

**INTERNATIONAL CONVENTION FOR THE
SUPPRESSION OF TERRORIST BOMBINGS,
DONE AT NEW YORK ON 15 DECEMBER 1997**

Documents tabled on 12 March 2002:

- **National Interest Analysis**

- **Text of the proposed treaty action**

International Convention for the Suppression of Terrorist Bombings, done at New York on 15 December 1997

NATIONAL INTEREST ANALYSIS

Proposed binding treaty action

1. It is proposed that Australia accede to the Convention in accordance with **Article 21(3)**.

Date of proposed binding treaty action

2. The Convention is in force. In accordance with **Article 22(1)**, the Convention entered into force on 23 May 2001 which was the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. As at 8 February 2002, forty eight such instruments had been deposited. As Australia will accede to the Convention after its entry into force, it will enter into force for Australia on the thirtieth day after deposit of our instrument of accession (**Article 22(2)**).

Date of tabling of the proposed treaty action

3. 12 March 2002.

Summary of the purpose of the proposed treaty action and why it is in the national interest

4. The Convention forms part of a framework of international treaties intended to combat the worldwide escalation of acts of terrorism. Terrorist attacks by means of explosives or other lethal devices have become increasingly widespread, and a review of the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism found that existing multilateral legal provisions did not adequately address these attacks. The purpose of the Convention is therefore to enhance international cooperation between States in devising and adopting effective and practical measures for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators. It also serves to reaffirm the unequivocal condemnation by States of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardise the friendly relations among States and peoples and threaten the territorial integrity and security of States.

5. Australia already has extensive domestic legislation designed to combat the kinds of acts covered by the Convention. Acceding to the Convention will dramatically increase the effectiveness of these domestic measures, through providing a mechanism for cooperation with other countries in investigating and prosecuting terrorist crimes committed in or against Australia or by Australians.

Reasons for Australia to take the proposed treaty action

6. Existing multilateral legal provisions do not adequately address the problem of terrorist attacks by means of explosives or other lethal devices. The attacks on the United States embassies in Africa and the Oklahoma City bombing illustrate the considerable loss of life and injury and the extensive property damage that may be inflicted by explosive devices. The Sarin gas attack in Japan has shown the personal injury and loss of life that may be inflicted by other lethal devices that the Convention covers. Under the Convention the definition of ‘explosive or other lethal device’ includes weapons or devices that are designed, or that have the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material.

7. The Convention enhances international cooperation between States by requiring State Parties to be able to exercise jurisdiction over alleged offenders when they are their nationals or commit offences in their territory or on vessels carrying their flag or on aircraft registered in that State (excluding government aircraft). State Parties must also be able to exercise jurisdiction where the alleged offender is present in their territory and they choose not to extradite him or her to another country which has a claim to jurisdiction. The Convention also gives a State Party the option of exercising jurisdiction over an alleged offender who commits an offence against its nationals, or against a government facility abroad (eg, one of its embassies) or on board a government aircraft or over an alleged offender who is a stateless person habitually resident that State Party or is attempting to exercise duress over that State Party. The Convention also provides for mutual assistance by State Parties and the transfer of detainees to assist with investigation or prosecution of offences. A Party in whose territory an alleged offender is present is obliged to investigate and, if appropriate, take steps to ensure the person’s presence for the purpose of prosecution or extradition.

Obligations

Obligation to establish terrorist bombing offences under domestic law

8. **Article 4** of the Convention obliges State Parties to establish the following criminal offences under their domestic law, punishable by appropriate penalties accounting for their gravity:

- the unlawful and intentional delivery, placement, discharge or detonation of an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with the intent to cause death or serious bodily injury, or extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss (**Article 2(1)**: the Convention defines each of the underlined terms more fully in **Article 1**);
- an attempt to commit such an offence (**Article 2(2)**);
- participating as an accomplice in such an offence or attempt (**Article 2(3)(a)**);
- organising or directing others to commit such an offence or attempt (**Article 2(3)(b)**); or
- in any other way contributing to the commission of one or more of the above offences by a group of persons acting with a common purpose; such contribution being intentional and made either with the aim of furthering the general criminal activity or purpose of the group or

in the knowledge of the intention of the group to commit the offence or offences concerned (**Article 2(3)(c)**).

