The Senate

Foreign Affairs, Defence and Trade Legislation Committee

Provisions of the Non–Proliferation Legislation Amendment Bill 2003

September 2003

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Senate Foreign Affairs, Defence and Trade Legislation Committee

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Table of contents

Page

Members of the Committee iii

Report to the Senate

Introduction 1

Submissions and public hearing 1

Acknowledgements 2

Background 2

Issues 3

Recommendation 11

Dissenting report: Labor Senators 13

Dissenting report: Democrat Senators 17

Dissenting report: Greens Senator 31

Appendix 1—Submissions received by the Committee 33

Appendix 2—Witnesses who appeared before the Committee 35

Appendix 3—Organisations invited to make a submission to the inquiry 37

Appendix 4—DFAT answers to questions on notice; follow–up question from Senator Marshall, and, DFAT's reply 39

Senate Foreign Affairs, Defence and Trade Legislation Committee

Report to the Senate

Introduction

1.1 The *Non–Proliferation Legislation Amendment Bill 2003* (the Bill) was introduced into the House of Representatives on 26 June 2003, by the Hon Christine Gallus MP, Parliamentary Secretary to the Minister for Foreign Affairs. The second reading debate on the Bill in the House of Representatives was adjourned on 26 June 2003.

1.2 On 20 August 2003, the Senate adopted the Selection of Bills Committee Report No. 9 of 2003 and referred the provisions of the Bill to the Committee for examination and report by 11 September 2003. The Selection of Bills Committee noted the following issues for consideration:

- the impact of the provisions of the bill on currently legal protest activities against nuclear facilities; and
- the impact of the provisions of the bill on 'whistleblowers' in regard to nuclear facilities.

Submissions and public hearing

1.3 The Committee wrote to a number of organisations inviting submissions on the Bill. A list of the organisations invited to make submissions appears at appendix 3.

1.4 The Committee received 11 submissions from the organisations and individuals listed at appendix 1.

1.5 The Committee held one public hearing on Monday 8 September, 2003 at Parliament House in Canberra and received evidence from representatives and officials of:

- The Australian Conservation Foundation,
- Greenpeace Australia Pacific, and
- The Australian Safeguards and Non–Proliferation Office, Department of Foreign Affairs and Trade.

Acknowledgements

1.6 The Committee is grateful to, and wishes to thank, the organisations and individuals who assisted with this inquiry.

Background

1.7 The *Non-Proliferation Legislation Amendment Bill* (the Bill) aims to strengthen Australia's arrangements for the protection of, and application of non–proliferation safeguards to, nuclear material, facilities and associated information. The Bill will enable Australia to bring into force legislation banning nuclear weapons testing prior to the entry into force of the Comprehensive Nuclear–Test–Ban Treaty (CTBT), and provides for machinery changes to improve the application of non-proliferation measures.

1.8 The Bill amends the *Nuclear Non-Proliferation (Safeguards) Act 1987* (the Safeguards Act), the *Comprehensive Nuclear Test–Ban Treaty Act 1998* (the CTBT Act), and the *Chemical Weapons (Prohibition) Act 1994*. In particular, the Bill amends the Safeguards Act to:

a) strengthen procedures to protect information relevant to proliferation of nuclear weapons and to the physical security of nuclear material;

b) ensure that regulatory arrangements apply to any material specially suited for use in nuclear activities, or the production of nuclear explosive devices;

c) require a permit for activity to establish a nuclear installation;

d) create offences for unauthorised access to an area specified in a permit for the possession or transport of nuclear material or associated items, and for causing damage to an installation or mechanism intended to protect nuclear material or associated items; and

e) bring penalty provisions into line with current legislative practice.

1.9 The CTBT Act is amended to:

a) enable the proclamation of key provisions of the Act prior to entry into force of the Comprehensive Nuclear Test-Ban Treaty; and

b) revise provisions dealing with on-site inspection so that they better reflect the practical requirements of such an inspection.

1.10 The main amendments to the Safeguards Act are contained in Schedule 1 of the Bill.

Issues

1.11 The specific areas of concern raised in submissions and at the public hearing, within the context of the Committee's terms of reference, include the following:

- Item 26 of Schedule 1, which creates the offence of communication prejudicing the physical security of nuclear material or an associated item;
- Item 45 of Schedule 1, which creates the offence of unauthorised access to areas to which access is restricted under permit;
- Item 71 of Schedule 1, which amends the *Australian Protective Service Act 1987* to allow a protective service officer to arrest without warrant anyone committing certain offences against the Safeguards Act, including the new offences described above; and
- Item 21 of Schedule 1 which creates the offence of breach of duty to ensure security of associated technology.

1.12 Two more general issues of concern were also raised:

- The short time frame allowed for public consultation and reporting on the Bill;
- The conflation of the issues dealt with in Schedule 1, which focuses on the Safeguards Act and largely domestic issues, and Schedules 2 and 3 which focus on Australia's international obligations under the Comprehensive Nuclear Test Ban Treaty and administrative issues.

Communication prejudicing physical security of nuclear material or associated item

1.13 Item 26 of the Bill, which contains the proposed new section 26A of the Safeguards Act states, in part, as follows:

> A person commits an offence if:
>
> (a) the person communicates information to someone else; and
>
> (b) the communication could prejudice the physical security of nuclear material, or an associated item, to which Part II applies.
>
> Penalty: Imprisonment for 2 years.
>
> (2) Subsection (1) does not apply if the communication is authorised by a person who has been granted a permit to possess the nuclear material or associated item.

1.14 In its submission to the inquiry, Greenpeace indicated concern that this provision could prevent information about nuclear activities being released in the public interest, and pointed out that this provision is broadly drafted and contains no requirement for an intention on the part of the person actually communicating the

information to prejudice the physical security of the nuclear material or associated item. As this provision is currently drafted, the communication does not actually have to prejudice safety or physical security; it is sufficient if it could prejudice the safety or physical security of the nuclear material or associated item.[1]

1.15 The Australian Conservation Foundation (ACF) expressed concern that this provision could be used to "restrict information flows, and intimidate potential 'whistle–blowers' and those with legitimate grievances and public interest concerns".[2] Both the ACF and Greenpeace drew the Committee's attention to examples of whistle blowing which, it is argued, may not have occurred had this provision been in force, for fear of prosecution.[3] Friends of the Earth also points to a number of examples in its submission where whistle blowers have "served the public interest" by releasing information not released by government agencies.[4]

1.16 The Anti–Nuclear Alliance of Western Australia (ANAWA) indicates concern about the broad wording of the proposed section 26A, and argues that the legislation is "potentially subject to interpretation far wider than acknowledged in the second reading speech or explanatory memorandum".[5] The Gundjehmi Aboriginal Corporation also argues that this section would considerably reduce the likelihood of whistleblowers releasing information in the public interest.[6]

1.17 Mr Andrew Leask of the Australian Safeguards and Nonproliferation Office, Department of Foreign Affairs and Trade (ASNO) responded to these concerns at the Committee's hearing on 8 September, indicating that the focus of the proposed section 26A is protecting information which could prejudice physical security, rather than other issues such as building safety:

> …26A(1)(b) as proposed refers specifically to a person. It talks about the communication—that is, the content of what is passed across—as being prejudicial to the physical security of nuclear material or an associated item.
>
> …
>
> We are dealing here specifically with a matter of information which could prejudice the physical security of the facility or nuclear material or an associated item. We also need to understand that that information can be

1 *Submission* 2, p. 3 (Greenpeace Australia Pacific (Greenpeace))

2 *Submission* 1, p. 2 (Australian Conservation Foundation (ACF))

3 *Committee Hansard,* 8 September 2003, p. 2 (Sweeney) and p. 5 (Courtney)

4 *Submission* 8, p. 2 (Friends of the Earth (Australia))

5 *Submission* 5, p. 2 (Anti–Nuclear Alliance of Western Australia (ANAWA))

6 *Submission* 11, p. 1 (Gundjehmi Aboriginal Corporation). See also *Submission* 9 (People for Nuclear Disarmament (WA))

> shared with appropriate authorities around the country if the permit holder … authorised the [disclosure].[7]

1.18 Mr Leask went on to explain his understanding of the phrase 'prejudice physical security':

> … what we are really talking about is the communication of information which could enable an adversary either to defeat the physical protection arrangements or to have an increased likelihood of being able to defeat the arrangements that are in place.[8]

