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Non-Proliferation Legislation Amendment Bill 2003

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Non-Proliferation Legislation Amendment Bill 2003

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Law and Bills Digest Group
18 September 2003

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Non-Proliferation Legislation Amendment Bill 2003

Date Introduced: 26 June 2003

House: House of Representatives

Portfolio: Foreign Affairs

Commencement: Main provisions commence on Royal Assent or the day after Royal Assent

Purpose

To amend:

- the *Nuclear Non-Proliferation (Safeguards) Act 1987* to strengthen Australia's arrangements for the security of nuclear material and related information, and
- the *Comprehensive Nuclear Test-Ban Treaty Act 1998* to enable Australia to apply legislation banning nuclear weapon tests ahead of entry into force internationally of the Comprehensive Nuclear Test Ban Treaty.

Background

September 11, Iraq and proliferation

In the post-September 11 world, international proliferation issues have again come to the fore. Preventing terrorists acquiring weapons of mass destruction – not least nuclear weapons – is a key focus of the United States led 'war on terror'. Restraining acquisition of such weapons by nation states is also a significant issue on the global agenda once more, with the current tension over North Korea's nuclear weapons plans only the most prominent of a number of examples. The two issues are linked. Controlling proliferation of nuclear armaments and other weapons of mass destruction reduces the possibility that such weapons may be acquired by terrorists.

Writing in *The Australian* in July 2003, Greg Sheridan noted that North Korea and Iran had carefully absorbed the lesson of Iraq:

governing regimes will be more secure, no matter how monstrous they are in other respects, if they possess nuclear weapons. In Iran today, the circles of mullahs,

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whether hard-line or moderate, discuss one thing many times, the different fates of Saddam Hussein and Kim Jong-Il. If Hussein had possessed 20 nuclear weapons when he invaded Kuwait he would still be there today, and would rule Saudi Arabia as well.....¹

According to Sheridan:

If North Korea survives this testing period and becomes an established nuclear weapons state the pressure on Japan and South Korea to follow suit would be overwhelming. Eventually, over perhaps a decade or two, the world will be transformed into one in which most big states have nuclear weapons. Trying to prevent leakage of weapons to terrorists then would be Sisyphean.²

Australia and Non-proliferation³

The international Treaty on the Non-Proliferation of Nuclear Weapons ('NPT') entered into force in 1970. The NPT is supported by a verification system provided by the International Atomic Energy Agency ('IAEA'). In the 1960s commentators assessed that 20-25 states would develop or acquire nuclear weapons by the 1980s. A measure of the NPT's success is that the spread of nuclear weapons projected in the 1960s did not occur.

There are 187 state parties to the NPT. The main states yet to join are Cuba, India, Israel and Pakistan. The NPT is reviewed every five years. In 1995 NPT members agreed to an indefinite extension of the Treaty.

At the last NPT review conference in May 2000, Australia and Japan jointly proposed various measures, including early entry into force of the Comprehensive Nuclear Test Ban Treaty, support for negotiation of a Fissile Material Cut-off Treaty, universalisation of the IAEA's strengthened safeguards system and steps to ensure that nuclear arms reductions are irreversible.

The development, production, stockpiling, and use of chemical weapons are banned by the Chemical Weapons Convention, which entered into force in 1997. The Biological Weapons Convention, which entered into force in 1975 bans production and stockpiling - though not use - of biological weapons, but currently contains no verification mechanism.

To ensure the effectiveness of its export licensing provisions in relation to chemical and biological weapons, Australia participates, as chair, in an informal grouping of countries which meet annually to discuss ways of effectively harmonising their national licensing measures. This group, which met initially in 1984 at the Australian Embassy in Brussels, has become known as the "Australia Group".

The Missile Technology Control Regime ('MTCR') came into force in 1987. The MTCR provides export controls on delivery systems rather than the warheads, helping limit the spread of ballistic missile technologies.

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Proliferation Security Initiative

The willingness of North Korea to trade in ballistic missile technologies and its recent nuclear brinkmanship were important factors behind the creation of the 'Proliferation Security Initiative' ('PSI') announced in Poland in May 2003 by US President Bush. The PSI aims to impede the trafficking in weapons of mass destruction ('WMD'), missiles and related items. Participants are Australia, France, Germany, Italy, Japan, the Netherlands, Poland, Portugal, Spain, the UK and the US.

