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**Criminal Code Amendment (Suppression of
Terrorist Bombings) Bill 2002**

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 120 2001-02

Criminal Code Amendment (Suppression of Terrorist
Bombings) Bill 2002

Jennifer Norberry
Law and Bills Digest Group
15 April 2002

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Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002

Date Introduced: 12 March 2002

House: House of Representatives

Portfolio: Attorney-General

Commencement: The provisions which implement the International Convention for the Suppression of Terrorist Bombings cannot commence before the Convention enters into force for Australia¹ and must commence no later than 6 months after that event occurs.

Purpose

The Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (the Bill):

- implements the [International Convention on the Suppression of Terrorist Bombings](#) (the Convention), and
- amends the Criminal Code so it includes Convention offences.

Background

International Conventions dealing with terrorism

The International Convention on the Suppression of Terrorist Bombings (1997) is one of the 12 major multilateral conventions and protocols dealing with terrorism. The others are:

- Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention, 1963—safety of aviation)
- Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention, 1970—aircraft hijackings)
- Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention, 1971—sabotage of aircraft in flight)

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- Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973—prohibiting attacks on senior government officials and diplomats)
- International Convention Against the Taking of Hostages (1979)
- Convention on the Physical Protection of Nuclear Material (1980)
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988—extending and supplementing the Montreal Convention)
- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (1988—relating to terrorist activity on board ships)
- Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988— applying to terrorist acts on fixed offshore platforms)
- Convention on the Marking of Plastic Explosives for the Purposes of Detection (1991—providing for chemical marking to facilitate the detection of plastic explosives in order to combat aircraft sabotage), and
- International Convention for the Suppression of the Financing of Terrorism (1999).²

11 September 2001

Following the attacks on the World Trade Center in New York and the Pentagon in Washington, DC the Howard Government made a number of announcements about the state of Australia's national security and plans for its enhancement. On 18 September 2001, the Attorney-General issued a press release that referred in part to Australia's legal regime for dealing with international terrorism. The Attorney cited three anti-terrorism conventions to which Australia is not a party and said:

With regard to the International Convention for the Suppression of Terrorist Bombings, drafting instructions are with the Office of Parliamentary Counsel to enable legislation with a view to Australia become a party to the Convention. With regard to the International Convention for the Suppression of the Financing of Terrorism³, as some of its provisions are already contained in existing legislation, Australia is consulting on whether to become a party as it is on the Convention on the Marking of Plastic Explosives for the Purposes of Detection.⁴

The Bill is part of a package of counter-terrorism legislation introduced by the Howard Government on 12 March 2002. The other Bills in the package are the Security Legislation Amendment (Terrorism) Bill 2002 [No.2]⁵, the Suppression of the Financing of Terrorism Bill 2002, and the Border Security Legislation Amendment Bill 2002. Other components

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of the anti-terrorism package are the *Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002* and the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (the ASIO Bill).⁶ The Government has also introduced a Telecommunications Interception Legislation Amendment Bill 2002 which enables interception warrants to be granted to investigate ‘an offence constituted by conduct involving an act or acts or terrorism’.⁷ The ASIO Bill has been referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD for report by 3 May 2002. The other five Bills⁸ have been referred to the Senate Legal and Constitutional Legislation Committee for report by the same date.

Readers of this Digest are referred to the Digests that have been or will be produced for each of these Bills and to two Parliamentary Library Research Papers, [Terrorism in Australia: Legislation, Commentary and Constraints](#) and [Terrorism and the Law in Australia: Supporting Materials](#).

The two Research Papers contain a detailed treatment of issues associated with legislating to counter terrorism. One relevant theme struck in those papers is that in enacting specific anti-terrorism laws a cautious and considered approach must be taken. If there was a thesis in the *Terrorism and the Law in Australia* project it was that there are dangers in underestimating our legislative and administrative preparedness and that there are difficulties in striking an appropriate balance between safety and liberty. The question of preparedness and the difficulty of balancing safety and liberty are considered in the *Legislation, Commentary and Constraints* Paper. Comparative approaches in the United Kingdom and United States are canvassed in the *Supporting Materials* Paper. In summary, the Paper observes that while precedents are useful, we will need our own views regarding the terrorist threat in Australia and whether the measures in question are necessary, sufficient and proportionate.

