Nuclear Terrorism Legislation Amendment Bill 2011

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Law and Bills Digest Section

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Nuclear Terrorism Legislation Amendment Bill 2011

Date introduced: 23 November 2011

House: House of Representatives

Portfolio: Attorney-General

Commencement: Sections 1 to 3 and Schedule 2 commence upon Royal Assent. Schedule 1, Part 1 will commence on a day to be fixed by Proclamation which must not be before the International Convention for the Suppression of Acts of Nuclear Terrorism enters into force for Australia. If the Proclamation does not occur within one month after the Convention enters into force, then the part commences and must be announced by notice in the Gazette. Schedule 1, Part 2 commences on the same day however, if item 33 of Schedule 2 to the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2011 has not commenced before this, then the Part 2 does not commence at all.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/bills/. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The primary purpose of the Nuclear Terrorism Legislation Amendment Bill 2011 (the Bill) is to amend the Nuclear Non-Proliferation (Safeguards) Act 1987 (NNPS Act) to implement the International Convention for the Suppression of Acts of Nuclear Terrorism 2005 (the Convention) by creating new offences for criminal conduct relating to nuclear material and other radioactive substances or devices prohibited by the Convention.

The Bill also amends the Extradition Act 1988 to ensure the new offences will not be regarded as political offences for the purposes of extradition.

Background

The United Nations General Assembly, by its resolution 51/210 of 17 December 1996, established an Ad Hoc Committee with the task to elaborate, among other instruments, a convention on nuclear terrorism. The Ad Hoc Committee subsequently finalised the text of the Convention at its ninth session, held from 28 March to 1 April 2005. The General Assembly, by its resolution 59/290 adopted the Convention on 13 April 2005. The main objective of the Convention is to provide a legal basis for
international co-operation in the investigation, prosecution and extradition of those involved in the preparation or execution of terrorist acts involving radioactive material or a nuclear device.\(^1\)

The Convention ‘establishes an international framework for criminalising certain conduct relating to nuclear material and other radioactive substances or devices’.\(^2\) In brief, the Convention requires States Parties to:

...enact specific offences in domestic law, as well as offences relating to threats or attempts to commit such crimes or contributions to the commission of such crimes. The Convention facilitates international cooperation in the prevention, investigation, prosecution and extradition of persons who commit a broad range of offences involving the use of nuclear material and other radioactive substances or devices.


The Convention entered into force generally on 7 July 2007. It was signed by Australia on 14 September 2005 and will enter into force for Australia 30 days after Australia deposits its instrument of ratification with the Secretary-General of the United Nations under article 25(2). The Attorney-General’s Department completed a National Interest Analysis (NIA) in which it proposed that Australia proceed to ratify the Convention and not make any reservations with respect to it.\(^4\)

On 23 August 2011, the Convention was tabled in the Commonwealth Parliament. The Joint Standing Committee on Treaties subsequently considered the Convention and also recommended that binding treaty action be taken.\(^5\) Before Australia can ratify this Convention, it is required to adopt such measures as may be necessary to establish as criminal offences under its national law the offences contained in article 2 of the Convention and to make those offences punishable by appropriate penalties (article 5). Some conduct prohibited by the Convention is already the subject of domestic criminal offences under provisions in the NNPS Act, the *Criminal Code Act 1995*, and the *Australian Nuclear Science and Technology Organisation Act 1987*.\(^6\) The proposed amendments to the NNPS Act will criminalise the remaining conduct.

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3. Ibid.
4. Ibid.

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Basis of policy commitment

United Nations Security Council Resolution 1373 of 28 September 2001 called upon all states to become parties to the international conventions and protocols relating to terrorism ‘as soon as possible’.\footnote{Attorney-General’s Department, National Interest Analysis, op. cit., p. 2.} Australia has ratified 13 of the 16 international counter-terrorism instruments. According to the Minister’s second reading speech, ‘Australia is committed to ratifying all the international counter-terrorism instruments as an integral part of strengthening its legal framework to fight terrorism’.\footnote{B O’Connor (Minister for Privacy and Freedom of Information, Minister for Home Affairs and Minister for Justice), ‘Second reading speech: Nuclear Terrorism Legislation Amendment Bill 2011’, House of Representatives, Debates, 23 November 2011, p. 13556, viewed 6 February 2012, \url{http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F14965034-cdb8-4a26-98aa-26c862a1cd0e%2F0050%22}.}