The first meeting of the eleven PSI countries was in Madrid on 12 June 2003:

The Madrid meeting was unanimous on the need to take active measures to stop the flow of WMD, missiles and related items to and from proliferators. This reflected the international alarm at the growing trade in WMD, missiles and related items, including the risk that these might fall into the hands of terrorists.⁴

The second meeting was held in Brisbane on 9-10 July 2003. Members agreed to move quickly on direct, practical measures:

Participants acknowledged that although interdiction efforts have been under way for some time, there is a need to further develop and enhance the capabilities of PSI nations to conduct actual air, ground and maritime interdiction operations in partnership against WMD and delivery systems. To that end, they agreed in principle to the concept of a series of interdiction training exercises, utilising both military and civilian assets as appropriate, and that such exercises should take place as soon as practicable.⁵

The third PSI meeting held in Paris at the beginning of September 2003 agreed that Australia should lead the first such exercise. This exercise – “Pacific Protector” – was held in the Coral Sea from 12 to 14 September 2003.⁶

WMD and Global Terrorists

The most pressing issue post-September 11 is the greatly increased anxiety that weapons of mass destruction – nuclear, chemical or biological – could be used against Western countries by global terrorists such as the Al Qaeda network. According to the Australian Strategic Policy Institute:

it is now more plausible to think that terrorists could wish to inflict truly massive casualties — in the tens of thousands or even more — on innocent people...The risk that terrorists could get hold of such weapons has probably not increased much, if at all, since September 2001. That risk did increase sharply when the Soviet Union fell apart, because the security of its huge stocks of chemical, nuclear and biological weapons was thrown into doubt.

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But there is apparently no clear evidence that Al Qaeda or other international terrorist groups have gained access to WMD. There is good evidence that they have been trying to gain such access, and there can be no doubt they would use WMD if they had them. And the anthrax attacks in the US after September 11, along with the sarin nerve gas attack in Tokyo in 1995, show that some dangerous individuals and groups have got hold of such weapons in the past.

...there is a serious possibility that weapons of any type could be stolen. Governments normally secure their WMD carefully, but it is not hard to imagine that a determined and well-funded effort could get inside help to remove a small number of weapons. This is probably the most likely scenario in which terrorists might acquire WMD. There is thus a real danger that sooner or later there will be a successful WMD terrorist attack. There is also a real risk of a conventional attack on a sensitive facility such as a nuclear power plant which could have some of the same effects as the use of WMD.⁷

In August 2003, the *Australian Financial Review* reported that the head of the Australian Security Intelligence Organisation referred in an informal speech to 'a genuine concern in the United States that another September 11-style catastrophic attack was a certainty and that he was inclined to agree with this view.'⁸ In September 2003 there were reports that Al Qaeda leader Osama bin Laden held a 'terror summit' in Afghanistan in April 2003 to outline plans to use biological weapons in his next 'unbelievable' attacks on the West.⁹

Nuclear Non-Proliferation (Safeguards) Act 1987 ('Safeguards Act')

The Second Reading Speech explains that the Safeguards Act:

gives effect to Australia's safeguards commitments under the Nuclear Non-Proliferation Treaty, under our safeguards agreement with the International Atomic Energy Agency, and under the Convention on the Physical Protection of Nuclear Material. Further, it provides a framework for implementing our network of bilateral agreements concerning transfers of nuclear items.¹⁰