Also of note is the recent Leader’s Summit on Terrorism and Multi-Jurisdictional Crime. On 5 April 2002, the Prime Minister and State and Territory Leaders negotiated an Agreement on Terrorism and Multi-Jurisdictional Crime. In relation to terrorism, this included an agreement to:

... take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation, including roll back provisions to ensure that the new Commonwealth law does not override State law where that is not intended and to come into effect by 31 October 2002. The Commonwealth will have power to amend the new Commonwealth legislation in accordance with provisions similar to those which apply under Corporations arrangements. Any amendment based on the referred power will require consultation with and agreement of States and Territories, and this requirement to be contained in legislation.⁹

At present, the details and implications of the Agreement are not clear.

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International Convention for the Suppression of Terrorist Bombings

An international convention against terrorist bombings was proposed by the United States following a truck bombing attack on US military personnel in Saudi Arabia in 1996.¹⁰ In the latter part of 1996, a United Nations ad hoc working group began meeting to formulate a draft convention. The Convention was approved by the UN General Assembly at the end of 1997. The Convention deals not only with bombings but also with attacks using chemical materials, biological agents, and radioactive materials.¹¹ It entered into force on 23 May 2001 and will enter into force for Australia on the 30th day after Australia's instrument of accession is deposited.

One commentator has remarked that the Convention:

... will fill an important gap in international law by expanding the legal framework for States to cooperate in the investigation, prosecution and extradition of persons who engage in ... international terrorism.¹²

It has also been said that the Convention contains a number of important innovations including:

- creating a multilateral convention dealing with attacks by terrorists in public places (existing anti-terrorist treaties deal with specific areas of concern including international civil aviation, protecting diplomats and other internationally protected persons; protecting nuclear material, hostage taking and maritime terrorism).
- not defining 'terrorism' (unlike other treaties) and instead defining 'particular conduct that, regardless of its motivation, is condemned internationally and therefore is an appropriate subject of international law enforcement cooperation'.¹³

The requirements of the Convention are explained in the [National Interest Analysis](#) (NIA) which accompanied its tabling in the Commonwealth Parliament.¹⁴ The requirements include:

- enacting legislation criminalising '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'.¹⁵
- legislating for ancillary offences—such as attempts to commit such offences or participation in such offences.
- establishing jurisdiction over such offences. It is a requirement of the Convention that the State Party is able to exercise jurisdiction over such offences when committed by its nationals, in its territory or on board a vessel flying its flag or on an aircraft

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registered in the State Party. Additionally, a State Party may establish jurisdiction over the offences 'when committed against its nationals or facilities abroad, 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 the State Party to do or abstain from doing any act'.¹⁶

The Constitution, treaty-making and implementation

The Bill is intended to implement the International Convention on the Suppression of Terrorist Bombings into Australian domestic law. The executive power of the Commonwealth, found in section 61 of the Constitution, gives the Australian Government the power to enter into international treaties. While Australia is bound in international law to observe the terms of a treaty once ratification or accession has occurred, the treaty does not become enforceable in Australian domestic law unless and until legislative action is taken to implement it.¹⁷

Section 51(xxix) of the Commonwealth Constitution, the external affairs power, supports legislation dealing with matters physically external to Australia, foreign nations, or which implements an international treaty or convention to which Australia is a party. In 1995, the Senate Legal and Constitutional References Committee described limits to the power in the following way:

5.64 Some limitations have been identified to the scope of the power. The power is subject to:

- a) those limitations that restrict federal power generally including express constitutional guarantees (such as freedom of interstate trade) and implied constitutional guarantees (such as the prohibition on legislation discriminating against the States or preventing a State from continuing to exist and function as such);
- b) the requirement that the treaty be genuine or bona fide; and the requirement that a law implementing the treaty be one that can be regarded as a reasonable and appropriate means of giving effect to its object.