1.19 Mr Leask pointed out that a whistle blower who was, for example, an insider who already had access to certain information, and who genuinely wanted to improve the system may approach a more senior person internally, but also may approach either of the two nuclear regulators in Australia with a complaint:

> He could make an internal complaint and then he could request permission to transmit it and it could be transmitted, say, to my organisation, which is entitled to receive the information.
>
> The problem comes of course if he is neither satisfied with his own agency nor indeed with the regulatory agency. Then he certainly could have a problem. But flagging that there is an issue is not what is aimed at here—rather, this is aimed at the detail which could enable an adversary to defeat the arrangements that have been put in place.[9]

Unauthorised access to areas to which access is restricted under permit

1.20 Item 45 in Schedule 1 of the Bill contains proposed new section 31A of the Safeguards Act, and states, in part, as follows:

> 31A(1) A person commits an offence if:
>
> (a) the person enters an area or gets onto or into a vehicle, aircraft or ship; and
>
> (b) the holder of a permit is required by a condition on the permit:
>
> (i) to restrict access to the area, vehicle, aircraft or ship to persons who have been authorised by the holder; and
>
> (ii) to mark the area, vehicle, aircraft or ship with signs indicating that entering or getting onto or into it without the authorisation of the holder of a permit is an offence under this Act; and

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7 *Committee Hansard,* 8 September 2003, pp. 9–10 (Mr Andrew Leask, Assistant Secretary, Australian Safeguards and Nonproliferation Office, Department of Foreign Affairs and Trade (ASNO))

8 *Committee Hansard,* 8 September 2003, p. 18 (Leask)

9 *Committee Hansard,* 8 September 2003, p. 19 (Leask)

> (c) the area, vehicle, aircraft or ship is clearly marked with signs indicating that entering or getting onto or into it without the authorisation of the holder of a permit is an offence under this Act.
>
> Penalty: Imprisonment for 6 months.
>
> (2) Strict liability applies to paragraphs (1)(b) and (c).
>
> (3) Subsection (1) does not apply if the person is authorised by the holder of the permit described in paragraph (1)(b) to enter the area or get onto or into the vehicle, aircraft or ship.

1.21 The ACF in its submission argued that this provision "has significant domestic political implications, especially given that this offence would apply to any designated 'area, vehicle, aircraft or ship' ", and it raises "real issues [about] community protest and action".[10] Greenpeace stated concerns that this provision has the potential to curtail the public right to protest about nuclear activities in Australia.[11]

1.22 The ANAWA suggests that this proposed new offence "suffers from a lack of any justification."[12] Friends of the Earth also argues that this provision is very broad ranging and "…presumably designed to restrict legitimate protest activities against the government's … plans for a new reactor and nuclear waste dump".[13]

1.23 In response, Mr Leask of ASNO explained the intention of the proposed section 31A:

> … we envisage that section 31A will apply to what we call a protected area. Australia has obligations under the Convention on the Physical Protection of Nuclear Material and, indeed, bilateral obligations to implement certain standards of physical protection. They are covered by the international standard by the International Atomic Energy Agency, known as 'document 225, revision 4'. That requires us to protect particular areas in particular ways. It does not describe the detail, but it outlines the philosophy and the approach that we would take. One element of that is to define a protected area, which is a limited area where you have more sensitive materials and items. We would envisage section 31A as applying to a protected area as defined by permit and, if you went to Lucas Heights, you would see a more secure area around the reactor, as opposed to the general office buildings.
>
> … I do not believe this bill is in any way restricting the right of lawful protest. But, clearly, unauthorised people entering a protected area—whether it be by legal means, such as through a gate, or by illegal means,

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10 *Submission* 1, p. 2 (ACF)

11 *Committee Hansard,* 8 September 2003, p. 6 (Oakey)

12 *Submission* 5, p. 2 (ANAWA)

13 *Submission* 8, p. 5 (Friends of the Earth (Australia)). See also *Submission* 11 (Gundjehmi Aboriginal Corporation)

> such as over a gate or breaking down a gate and going in—which contains sensitive materials and which has as part of its design philosophy defence in depth, begin to compromise those arrangements and have to be treated … as a genuine threat to the security of the material and the facilities. In that regard, I do not believe this bill makes any impact at all on lawful, legitimate protest, but it does seek to make gaining access to designated areas— …the protected area, as defined under guidance documents such as this one here—a more serious offence than simply the offence of trespass under normal and ordinary circumstances. That is what it is designed to do.[14]

1.24 Mr Leask also explained that an offence would only be committed if the holder of the permit is required by a condition on that permit to restrict access to the area, vehicle, aircraft or ship and to mark the area with signs indicating that entering or getting onto or into the area or vehicle, etc, without the authorisation of the permit holder is an offence.[15]

1.25 As paragraph 31A(1)(c) indicates, the area, vehicle, aircraft or ship must be clearly marked with signs indicating that entering into, getting onto or into it without authorisation of the permit holder is an offence. Depending on the circumstances, a vehicle transporting nuclear material for example may well not be marked, so as not to draw unnecessary attention to it. In this case, the offence proposed in section 31A would not apply.[16]

Arrest without warrant

1.26 Item 71 in Schedule 1 of the Bill amends the *Australian Protective Service Act 1987* (the Protective Service Act), to clarify the power of a protective service officer to make an arrest without warrant. Subparagraph 13(2)(a)(v) of the Protective Service Act provides that the power to arrest without warrant applies to all offences under the Safeguards Act, other than those offences which are specifically excluded.

1.27 Item 71 refers to the newly created offences under sections 25A and 28A of the Safeguards Act, and adds them to the list of excluded offences, but does not refer to the new offences in sections 26A and 31A. This means that a protective service officer may arrest without warrant anyone found committing an offence under either of these proposed new offences.

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14 *Committee Hansard,* 8 September 2003, p. 17 (Leask)

15 *Committee Hansard,* 8 September 2003, pp.10–11 (Leask)

16 *Committee Hansard,* 8 September 2003, p. 11 (Leask)

1.28 Several submissions to the inquiry expressed concern at this provision extending the powers of the Australian Protective Service (APS).[17] When questioned about this provision at the Committee's hearing, Mr Leask responded:

> …this would be an APS officer making an arrest where he had reason to believe that associated information or technology was in the possession of somebody who was not entitled to have it. It is quite a specific power of arrest. The main reason for making it without warrant is that the time taken to go away and get a warrant could mean that the information was compromised.[18]

1.29 Mr Leask went on to explain that this new provision "specifically covers associated items and associated technologies which are not explicitly covered elsewhere".[19]

1.30 Further discussion on this issue, in the context of the offence proposed in Item 26 of the Bill, revealed concerns about how and by whom a determination is made that a communication could prejudice the physical security nuclear material or an associated item, and thus what the grounds are for the APS officer to exercise his power to arrest without warrant. A related question was raised about whether APS officers will be given training to assist them in exercising these new powers.

1.31 In response to questions on notice, ASNO indicated that section 13 of the Protective Service Act confers a power to arrest without warrant on APS officers. This power can be exercised where the officer believes on reasonable grounds that the person has just committed, or is committing a prescribed offence, listed in subsection 13(2). As indicated above, the proposed new offences fall within this provision.[20]

1.32 Where an APS officer arrests a person, section 17 of the Protective Service Act requires the officer to deliver the person forthwith to the custody of a police officer to be dealt with in accordance with the law. If the APS officer ceases to have reasonable grounds to believe the conditions for arrest exist, the officer must release the person, as required by section 18 of the Protective Service Act.

