

Chemical Weapons Convention Bill 2012

EXPLANATORY MEMORANDUM

BACKGROUND

The Chemical Weapons Convention Bill 2012 gives effect in Nauru to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (done at Paris on 13 January 1993). Nauru ratified the Convention on 12 November 2001.

The text of the Convention is available electronically on the website of the Organisation for the Prohibition of Chemical Weapons (OPCW) established under the Convention and the following overview is drawn from that website.

The Convention comprises a Preamble, 24 Articles, and 3 Annexes—the Annex on Chemicals, the Verification Annex, and the Confidentiality Annex.

The rationale of the Chemical Weapons Convention is expressed most succinctly in the Preamble, “. . . Determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention.” It goes on to mention the benefits of peaceful chemistry and the desire to promote free trade in chemicals and international cooperation in chemical activities not prohibited by the Convention.

Article I sets out the general obligations of each State Party under the Convention. The Convention prohibits a State Party from using chemical weapons or engaging in military preparations to use chemical weapons. A State Party is also never to “develop, produce, otherwise acquire, stockpile, or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone”. Likewise, a State Party may not promote or aid any activity—perpetrated by individuals, groups, or another State—prohibited by the Convention. Under Article I, a State Party must destroy all chemical weapons stockpiles in its possession as well as all chemical weapons production facilities (CWPFs) on its territory and any chemical weapons it might have abandoned on the territory of another State Party. Also under Article I, the use of riot control agents (e.g. tear gas) is prohibited as a method of warfare.

Article II of the Convention sets out the definitions and criteria to be used in implementing the Convention. Among those terms defined are “chemical weapon”, “toxic chemical”, “precursor”, “old chemical weapons”, “abandoned chemical weapons”, “riot control agent”, “chemical weapons production facility”, and other terms related to

the industry verification regime: “production capacity”, “processing”, “consumption”, etc.

Article III requires each State Party to submit declarations to the OPCW within 30 days after the Convention enters into force for that particular State Party. A State Party must declare its possession of chemical weapons and/or CWPFs and its plans for destroying them. It must also declare any other facilities designed for the development of chemical weapons, such as laboratories, and its possession or non-possession of riot control agents. These declarations also detail whether or not a State Party has old chemical weapons on its territory and if it has abandoned chemical weapons on the territory of another State Party or if a State Party has abandoned such weapons on its territory. Chemical weapons that have been buried on land after 1977, or were dumped at sea after 1 January 1985, are also declarable.

Articles IV and V relate to the requirement for States Parties to destroy their chemical weapons and CWPFs, including the submission of detailed plans for destruction and annual declarations on the status of destruction operations. In the case of CWPFs, States Parties may request that they be converted for use for peaceful, non-prohibited purposes. The States Parties themselves are responsible for the costs of destruction and/or conversion and for the costs of verification of destruction activities by the OPCW.

Article VI covers “activities not prohibited under this Convention”, otherwise known as the non-proliferation or industry verification regime. The States Parties must ensure that toxic chemicals and their precursors are only developed, produced, transferred and used for peaceful purposes. Facilities that produce Scheduled chemicals and discrete organic chemicals are subject to control and reporting mechanisms implemented by the State Party, and to inspection by the OPCW.

Article VII covers national implementation of the Convention and requires each State Party to enact implementing legislation at the national level, to criminalize the Convention’s prohibitions in the context of national penal law, and to inform the OPCW of the measures taken to implement the Convention. Under this Article, States Parties pledge to cooperate in the areas of legal assistance, safety, and the environment. This Article also requires the establishment of a National Authority to liaise between the State Party and the OPCW.

Article VIII establishes the Organisation for the Prohibition of Chemical Weapons, or OPCW, as the implementing body of the Convention, with headquarters in The Hague, The Netherlands. The Organisation is comprised of three main organs or bodies: the Conference of the States Parties, the Executive Council, and the Technical Secretariat. Article VIII delineates the roles and functions of each body.

Article IX provides for the consultation and clarification if concerns about possible non-compliance arise. In addition, the procedures for requesting and carrying out a challenge inspection in any State Party if its compliance with the Convention is in doubt are provided. Any State Party may request a challenge inspection, anywhere on the territory of another State Party.

Articles X and XI provide for, respectively, assistance and protection to a State Party if it is attacked or threatened with attack by chemical weapons, and international cooperation for the economic and technological development of States Parties. Under Article X, each State Party must inform the OPCW of the type(s) of support it can give to assistance and protection efforts. Article XI promotes trade in chemicals for peaceful purposes and the development of chemistry in all States Parties for purposes not prohibited under the Convention.