5.65 The Attorney-General's Department's submission has indicated that the power extends not only to support a law calculated to discharge Australia's known obligations, but also to those reasonably apprehended.¹⁸ The power may also extend to compliance with the recommendations of international agencies and the pursuit of international objectives which have not been reduced to binding obligations.¹⁹

Importantly, as the Senate Legal and Constitutional Committee emphasised in 2000, the power extends to the implementation of treaties and is not confined to the implementation of treaty obligations *per se*.²⁰ The Committee quoted the judgment of Deane J in *Richardson v. Forestry Commission* in which His Honour said:

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I am of the view that it is not necessary for a treaty to which Australia is a party to impose an obligation upon Australia as a condition precedent to engaging the external affairs power.²¹

Lastly, a section 51(xxix) law need not implement a treaty in full. Partial implementation will not result in constitutional invalidity so long as the law can be characterised as a measure implementing the treaty.²²

Australia is not yet a party to the Convention. However, the provisions in the Bill that implement the Convention cannot commence until after Australia becomes a party to the Convention [**item 2** of the table and **subclauses 2(3) and (4)**].

Treaty-making processes in Australia

In 1996, the Howard Government announced changes to Australia's treaty-making processes.²³ The reforms introduced in 1996 included the following:

- treaties are tabled in Parliament at least 15 sitting days before final treaty action is taken, except in urgent cases.
- an NIA is tabled with the treaty. The NIA contains a statement of why Australia should become a party to the treaty, describes any foreseeable impact this may have, the obligations contained in the treaty and how it is proposed to implement the treaty, and summarises the views of the States, Territories and any non-government organisations that have been consulted.
- treaties and their accompanying NIAs are considered by the Joint Standing Committee on Treaties which usually reports to Parliament within 15 sitting days.²⁴

In the case of multilateral treaties, such as the International Convention on the Suppression of Terrorist Bombings, it is usual for the treaty to be 'open for signature' for a specified period. Countries may sign within that period but will not be bound before ratification occurs. Australia's treaty making procedures usually mean that a multilateral treaty is first signed and the treaty then is tabled in Parliament before ratification occurs. However, the International Convention for the Suppression of Terrorist Bombings was closed for signature on 31 December 1999. This means that Australia will engage in a one-step process to become a party to the treaty—an act of accession.²⁵

Prior to the 1996 reforms, the States and Territories were consulted about treaty-making proposals. However, sometimes consultations resulted in delays to ratification and sometimes consultations were inadequate.

So far the 1996 reforms have avoided each excess.

The June 1996 Principles and Procedures regarding consultation make it clear that their operation does not necessitate 'unreasonable delays' in the negotiation,

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ratification or implementation of treaties. The Principles apply to treaties which concern matters 'of sensitivity and importance' to State and Territory governments.

The Principles state that in deciding negotiating policy or when considering whether to become party to such treaties the federal government 'should, wherever practicable, seek and take into account the views of the States and Territories'. The consultation process continues up to and including implementation.²⁶

When ratifying or acceding to international treaties, the Commonwealth Government sometimes relies partially on existing State and Territory law to implement the treaty. Its own implementing legislation may preserve the operation of relevant State and Territory statutes.²⁷ The Bill reflects this situation.

National Interest Analysis for the Convention

The International Convention for the Suppression of Terrorist Bombings and its NIA were tabled in the Parliament on 12 March 2002 and are currently being considered by the Joint Standing Committee on Treaties.

The NIA outlines the reasons that Australia should become a party to the Convention, describes the Convention obligations and summarises the responses of the States, Territories and non-government organisations who were consulted about the proposed treaty action. The responses by the States and Territories were favourable, although some jurisdictions stated that implementation of the treaty by the Commonwealth should not affect the operation of State or Territory criminal law. Non-government organisations also appear to have supported Australia becoming a party to the Convention.²⁸

Potentially relevant State and Territory criminal laws

As the Bill itself and the responses of some of the States and Territories to Australia's proposed treaty action make clear, there is a variety of offences at State and Territory level which could be relevant if a terrorist act such as the detonation of an explosive or other lethal device in a public place were to occur in Australia.

