



**Australian Government**

**Australian Safeguards and Non-Proliferation Office**

16 January 2007

The Secretary  
Senate Foreign Affairs, Defence and Trade Legislation Committee  
Parliament House  
CANBERRA ACT 2600

**INQUIRY INTO THE PROVISIONS OF THE NON-PROLIFERATION LEGISLATION  
AMENDMENT BILL 2006**

A letter of 12 December 2006 from the Chair of the Senate Standing Committee on Foreign Affairs, Defence and Trade to the Minister for Foreign Affairs invited submissions in connection with the Committee's Inquiry into the Provisions of the Non-Proliferation Legislation Amendment Bill 2006.

I attached here a submission by the Department of Foreign Affairs and Trade. This submission should be treated as under embargo until advised. The embargo will be lifted when the submission has been approved by the Minister for Foreign Affairs. I expect this to occur before the Committee undertakes public hearings.

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Australian Safeguards and Non-Proliferation Office

**SUBMISSION TO THE SENATE FOREIGN AFFAIRS, DEFENCE AND  
TRADE LEGISLATION COMMITTEE**

**INQUIRY INTO THE PROVISIONS OF THE NON-PROLIFERATION  
LEGISLATION AMENDMENT BILL 2006**

**Submission to the Senate Foreign Affairs, Defence and Trade Committee**

**Inquiry into the Provisions of the  
Non-Proliferation Legislation Amendment Bill 2006**

**Department of Foreign Affairs and Trade**

**Introduction**

1. The Department of Foreign Affairs and Trade is the sponsor of the Non-Proliferation Legislation Amendment Bill 2006 (the “Bill”). The Department makes the following submission to provide additional information on the structure of the Bill, and the rationale for and consequences of its elements.

2. The purpose of the Bill is to amend 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* (the “CWP Act”) to:

- A. implement amendments to the Convention on the Physical Protection of Nuclear Material;
- B. provide a framework for the application of non-proliferation safeguards to a nuclear facility that is being decommissioned;
- C. review penalties for serious offences in the Safeguards Act; and to
- D. extend the geographical jurisdiction for non-proliferation offences in the abovementioned legislation.

The body of this submission provides additional information on each of those subjects.

3. Items 4, 5 and 46-50 in Schedule 1 of the Bill deal with matters which are considered to be minor and/or mechanical in nature. This submission therefore does not provide information on the amendments proposed by those items additional to that located in the explanatory memorandum to the Bill.

4. The Bill is unlikely to have any general impact on businesses or Government agencies in Australia. The amendments will have a limited effect on some holders of permits issued under the Safeguards Act.

**A. Amendments relating to the Convention on the Physical Protection of Nuclear Material (the “Physical Protection Convention”)**

5. The Physical Protection Convention entered into force on 8 February 1987. It requires States Parties to make specific arrangements and meet defined standards for the physical protection of nuclear material in international transport, and promotes international cooperation in relation to this objective. In its original form, the Physical Protection Convention does not address the protection of nuclear facilities

and deals only in a limited way with the domestic use, storage or transportation of nuclear material.

6. In July 2005 a Diplomatic Conference agreed amendments to strengthen the Physical Protection Convention. Key amongst these were to: explicitly include domestic use, storage and transport; introduce an offence of sabotage; and to require States Parties to establish robust and comprehensive domestic security regimes for nuclear material and nuclear facilities.

7. In implementing the Physical Protection Convention, Australia has always taken a broad view of its obligation under the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) to protect nuclear material and nuclear facilities from proliferation, theft or sabotage. As such, many of the provisions of the amended Convention apply already in Australia - through the Safeguards Act.

8. In order to fully implement the 2005 amendments to the Physical Protection Convention, further requirements strengthening domestic security and counterterrorism arrangements will be added by the Bill - mainly through the Safeguards Act. Australia will be in a position to ratify the amended Convention following this, and after the promulgation of regulations under Safeguards Act, the *Extradition Act 1988* and the *Mutual Assistance in Criminal Matters Act 1987* (the latter are to address extradition provisions in the amended Convention).

9. Widespread ratification and implementation of the strengthened Physical Protection Convention will enhance international security by protecting against theft and sabotage of nuclear material and facilities. Early action by Australia will bolster this objective, as well as regional counter-terrorism and security efforts.

10. States and Territories have been consulted through the Standing Committee on Treaties in relation to the proposed treaty action. Relevant Commonwealth agencies have been briefed on the proposed treaty action and its implementation through the Nuclear Agencies Consultative Committee on 4 May 2006. Key Commonwealth nuclear agencies, including those most likely to be affected by the amendments to the Physical Protection Convention, have been active contributors during the negotiation of those amendments.

11. In its report of 3 October 2006, the Joint Standing Committee on Treaties indicated its support for the amendments to the Physical Protection Convention and recommended that binding treaty action be taken.

#### Implementation of the amended Physical Protection Convention in the Bill

12. Amendments to the Physical Protection Convention add a new Article 2A that requires States Parties to establish and maintain a physical protection regime to protect nuclear material against theft, to rapidly recover any missing or stolen nuclear material, to protect nuclear material and nuclear facilities against sabotage, and to mitigate or minimise the radiological consequences of any such sabotage. Article 2A establishes a series of fundamental principles to be applied as part of such a regime.

13. Australia already has a strong physical protection regime. This is given legal force through the system of permits for nuclear material and facilities under the Safeguards Act. The permits place conditions and restrictions that require permit holders to establish physical protection arrangements. The requirements are specified in terms of relevant international standards, and are supervised by the Australian Safeguards and Non-Proliferation Office (ASNO). The fundamental principles established by Article 2A are already being applied. The most significant example is their use in developing and evaluating the security system implemented by the Australian Science and Nuclear Technology Organisation (ANSTO) at the new OPAL reactor.