Article XII deals with measures to ensure compliance, including sanctions against a State Party that fails to uphold its treaty obligations. Apart from imposing measures of redress or penalties, or restrictions on rights and privileges, etc., the Conference must bring cases of particular gravity to the attention of the United Nations General Assembly and the Security Council.

Articles XIII through XXIV deal with various issues such as relations with other international treaties, the settlement of disputes, amendments to the Convention, duration and withdrawal, entry into force, etc.

Of the 3 annexes, the Verification Annex is the most extensive. It sets out all of the detailed procedures to be followed by the States Parties and by OPCW inspection teams during verification/inspection activities at chemical weapons facilities or sites and industrial facilities. The Annex on Chemicals delineates the three Schedules, and the Confidentiality Annex guarantees the protection of sensitive, national security related information and confidential business information during inspections and when such information is submitted by States Parties to the OPCW.

EXPLANATION OF CLAUSES

PART 1 – PRELIMINARY MATTERS

Clauses 1 and 2 are formal provisions.

Clause 3 provides for the extraterritorial application of offences.

Clause 4 ensures that the measure binds the Republic.

PART 2 – INTERPRETATION

Clause 5 contains definitions for the purposes of the measure. These definitions reflect those definitions contained in the Convention that are important for the substantive provisions contained in the measure.

Clause 6 provides that terms not contained in the definition clause have the meanings assigned by the Convention.

PART 3 – CHEMICAL WEAPONS AUTHORITY

Clause 7 provides that the Head of the Department responsible under the Minister for the administration of the Act is the Chemical Weapons Authority for Nauru. It is a requirement of the Convention to have such an Authority.

Clause 8 sets out the functions of the Authority which all relate to the Convention and the administration of the measure. In making decisions about giving consent under the measure, the Authority is required to act consistently with the Convention.

Clause 9 provides for delegation (but not subdelegation) of the Authority's functions and powers.

PART 4 – CHEMICAL WEAPONS

Clauses 10 to 13 establish offences relating to chemical weapons and riot control agents used as a method of warfare as required by the convention. The penalties are very high in recognition of the gravity of these offences (\$1 million or imprisonment for life).

Clause 14 provides for forfeiture of any chemical weapon found in Nauru.

PART 5 – SCHEDULED AND DISCRETE ORGANIC CHEMICALS

Division 1 – Schedule 1 chemicals

Clause 15 requires the consent of the Authority to the production, acquisition, possession, transport, use, import or export of a Schedule 1 chemical. The circumstances in which consent may be given, and the conditions to which consent should be subject, are designed to align with the requirements of the Convention.

Clause 16 makes it an offence to produce, acquire, possess, transport or use a Schedule 1 chemical in the territory of a State not party to the Convention or to import or export such a chemical to or from such territory.

Division 2 – Schedule 2 chemicals

Clause 17 regulates the production, processing and consumption of Schedule 2 chemicals. It provides that this must only be for a permitted purpose. It then sets out

when a person who engages in such an activity has an obligation to report to the Authority and the nature of that obligation.

Clause 18 makes it an offence to import or export a Schedule 2 chemical to or from the territory of a State not party to the Convention.

Clause 19 requires a person who imports or exports a Schedule 2 chemical in other circumstances to make a report at the end of each calendar year to the Authority.

Division 3 – Schedule 3 chemicals

Clause 20 regulates the production of Schedule 3 chemicals. It provides that this must only be for a permitted purpose. It then sets out when a person who engages in such an activity has an obligation to report to the Authority and the nature of that obligation.

Clause 21 imposes reporting obligations on a person who imports or exports a Schedule 3 chemical.

Clause 22 imposes an additional obligation if the export is to a territory of a State not party to the Convention to obtain an end user certificate and to take any other measures that are reasonable in the circumstances to ensure that the chemical is only used for a permitted purpose.

Division 4 – Discrete organic chemicals

Clause 23 regulates the production of discrete organic chemicals by synthesis. It provides that this must only be for a permitted purpose. It then sets out when a person who engages in such an activity has an obligation to report to the Authority and the nature of that obligation.

Division 5 – Information

Clause 24 ensures that the Authority can require a person to provide whatever information may be needed for the Republic to comply with its reporting obligations under the Convention.