For example, in New South Wales, it is an offence to commit an act of sabotage where a person's conduct causes damage to a public facility, was intended to cause that damage and was intended to cause extensive destruction of property or major economic loss. The maximum penalty is imprisonment for 25 years.²⁹ The offence of threatening sabotage carries a maximum penalty of 14 years imprisonment in NSW.³⁰ In the Australian Capital Territory there are offences of causing criminal damage to property. The most serious of these, where a person destroys or damages property intending to endanger human life, carries a maximum penalty of 20 years imprisonment.³¹ Both criminal damage to property and arson offences (covering damage by fire or explosives) are common in State and Territory law.³²

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Principles of criminal responsibility in the Commonwealth Criminal Code

The Bill inserts new offences dealing with terrorist bombings into Chapter 4 of the Commonwealth Criminal Code which is located in the Schedule to the *Criminal Code Act 1995*. Chapter 4 is headed ‘The integrity and security of the international community and foreign governments’.

Chapter 2 of the Criminal Code elaborates the principles of criminal responsibility which now apply to all Commonwealth offences, both existing and new. Chapter 2 provides that Commonwealth criminal offences consist of physical elements and, except for strict and absolute liability offences, fault elements. The Code defines four fault elements—intention, knowledge, recklessness and negligence.³³ If an offence provision does not specify a fault element then a default scheme operates.³⁴ The default element for a physical element consisting of conduct is intention. Recklessness is the default fault element for physical elements of circumstance or result. The Code does not prevent other fault elements applying to these physical elements.³⁵ In the case of strict liability offences or offences containing physical elements to which strict liability applies, the prosecution does not need to prove fault but a defence of mistake of fact is available to an accused person.³⁶

Main Provisions

General

The effect of **clause 2** is that the provisions which implement the Convention cannot commence before the day that the Convention enters into force for Australia and must commence no later than 6 months after the day on which the Convention enters into force for Australia.

Item 1 of Schedule 1 inserts a new Division (Division 72)—‘International terrorist activities using explosive or lethal devices’—into the Criminal Code.

New section 72.1 recites the purposes of the provisions, which are to create offences relating to certain ‘international terrorist activities’ and give effect to the Convention.

Exemption from liability for members of the Australian Defence Forces

Article 19(2) of the Convention states:

The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a

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State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

In relation to the Convention exception applying to the ‘official duties’ of armed forces, one commentator explains:

While such an exclusion might be thought to be implicit in the context of the Convention, the negotiators thought it best to articulate the exclusion in the light of the relatively broad nature of the conduct described in Article 2 and the fact that this conduct overlaps with common and accepted activities of state military forces.³⁷

New section 72.2 provides that members of the Australian Defence Forces acting ‘in connection with the defence or security of Australia’ cannot be prosecuted for a **new Division 72** offence.

Primary offences

Article 4 of the Convention requires State Parties to establish the offences set out in Article 2 and to make them punishable by ‘appropriate penalties which take into account the grave nature of those offences’. The Bill contains two primary offences—bombing intending to cause death or serious injury and bombing intending to cause serious destruction which results in major economic loss. In either case, the maximum penalty is life imprisonment [**new subsection 72.3**]. The *Crimes Act 1914* enables a sentencing court to substitute a fine or imprisonment, or both for a penalty of life imprisonment.³⁸

Bombing intending to cause death or serious injury

Article 2(1)(a) of the Convention provides as follows:

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates 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:

- (a) With the intent to cause death or serious bodily injury; ...

New subsection 72.3(1) provides that a person commits an offence if:

- he or she intentionally detonates a device, and
- he or she is reckless about whether the device is an explosive or other lethal device, and
- the device is detonated etc in a place of public use, a government facility, a public transport system or an infrastructure facility, and
- he or she intends to cause death³⁹ or serious harm⁴⁰.

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The wording of the physical elements of the offence generally replicate the wording of Article 2. However, some of the fault elements may be different. Article 2 is not entirely clear but it is arguable that it generally applies the fault element of intention to the physical elements in the offences. However, **new subsection 72.3(1)** applies:

- the lesser standard of ‘recklessness’⁴¹ to one physical element of circumstance in the offence (the nature of the device)
- strict liability to one physical element of circumstance (regarding the nature of the place, facility or system where the device is detonated). Where strict liability applies to an element of an offence, the prosecution does not have to prove a fault element for that physical element but a defence of mistake of fact is available.