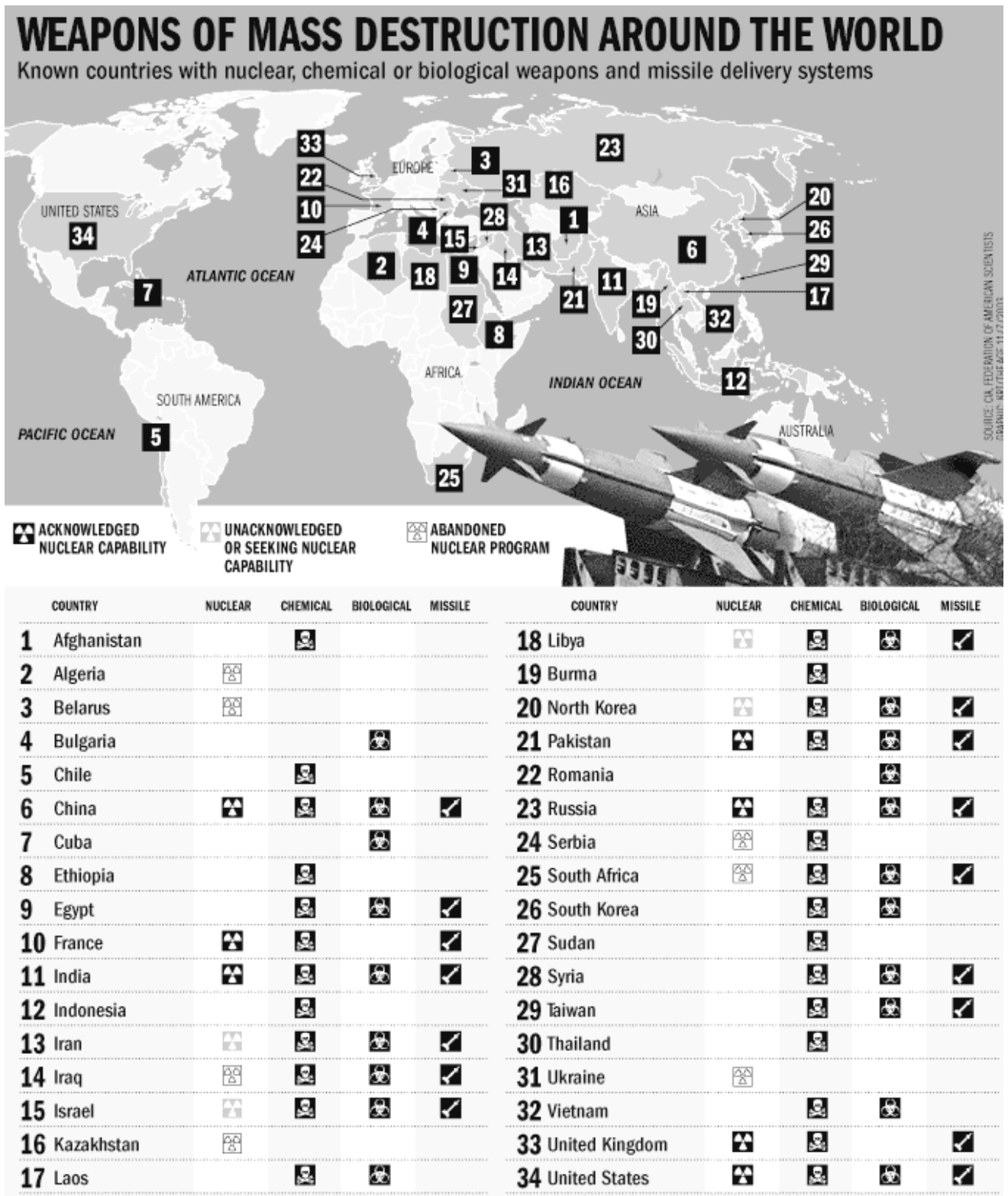
The Safeguards Act currently makes it an offence to possess nuclear material or 'associated items' without a permit issued by the Minister for Foreign Affairs and Trade. The Minister cannot issue such a permit without a report from the Director of Safeguards in the Australian Safeguards and Non-Proliferation Office – an independent statutory position appointed by the Governor-General. In turn, the Director of Safeguards must be satisfied that the nuclear facility complies with the Australian safeguards system and has adequate physical security. The Safeguards Act also makes it an offence to unlawfully communicate information relevant to the production of nuclear weapons or other nuclear explosive devices.

Under the *Australian Protective Services Act 1987* protective service officers can arrest without warrant people who they suspect on reasonable grounds of committing offences under the Safeguards Act.

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(published in *The Age*, 11 July 2003, p. 4.)

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Comprehensive Nuclear Test Ban Treaty

The Partial Test Ban Treaty of 1963 banned atmospheric nuclear testing, although some nuclear weapons states such as France continued to conduct atmospheric tests for the next decade or more.

The next step was to put an end to all testing of nuclear weapons, even below ground. Throughout the 1980s and 1990s Australia supported the conclusion of a Comprehensive Test Ban Treaty ('CTBT'), notwithstanding that for much of this period the United States resisted the concept.

Many nations signed on to the indefinite extension of the NPT in 1995 on the explicit condition that the nuclear powers would cease all nuclear-yield testing.¹¹

In early September 1996, the United Nations General Assembly voted 158-3 to approve the CTBT. The Treaty was opened for signature on 24 September 1996 and was signed by Australia and the five declared nuclear powers (the United States, the United Kingdom, Russia, France and China) on that date. Australia ratified the Treaty on 9 July 1998.

Article XIV of the treaty provides that the treaty does not enter into force until it has been ratified by the 44 'nuclear-capable' states.

In order to detect breaches of the Comprehensive Nuclear Test Ban, the Treaty establishes an 'international monitoring system' involving seismic data obtained from monitoring stations sited around the world.

Bringing the treaty into force would allow the full implementation of the international monitoring system and introduce on-site inspections that would further strengthen the verification regime and increase its transparency.

While the United States under President Clinton signed the CTBT, in 1999 the US Senate refused to ratify the Treaty, and the Bush White House has openly opposed it, hinting that it may end the moratorium on testing that has been in effect since 1992.