1.33 Further, the Protective Service Act does not confer any powers on APS officers to make an application for an arrest warrant, however an APS officer can provide relevant information to police may investigate the matter, and if the relevant conditions are satisfied, may apply for a warrant for arrest. In order to arrest without warrant, the APS officer must be satisfied on reasonable grounds that a person is

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17 *Submission* 1, p. 3 (ACF), *Submission* 5, p. 2 (ANAWA), *Submission* 9, p. 1 (People for Nuclear Disarmament (WA)) *Submission* 10, p. 1 (Wasley)

18 *Committee Hansard,* 8 September 2003, p. 11 (Leask)

19 *Committee Hansard,* 8 September 2003, p. 12 (Leask)

20 Answers to questions on notice, 9 September 2003, pp. 2–3 (ASNO–DFAT)

committing or has just committed an offence against one of the provisions of the Safeguards Act.[21]

1.34 In relation to training for APS officers to enable them to undertake these extra duties, ASNO has indicated that APS recruits must undergo a comprehensive selection and training process to become probationary officers. APS officers receive additional on the job training relevant to their particular working environment, and refresher training to ensure that they are familiar with relevant legislative changes. Training requirements arising from this proposed legislation will be assessed and appropriate arrangements made.[22]

Breach of duty to ensure security of associated technology

1.35 Item 21 of Schedule 1 inserts section 25A into the Safeguards Act and creates the offence of breach of duty to ensure the security. This section states in part as follows:

> (1) A person commits an offence if:
>
> (a) the person is authorised to deal with associated technology to which Part II applies by the holder of a permit to possess the associated technology; and
>
> (b) the person has not been granted a permit to possess the associated technology; and
>
> (c) the person is required to ensure the physical security of the associated technology; and
>
> (d) the person engages in conduct; and
>
> (e) the conduct contravenes the requirement.
>
> Penalty: Imprisonment for 2 years.
>
> (2) In this section:
>
> ***engage in conduct*** means:
>
> (a) do an act; or
>
> (b) omit to perform an act.

1.36 Greenpeace pointed out that this offence specifically refers to people who are authorised to possess associated technology, and that the amendment appears to be "explicitly about the leaking, or other failure to ensure the physical security of, documents and/or information". Greenpeace argues that that this offence will

21 Answers to questions on notice, 9 September 2003, p. 3 (ASNO–DFAT)

22 Answers to questions on notice, 9 September 2003, p. 3 (ASNO–DFAT)

significantly impact on the release of information to the public and could inhibit potential whistle blowers.[23]

1.37 The ACF questioned the impact this proposed offence may have on subcontractors working at the Lucas Heights reactor and other nuclear industries.[24] The ANAWA made a similar point, and questioned whether the intention of this provision is to provide for security of nuclear materials, or whether the intention is intimidation and potential prosecution of whistle blowers.[25]

1.38 There could be some overlap between this proposed offence and the current section 26 of Safeguards Act, which is about unauthorised communication of information of a kind referred to in the definition of 'associated technology'. Further, section 26 of the Safeguards Act applies only where a person, without reasonable excuse, communicates information and the communication is not required or authorised by the Act.

1.39 The qualification that the unauthorised communication must be made without 'reasonable excuse' does not appear in any of the proposed offences created by Items 21, 26 and 45 of the Bill.

Time frame for consultation and reporting

1.40 A number of submitters referred to the lack of time allowed for public consultation on the provisions of this Bill, which impeded their ability to thoroughly consider the implications of the proposed changes to the legislation, in particular, the new offences discussed above.[26]

1.41 In response to a question about the time frame for consideration of the Bill, ASNO indicated that as the legislation forms part of the Government's efforts to strengthen non-proliferation and counter acts of terrorism, its aim was to see the legislation passed without delay. ASNO also indicated that the timing of the legislation was not in any way related to either the construction timetable for the replacement reactor at Lucas Heights or any proposed transport of any nuclear material.[27]

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23 *Submission* 2, p. 3 (Greenpeace)

24 *Submission* 1, p. 2 (ACF)

25 *Submission* 5, p. 2 (ANAWA)

26 See *Submission* 1 (ACF), *Submission* 4 (Medical Association for the Prevention of War), *Submission* 5 (ANAWA), *Submission* 8 (Friends of the Earth), and *Committee Hansard* 8 September 2003, p. 6 (Oakey)

27 Answers to questions on notice, 9 September 2003, pp. 3-4 (ASNO–DFAT)

Conflation of domestic and international issues

1.42 At first glance, there does not appear to be any obvious connection between the provisions in Schedules 1, 2 and 3 of the Bill. Schedule 1 which contains the main amendments to the Safeguards Act, deals largely with domestic security issues. Schedule 2 focuses on Australia's obligations under the Comprehensive Nuclear–test–ban Treaty and amends the *Comprehensive Nuclear Test-Ban Treaty Act 1998*. Schedule 3 amends these two Acts along with the *Chemical Weapons (Prohibition) Act 1994*, to provide for the implementing office and its Director to be referred to by a name or title specified by the Minster.

1.43 When asked why these different issues have been included in the Bill, Mr Leask indicated that it was more a question of convenience than a question of policy or commitment by the Government that these issues were grouped together:

> I think in one sense the answer to your question is that there is no great linkage. There is no linkage that has to be there, but we have done it by virtue of the mechanical processes that we have been going through, and the development of the ideas and concepts where we need to strengthen things, and they have come together. That is why they have been presented this way.[28]

Recommendation

1.44 The Committee recommends that the Bill be passed by the Senate in its current form.

Senator the Hon Peter Cook
Acting Chair

28 *Committee Hansard,* 8 September 2003, p. 16 (Leask)

Non–Proliferation Legislation Amendment Bill 2003

Dissenting Report by Labor Senators

Splitting the Bill

1.1 The title of this Bill is the *Non-Proliferation Legislation Amendment Bill*. As pointed out in the body of the report however, the Bill is divided into three schedules. The first schedule, containing the most substantive provisions, amends the *Nuclear Non–Proliferation (Safeguards) Act 1987*. The second schedule amends the *Comprehensive Nuclear Test–Ban Treaty Act 1998*, banning nuclear weapons tests ahead of the entry into force of the Comprehensive Nuclear Test–Ban Treaty. The third schedule contains amendments both these Acts as well as the *Chemical Weapons (Prohibition) Act 1994*. These amendments provide for the implementing office and its Director to be referred to by a name or title specified by the Minister.

1.2 The Australian Safeguards and Non–proliferation Office (ASNO) of the Department of Foreign Affairs and Trade indicated at the hearing on 8 September 2003 that it was more a matter of convenience that these issues were grouped together rather than a question of policy or commitment by the Government.

1.3 This Bill is clearly an 'omnibus' bill, amending three separate pieces of legislation for quite different purposes. The Bill should therefore be described as an omnibus bill, rather than a bill which focuses on non–proliferation measures.

1.4 Given that there is no obvious logical connection between the schedules of the Bill, which deal with entirely separate matters, it may be more appropriate to split the Bill so that the matters in Schedule 1 are dealt with in separate legislation from the matters in Schedules 2 and 3.

Chemical and biological weapons

1.5 In principle, Labor Senators strongly support legislative provisions designed to address the non-proliferation of nuclear and chemical weapons. As indicated by Mr Leask of ASNO in evidence to the Committee, the *Chemical Weapons (Prohibition) Act* brings into force the chemical weapons convention in Australia. This convention denies the acquisition, use, stockpiling, storage and development of chemical weapons. The Act prohibits certain chemicals and regulates certain chemicals for import and export, and requires that chemical facilities and the usage of chemicals must be licensed. [1]

1.6 When questioned in regard to biological weapons, Mr Leask indicated that in accordance with the *Crimes (Biological Weapons) Act 1976*, it is a crime to have,

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1 *Committee Hansard,* 8 September 2003, p. 19 (Leask)

store, use, or develop biological weapons in Australia, but that there are no detailed arrangements for the control of individual items or activities.[2] Mr Leask stated further:

> When the biological weapons convention came into force in 1972, it was judged then—and in many ways it is judged the same now—as a treaty almost impossible to verify internationally. It was just too difficult to regulate the biotech world with intrusive inspection regimes. Therefore, for the BWC itself, there is no verification regime and, therefore, there is no specific requirement to set up a national authority and designate it to specifically effect domestic obligations—which Australia has and which it then implements domestically. Therefore, whilst we have implemented the treaty in a general sense through the C(BW) Act—and that is administered by the Attorney–General's Department—there is no such supplementary legislation or verification arrangements pertaining to that particular convention.[3]

1.7 Labor Senators consider that current legislation deals with the non-proliferation of nuclear and chemical weapons, similar provisions for biological weapons should be considered as part of this legislation.

Right to protest and whistle blower provisions

1.8 Labor Senators have serious reservations about the provisions in this Bill which purport to limit the right to protest, and which affect potential whistleblowers. The wording of these offences and the penalties provided do not appear to allow for any consideration of the intentions of protestors and whistleblowers. There is a fine balance to be struck between provisions which legitimately enhance security and provisions which impose unduly on citizens' legitimate rights to protest. Labor senators are also concerned about the increasing tendency to delegate police powers to non–police personnel.