9. **Article 5** requires that such offences, particularly where intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, cannot be justified by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

Obligation to establish jurisdiction over such offences

10. The Convention obliges each State Party to be able to exercise jurisdiction over these offences when committed by its nationals or in its territory, or on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed (**Article 6(1)**). The Convention further gives each State Party the *option* to establish its jurisdiction over these offences when committed *against* its nationals or facilities abroad (such as embassies), when committed on board official State aircraft or by a stateless person habitually resident in its territory, or when committed in an attempt to compel that State to do or abstain from doing any act (**Article 6(2)**). Australia will take up this voluntary jurisdiction. Voluntary jurisdiction will ensure that Australia has the ability to take action against offences falling within **Article 6(2)** in the event that no other State is in a position, or is willing to do so. Adoption of only the compulsory basis of jurisdiction may prove embarrassing in the event that terrorist bombing activities were directed against Australian nationals or government facilities abroad and no other jurisdictional basis was available. State Parties must notify the Secretary-General of the United Nations upon ratifying, accepting, approving or acceding to the Convention which if any of the optional grounds for jurisdiction they have established and notify the Secretary-General of any change (**Article 6(3)**). The Convention expressly does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law (**Article 6(5)**).

Obligation to extradite or prosecute alleged offenders found in territory

11. If a State Party receives information that a person who has or is alleged to have committed any of these offences may be present in its territory, it must investigate this information. If it is satisfied that the circumstances so warrant, that State must ensure that person's presence for the purpose of prosecution or extradition (**Article 7(1) and (2)**). It must then immediately notify, directly or through the Secretary-General of the United Nations, those State Parties with jurisdiction over the offence and, if it considers it advisable, any other interested State Parties, of the fact that such person is in custody and of the circumstances which warrant that person's detention. It must also inform those State Parties of its findings and indicate whether it intends to exercise its own jurisdiction over the matter (**Article 7(6)**). **Article 8** obliges a State Party that is not able to extradite a person who has or is alleged to have committed any of these offences to another State Party with jurisdiction over the case to submit the case without undue delay to its own prosecutorial authorities without exception whatsoever and whether or not the offence was committed in its territory. Given this obligation, State Parties must also be able to exercise jurisdiction over the Convention offences in such cases (**Article 6(4)**).

12. The State Party where the alleged offender is prosecuted is obliged, in accordance with its domestic law or applicable procedures, to communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who must in turn transmit the information to the other State Parties (**Article 16**).

Obligation to provide assistance in prosecution of alleged offenders

13. **Article 9** requires State Parties to deem the Convention offences to be included as extraditable offences in existing extradition treaties they may have with other State Parties. State Parties further undertake to include such offences in new extradition treaties to be subsequently concluded between them. Those State Parties that, like Australia, do not make extradition conditional on the existence of a treaty, commit to recognise the Convention offences as extraditable offences between themselves, subject to the conditions provided by the law of the State to which the request was made.

14. **Article 10** obliges State Parties to afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences, including assistance in obtaining evidence at their disposal necessary for the proceedings. This obligation is to be carried out in conformity with any treaties or other arrangements on mutual legal assistance that may exist between the Parties or, in the absence of such treaties or arrangements, in accordance with their domestic law.

15. A State Party *cannot* refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives (**Article 11**, as a corollary to Article 5). It *may*, however, refuse such a request if it has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons (**Article 12**).

16. A person in the custody of one State Party whose presence in another State Party is requested to assist in the investigation or prosecution of Convention offences may be transferred if the person freely consents and the competent authorities of both States agree (**Article 13(1)**). The State to which the person is transferred is obliged to keep that person in custody, unless the transferring State requests or agrees otherwise, and to return the person to the transferring State's custody without requiring extradition proceedings. The person transferred must receive credit for service of the sentence being served in the transferring State for time spent in the custody of the State to which he was transferred (**Article 13(2)**). The transferred person cannot be prosecuted or detained in the territory of the State to which that person is transferred in respect of acts or convictions prior to his or her departure from the territory of the transferring State, unless the transferring State agrees otherwise (**Article 13(3)**).

