

**National Interest Analysis [2011] ATNIA 21**

**with attachment on consultation**

**International Convention for the  
Suppression of Acts of Nuclear Terrorism**

**done at New York on 14 April 2005**

**[2005] ATNIF 20**

# NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

## SUMMARY PAGE

### International Convention for the Suppression of Acts of Nuclear Terrorism

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#### Nature of timing of proposed treaty action

1. It is proposed that Australia ratify the *International Convention for the Suppression of Acts of Nuclear Terrorism* (the Convention). Australia signed the Convention on 14 September 2005. Pursuant to its Article 24, the Convention is subject to ratification by depositing instruments of ratification with the Secretary-General of the United Nations.
2. The Convention entered into force generally on 7 July 2007, following deposit of twenty-two instruments of ratification, acceptance, approval or accession as required by Article 25(1). Of 115 signatories to the Convention, 54 have ratified and a further 23 countries have subsequently acceded to the Convention. Australia's ratification will occur as soon as practicable following completion of the domestic treaty implementation process. Under its Article 25(2), the Convention will enter into force for Australia thirty days after the deposit by Australia of its instrument of ratification with the Secretary-General of the United Nations. Australia does not propose to make any reservations with respect to the Convention.

#### Overview and national interest summary

3. The Convention establishes an international framework for criminalising certain conduct relating to nuclear material and other radioactive substances or devices. States Parties are required 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.
4. The Convention works in concert with other United Nations counter-terrorism legal instruments, including the *International Convention for the Suppression of Terrorist Bombings* ([2002] ATS 17), the *International Convention for the Suppression of the Financing of Terrorism* ([2002] ATS 23) and the *Convention on the Physical Protection of Nuclear Material* ([1987] ATS 16).
5. Australia's ratification of the Convention will contribute to international efforts aimed at countering terrorism involving the use of radioactive material. It will 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. In addition, the enactment of implementing legislation will further strengthen Australia's strong counter-terrorism legislative framework.

### **Reasons for Australia to take the proposed treaty action**

6. The 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". Australia has ratified 13 of the 16 international counter-terrorism instruments.

7. Ratifying the Convention would send a strong message to the international community demonstrating Australia's continued commitment to addressing the threat of terrorism. It will represent an important contribution to the second Nuclear Security Summit, which will take place in the Republic of Korea in March 2012. In addition, it will strengthen Australia's case in encouraging regional countries to ratify the 16 international counter-terrorism instruments.

8. The Convention recognises that acts of nuclear terrorism, including conduct in relation to radiological material and devices, may result in grave consequences and pose a threat to international peace and security. The Convention provides a framework for international cooperation in the prevention, investigation, prosecution and extradition of persons who commit relevant offences involving nuclear material and other radioactive substances or devices. International cooperation, including through the work programs of the Global Initiative to Combat Nuclear Terrorism and the Nuclear Security Summit, enables effective and practical measures to be implemented to prevent terrorist acts and ensure prosecution and punishment of perpetrators.

9. The Convention is an important tool in the international fight against terrorism and the proliferation and use of weapons of mass destruction, as it fills a gap in existing international regimes by recognising the potential for nuclear weapons, facilities and radioactive material to be used to carry out acts of terrorism. Because key aspects of the conduct prohibited by the Convention are consistent with measures Australia has already taken, only limited amendments to Commonwealth legislation are necessary to fully implement the Convention.

### **Obligations**

10. The key obligations placed on States Parties are to criminalise in their domestic legislation the offences set out in Article 2 of the Convention and to cooperate in the detection, prevention, suppression, investigation and punishment of breaches of these offences.

#### *Nuclear terrorism offences*

11. The Convention sets out offences prohibiting the following conduct (Article 2):

- possessing radioactive material or making or possessing a device with the intent to cause death or serious bodily injury or substantial damage to property or to the environment;
- using radioactive material or a device in a manner which releases or risks the release of radioactive material with the intent to cause death or serious bodily injury, substantial damage to property or to the environment, or to compel a natural or legal person, an international organisation or a State to do or refrain from doing an act;
- using or damaging a nuclear facility in a manner which releases or risks the release of radioactive material with the intent to cause death or serious bodily injury, substantial damage to property or to the environment, or to compel a natural or legal person, an international organisation or a State to do or refrain from doing an act;
- threatening to commit an offence under the Convention;
- demanding radioactive material, a device or a nuclear facility by threat;
- attempting to commit an offence under the Convention;
- participating as an accomplice in an offence under the Convention;
- organising or directing others to commit an offence under the Convention; and
- in any other way intentionally contributing to the commission of an offence under the Convention by a group of persons acting with a common purpose, either with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the offence or offences concerned.