1.9 Due to the limited time allowed for inquiring and reporting on the provisions of this Bill, the Opposition has not been able to formulate recommendations on these provisions and consequently reserves the right to oppose these provisions.

1.10 During the hearing on Monday 8 September, the Committee asked officers from the Australian Safeguards and Non–proliferation Office (DFAT) to take on notice a number of questions. The answers received by the Committee prompted another question from Senator Gavin Marshall (ALP, Vic). (See appendix 4 for both documents). The initial questions related to arrangements for obtaining warrants; arrest without a warrant; and, training for APS officers after the increase in their powers.

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2 *Committee Hansard,* 8 September 2003, p. 19 (Leask)

3 *Committee Hansard,* 8 September 2003, p. 19 (Leask)

1.11 The response received to the additional question is also contained in the appendix. However, the Opposition reserves the right to raise this issue when the Bill is debated in the Senate.

Senator Peter Cook
Labor Senator for Western Australia

Senator Chris Evans
Labor Senator for Western Australia

Senator Gavin Marshall (participating member)
Labor Senator for Victoria

Non–Proliferation Legislation Amendment Bill 2003

Dissenting report by the Australian Democrats

1. Introduction

The Australian Democrats have opposed the use and development of nuclear materials and facilities for non-medical purposes in Australia for a considerable length of time. We have also been strong supporters of international efforts to prevent the proliferation and testing of nuclear weapons

The legacy of the 1950's and 1960's British nuclear tests on Australian soil at Maralinga and Monte Bello and Christmas Islands is a reminder that the fallout from tests are long-lived and very dangerous. Our land has not been safely cleared of plutonium contamination and thousands of the workers and servicemen who participated in the tests have already died or are suffering from radiation-related illnesses. We know of sites in Tahiti, Russia, Algeria and the US that are still heavily contaminated, as they no doubt are wherever tests have taken place.

The Democrats are acutely aware of the importance of the Comprehensive Nuclear–Test-Ban Treaty (the **CTBT**), the Treaty on the Non–Proliferation of Nuclear Weapons (the **Non–Proliferation Treaty**), and the Agreement between Australia and the International Atomic Energy Agency for the Application of Safeguards in Connection with the Treaty on the Non–Proliferation of Nuclear Weapons (the **Agency Agreement**) in the efforts to control the use and development of nuclear weapons. It is also conscious of the role the *Nuclear Non–Proliferation (Safeguards) Act 1987* (**NNPS Act**) plays in protecting nuclear materials and facilities, and implementing non-proliferation safeguards, in Australia. These international agreements and the NNPS Act have played an important role in controlling the spread and testing of nuclear weapons.

The non–government organisation statement on the Comprehensive Nuclear Test Ban Treaty for the Third Article XIV Conference on Accelerating Entry–Into–Force in Vienna said this week:

> The Comprehensive Nuclear Test-Ban Treaty (CTBT) is an integral part of our global efforts to achieve international security for all, free from the threat of weapons of mass destruction. All states should recognise that action of the CTBT is all the more important in light of the rising hostilities across the globe. From ongoing casualties in Iraq, the unstable tension on the Korean Peninsula, and the precariousness of the NPT, the dire necessity of a comprehensive test ban is evident. Implementation of the CTBT will take the world one important step closer to the kind of global security framework it desperately needs. States presently resisting the CTBT are undermining their own security as well as the security of the world.

> The CTBT was brought about largely through the hard work and determination of NGOs and millions of ordinary people around the world. In all of these years, the NGO community has never faltered in its advocacy for a test–ban treaty. People throughout the world understood that ending nuclear testing was essential for three powerful reasons; to halt the spiralling arms race; to obstruct the emergence of new nuclear powers; and to prevent further devastation of human health and the global environment, already contaminated from the more than 2,000 nuclear tests conducted in the 20th century. It is estimated that atmospheric testing directly produced 430,000 fatal human cancers by the year 2000. Eventually that total will be 2.4 million.

The Democrats note that 12 key states have not yet signed and/or ratified the CTBT, including the US administration, which, although a signatory, has not sought Senate approval for ratification. The US was the only country to oppose the retention of the CTBT on the UN agenda in November 2001.

The NGO Statement notes:

> The US has also declared its intention not to contribute financially or to participate in non-IMS activities of the Preparatory Commission of the CTBTO, including preparations for on–site inspections. In addition, through employing a narrow reading of the rules, the United States prevented the CTBTO Provisional Secretariat from making a statement at the 2003 PrepCom of the NPT as they had the year before.

According to the statement, in order for the Treaty to enter into force:

> The Democratic People's Republic of Korea, India, and Pakistan must sign and ratify the CTBT. China, Colombia, the Democratic Republic of the Congo, Egypt, Indonesia, Iran, Israel, the United States and Vietnam must now ratify, without further procrastination. The longer these states wait to join the Treaty, the greater the chance that some nation may begin testing and set off a dangerous international action–reaction cycle of military and nuclear confrontation.

The Democrats urge the Federal Government to play its part in encouraging the prompt signature and/or ratification of the CTBT by those 12 countries that have yet to do so and, in particular, to use whatever influence it has on the US to see that it neither develops nor tests new types of nuclear weapons, as has been mooted by the Bush Administration.

The Government claims the *Non–Proliferation Legislation Amendment Bill 2003* (the **Bill**) is designed to improve the arrangements for the application of non–proliferation safeguards and protection of nuclear materials and facilities. In this regard, the Explanatory Memorandum for the Bill states that it[1]:

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[1] *Non–Proliferation Legislation Amendment Bill 2003, Explanatory Memorandum*, p. 1.

> …strengthens Australia's arrangements for the protection of, and application of non–proliferation safeguards to, nuclear material, facilities and associated information. It will enable Australia to bring into force legislation banning nuclear weapons tests ahead of entry into force of the Comprehensive Nuclear–Test–Ban Treaty (CTBT). It provides also for machinery changes to improve the application of non-proliferation measures.

As a general principle, we support moves to improve the domestic arrangements for the protection of nuclear materials, facilities and information concerning nuclear materials and facilities. The escalation in terrorist activity over the past 3 years has created a need for Australia's laws to be reviewed to ensure appropriate regimes are in place to deal with the increased risk to national security. However, in devising responses to the increased risk of terrorist activity, and in seeking to ensure greater protection for nuclear materials and facilities, the Government must be mindful of the democratic values that form the bedrock of Australian society.

Unfortunately, there are several provisions in this Bill that infringe upon those values. These provisions relate to the protection of associated technology, the communication of information that could prejudice the physical security of nuclear materials or associated items, and trespassing on property that contains nuclear materials or associated items. These provisions are discussed below in parts 2, 3 and 4.

The Anti–Nuclear Alliance of Western Australia said in its submission[2]:

> …as long as the nuclear industry exists in Australia, a sizable proportion of the community will oppose its operations. On occasion this opposition will be expressed as direct action undertaken to highlight the threats posed by the technology and its waste products. It is essential for the Government to acknowledge that citizens expressing their democratic rights of dissent should never be the target of the kind of punitive sanctions made lawful under this bill.
>
> In similar vein, persons working within the industry must be confident that any efforts to expose corruption or unsafe practices in the industry will not expose them to similar sanctions.
>
> Specifically, our concerns are that either by conscious intent or poor drafting, the legislation is potentially subject to interpretation far wider than acknowledged in the second reading speech or explanatory memorandum. Nowhere in these documents is it stated that the bill is intended to provide authorities with powers to crack down on protest activities or the actions of whistleblowers, and yet the bill quite clearly establishes these powers.

Apart from these provisions, we believe the Bill will improve the existing arrangements for the regulation and control of the use and development of nuclear materials and facilities in Australia and we support the inclusion of a requirement to

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[2] Submission of Anti–Nuclear Alliance of Western Australia, p. 1.

obtain a permit to establish a nuclear facility, a facility for carrying out nuclear activities, or a facility for the use of associated equipment. The Democrats are also strongly supportive of the amendment of the *Comprehensive Nuclear–Test–Ban Treaty Act 1998* to enable the proclamation of key provisions of the Act prior to the CTBT coming into force.