14. Although permits under the Safeguards Act may already be granted subject to conditions and restrictions to ensure the physical security of nuclear material or an associated item, items 10, 11 and 12 in Schedule 1 of the Bill amend the Safeguards Act to underscore that permit conditions and restrictions may be made to implement Australia's obligations under the Physical Protection Convention. This is intended to make clear the power in the Act to implement Australia's treaty obligations.

15. Article 7 of the Physical Protection Convention is extended in relation to activities that States Parties must make punishable offences under national law. In particular, new offences are added for: the international trafficking of nuclear material; the sabotage of nuclear facilities with intent to cause death, injury or damage by exposure to radiation or radioactive substances; acts organising or directing others to commit an offence specified by Article 7 (conspiracy); and acts contributing to the commission of other offences specified by Article 7.

16. To implement the amended Article 7 of the Physical Protection Convention, Items 29 to 39 in Schedule 1 of the Bill extend existing offences under the Safeguards Act. Consistent with the broad view that the Government takes of Australia's obligation under the NPT to protect nuclear material and nuclear facilities from proliferation, theft or sabotage, the Bill provides that these changes will commence the day after the Act receives Royal Assent, i.e. they will have effect before entry into force of the amended Convention. Items 27 and 28 in Schedule 1 of the Bill provide for the definition of "nuclear facility" used in the new offences to be in accordance with Article 7.

## **B. Permit to decommission a nuclear facility**

17. Australia's obligation under the NPT to apply safeguards to its nuclear activities is broad in scope. A practical consequence of this is that safeguards will continue to apply for a time at a nuclear facility even if all nuclear material and associated items are removed from it. This is expected to be the case for nuclear facilities operated by ANSTO. To ensure that the Safeguards Act deals adequately with this, items 13 and 14 in Schedule 1 of the Bill amend the Act to add the requirement for a permit for work to decommission a nuclear facility. The conditions and restrictions applying to such a permit would provide a framework for safeguards requirements such as reporting of activities to the International Atomic Energy Agency (IAEA), and for site visits by ASNO and IAEA inspectors. The term "decommission" has not been defined in order that its application to nuclear facilities is broad.

18. So that ASNO may ascertain whether decommissioning is in accordance with information provided by the facility operator, items 44 and 45 broaden the powers of ASNO inspectors.

19. Item 23 in Schedule 1 of the Bill creates an offence for decommissioning a facility without a permit. The offence provision is subject to a six month grace period after Royal Assent (item 54), but the requirement to obtain a permit is not.

20. Item 1 consequentially amends the *Australian Federal Police Act 1979* to specify that this offence is excluded from those for which a *protective service officer* may effect an arrest without a warrant. This provision is included as a protective service officer would be unlikely to know whether a particular activity constituted decommissioning, and whether a permit for it was held.

### C. Review of penalties for serious offences

21. ASNO has reviewed the maximum penalty specified for offences under the Safeguards Act and has recommended changes to ensure that the maximum penalty for certain offences is consistent with comparable Commonwealth non-proliferation legislation, taking into account the potentially serious consequences of an offence. Table 1 summarises the proposed changes. Reasoning for each change is given in the relevant part of the explanatory memorandum.

Item in Schedule 1	section	Description	Current penalty	Proposed Maximum penalty
15	s23	Possession of nuclear material or associated item without permit	imprisonment for not more than 5 years	10 years
18	s26	Unauthorised communication of information	imprisonment for not more than 2 years	10 years
21	s26A	Communication prejudicing security of nuclear material or associated item	imprisonment for 2 years	8 years
25	s31	Obstruction of Agency inspector	imprisonment for not more than 6 months	2 years
32	s35 (as proposed to be amended)	Use of nuclear material causing death or injury to persons or damage to property or the environment	imprisonment for 10 years	20 years

### D. Extension of geographical jurisdiction for non-proliferation offences

22. An interdepartmental review of Commonwealth non-proliferation legislation recommended that the geographical jurisdiction for offences which may constitute a proliferation risk should be extended and harmonised – based on section 15.2 of the

*Criminal Code*. In response to this, the Bill amends offence provisions in the Safeguards Act, the CWP Act and the CTBT Act.

23. Section 15.2 of the *Criminal Code* extends jurisdiction to cover conduct that occurs on an Australian ship or aircraft, and conduct overseas by an Australian citizen, resident or body corporate.

24. Items in Schedule 1 of the Bill apply this jurisdiction to the following offences:

for the CWP Act:

Item in Schedule 1	section	Description
Items 6 and 7	s12	Offences relating to chemicals weapons (e.g. develop, use, transfer chemical weapons)

for the CTBT Act:

Item in Schedule 1	section	Description
Item 8	s9	Offence of causing a nuclear explosion

for the Safeguards Act:

Item in Schedule 1	section	Description
Item 16	s23	Possession of nuclear material or associated item without permit
Item 17	s25A	Breach of duty to ensure security of associated technology
Item 20	s26	Unauthorised communication of information
Item 22	s26A	Communication prejudicing security of nuclear material or associated item
Item 24	s30	False or misleading statements
Item 26	s31A	Unauthorised access to areas etc. to which access is restricted under permit

25. Items 42 and 43 in Schedule 1 amend section 38(3) of the Safeguards Act so that the jurisdiction for offences relating to physical protection of nuclear material and facilities are consistent with section 15.2 of the *Criminal Code*.