It can be said that the use of ‘recklessness’⁴² as a fault element is in keeping with the principles of criminal responsibility found in the Criminal Code which, as a general rule, applies ‘recklessness’ rather than ‘intention’ to a physical element of circumstance in the offence. However, ‘intention’⁴³ can apply to physical elements of circumstance and result and, in keeping with the Convention, is applied by the Bill to the physical element of result in the offence (causing death or serious harm). This is not to suggest that the wording of the offences calls their constitutional validity into question—within reason, it is the Parliament rather than the High Court that determines whether a law is ‘appropriate and adapted’ to implementing a treaty unless, for example, the law ‘goes beyond the treaty or is inconsistent with it’.⁴⁴

Bombing etc intending to cause extensive destruction resulting in major economic loss

Article 2(1)(b) of the Convention provides as follows:

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates 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:

...

(b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

New subsection 72.3(2) provides that a person commits an offence if:

- he or she intentionally detonates a device, and
- he or she is reckless that the device is an explosive or other lethal device, and
- the device is detonated etc in a place of public use, a government facility, a public transport system or an infrastructure facility, and
- he or she intends to cause ‘extensive damage’ to that place, facility or system, and

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- he or she is reckless about whether the intended destruction results in ‘major economic loss’.

Arguably, once again, the Convention offence applies the fault element of intention to the physical elements of the offence, whereas the Bill makes one physical element subject to strict liability (the location of the device), and applies ‘recklessness’ to one physical element of circumstance in the offence (the nature of the device) and to one physical element of result in the offence (major economic loss).

It is interesting to note that the Model Criminal Code Officers Committee’s (MCCOC) report on *Damage and Computer Offences*⁴⁵ suggested a number of offences of sabotage that were based on proposals originally designed to deal with terrorism in the International Convention on the Suppression of Terrorist Bombings. MCCOC’s proposed offence of sabotage applied the fault element of ‘intention’ to the physical elements of conduct and result in the offence.⁴⁶ The expression, ‘public facility’ in the MCCOC offence included the facilities referred to in the Convention. The offence read as follows:

4.3.3 Sabotage

A person:

- (a) who damages a public facility by committing a property offence or by causing an unauthorised computer function, and
- (b) who intends to cause:
 - (i) major disruption to government functions, or
 - (ii) major disruption to the use of services by the public, or
 - (iii) major economic loss,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

The offences of sabotage and threatened sabotage in the NSW Crimes Act are based on, although they do not exactly replicate, the MCCOC proposals.

MCCOC said this about the fault requirements for its proposed sabotage offence:

Formulation of the offence follows the UN Convention in restricting liability to individuals who intend to cause major disruption or major economic loss. It is the element of deliberate attack on public or governmental facilities, which will frequently involve outright terrorism, which justifies the severity of the penalty proposed for sabotage. In the absence of proof of intention to cause harm of this magnitude, the penalties for criminal damage or the computer offences provide adequate sentencing ranges for the merely reckless offender.

In the Code, a person who acts with the realisation that a harmful consequence is certain to follow their action is taken to have intended that consequence.⁴⁷

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Ancillary offences

Articles 2(2) and (3) of the Convention provide for ancillary offences such as attempting to commit an offence as defined in Article 2(1).

Such ancillary offences— for instance, attempts, complicity and common purpose and incitement— will be provided as a result of the operation of Part 2.4 of the Criminal Code. Subsection 11.6(2) of the Code provides that a reference in a Commonwealth law ‘to a particular offence includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy)’. Part 2.4 provides that ancillary offences are punishable as if the primary offence had been committed.⁴⁸

Definitions

New section 72.10 is a definitions section. It defines words contained in the new offence provisions in the same way as they are defined in the Convention. As a result, ‘explosive or other lethal device’ means:

- (a) An explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage; or
- (b) A weapon or device that is designed, or has 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.