2. Lack of public consultation

This Bill contains provisions that are of considerable public importance and that warrant detailed debate. Despite this, the Government has attempted to rush it through Parliament without inviting public comment and without consulting relevant sectors of the community. The vast majority of people who made submissions to the Committee complained, reasonably, that there was little time to fully consider the implications of the Bill. In this regard, the submission made by the Friends of the Earth states[3]:

> Friends of the Earth (Australia) (hereafter FoEA) is concerned at the limited opportunity for public scrutiny of the measures proposed in the Non-Proliferation Legislation Amendment Bill 2003. FoEA calls for the Senate inquiry into the Bill to be extended and for the Senate Committee to take further steps both to investigate the implications of the Bill and to publicise the Bill and the Senate inquiry into it.

The statements made by the Medical Association for Prevention of War are also indicative of the general dissatisfaction with the limited amount of time that has been provided to enable this Bill to be scrutinised and debated[4].

> Medical Association for Prevention of War (MAPW) wishes to raise concerns regarding the lack of timely public and parliamentary notification of the above named Bill…The short time frame of the Bill has not allowed adequate parliamentary and public debate regarding its effects.

Members of the public should always be provided with a reasonable opportunity to debate and scrutinise legislation, particularly where the legislation will restrict civil liberties. In certain circumstances, there may be a need to shorten the period for public consultation. However, the Government has failed to provide a reasonable explanation for the urgency associated with this Bill.

3. Duty to ensure security of associated technology (Schedule 1, Part 1, item 21)

The proposed section 25A states:

> (1) A person commits an offence if:

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[3] Submission of Friends of the Earth (Australia), p. 1.

[4] Submission of the Medical Association for the Prevention of War, p. 1.

(a) the person is authorised to deal with associated technology to which Part II applies by the holder of a permit to possess the associated technology; and

(b) the person has not been granted a permit to possess the associated technology; and

(c) the person is required to ensure the physical security of the associated technology; and

(d) the person engages in conduct; and

(e) the conduct contravenes the requirement.

Penalty: Imprisonment for 2 years.

(2) In this section:

engage in conduct means:

(a) do an act; or

(b) omit to perform an act.

(3) Section 15.1 of the Criminal Code (extended geographical jurisdiction—category A) applies to an offence against subsection (1).

"Associated technology" is defined for these purposes as:

…any document that contains information (other than information that is lawfully available, whether within Australia or outside Australia and whether for a price or free of charge, to the public or a section of the public):

(a) that is applicable primarily to the design, production, operation, testing or use of:

(i) equipment or plant for:

(A) the enrichment of nuclear material;

(B) the reprocessing of irradiated nuclear material; or

(C) the production of heavy water; or

(ii) nuclear weapons or other nuclear explosive devices; or

(b) to which a prescribed international agreement applies and that is of a kind declared by the Minister, in writing, to be information to which this definition applies;

and includes any photograph, model or other thing from which such information may be obtained or deduced.

The Democrats argue that section 26 of the NNPS Act already prohibits the unauthorised communication of information of a kind that is referred to in the definition of "associated technology". In order to establish this offence, it is necessary to prove the following elements.

- The accused must communicate information to another person.
- The information must be of a kind referred to in the definition of associated technology.
- The accused must have the necessary fault element in relation to the communication of the information (ie intention, knowledge, recklessness or negligence)[5].
- The communication must not be required or authorised under the Act (NB: a permit may authorise permit holders to communicate information contained in associated technology to another person)[6].
- The communication must not be made in accordance with an authority granted under s.18 (which allows the Minister to authorise a person to communicate information of a kind referred to in the definition of "associated technology" to another person)[7].
- The communication must not be exempt under subsections 26(2),(3) or (4) (which relate to communications by officers, inspectors and prescribed authorities in the performance of their duties)[8].
- The accused does not have a reasonable excuse for the communication[9].

This offence carries a maximum penalty of 2 years imprisonment and/or a $5,000 fine (the Bill will change this by removing the discretion to impose a fine).

The offence created under proposed section 25A will overlap that contained in section 26. However, there are several key differences. Most importantly from a civil liberties perspective, section 26 only applies to the communication of sensitive information. In contrast, proposed section 25A will apply to conduct (which includes doing an act, or omitting to perform an act) associated with the security of a document containing sensitive information. Owing to the operation of Part 2.2 of the Criminal Code, the relevant fault element for this offence will be whether the accused intentionally, knowingly, recklessly or negligently engaged in conduct that

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[5] See Part 2.2 of the *Criminal Code*.

[6] The defendant bears the evidential burden of proof in relation to this issue (see section 13.1 of the Criminal Code).

[7] The defendant bears the evidential burden of proof in relation to this issue (see section 13.1 of the Criminal Code).

[8] The defendant bears the evidential burden of proof in relation to this issue (see section 13.1 of the Criminal Code).

[9] The defendant bears the evidential burden of proof in relation to this issue (see section 13.1 of the Criminal Code).

contravened a requirement to ensure the physical security of the associated technology.

The primary concern that we have in relation to this provision is that it could result in the imposition of criminal liability in manifestly unreasonable circumstances. For example, if the holder of a permit authorises a person to have custody of a document containing sensitive information and the document is stolen after the person negligently left the document in an inappropriate place (ie an unlocked car or a public place), the person may be guilty of an offence punishable on conviction by imprisonment for 2 years. Obviously, the Courts will have the discretion to impose a fine instead of a gaol sentence if it considers it appropriate[10]. However, we consider the imposition of criminal liability for recklessly or negligently failing to ensure the physical security of associated technology is draconian and will not result in any improvements in national security.

In addition, unlike section 26, there is no "reasonable excuse" element. Therefore, the accused will be required to rely on the standard common law defences (ie due diligence, honest and reasonable mistake of fact, necessity etc.). While useful, the common law defences will not necessarily guard against the imposition of criminal liability in unreasonable circumstances, such as the situation described above.

The NNPS Act already contains sufficient provisions to prevent the dissemination of sensitive information concerning nuclear materials and facilities. As discussed above, section 26 prohibits the unauthorised communication of information of a kind referred to in the definition of associated technology. If a person intentionally, knowingly or recklessly gives another person associated technology in breach of a requirement to ensure the physical security of the relevant document, it is likely the person will be guilty of contravening section 26. Further, the person who receives the document is likely to be in breach of section 23, which prohibits the unauthorised possession of associated technology. If the disclosure or communication of associated technology to another person is already covered by existing offences, there does not appear to be any need for the additional offence contained in proposed section 25A. It will not decrease the risks associated with the management and control of sensitive nuclear information and will result in people being exposed to criminal proceedings in manifestly unreasonable circumstances.

Given the nature of this offence, many people who made submissions to the Committee expressed the opinion that proposed section 25A was intended to discourage whistleblowers and curtail public debate. For example, the submission of the Australian Conservation Foundation states in relation to this provision that[11]:

> …(it) may be used to restrict information flows and intimidate potential 'whistle–blowers' and those with legitimate grievances and public interest concerns.

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[10] See *Crimes Act 1914*, section 4B.

[11] Submission of the Australian Conservation Foundation, p. 2.

Similarly, Greenpeace stated in its submission that[12]:

> The inclusion of sections 25A and 26A threaten to burden communication about government and political matters with regards to the nuclear debate in Australia. While these amendments are being proposed with a raft of other amendments that appear to be fulfilling legitimate international objectives under the CTBT, sections 25A and 26A do not fulfil a legitimate or justifiable domestic policy objective, but their effect will be to stifle public debate.

The Anti–Nuclear Alliance of Western Australia also made a similar point in its submission, when it stated in relation to Items 21–27[13]:

> Items 21-27 appear to have bearing on staff, contractors and subcontractors working on Lucas Heights and related infrastructure. Is the intention really to provide for security of nuclear materials, or is it designed for the intimidation and potential prosecution of whistleblowers?

When proposed sections 25A and 26A are viewed together, there appears to be considerable merit in the argument that the intention of these provisions is to intimidate whistleblowers and those who oppose the use and development of nuclear materials and facilities in Australia. Why else would the Government wish to include proposed section 25A when all legitimate security concerns associated with the communication of sensitive nuclear information are already covered in section 26?

Recommendation 1: That Schedule 1, Part 1, item 21 be omitted.