Committee consideration

On 22 November 2011, the Joint Standing Committee on Treaties tabled report 122 into Treaties tabled on 23 August 2011, 13 and 20 September and 13 October 2011. As previously mentioned, the Convention had been tabled in the Commonwealth Parliament on 23 August 2011. The Committee expressed support for the Convention and ultimately recommended that binding treaty action be taken.\footnote{Joint Standing Committee on Treaties, Report no. 122, ‘Treaties tabled on 23 August, 13 and 20 September and 13 October 2011’, APH website, p. 29, viewed 26 January 2012, \url{http://www.aph.gov.au/house/committee/jsct/23august2011/report/fullreport.pdf}.} The Committee provided a number of reasons why Australia should take the proposed binding treaty action. These included:

- ratification would contribute to international efforts aimed at countering terrorism involving the use of radioactive material
- it would ensure that persons who commit such acts can be brought to justice irrespective of the territory in which they are found and whether or not extradition agreements are in place
- implementing legislation will further strengthen Australia’s strong counter-terrorism legislative framework
- ratification would send a message to the international community demonstrating Australia’s continued commitment to addressing the threat of terrorism, and
- it would strengthen Australia’s case in encouraging regional countries to ratify the 16 international counter-terrorism instruments.\footnote{Ibid., p. 23.}

The Committee also pointed out the time disparity between the treaty’s signing in September 2005 and the tabling in Parliament—a difference of six years and noted that ‘given the importance of

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terrorism generally and the concerns of nuclear terrorism, the Committee is surprised that this delay has occurred and that the necessary treaty actions hadn’t occurred earlier.\textsuperscript{11}

On 25 November 2011 the Senate Selection of Bills Committee resolved not to refer the Bill to a Committee for inquiry.\textsuperscript{12} At time of writing, the Senate Standing Committee for the Scrutiny of Bills had not considered the Bill.

Financial implications

The Explanatory Memorandum notes that this Bill ‘does not impose any direct financial costs on the Commonwealth or the states or the territories’.\textsuperscript{13} While any new criminal offence provisions may involve future costs in enforcement and prosecution, these costs are difficult, if not impossible to quantify.

Main issues and Key provisions

\textbf{Proposed new section 38B} incorporates into Division 2A (offences relating to nuclear terrorism) of the NNPS Act the Convention definition of the terms, ‘device’, ‘state or government facility’, ‘nuclear facility’, and ‘radioactive material’.

\textbf{Proposed new section 38C} creates two new offences: possession of radioactive material or a convention device (\textit{proposed subsection 38C(1)}); and making a convention device (\textit{proposed subsection 38C(2)}). These offences implement article 2(1)(a) of the Convention. Article 5(b) of the Convention states that each State Party shall make the offences as set out in article 2 ‘punishable by appropriate penalties which take into account the grave nature of these offences’. Both these offences will attract a maximum penalty of 20 years imprisonment.

\textbf{Proposed new section 38D} creates three new offences: using radioactive material (\textit{proposed subsection 38D(1)}); using or damaging a convention device (38D(2)); and using or damaging a nuclear facility (\textit{proposed subsection 38D(3)}). Again, all these offences attract a maximum penalty of 20 years imprisonment. These offences implement paragraph 2(1)(b) of the Convention. However, it is significant to note that the offence created by \textit{proposed subsection 38D(2)} is arguably broader than the terms of the Convention. Under this provision it is an offence to \textit{damage} a convention device whereas article 2(1)(b) of the Convention only makes it an offence to \textit{use} such a device.

Article 2(2) of the Convention provides that a person also commits an offence if they intentionally \textit{threaten} to commit an offence as set out in article 2(1)(b) – that is, by using in any way radioactive

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\textsuperscript{11} Joint Standing Committee on Treaties, \textit{Report no. 122}, op. cit., p. 29.
\textsuperscript{13} Explanatory Memorandum, op. cit., p. 2.
\end{flushleft}
material or a device, or using or damaging a nuclear facility in a manner which releases or risks the release of radioactive material. Again, this Bill is broader than the terms of the Convention because it encompasses a threat to damage a convention device. **Proposed section 38E** provides that it is an offence to threaten to do an act that would be an offence against **proposed section 38D**, which includes using radioactive material, using or damaging a convention device, and using or damaging a nuclear facility. As previously stated, under the terms of the Convention it is not an offence to damage a device or to threaten to do so.

Similarly, **proposed new subsection 38E(2)** is also arguably broader than the terms of the Convention. While article 2(2)(b) of the Convention makes it an offence if a person ‘demands unlawfully and intentionally radioactive material, a device or a nuclear facility by threat, under circumstances which indicate the credibility of the threat, or by use of force’, this offence is articulated in broader terms in this Bill. **Proposed subsection 38E(2)** creates an offence for an offender to demand of another person that they either create radioactive material, a convention device or a nuclear facility, allow the offender or a third person access to, or control of, radioactive material, a convention device or a nuclear facility, or make radioactive material, a convention device or a nuclear facility available to the offender or to a third person. Significantly, under proposed paragraph 38E(2)(b) the material, thing or facility is ‘or would if created’, be radioactive material, a convention device or a nuclear facility. However, under the Convention, the offence requires that the demand be made by force, or threat of force. In contrast, the Bills’ offence may also be made through any form of intimidation. This offence will also attract a maximum penalty of 20 years imprisonment.