Convention definitions also encompass locations and were chosen during negotiations for the Convention ‘with a view toward criminalizing attacks in locations where terrorist attacks had typically occurred and where such attacks would put the public at greatest risk of harm’.⁴⁹ Following the Convention, the Bill defines:

- ‘government facility’ to include:
 - any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.
- ‘infrastructure facility’ to mean:
 - any publicly or privately owned facility providing or distributing services for the benefit of the public, such as water, sewage, energy, fuel or communications.
- ‘place of public use’ to mean:

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those parts of any building, land, street, waterway or other location that are accessible or open to members of the public, whether continuously, periodically or occasionally, and encompasses any commercial, business, cultural, historical, educational, religious, governmental, entertainment, recreational or similar place that is so accessible or open to the public.

- ‘public transportation system’ to mean:
all facilities, conveyances and instrumentalities, whether publicly or privately owned, that are used in or for publicly available services for the transportation of persons or cargo.

Jurisdiction

In general, the Convention applies to conduct that has an international aspect.⁵⁰ An example might include the case where the perpetrators and victims are from different countries.⁵¹ During the consultation process with the States and Territories, the Attorney-General wrote to each jurisdiction and explained 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.⁵²

The Bill follows the Convention and will not apply to offences that are ‘exclusively internal’ to Australia.

New section 72.4 is a jurisdictional provision. Its effect is that conduct is only caught by **new section 72.3** in the following circumstances:

- (1) one or more of the circumstances set out in **new paragraphs 72.4(1)(a)-(g)** apply, and
- (2) the circumstances relating to the offence are not ‘exclusively internal’ as defined by **new subsection 72.4(2)**.

In order to satisfy (1) the proscribed conduct must occur wholly or partly in Australia, or the offender must be an Australian citizen or a stateless person living in Australia, or the conduct must be subject to the jurisdiction of another State Party and the alleged offender is in Australia, or the offence must be committed against a Commonwealth, State or Territory government facility located outside Australia, or the offence must be committed against an Australian citizen or corporation, or the purpose of the conduct must be to compel the governmental institutions of the Commonwealth, a State or a Territory to do or not do an act. These requirements give effect to the compulsory and optional jurisdictions in the Convention.

Conduct will be excluded from the reach of the offence provisions if the circumstances are ‘exclusively internal’, that is if all of the following apply—the conduct occurs wholly in

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Australia, the offender is an Australian citizen, all of the victims of the offence are Australian citizens or bodies corporate, the offender is in Australia and no other State Party has a basis for exercising jurisdiction in relation to the conduct.

The operation of State and Territory law

New section 72.5 provides that the operation of other Commonwealth, State and Territory laws is not excluded or limited by **new Division 72**. **New section 72.5** thus enables State and Territory laws of the types described earlier to continue to operate.

Commencing prosecutions

New section 72.7 provides that a prosecution under **new Division 72** can only be commenced with the Commonwealth Attorney-General's consent. It also stipulates what matters the Attorney-General must consider in making a decision. These are:

- the terms of the Convention
- whether the proscribed conduct also breaches State or Territory criminal laws, and
- whether a State or Territory prosecution has been or will be commenced.

Evidentiary provisions

New section 72.8 enables Ministers with portfolio responsibilities for the *Charter of the United Nations Act 1945* and the *Australian Citizenship Act 1948* to issue certificates about such matters as when the Convention entered into force for Australia and whether a person is an Australian citizen, respectively. In legal proceedings, such certificates are prima facie evidence of what they state.

Jurisdiction of State courts

Section 38 of the *Judiciary Act 1903* gives the High Court exclusive jurisdiction in relation to a number of matters, including 'matters arising directly under any treaty'. **New section 72.9** excludes the operation of section 38 of the Judiciary Act in relation to matters arising under **new Division 72**. The reason for doing so is to ensure that offences created by **new Division 72** will be prosecuted in State and Territory courts rather than in the High Court. **New section 72.9** does not (and could not) oust the original jurisdiction of the High Court to hear matters 'arising under any treaty' entrenched by section 75(i) of the Constitution—rather it removes a statutory barrier to a court other than the High Court exercising jurisdiction in such matters.

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Amendment of the *Extradition Act 1988*

Article 11 of the Convention provides that Convention offences are not to be regarded as ‘political offences’ for the purposes of extradition or mutual assistance and that accordingly:

...a request for extradition or for mutual legal assistance based on such an offence may not be refused 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.