4. Communication of information that could prejudice nuclear material or an associated item (Schedule 1, Part 1, item 26)

Proposed section 26A states:

(1) A person commits an offence if:

(a) the person communicates information to someone else; and

(b) the communication could prejudice the physical security of nuclear material, or an associated item, to which Part II applies.

Penalty: Imprisonment for 2 years.

(2) Subsection (1) does not apply if the communication is authorised by a person who has been granted a permit to possess the nuclear material or associated item.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the Criminal Code).

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[12] Submission of Greenpeace Australia Pacific, p. 4–5.

[13] Submission of Anti–Nuclear Alliance of Western Australia, p. 2.

> (3) Section 15.1 of the Criminal Code (extended geographical jurisdiction—category A) applies to an offence against subsection (1)."

The prohibition on the communication of information in this provision is extremely broad. In this regard, section 26A will apply to information concerning "nuclear material" and "associated items".

"Nuclear material" is defined as including: uranium containing a mixture of isotopes occurring in nature; uranium depleted in the isotopes 235; uranium–233; uranium enriched in the isotopes 235 or 233; and any material containing uranium–233 or uranium enriched in the isotopes 235 or 233.

"Associated item" is defined as including "associated material", which in turn will be defined as including:

> …any material…that: (a) is of a kind specially suited for use in nuclear activities, the construction of a nuclear reactor or the production of nuclear weapons or other nuclear explosive devices.

"Nuclear activities" is defined for these purposes as including any activity that forms part of the "nuclear fuel cycle". The NNPS Act defines the "nuclear fuel cycle" as having the same meaning as it has when used in the Agency Agreement. The Agency Agreement does not define this term. However, it is used in Articles 6, 35 and 82 of the Agency Agreement. Of these, Article 6 provides the most useful indication of the intended meaning of this phrase. In this regard, Article 6 refers to the nuclear fuel cycle as:

> …involving the production, processing, use or storage of nuclear material from which nuclear weapons or other nuclear explosive devices could readily be made.

As a result of the breadth of the definitions of "nuclear material" and "associated item", it is likely that proposed section 26A would apply to a wide range of activities associated with nuclear issues, including uranium mining and milling[14]. However, it is unlikely that imposing a broad prohibition on the dissemination of information concerning nuclear activities will improve national security.

The risks associated with nuclear activities are primarily related to the security of places, materials and information that:

(a) could readily be used to develop nuclear explosives; or

(b) could easily be involved an incident that could result in the emission of radioactive pollution.

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[14] The details of the reasons why information concerning uranium mining and milling will fall within the purview of this provision are discussed in detail in the submission of the Gundjehmi Aboriginal Corporation (p.2, paras. 4–5).

There are already sufficient laws to prevent the "inappropriate" communication of information that is likely to jeopardise national security. As discussed, sections 23 and 26 of the NNPS Act impose restrictions on the possession and communication of information concerning "associated technology". Similarly, if a person communicates information concerning nuclear materials or a nuclear facility without appropriate authorisation to a person in connection with the development of nuclear explosives or the sabotage of a nuclear facility, the person would be liable for conspiring to commit an offence or being complicit in the commission of an offence (whether the offence be under the NNPS Act or another statute).

The imposition of a broad prohibition on the dissemination of information concerning nuclear activities would capture activities that have no bearing on national security. For example, how would restricting the dissemination of information on uranium mining and milling lessen the risks associated with Australia's nuclear activities? In doing so, it would infringe upon the free flow of information on an issue of profound public importance.

The overwhelming majority of submissions that were made to the Committee expressed concern about the ability of this provision to curtail legitimate public debate about nuclear issues. The following statement from the submission of the Gundjehmi Aboriginal Corporation reflects the concern that was expressed about the impact of proposed section 26A[15].

> Free discourse is an important aspect of Australian civil society—one of which many Australians in public life are purportedly proud. Such discourse is threatened by measures such as those contained in proposed section 26A of the Act.

Similarly, the People for Nuclear Disarmament (Western Australia) stated in its submission that[16]:

> …it is Item 26 which is most alarming, as it could be used against anti-nuclear activities, or whistleblowers from within the nuclear industry… It seems that Schedule 1 provisions of this bill are designed to protect the nuclear industry from its critics, and we regard that with great concern.
>
> People working within the nuclear industry have a right, and a duty, to speak out when public safety is put at risk by shoddy procedures, yet these are the people who would be effectively, and probably deliberately, silenced by provisions of this Bill, in section 26.

While the Government has a responsibility to respond to the increased threat posed by terrorist organisations, it should be cautious to curtail the freedom of expression and exchange of information on issues of public importance. In this instance, the response

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[15] Submission of Gundjehmi Aboriginal Corporation, p. 3.

[16] Submission of the People for Nuclear Disarmament (Western Australia), p. 1.

is disproportionate to the threat and is unnecessary given the existing laws concerning the communication of information on nuclear materials and facilities.

In addition, proposed section 26A contains several elements of ambiguity. The most worrisome of these relates to the meaning of the phrase, "prejudice the physical security of nuclear material or an associated item". This phrase is not defined. The Macquarie Dictionary defines "prejudice" as "to affect disadvantageously or detrimentally". It defines "physical" as: "pertaining to material nature". At what point does the communication of information "detrimentally affect" the physical security of nuclear material or an associated item? Would communicating the fact that a vehicle containing nuclear materials is expected to pass through a particular area fall within this definition? Similarly, would communicating information about the flaws in the security of a nuclear facility be captured by this provision?

The Anti–Nuclear Alliance of Western Australia described the problem with the wording of proposed section 26A succinctly when it stated in its submission that[17]:

> To describe this drafting as 'loosely worded' scarcely does it justice. The interpretation of 'prejudice' in this instance could easily apply in the event of a protest action which delays a shipment of nuclear waste for half an hour (for example). Having the clause cover 'associated item[s] merely compounds the problem.

The ambiguity associated with proposed section 26A adds further weight to the case against its enactment.

Recommendation 2: That Schedule 1, Part 1, item 26 be omitted.

5. Trespass offence (Schedule 1, Part 1, item 45)

Proposed section 31A provides:

> (1) A person commits an offence if:
>
> (a) the person enters an area or gets onto or into a vehicle, aircraft or ship; and
>
> (b) the holder of a permit is required by a condition on the permit:
>
> (i) to restrict access to the area, vehicle, aircraft or ship to persons who have been authorised by the holder; and
>
> (ii) to mark the area, vehicle, aircraft or ship with signs indicating that entering or getting onto or into it without the authorisation of the holder of a permit is an offence under this Act; and

[17] Submission of the Anti–Nuclear Alliance of Western Australia, p. 2.

> (c) the area, vehicle, aircraft or ship is clearly marked with signs indicating that entering or getting onto or into it without the authorisation of the holder of a permit is an offence under this Act.
>
> Penalty: Imprisonment for 6 months.
>
> (2) Strict liability applies to paragraphs (1)(b) and (c).
>
> (3) Subsection (1) does not apply if the person is authorised by the holder of the permit described in paragraph (1)(b) to enter the area or get onto or into the vehicle, aircraft or ship.
>
> Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the Criminal Code).
>
> (4) Section 15.1 of the Criminal Code (extended geographical jurisdiction—category A) applies to an offence against subsection (1)."

As with proposed sections 25A and 26A, there does not appear to be any valid reason for the enactment of this provision. There are already sufficient laws to prevent the unauthorised entry onto Commonwealth land (eg. s.89 of the *Crimes Act 1914*). There are also numerous civil remedies available where a person unlawfully enters onto private property or a government vehicle, aircraft or ship (eg. trespass). There are also satisfactory laws to capture circumstances where a person enters onto property with the intention of obtaining nuclear materials for use in a nuclear weapon, to sabotage a nuclear facility, or to hijack or sabotage a vehicle, aircraft or ship containing nuclear materials (eg. attempt, conspiring or complicity in a breach of the NNPS Act, *Crimes (Aviation) Act 1991*, *Crimes (Ships and Fixed Platforms) Act 1992*, *Criminal Code Act 1995* and numerous other laws of the States and Territories). The Australian Conservation Foundation made this point in its submission, when it stated[18]:

> No rationale is provided to why the raft of existing laws (trespass et al) available under the criminal code to Commonwealth and other authorities is not sufficient to cover such events and why this new offence is needed.