12. The Convention obliges States Parties to criminalise the prohibited conduct in Article 2 of the Convention under their domestic law (Article 5).

13. States Parties are required to ensure that defences based on political, philosophical, ideological, racial, ethnic, religious or other similar considerations do not apply to criminal acts within the scope of the Convention (Article 6). This Article ensures that offenders cannot rely on political or other similar motivations as a defence to these offences.

14. States Parties are required to establish jurisdiction over those offences when committed by a national, on their territory, on board a vessel flying their flag or on an aircraft registered under their laws at the time the offence is committed (Article 9(1)). The Convention also allows, but does not oblige, States Parties to establish jurisdiction over the offences in a number of other circumstances where there is a connection between the offence, or the offender, and the State Party concerned (Article 9(2)). However, where an offender is within a State Party's territory and the State Party does not extradite, the State Party must establish jurisdiction over the

offender, even if there is no connection between the offender, the offence and the State Party concerned, that is, no other jurisdictional basis can be established (Article 9(4)).

15. The Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis to exercise jurisdiction under Article 9, paragraphs (1) or (2) of the Convention (Article 3). The Convention does not apply to the activities of armed forces in armed conflict to the extent that international humanitarian law applies (Article 4(2)); nor does the Convention apply to activities of a State Party's military forces in the exercise of official duties (for example, official conduct during peacetime) inasmuch as they are governed by other rules of international law. Further, the Convention does not address the issue of the legality of the use or threat of use of nuclear weapons by States (Article 4(4)).

#### *Preventive measures*

16. States Parties are obliged to cooperate by taking all practicable measures to prevent and counter preparations in their respective territories for the commission of offences within or outside their territories (Article 7). Such measures would include prohibiting illegal activities of persons and organisations that encourage, instigate, organise, knowingly finance or knowingly provide technical assistance or information or engage in the perpetration of Convention offences. States Parties are further obliged to exchange accurate and verified information in accordance with their domestic law, coordinate administrative and other measures to prevent the commission of a Convention offence, and institute criminal proceedings against alleged offenders. However, States Parties are not required to provide any information not permitted to be communicated by national law or which could jeopardise the security of the State Party concerned or the physical protection of nuclear material (Article 7(3)).

17. A further precaution requires States Parties to make every effort to adopt appropriate measures to ensure the protection of radioactive material, taking into account relevant recommendations and functions of the International Atomic Energy Agency (Article 8). The principal document which this refers to is the IAEA *Code of conduct on the Safety and Security of Radioactive Sources*.

#### *Investigation and prosecution*

18. The Convention provides for obligations to ensure the investigation and prosecution of any alleged offender. States Parties are obliged to investigate allegations that a person on their territory has committed a Convention offence and, if the outcome of the investigations so warrant, to take measures to ensure the person's presence for the purpose of prosecution or extradition (Article 10). If a State Party in which an alleged offender is present has jurisdiction in respect of the offence, it is obliged to submit the case to its authorities for the purpose of prosecution, unless the alleged offender is extradited (Article 11).

19. The State Party that actually prosecutes the alleged offender must communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who will transmit the information to the other States Parties (Article 19).

#### *Rights of an alleged offender*

20. The Convention confirms the rights of a person detained in relation to a Convention offence to be visited by a representative of that person's State or to receive a visit from the International Committee of the Red Cross (Article 10). The Convention also provides for guarantees of fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law (Article 12).

#### *Judicial cooperation*

21. Convention offences are to be treated as extraditable offences between States Parties to the Convention (Article 13). States Parties undertake to include the offences in the Convention as extraditable offences in every extradition treaty subsequently concluded by them. Where a State Party makes extradition conditional on the existence of an extradition treaty, it may, at its option, consider the Convention as a legal basis for extradition in relation to the Convention offences.