The *Extradition Act 1988* reflects universally recognised exceptions to extradition such as exemption for political offences. **Item 2** of the Schedule amends the definition of ‘political offence’ in section 5 of the Extradition Act so that offences created by Article 2 of the Convention are not included as political offences.⁵³ As a result, extradition cannot be refused solely on this ground in respect of persons accused of those offences.

The Bill does not amend the *Mutual Assistance in Criminal Matters Act 1987*. Under that Act, the Attorney-General may refuse a request for mutual assistance if he or she forms the opinion that the purpose of the request is to prosecute or punish a person for a ‘political offence’.⁵⁴ An amendment to the Mutual Assistance in Criminal Matters Act is unnecessary because that Act adopts the definition of ‘political offence’ contained in the Extradition Act.⁵⁵

Concluding Comments

One question that might be asked about the Bill relates to the fault elements in the offences created by **new subsections 72.3(1) and (2)**. The offences in the Bill generally follow the scheme set out in the Commonwealth Criminal Code, in which the lesser standard of ‘recklessness’ is applied to physical elements of circumstance and result, and the higher standard of ‘intention’ is applied to physical elements of conduct. Given the serious penalties for the offences and, if it is more in keeping with Convention, should ‘intention’ be applied to certain physical elements of circumstance or result in the offences—for instance, to the element of result in **new paragraph 72(2)(e)**, that the destruction ‘results or is likely to result in major economic loss’?

Endnotes

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- 1 This will occur 30 days after Australia has deposited its instrument of accession.
 - 2 http://www.undcp.org/terrorism_conventions.html (accessed 15 April 2002).
 - 3 Australia signed this Convention on 15 October 2001 but has not yet ratified.

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- 4 Attorney-General, 'Australia's national security', *News Release*, 18 September 2001.
- 5 Introduced on 13 March 2002. The original Bill [the Security Legislation Amendment (Terrorism) Bill 2002], which was introduced on 12 March 2002, was withdrawn on 13 March 2002 and the [No.2] Bill was substituted. The reason was that the Office of Parliamentary Counsel had drawn the Government's attention to a discrepancy between the title of the original Bill and the title referred to in the notice of presentation given by the Attorney-General. This discrepancy meant that the Bill's introduction was inconsistent with House of Representatives' Standing Orders. The withdrawal and re-introduction were designed to address this problem. See Mr Peter Slipper MP, House of Representatives, *Hansard*, 13 March 2002, pp.1138-9.
- 6 Introduced into the House of Representatives on 21 March 2002.
- 7 See **item 7, Schedule 1**, Telecommunications Interception Legislation Amendment Bill 2002.
- 8 As stated above, the Anti-hoax Bill has received Royal Assent.
- 9 Attorney-General, *News Release*, 'National Move to Combat Terror', 7 April 2002. The Attorney's News Release can be found at: http://www.ag.gov.au/aghome/agnews/2002newsag/37_02.htm (accessed 15 April 2002).
- 10 SM Witten, 'The International Convention for the Suppression of Terrorist Bombings' *American Journal of International Law*, October 1998, pp.2-12.
- 11 See Article 22(2) of the Convention and the National Interest Analysis for the International Convention for the Suppression of Terrorist Bombings, done at New York on 15 December 1997.
- 12 Witten, *op.cit.*, p. 1.
- 13 *ibid.*, p.3.
- 14 See below for a discussion of treaty-making processes in Australia.
- 15 National Interest Analysis, *op.cit.*, para. 8.
- 16 *ibid.*, para. 10.
- 17 See, for example, S Joseph & M Castan, *Federal Constitutional Law. A Contemporary View*, Lawbook Co, Sydney, 2001.
- 18 In *Richardson v. Forestry Commission* (1988) 164 CLR 261 at 295, Mason CJ and Brennan J said, 'As the external affairs power is a plenary power, it extends to support a law calculated to discharge not only Australia's known obligations but also Australia's reasonably apprehended obligations. The power extends to support a law required to discharge a treaty obligation which is known to exist and also a law which is required to ensure the discharge of a treaty obligation which is reasonably apprehended to exist.'
- 19 Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995, pp. 76-7.
- 20 Senate Legal and Constitutional Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999*, 2000.