Proposed section 31A appears to be intended to curtail protest activity that involves unlawful entry onto property. In this regard, if a person trespasses on property with the intent of committing a serious offence concerning nuclear materials or a nuclear facility, it is unlikely they would be prosecuted under this section due to the limited nature of the maximum sentence (ie 6 months imprisonment). However, such a sentence is likely to be sufficient to deter protestors from trespassing on property containing nuclear materials and equipment. As the Australian Conservation Foundation stated in its submission[19]:

> This seems designed specifically to further restrict protests at Lucas Heights and over the transport of radioactive waste. Given that these permit

[18] Submission of the Australian Conservation Foundation, p. 2.

[19] Submission of the Australian Conservation Foundation, p. 2.

> conditions are not expected to be public knowledge this raises real issues re community protest and action.

There are numerous other laws that protect public and private property that may contain nuclear materials and equipment. However, in most cases the laws do not carry gaol sentences[20]. The penalty prescribed in relation to proposed section 31A is 6 months imprisonment. Imposing a custodial sentence on a protestor would be draconian and contrary to the best interests of the community.

An additional problem associated with this provision is that strict liability applies to paragraph (1)(c). This ensures that the prosecution will not be required prove that the defendant had knowledge of the signs that indicate that unauthorised entry is an offence. We do not consider that strict liability should apply in relation to this aspect of the offence.

Recommendation 3: That Schedule 1, Part 1, item 45 be omitted. However, if the Parliament considers that this provision should be retained:

(a) proposed subsection 31A(2) should be amended to ensure that strict liability does not apply to paragraph (1)(c); and

(b) the prescribed penalty for proposed subsection 31A(1) should be altered to a monetary penalty only with a maximum of 10 penalty units (which would be consistent with the prescribed penalty for trespassing on prohibited Commonwealth land and the prescribed penalty for contravening section 41E of the *Atomic Energy Act 1953*).

Recommendation 4: That unless Schedule 1, Part 1, items 21 and 26 are omitted, and Schedule 1, Part 1, item 45 is either omitted or amended in accordance with Recommendation 3, the Bill not be passed.

Senator Lyn Allison
Australian Democrats

[20] For example, the prescribed penalty for unauthorised entry onto "prohibited" Commonwealth land is 10 penalty units (*Crimes Act 1914*, s.89). See also section 41E of the *Atomic Energy Act 1953*, which prohibits entry onto certain land associated with the Ranger uranium mine in the Northern Territory. The prescribed penalty in relation to this offence is $1,000. Obviously, relevant torts only offer civil remedies.

Non–Proliferation Legislation Amendment Bill 2003

Dissenting report by the Australian Greens

The Australian Greens share the concerns of the Australian Conservation Foundation and Greenpeace Australia Pacific in relation to the impact of this legislation on whistleblowers. These concerns are outlined in the main Committee Report.

The Australian Greens have serious concerns about this legislation. These concerns fall into several categories:

1. Linking of domestic and international issues;
2. failure to distinguish between the actions of terrorists and the right to protest; and
3. hasty passage of the legislation.

Linking of domestic and international issues

This legislation seeks to deal with two matters: measures to bring Australia in line with the Comprehensive Test Ban Treaty and domestic provisions that impact on whistleblowers and the right to protest. The Australian Greens welcome the provisions that ensure that a ban on nuclear testing in Australia will be given effect prior to the entry into force of the Comprehensive Test Ban Treaty. However, there are significant flaws with the provisions of the bill that deal with domestic matters and we believe that the Committee has not had sufficient time to address these issues.

At the public hearing Mr Leask, Assistant Secretary of the Australian Safeguards and Non–Proliferation Office in the Department of Foreign Affairs and Trade, said there was no policy reason for linking these domestic and international issues in this piece of legislation. The Australian Greens object to the government tying widely supported measures to implement the Comprehensive Treaty Ban Treaty in Australian law with security measures than have serious implications for civil liberties. This is a political tactic that the government is increasingly employing with matters relating to terrorism. This undermines the Parliament's ability to legislate widely supported measures by linking them to excessive security measures that fail to guarantee proper protection for citizens' rights.

Failure to distinguish between the actions of terrorists and the right of protest

This legislation seeks to deal with a current climate of increased proliferation uncertainty. The Australian Greens support the comments of Mr Dave Sweeney from the Australian Conservation Foundation in the public hearing that:

> …the best ways to address this uncertainty are twofold: first, to reduce the amount of fissile material that is in circulation and second, to use the full range of our international influence to support active non–proliferation measures.

As evidenced by the public debate around the ASIO legislation it is extremely difficult to craft legislation that deals with security concerns without curtailing civil liberties. The same is true of this legislation. Item 26 of Schedule 1 creates an offence if a person communicates information that could prejudice the physical security of nuclear material. This item contains no requirement for an intention on the part of the person actually communicating the information to prejudice the physical security of the nuclear material or associated item. As this provision is currently drafted, the communication does not actually have to prejudice safety or physical security; it is sufficient if it could prejudice the safety or physical security of the nuclear material or associated item, as noted in the Greenpeace submission.

Without any reference in this item to an intention to prejudice the physical security of the nuclear material in this offence the offence clearly captures those communicating information about nuclear material or transportation of nuclear material for the public interest.

Hasty passage of the legislation

The Government has provided no justification why this legislation is being rushed through Parliament. An inquiry into this legislation allowed just two weeks for public input and two hours for a public hearing. Having regard to the lengthy debate on the ASIO legislation dealing with security concerns and civil liberties, it is appropriate that more public consultation occur on these particular provisions of this bill. Such consultation would allow the issues raised in this public hearing to be appropriately addressed.

Recommendation:

The Australian Greens recommend that the Non–Proliferation Legislation Amendment Bill 2003 be split to allow Schedules 2 and 3 to proceed and that Schedule 1 be referred back to the Senate Foreign Affairs, Defence and Trade Legislation Committee for a more substantial public inquiry to further explore and address the concerns raised in this inquiry.

Senator Kerry Nettle
Australian Greens

APPENDIX ONE

Submissions received by the Committee

Submission	Name
1	Australian Conservation Foundation
2	Greenpeace
3	Ms Janet Marsh
4	Medical Association for Prevention of War
5	Anti–Nuclear Alliance of Western Australia
6	Ms Nicola Wiseman
7	Ms Kristina Schmah
8	Friends of the Earth
9	People for Nuclear Disarmament (WA)
10	Ms Natalie Wasley
11	Gundjehmi Aboriginal Corporation

APPENDIX TWO

Witnesses who appeared before the committee at a public hearing

Canberra, 8 September 2003

Australian Conservation Foundation

Mr Dave Sweeney, National Nuclear Campaigner

Mr Wayne Smith, National Liaison Officer and Acting Campaign Director

Greenpeace

Ms Helen Oakey, Political Liaison Officer

Mr James Courtney, Nuclear Campaigner

Department of Foreign Affairs and Trade

Dr Andrew Leask, Assistant Secretary, Australian Safeguards and Nonproliferation Office (ASNO)

Mr Stephan Bayer, Safeguards Officer, ASNO

Mr Donald Sorokowski, Executive Officer ASNO

APPENDIX THREE

Organisations invited to make submissions

Anti–Nuclear Alliance of Western Australia

Australian Capital Territory Human Rights Office

Australian Conservation Foundation

Australian Council for Civil Liberties

Civil Liberties Council of Western Australia

Friends of the Earth

Greenpeace Australia Pacific

Gundjehmi Aboriginal Corporation

Human Rights and Equal Opportunities Commission

Kingsford Legal Centre

Liberty Victoria

Medical Association for the Prevention of War

New South Wales Council for Civil Liberties

Ozpeace

Public Interest Advocacy Centre

Queensland Council for Civil Liberties

Sydney Peace and Justice Coalition

Tasmanian Conservation Trust

World Wide Fund for Nature

APPENDIX FOUR

Non–Proliferation Legislation Amendment Bill 2003

Answers to questions on notice from
Department of Foreign Affairs and Trade

Australian Government

Department of Foreign Affairs and Trade

Australian Safeguards and Non-Proliferation Office

Senator the Hon Peter Cook
Acting Chairperson
Senate Foreign Affairs, Defence and Trade Legislation Committee
CANBERRA

9 September 2003

QUESTIONS ON NOTICE TAKEN AT COMMITTEE HEARING

8 SEPTEMBER 2003

Answers to questions taken on notice at yesterday's public hearing by the Senate Foreign Affairs, Defence and Trade Legislation Committee are attached.