22. The Convention also obliges States Parties to cooperate with each other in relation to investigations, extradition and mutual legal assistance concerning the Convention offences, and sets out conditions for such cooperation (Article 14). The Convention offences shall not be regarded as political offences and the Convention prevents States Parties from refusing a request for mutual legal assistance or extradition solely on the ground that it concerns a political offence (Article 15). The Convention nevertheless preserves the right of a State Party to refuse requests for mutual legal assistance or extradition if it has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons (Article 16).

23. The Convention also sets out conditions for the international transfer of persons in custody for the purpose of giving evidence, identification or otherwise assisting in investigations or prosecutions (Article 17).

#### *Seizing radioactive material or devices or nuclear facilities*

24. States Parties are obliged to take steps to render harmless radioactive material, devices or nuclear facilities seized following the commission of a Convention offence. States Parties are further obliged to ensure that any nuclear material is held in accordance with the applicable International Atomic Energy Agency safeguards, physical protection recommendations and health and safety standards. The Convention sets out conditions for the return or disposition of radioactive material or

devices or nuclear facilities seized following the commission of an offence (Article 18).

### *Dispute settlement procedures*

25. Any dispute arising between two or more States Parties to the Convention that cannot be settled through negotiation shall, at the request of one of the States Parties involved in the dispute, be submitted to arbitration. If, within six months, States Parties cannot agree on the organisation of the arbitration, any of the States Parties involved in the dispute may be referred to the International Court of Justice (Article 23). States may declare their withdrawal from this dispute settlement provision at the time of signature or ratification. The other States Parties will consequently not be bound by Article 23 with respect to any State Party that has made such a reservation. Such a reservation may be withdrawn at any time by notification to the Secretary-General of the United Nations. Australia does not intend to make such a reservation.

## **Implementation**

### *Nuclear terrorism offences*

26. The Convention requires States Parties to adopt such measures as may be necessary under domestic law to criminalise the prohibited conduct in Article 2 of the Convention. Some conduct prohibited by the Convention is already the subject of domestic criminal offences under provisions in the *Criminal Code Act 1995* (Criminal Code). It is proposed that the remaining conduct be criminalised under Australian law by amendment to the *Nuclear Non-Proliferation (Safeguards) Act 1987* (NNPS Act).

27. To implement Article 2(1)(a), it is proposed to create a new offence in the NNPS Act for a person who unlawfully and intentionally:

Possesses radioactive material or makes or possesses a device:

- (i) with the intent to cause death or serious bodily injury; or
- (ii) with the intent to cause substantial damage to property or to the environment (including air, soil, water, fauna, or flora).

28. To implement Article 2(1)(b), it is proposed to insert a new offence into the NNPS Act for a person who unlawfully and intentionally:

Uses in any way radioactive material or a device, or uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material:

- (i) with the intent to cause death or serious bodily injury; or
- (ii) with the intent to cause substantial damage to property or to the environment (including air, soil, water, fauna, or flora); or
- (iii) with the intent to compel a natural or legal person, an international organization or a State to do or abstain from doing an act.

29. To implement Article 2(2)(a), it is proposed to insert a new offence into the NNPS Act for a person who:

Threatens, under circumstances which indicate the credibility of the threat, to commit an offence as set forth in paragraph 1 (b) of the present article.

30. To implement Article 2(2)(b), it is proposed to insert a new offence into the NNPS Act for a person who:

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.

31. No new offences are required to implement the Convention offences at Article 2, paragraphs (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).

32. Article 3 of the Convention provides that 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, the alleged offender is found in the territory of that State and no other State has a basis to exercise jurisdiction under Article 9, paragraphs (1) or (2) of the Convention. Article 9(1) of the Convention requires States Parties to assert jurisdiction over the offences in Article 2 when:

- (a) The offence is committed in the territory of that State; or
- (b) The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or
- (c) The offence is committed by a national of that State.

33. To ensure Australia is able to assert jurisdiction over the Convention offences it is proposed to provide for extended geographical jurisdiction to ensure the offences apply whether or not the conduct constituting the alleged offence occurs in Australia and whether or not a result of the conduct constituting the alleged offence occurs in Australia, provided there is a transnational element to the offence.