17. The Convention confirms the rights of a person detained pursuant to the Convention in a foreign country to consular assistance or assistance from the International Committee of the Red Cross (**Article 7(3) and (5)**). It also requires that any person taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to the Convention is guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights (**Article 14**).

Obligations to cooperate in preventing terrorist bombings

18. **Article 15** obliges State Parties to cooperate to prevent the commission of Convention offences, including through preventing and countering preparations in their respective territories for the commission of those offences within or outside their territories, by exchanging accurate and verified information in accordance with their national law, and coordinating administrative and other measures and through research and development of methods of detection of explosives,

consultations on standards for marking explosives, exchange of information on preventive measures, cooperation and transfer of technology, equipment and related materials.

Savings clauses

19. The Convention includes a number of savings clauses to safeguard the sovereignty of State Parties and preserve existing international law. **Article 17** obliges State Parties to carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States. **Article 3** provides that the Convention will not apply in relation to offences committed within a single State, where the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a valid basis to exercise jurisdiction. In such cases, however, the provisions of the Convention on prevention and law enforcement cooperation will still apply, as appropriate.

20. **Article 18** confirms that nothing in the Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law. **Article 19(1)** further confirms that nothing in the Convention affects other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.

21. **Article 19(2)** provides that the activities of armed forces during an armed conflict that are already governed by international humanitarian law (that is, the laws of armed conflict, both under customary international law as well as codified in the Four Geneva Conventions of 12 August 1949, the two Additional Protocols of 1977 and other instruments) are not governed by the Convention.

Dispute settlement

22. If two or more State Parties cannot settle a dispute concerning the interpretation or application of this Convention within a reasonable time through negotiation, the Convention provides for one of them to be able to submit that dispute unilaterally to arbitration or, if the parties are unable to agree within six months on the organisation of the arbitration, to the International Court of Justice (**Article 20(1)**). A State may exempt itself from this procedure through a declaration to that effect at the time of its signature, ratification, acceptance, approval of, or accession to the Convention. The other State Parties are thereby also exempted from the procedure with respect to the State Party making such a declaration (**Article 20(2)**). Any State that has made such a declaration may at any time withdraw it by notification to the Secretary-General of the United Nations (**Article 20(3)**). Australia does not intend to make such a declaration.

Implementation

23. Implementation of the Convention will not require amendments to be made to State or Territory legislation. The Commonwealth *Criminal Code Act 1995* will be amended to implement the Convention.

Costs

24. Australia's accession to the Convention would not impose any direct financial costs. Costs related to law enforcement activity such as investigations, prosecutions, extradition proceedings and responding to mutual assistance requests will be borne from existing resources.

Consultation

25. The Attorney-General wrote to the Attorneys-General of the States, the Australian Capital Territory and the Northern Territory. Details of the responses of the States and Territories are listed in Attachment A.

26. Responses from non-government organisations are listed in Attachment B.

Regulation Impact Statement

27. The Office of Regulation Review, Productivity Commission has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action: amendments, protocols, annexes or other legally binding instruments

28. The Convention is silent on the question of protocols, annexes or other legally binding instruments. It is also silent on the question of amendment. Under international law, this means that the amendment of the Convention is governed by the principles set out in **Article 40** of the Vienna Convention on the Law of Treaties.

Withdrawal or denunciation

29. The Convention provides for denunciation by written notification to the Secretary-General of the United Nations. Denunciation takes effect one year after that notice is received (**Article 23**).