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- 21 (1988) 164 CLR 261 at 313.
- 22 Senate Legal and Constitutional Committee, op.cit.
- 23 ‘Government reform of treaty-making’, *Press Release (Minister for Foreign Affairs)*, 2 May 1996.
- 24 Department of Foreign Affairs and Trade, ‘Stages in the development of treaties’, Australia and International Treaty Making Information Kit, <http://www.austlii.edu.au/au/other/dfat/reports/infokit.html> (accessed 15 April 2002).
- 25 *ibid.*
- 26 J Trone, *Federal Constitutions and International Relations*, University of Queensland Press, 2001, pp. 33–4.
- 27 *ibid.*
- 28 However, the Law Institute of Victoria reportedly said it could not see any sound legal reason for Australia adopting the treaty. National Interest Analysis, op.cit, Attachment B.
- 29 Section 203B, *Crimes Act 1900* (NSW).
- 30 Section 203C, *Crimes Act 1900* (NSW).
- 31 Subsection 128(2), *Crimes Act 1900* (ACT).
- 32 For example, section 129, *Crimes Act 1900* (ACT) dealing with arson and section 190, *Criminal Code Act 1899* (Qld) dealing with criminal damage to property. Part VII, Division 6 of the Criminal Code of the Northern Territory includes offences of arson, attempting to destroy property by explosives, and criminal damage.
- 33 Division 5, Criminal Code.
- 34 Section 5.6, Criminal Code.
- 35 Subsection 5.1(2), Criminal Code.
- 36 Section 6.1, Criminal Code.
- 37 Witten, op.cit, p.7.
- 38 Subsection 4B(2A), *Crimes Act 1914*.
- 39 ‘Death’ is defined in the Criminal Code dictionary as:
- (a) the irreversible cessation of all function of a person’s brain (including the brain stem);
or
 - (b) the irreversible cessation of circulation of blood in a person’s body.
- 40 ‘Serious harm’ is defined in the Criminal Code dictionary as meaning:
- harm (including the cumulative effect of any harm):
 - (a) that endangers, or is likely to endanger, a person’s life; or
 - (b) that is or is likely to be significant and longstanding.
- The word, ‘harm’, is also defined in the Criminal Code dictionary.

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- 41 The definition of ‘recklessness’ in the context of ‘result’ in the Criminal Code is:
A person is reckless with respect to a result if:
(a) he or she is aware of a substantial risk that the result will occur, and
(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk. [subsection 5.4(2)].
- 42 Note that if recklessness is a fault element for a physical element of an offence, then proof of intention, knowledge or recklessness will satisfy that fault element [subsection 5.4(4), Criminal Code].
- 43 A person has intention with respect to a result if ‘he or she means to bring it about or is aware that it will occur in the ordinary course of events’. Subsection 5.2(3), Criminal Code.
- 44 Senate Legal and Constitutional Committee, *op.cit.* Quotation from the judgment of Mason CJ in *Commonwealth v. Tasmania* (1983) 158 CLR 1 at 132.
- 45 Model Criminal Code Officers Committee, *Report. Chapter 4. Damage and Computer Offences and Amendment to Chapter 2: Jurisdiction*, January 2001.
- 46 By operation of the default provisions of the Criminal Code, ‘intention’ applies to the physical element of conduct in 4.3.3(a).
- 47 Model Criminal Code Officers Committee, *op.cit.*, p. 211.
- 48 Subsections 11.1(1), 11.2(1) and sections 11.4 and 11.5, Criminal Code.
- 49 Witten, *op.cit.*, p. 4.
- 50 See Article 3. The exceptions are found in Articles 10-15 of the Convention which deal with extradition and mutual legal assistance.
- 51 Witten, *op.cit.*
- 52 National Interest Analysis, *op.cit.*, Attachment A.
- 53 There is a long list of exceptions to the definition of ‘political offence’ in the Extradition Act. Offences constituted by conduct described in a number of multilateral anti-terrorist conventions are amongst the matters excluded from the definition.
- 54 Section 5, Mutual Assistance in Criminal Matters Act.
- 55 Section 3, Mutual Assistance in Criminal Matters Act.

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