34. To provide guidance in interpreting the new offences, relevant definitions will be inserted into the NNPS Act to apply to the new offences. In particular, it will be necessary to include new definitions for the expressions:

- device;
- nuclear facility;
- nuclear material; and
- radioactive material.

35. The definitions will adopt the meanings for those terms as set out in Article 1 of the Convention.



36. It is proposed that the new offences and definitions be inserted into the NNPS Act following the provisions that implement Australia's domestic legislative obligations in relation to the *Convention on the Physical Protection of Nuclear Material* ([1987] ATS 16).

#### *Judicial cooperation*

37. Amendments to Australia's extradition laws may be required to ensure that obligations under Article 15 of the Convention are implemented, to ensure that Convention offences are not considered 'political offences' for the purposes of the *Extradition Act 1998*.

#### *Seizing radioactive material or devices or nuclear facilities*

38. In 2006, shortly after the adoption of the Convention, the following paragraph was inserted into section 5(1) of the *Australian Nuclear Science and Technology Organisation Act 1987* to reflect the functions of the *Australian Nuclear Science and Technology Organisation* under the Convention:

- (bc) to condition, manage and store radioactive materials and radioactive waste at the request of:
  - (i) a law enforcement agency; or
  - (ii) a Commonwealth, State or Territory agency responsible for the management of emergencies or disasters; including, but not limited to, radioactive materials or radioactive waste involved in, or arising out of, a radiological incident or a radiological emergency.

#### **Costs**

39. The proposed treaty action is not expected to impose any direct financial costs on Australia in complying with its obligations.

#### **Regulation Impact Statement**

40. The Office of Best Practice Regulation has been consulted and confirms that a Regulation Impact Statement is not required.

#### **Future treaty action**

41. Article 26 of the Convention provides that amendments may be proposed by any State Party. Proposed amendments are to be submitted to the depositary, which will then circulate it immediately to all States Parties. If a majority of States Parties requests the depositary to convene a conference, a conference will be convened no sooner than three months after the invitations are issued. States Parties shall make every effort to ensure amendments are adopted by consensus or, if a consensus cannot be reached, by at least a two-thirds majority of all States Parties. Thereafter, the amendment shall be circulated to all States Parties. An approved amendment will enter into force for each State Party that deposits its instrument of ratification, acceptance, accession or approval of the amendment on the thirtieth day after the date on which two-thirds of the States Parties have deposited their relevant instrument.

The amendment will thereafter enter into force for any State Party on the thirtieth day following that State Party's acceptance.

42. Acceptance of amendments to the Convention by Australia would be subject to Australia's domestic treaty approval process, including tabling in Parliament and consideration by the Joint Standing Committee on Treaties (JSCOT).

### **Withdrawal or denunciation**

43. Any State Party may denounce the Convention (Article 27). Denunciation is to be effected by written notification to the Secretary-General of the United Nations and shall take effect one year following the date on which notification is received.

44. Denunciation by Australia of the Convention would be subject to Australia's domestic treaty approval process, including tabling in Parliament and consideration by the JSCOT.

### **Contact details**

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## **ATTACHMENT ON CONSULTATION**

### **International Convention for the Suppression of Acts of Nuclear Terrorism done at New York on 14 April 2005 [2005] ATNIF 20**

45. Australia's implementation of the Convention is not likely to have any general impact on business in Australia.
46. The States and Territories have been consulted through the Standing Committee on Treaties (SCOT) at its scheduled meetings since 17 May 2006. States and Territories have been informed of the progress of implementation through biannual updates of the schedules of treaty actions under negotiation, consideration or review.
47. Further consultation with States and Territories has occurred through the Legal Issues Sub-Committee of the National Counter-Terrorism Committee.
48. Consultation with States and Territories will continue during development of the proposed legislation to implement the Convention.
49. Key Commonwealth Agencies have been briefed at quarterly meetings of the Maritime Legislation Working Group since June 2007.
50. Consultation with relevant Commonwealth Departments and Agencies has occurred in various meetings throughout 2009, 2010 and 2011.