Contact details

Security Law and Justice Branch
Information and Security Law Division
Attorney-General's Department

Consultation with the States, the Australian Capital Territory and the Northern Territory

The Attorney-General wrote to the Attorneys-General of the States, the Australian Capital Territory and the Northern Territory explaining the principal and ancillary Commonwealth offences that implementing the Convention would create. The Attorney-General's letter noted that existing State and Territory legislation would apply to Convention offences that were committed in Australia but that that legislation would not be sufficient to fully implement the Convention. The Attorney-General proposed that a Commonwealth Act would establish a comprehensive jurisdictional and procedural regime without interfering with the responsibility of States and Territories to provide for offences committed in Australia.

The Attorney-General's letter explained that the Convention would apply to a limited extent where an offence had no relevant international element. The provisions of the Convention that will apply in such a case relate to mutual assistance, the transfer of detainees to assist with investigation or prosecution of offences and the treatment of detainees. The results of the consultations with the States, the Australian Capital Territory and the Northern Territory Attorneys-General were favourable.

The Attorney-General of the Northern Territory agreed that the Convention should be implemented by a combination of State and Territory and Commonwealth legislation such that the Commonwealth legislation would only operate to the extent that State and Territory legislation does not implement the Convention.

The Attorney-General of Western Australia agreed that Australia should become a party to the Convention and that it be implemented in Australia along the lines outlined in the Commonwealth Attorney-General's letter.

The Attorney-General of Tasmania supported Australia becoming a party to the Convention. He advised that the Convention's terms were already implemented by Tasmanian legislation and that he would support the enactment of Commonwealth legislation as proposed.

The South Australian Government supported Australia becoming a party to the Convention provided the Convention was implemented so as not to affect the operation of the State criminal law. The South Australian Attorney-General's letter advised that the formula referred to in the Commonwealth Attorney-General's letter was acceptable.

The Premier of Queensland advised that the Queensland Government would support Australia becoming a signatory to the Convention and that he would support the implementation strategy which the Commonwealth Attorney-General proposed.

The Victorian Attorney-General advised that Victoria supported Australia's accession to the Convention provided that the Commonwealth and the States and Territories agreed on how the Convention would be implemented. The Victorian Government did not oppose the proposed legislation on the basis that the Commonwealth Act did not indicate any intention to 'cover the field' in relation to Convention offences.

The New South Wales Attorney-General advised that New South Wales supported Australia's becoming a signatory to the Convention. He advised that consideration was being given to appropriate statutory amendments to ensure, amongst other things, that the offence provisions of

the New South Wales Crimes Act 1900 were sufficiently wide to comprehend the offences in Article 2 of the Convention (ie unlawfully and intentionally delivering, placing, discharging or detonating an explosive or other lethal device as described and associated ancillary offences).

The Australian Capital Territory Attorney-General accepted that Australia should become a party to the Convention. He noted the intention to introduce Commonwealth legislation to establish a comprehensive jurisdictional and procedural regime over Convention offences without interfering with the responsibility of States and Territories to provide for offences committed in Australia. He advised that many offences dealt with in the Convention were already covered by the Territory's legislation. He also advised that the ACT Government supported the establishment of criminal jurisdiction for offences committed outside Australia by Australian citizens.

Consultation with Non-government organisations

Amnesty International Australia had no objection to Australia becoming a party to the Convention and advised that it welcomed international efforts to combat terrorism. However, it pointed out that this was an area where particular cases may give rise to difficult situations where a regime is either repressive or has no acceptable system of criminal justice or both.

The Australian Red Cross believed that Australia should sign the Convention and that the need for the Convention reflected the profound changes in international terrorist organisations, targets and operations.

The Law Council of Australia advised that it believed that Australia ought to become a party to the Convention.

The Law Institute of Victoria submitted that implementing the treaty would see a transfer of power (albeit a very small transfer of power) from the States to the Commonwealth, that it was undesirable to have a specific offence of 'terrorism' and that there was unlikely to be much utility in the reciprocal extradition/witness arrangements. It could not see any sound legal reason for Australia adopting the treaty.

The Law Society of the Australian Capital Territory advised that it fully supported Australia being one of the parties to the Convention.

The United Nations Association of Australia Incorporated supported Australia becoming a party to the Convention. The Association viewed the Convention as a positive contribution to the removal of threats of terrorism internationally.