In preparing this reply, I have consulted the Australian Nuclear Science and Technology Organisation, the Radiation Protection and Nuclear Safety Agency and the Attorney-General's Department.

John Carlson
Director General

1. Which appropriate authorities receive information concerning the transport of nuclear material?

With regard to Lucas Heights, the Australian Nuclear Science and Technology Organisation (ANSTO) informs:

(a) in respect of fresh fuel for the reactor, the Australian Safeguards and Non-Proliferation Office (ASNO), the Australian Radiation Protection and Nuclear Safety Agency (ARPANSA), the Australian Federal Police (AFP), NSW Police, and the Australian Customs Service (ACS).

(b) in respect of spent fuel, ASNO, ARPANSA, AFP, NSW Police, ACS, NSW Fire Service (including HAZMAT), the NSW/local ambulance service, the Federal Department of Education, Science and Training (DEST), the Department of the Premier of NSW, NSW Environmental Protection Agency, and Port Authorities. In addition local MPs and Councils are informed one or two days in advance.

2. Do local councils receive information pertaining to the transport of nuclear material?

Yes, see 1. above.

3. What circumstances might lead to a decision being made not to inform local authorities about the transport of nuclear material?

This would be reviewed on a case by case basis. A severely heightened security threat might lead to this action.

4. What are the arrangements under which an APS officer should obtain a warrant following an 'arrest without warrant'?

The Australian Protective Service (APS) operates under the *Australian Protective Service Act 1987*. APS officers provide protective and custodial services for or on behalf of the Commonwealth. This does not include the investigation of criminal offences, which is more properly a function of the police.

Section 13 of the *Australian Protective Service Act* 1987 confers a power of arrest without warrant on APS officers. That arrest power can be exercised only where the APS officer believes on reasonable grounds that the person has just committed, or is committing a prescribed offence (listed in subsection 13(2)). The prescribed offences have been carefully defined, and are linked to the security of persons and property.

The arrest power in section 13 of the *Australian Protective Service Act 1987* is supported by a power to search for and seize certain things (section 16). The

things that can be seized by an APS officer under section 16 are limited, and items seized must be delivered into the custody of the police.

Where an APS officer arrests a person, section 17 of the *Australian Protective Service Act 1987* requires the APS officer to deliver the person forthwith into the custody of a police officer to be dealt with according to law. Where the APS officer ceases to have reasonable grounds to believe the conditions for the arrest exist, section 18 of the *Australian Protective Service Act 1987* requires the APS officer to release the person.

Where the grounds for an arrest under section 13 of the *Australian Protective Service Act 1987* are not satisfied, the APS officer cannot apply for a warrant for the arrest of the person. This is because the *Australian Protective Service Act 1987* does not confer any powers on APS officers to make an application for an arrest warrant. However, an APS officer can provide relevant information to the police, who may investigate the matter, and if the relevant conditions are satisfied, the police may apply for a warrant for the arrest of the person.

The *Non-Proliferation Legislation Amendment Bill 2003* will insert several offences in subsection 13(2) of the *Australian Protective Service Act 1987* giving an APS officer jurisdiction to make an arrest under subsection 13(1). Subsection 13(2) of the *Australian Protective Service Act 1987* currently lists provisions similar to proposed section 26A of the *Non-Proliferation Legislation Amendment Bill 2003*, including sections 23 and 26 of the *Nuclear Non-Proliferation (Safeguards) Act 1987*.

5. What judgements must an APS officer effect when making an arrest without warrant under proposed section 26A?

An APS officer can arrest a person only if the APS officer has reasonable grounds to believe the person has just committed or is committing a prescribed offence (listed in subsection 13(2) of the *Australian Protective Service Act* 1987) and that the additional conditions listed in subsection 13(1) of the *Australian Protective Service Act 1987* are satisfied.

Accordingly, an APS officer will have to satisfy himself or herself that there are reasonable grounds to believe that a person is committing or has just committed an offence under section 26A. This will require the APS officer to exercise judgement as to whether information is being communicated and whether that information could prejudice the physical security of nuclear material or an associated item.

6. What training is or might be provided to an APS officer to assist them in exercising these (section 26A) increased powers?

APS officers are the most carefully selected and highly trained security personnel in Australia. All applicants for positions as APS officers are required to undergo psychological, medical and fitness testing. Once selected, recruits undergo training which provides APS officers with a wide range of background knowledge and applicable skills. Recruits must successfully complete the extensive training course before becoming Probationary APS officers.

In addition, APS officers receive supplementary, job–specific training relating to their local work environment, and receive ongoing refresher training and testing to ensure they are familiar with changes to legislation. Training programs are reviewed and adapted on an on-going basis to ensure APS officers understand relevant changes to legislation and can exercise their powers effectively. Training requirements arising from the *Non-Proliferation Legislation Amendment Bill 2003* will be assessed and an appropriate training response made.

7. Supplementary Questions on Notice submitted by Senator Nettle.

7.1 Does the Government have a timeline in which they want this legislation dealt with? Noting it is not on the forward schedule for September.

The Australian Safeguards and Non–Proliferation Office, as the sponsoring agency, is not aware of any timeframes specified by the Government for this legislation. However, as the legislation forms part of the Government's efforts to strengthen non–proliferation and counter acts of terrorism, we would like to see it passed without delay.

7.2 What is the rational behind the extremely quick inquiry and tabling of this committee report?

We have no knowledge of the reason for the early inquiry and tabling of this Committee report. We understand this timing is the result of Senate Committee processes.

7.3 Does the timing of this legislation relate to the construction timetable for the replacement reactor at Lucas Heights or upcoming transportation of nuclear material?

As far as the Australian Safeguards and Non–Proliferation Office is concerned, the timing of the passage of this legislation is not related to either the construction timetable for the replacement reactor or any proposed transportation of nuclear material anywhere in Australia, including Lucas Heights.

Senator Marshall's follow–up question…

SENATOR GAVIN MARSHALL
Labor Senator for Victoria

9 September 2003

Mr Brenton Holmes
Committee Secretary,
Senate Foreign Affairs, Defence and Trade Committee
Suite S1.57
Parliament House
CANBERRA ACT 2600

Dear Brenton,

In respect to answers from the Australian Safeguards and Non-Proliferation Office to questions on notice (of 9 September 2003), resulting from the Inquiry into the Non-Proliferation Legislation Amendment Bill 2003, I ask for further clarification as follows: -

Would the answers provided to questions 4, 5 and 6 change in any way, with the passing of the Australian Protective Service Amendment Bill 2003 currently before the Senate, in its current form?

Yours sincerely

Senator Gavin Marshall
Senator for Victoria

CC: Senator the Hon. Peter Cook, Acting Committee Chair

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Department of Foreign Affairs and Trade's answer to Senator Marshall's follow–up question…

Australian Government

Department of Foreign Affairs and Trade

Australian Safeguards and Non-Proliferation Office

Senator the Hon Peter Cook
Acting Chairperson
Senate Foreign Affairs, Defence and Trade Legislation Committee
CANBERRA

10 September 2003

SUPPLEMENTARY QUESTION ON NOTICE BY SENATOR MARSHALL ARISING FROM THE COMMITTEE HEARING

8 SEPTEMBER 2003

On 9 September 2003, Senator Marshall requested further clarification to the answers provided by the Australian Safeguards and Non-Proliferation Office to questions on notice (of that date) resulting from the inquiry into the *Non-Proliferation Legislation Amendment Bill 2003*. Senator Marshall's question is as follows:

"Would the answers provided to questions 4, 5 and 6 change in any way, with the passing of the Australian Protective Service Amendment Bill 2003 currently before the Senate, in its current form?"

The Attorney–General's Department advises as follows:

"the passing of the *Australian Protective Service Amendment Bill 2003* (APS Bill) in its current form would have no impact on the answers provided to Questions On Notice 4, 5 and 6 on 9 September 2003.

The matters covered by the APS Bill do not affect the existing arrest power, will not affect the judgements exercised by an APS officer when exercising a power of arrest in relation to proposed section 26A, and do not deal with training issues."

John Carlson
Director General