According to the NIA, no new offences are required to implement article 2(3) and (4) which prohibit the attempt of, or otherwise participating in, conduct prohibited by the Convention:

> This is because those Convention offences are already criminalised by existing ancillary offences in Division 11 of Part 2.4 of the Criminal Code (‘Extensions of criminal responsibility’). Division 11 offences include attempt (section 11.1), complicity and common purpose (section 11.2), joint commission (section 11.2A), commission by proxy (section 11.3), incitement (section 11.4), and conspiracy (section 11.5).14

Pursuant to article 9(1) and (2) of the Convention, a State Party is **required** to establish its jurisdiction over the offences committed in its territory or onboard a vessel or aircraft registered in that state, or when the alleged offender is a national of that state. In addition, a State Party **may** establish jurisdiction over any such offence when it is committed by stateless persons within that state, or against nationals of that state, or against a government facility or diplomatic building of that state abroad, or on board an aircraft operated by that state (extended geographical jurisdiction). As Professor Christopher Joyner of Georgetown University explains:

> The nationality principle, which is generally accepted, allows a state to prescribe laws that bind its nationals, regardless of the location of either the national or where the offence occurs. The

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nationality principle extends a state’s jurisdiction to actions taken by its citizens outside its territorial boundaries. The government is expected not only to protect its citizens when they are abroad, but it may also punish its citizens’ criminal conduct, regardless of where it occurs.15

Thus, proposed new section 38F provides that in order for a jurisdictional nexus to be created, one or more of the following criteria must also be satisfied (in addition to the elements of the offence):

• the conduct constituting the offence occurred either wholly or partly in Australia or on board an Australian ship or aircraft
• at the time of the alleged offence, the offender was an Australian citizen
• at the time of the alleged offence, the offender was a stateless person whose place of habitual residence is in Australia
• the conduct is subject to the jurisdiction of another State Party under article 9(1) or (2) and the person is in Australia16
• the alleged offence was committed against an Australian Government facility that is located outside Australia
• the alleged offence was committed against an Australian citizen or a body corporate incorporated under the law of the Commonwealth or of a state or a territory, or
• the alleged offender intended to compel an Australian Government institution, including institutions of state and territory governments, to do or omit to do an act.

Thus, as explained by the Minister in the second reading speech to the Bill:

The offences will not be limited to conduct by Australians and in Australia, but will apply in a broad range of situations where the convention requires states parties to assert jurisdiction. For example, the offences will cover situations where the offender is a foreigner if the offence is committed on board an Australian ship or aircraft or against an Australian citizen.17

Pursuant to article 3, the Convention does not apply where the offence is committed within a single state, the alleged offender and the victims are nationals of that state, and no other state has a basis to exercise jurisdiction. Professor Christopher Joyner explains that:

Article 3 embodies the principle of territorial jurisdiction in which jurisdiction is determined according to the location of an act. That is, a State is entitled to exercise its exclusive rights over acts done by a person within its territory...Authority over the apprehension, prosecution, and trial of such alleged offenders is left to the Government of that particular State, to be executed under its domestic law’.18

16. Though note also proposed new section 38G relating to double jeopardy.
18. Ibid., p. 235.

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Accordingly, the statutory Note to proposed new section 38F clarifies that a person commits an offence under Division 2A even if the conduct occurs in circumstances to which the Convention does not apply because of article 3.

Proposed new section 38H provides that prosecutions of the offences contained in Division 2A cannot be commenced without the written consent of the Attorney-General. However, pursuant to subsection (2) a person may be arrested, charged, remanded in custody or released on bail, in connection with an offence under Division 2A without such requisite consent. The Explanatory Memorandum notes that:

This is consistent with a number of existing provisions in Commonwealth legislation. For example, subsections 71.10(1) and 72.7(1) of the Criminal Code require the written consent of the Attorney-General before commencing a prosecution for an offence in Divisions 71 and 72. Those Divisions contain offences developed to implement the Convention on the Safety of United Nations and Associated Personnel and the International Convention for the Suppression of Terrorist Bombings, respectively.19 [Emphasis added].

Perhaps this is reasonable considering the gravity of the offences and the fact that the Convention borrows many of its provisions, organisational structure and framework from the International Convention for the Suppression of Terrorist Bombings.

Item 8 amends the Extradition Act 1988 to exclude article 2 of the Convention from the definition of ‘political offence’. This amendment implements article 15 of the Convention which states ‘none of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives’.


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