Illustrative Model Legislation.

Transfers of Other Chemicals

In addition to the obligations relevant to Scheduled chemicals, there are additional obligations relevant to the chemical trade. In particular, Paragraph 1(a) of Article I of the Convention specifies that each State Party to this Convention undertakes, inter alia, never under any circumstances to transfer, directly or indirectly, chemical weapons to anyone. In the context of the Convention, chemical weapons are defined as toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes.

Paragraph 2 of Article VI specifies, inter alia, that each State Party shall adopt the necessary measures to ensure that toxic chemicals and their precursors are transferred only for purposes not prohibited under this Convention.

Thus, under the Convention, each State Party will be under an obligation to ensure that other chemicals, in addition to Scheduled chemicals, that it exports are not to be used in a chemical weapons program. Appropriate legislation and penalties will be necessary to cover these provisions.

Australia's proposed "catch-all" provisions have already been discussed above at Part II, Section 7. This catch-all legislation, which will be in effect before Australia's CWC Act, will cover Australia's Convention obligations with respect to the transfers of other chemicals (which are not specifically listed under an existing Customs Act) in violation of the CWC.

(c) DESTRUCTION AND VERIFICATION OF CW/CWPF

No legislative provision has been made for destruction and verification of Chemical Weapons and Chemical Weapons Production Facilities, 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) ESTABLISHMENT OF THE NATIONAL AUTHORITY

Paragraph 4 of Article VII of the Convention obligates States Parties to "designate or establish" a National Authority as a national focal point to liaise with the OPCW and other States Parties. The Convention allows States Parties to fulfil their international legal obligations according to their own legal requirements. In Australia the National Authority does not need to be a statutory body and can be established by Executive decision. Consequently, the legislation is silent as to the creation of the Authority. However, it is inevitable that some references will be made to the existence of the Authority in the legislation in the definitions section and for other practical purposes (in particular, inspection purposes). The definition of "National Authority" in Section 3 indicates that the relevant Government Minister will designate or establish the Authority. Under Section 15(1) the relevant Minister will also appoint the Director and Inspectors of the National Authority.

(e) INFORMATION ON NATIONAL PROGRAMS RELATED TO PROTECTIVE PURPOSES

Paragraph 4 of Article X of the Convention specifies that each State Party shall provide annually to the Technical Secretariat information on its protective purposes program. This information is to be provided in accordance with procedures to be considered and approved by the Conference of States Parties based on draft agreements, provisions and guidelines developed by the Preparatory Commission. This obligation has not been included in the Illustrative Model Legislation on the assumption that the Information on National Programs related to Protected Purposes will be provided from Government sources (for example, the Department of Defence, based on activities undertaken by that department and/or its contractors).

(f) ECONOMIC AND TECHNOLOGICAL DEVELOPMENT

Under paragraph 2 of Article XI of the Convention, States Parties are obliged to facilitate economic and technological development between themselves and to exchange scientific and technical information relating to the development and application of chemistry for purposes not prohibited under this Convention. States Parties will receive this type of information on a voluntary basis from individuals and/or corporations and then have a Convention obligation to communicate it to other States Parties. Because the initial receipt of the information is on a voluntary basis it has not been considered appropriate to include a legislative requirement for individuals or corporations to provide such information.

(g) PENALTIES

Reference is made throughout the Illustrative Model Legislation both to imprisonment and to fines for breaches of the legislation. The Illustrative Model Legislation contains no guidelines as to length of prison sentences or amounts of fines. It is envisaged that the actual Australian legislation will be more specific in this matter and state the maximum penalties for violations of the legislation which are commensurate with sentencing provisions in existing Criminal Law. For example a Section 7 breach will probably be liable to receive a severe maximum fine given that a similar breach of the *Crimes (Biological Weapons) Act* is liable to a maximum fine of \$200,000.

Life imprisonment is specially mentioned in Section 7 as a possible sentence for an individual's violation of the provision. Such a sentence would be reserved for the most serious breaches of the provisions. The Australian legislation will certainly not allow the death penalty for individuals who breach any provision. As a part to the Second Optional Protocol to the

International Covenant on Civil and Political Rights Australia is obligated to abolish the death penalty for all criminal offences.

The Convention itself gives no guidelines on the scope of sentences for breaches of the Convention. It is clearly a matter for each individual State Party to criminalise violations and to set their own penalties commensurate with their existing Criminal Law. The fact that States Parties will have disparate sentences for similar acts is a reality of the international legal system.