Division 6 – International inspections

Clause 25 provides that a place or thing is subject to an international inspection if the inspection is permitted under the Convention.

Clause 26 provides international inspectors with the necessary powers, privileges and immunities.

Clause 27 enables the Authority to authorise a person to accompany an international inspector on an inspection.

Clause 28 makes it an offence to hinder or obstruct inspection activities.

PART 7 – MISCELLANEOUS MATTERS

Clause 29 makes it an offence to provide false or misleading information under the measure.

Clause 30 ensures that directors of bodies corporate are criminally liable for non-compliance of the body corporate with the measure.

Clause 31 provides for information received under the measure to be kept confidential. This is important because commercially sensitive information may need to be disclosed.

Clause 32 provides an evidentiary aid in relation to consents.

Clause 33 provides general regulation making power. The regulations may provide for exemptions. This is included in case it is necessary in relation to concentration levels for Schedule 1 chemicals below which controls are not considered necessary.

The **Schedule** contains an extract from the Convention, namely, the annex on chemicals in order for readers to more readily understand which chemicals are controlled. The following explanation of the annex is drawn from the website of the Organisation for the Prohibition of Chemical Weapons.

The chemicals, which are explicitly specified in the Convention for monitoring purposes, cover a wide range of compounds and include chemical warfare agents, as well as key and more distant precursors. These chemical compounds, or families of compounds, are listed in the three Schedules of the Convention's Annex on Chemicals. Each of these Schedules has different requirements for verification. These requirements are more stringent in the case of those chemicals that are deemed to pose a greater risk. The Verification Annex also includes restrictions on the international transfer of scheduled chemicals.

Schedule 1 chemicals include those that have been or can be easily used as chemical weapons and which have very limited, if any, uses for peaceful purposes. These chemicals are subject to very stringent restrictions, including a ceiling on the production of one tonne per annum per State Party, a ceiling on total possession at any given time of one tonne per State Party, licensing requirements, and restrictions on transfers. These restrictions apply to the relatively few industrial facilities that use Schedule 1 chemicals. Some Schedule 1 chemicals are used as ingredients in pharmaceutical preparations or as diagnostics. The Schedule 1 chemical saxitoxin is used as a calibration standard in monitoring programmes for paralytic shellfish poisoning, and is also used in neurological research. Ricin, another Schedule 1 chemical, has been employed as a bio-medical research tool. Some Schedule 1 chemicals and/or their salts are used in medicine as anti-

neoplastic agents. Other Schedule 1 chemicals are usually produced and used for protective purposes, such as for testing chemical weapons protective equipment and chemical agent alarms.

Schedule 2 chemicals include those that are precursors to, or that in some cases can themselves be used as, chemical weapons agents, but which have a number of other commercial uses (such as ingredients in resins, flame-retardants, additives, inks and dyes, insecticides, herbicides, lubricants and some raw materials for pharmaceutical products). For example, BZ is a neurotoxic chemical listed under Schedule 2, which is also an industrial intermediate in the manufacture of pharmaceuticals such as clindinium bromide. Thiodiglycol is both a mustard gas precursor as well as an ingredient in water-based inks, dyes and some resins. Another such example is DMMP, a chemical related to certain nerve agent precursors that is used as a flame retardant in textiles and foamed plastic products.

Schedule 3 chemicals include those that can be used to produce, or can be used as, chemical weapons, but which are widely used for peaceful purposes (including plastics, resins, mining chemicals, petroleum refining fumigants, paints, coatings, anti-static agents and lubricants). Among the toxic chemicals listed under Schedule 3 are phosgene and hydrogen cyanide, which have been used as chemical weapons, but are also utilised in the manufacture of polycarbonate resins and polyurethane plastics, as well as certain agricultural chemicals. Triethanolamine, a precursor chemical for nitrogen mustard gas, is found in a variety of detergents (including shampoos, bubble baths and household cleaners) as well as being used in the desulfurisation of fuel gas streams.

Among those chemicals not specifically listed in the Schedules or anywhere in the Convention are discrete organic chemicals (DOCs). Manufacturing operations producing DOCs are referred to as “other chemical production facilities”. These plant sites are subject to declarations and verification requirements if they produce in aggregate more than 200 tonnes of DOCs annually. They are also subject to these requirements if they comprise plants at which more than 30 tonnes of any DOCs containing the elements phosphorous, sulphur or fluorine (PSF chemicals) are produced. Thousands of plant sites have been declared to the Technical Secretariat.