Many US allies in the North Atlantic Treaty Organisation, including the United Kingdom, Germany, and France, have signed and ratified the CTBT, as have Japan and Russia. Others, including China, have indicated they will work to bring the treaty into force once the United States has ratified it. 97 nations have ratified the CTBT to date, including 31 of the 44 'nuclear-capable states' that must do so for the CTBT to enter into force.¹²

The Sydney Morning Herald reported in March 2002 that China and Iran had withdrawn their contribution to monitoring nuclear tests, apparently in protest against Washington's position on the CTBT.¹³ The monitoring stations in Iran and China are among 337 around the world intended to send a stream of seismic and other data to the test ban organisation in Vienna, allowing it to spot a nuclear test anywhere on Earth.

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Comprehensive Nuclear Test-Ban Treaty Act 1998

Australia's Comprehensive Nuclear Test-Ban Treaty Act ('CTBT Act') received Royal Assent on 2 July 1998. The Act makes it an offence punishable with life imprisonment to cause a nuclear weapon test explosion or any other nuclear explosion.

However the CTBT Act does not commence until the CTBT 'enters into force for Australia'. The Bill introduces a new provision enabling parts of the Act to apply before the CTBT commences.

In the Second Reading Speech for the Bill, the Parliamentary Secretary to the Minister for Foreign Affairs, Christine Gallus MP, noted that:

While the CTBT has widespread support, with over 100 nations having ratified to date, the very specific requirement that 44 particular countries must ratify to trigger entry into force remains more distant than the government would wish. Australia continues strongly to support and promote entry into force of the CTBT, and already has in place 15 of the 21 treaty monitoring facilities it will host.

This bill offers an opportunity to make one additional and very clear gesture of support for the test ban. The bill amends the commencement provisions of the Comprehensive Nuclear Test-Ban Treaty Act so that key provisions of the act can be proclaimed in advance of entry into force. When these amendments are in place the government will immediately bring into effect provisions which ban nuclear testing in Australia and any contribution to such testing by an Australian citizen.¹⁴

For full background on nuclear weapons testing and the development of the CTBT, see [Bills Digest 190 1997-98](#).¹⁵

Main Provisions

Schedule 1 – Nuclear Safeguards

The Bill proposes amendments to the Safeguards Act aimed at increasing the security of nuclear materials and information.

Item 32 of Schedule 1 inserts **proposed section 28A** in the **Safeguards Act** making it an offence to *establish* a nuclear or related facility without a permit. This is in addition to **existing section 29** which stipulates that it is an offence not to inform the Director of Safeguards of the proposed construction or modification of a nuclear facility, and **existing section 23** which prohibits *possession* of nuclear material or associated items without a permit.

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Item 10 of Schedule 1 inserts **proposed section 16A** in the **Safeguards Act** allowing the Minister for Foreign Affairs and Trade to grant a permit for the establishment of a nuclear or similar facility. As with a permit to possess nuclear material or associate items under **existing section 13**, the Minister cannot issue an establishment permit without a report from the Director of Safeguards, who must be satisfied that the nuclear facility would comply with the Australian safeguards system and have adequate physical security.

Schedule 1 also proposes to create a number of other offences.

Item 26 inserts **proposed section 26A** in the **Safeguards Act** making it an offence to 'communicate information to someone else' which 'could prejudice the physical security of nuclear material or an associated item'. This is in addition to the offence under **existing section 26** of communicating information relevant to the production of nuclear weapons. **Item 1 of Schedule 1** expands the range of materials that the Minister may declare to be 'associated' materials and therefore 'associated items' under **sub-section 4(1)** of the Act. The new definition will include a more comprehensive range of materials suited for use in the production of nuclear weapons or similar activities.

Item 21 inserts **proposed section 25A** in the **Safeguards Act** making it a criminal offence to breach a duty to ensure the physical security of information that could be used for nuclear weapons or other nuclear explosive devices. The *Explanatory Memorandum* notes that a duty to ensure the physical security of such information may arise 'from the person's employment by the permit holder, or pursuant to a contract between them'.¹⁶ **Proposed sub-section 25A(2)** provides that an offence is committed if a person either performs an act or omits to perform an act resulting in a breach of a relevant duty. An 'intention' to engage in the relevant conduct and 'recklessness' as to the breach of duty are minimum requirements for the proposed offence by virtue of the *Criminal Code Act 1995*.¹⁷ The 'recklessness' requirement means that the prosecution would need to establish that it was unjustifiable for a person to risk breaching such a duty.¹⁸

Item 45 inserts **proposed section 31A** in the **Safeguards Act** making it an offence to enter into an area or to get 'onto or into a vehicle, aircraft or ship' to which access is restricted in a permit issued under the Act. The area or vehicle must be clearly signposted to indicate that access is restricted. The offence is one of 'strict liability', meaning the onus is on the person charged with the offence to establish an 'honest and reasonable mistake of fact' to avoid prosecution.

Item 71 adds the new offences under proposed **sections 26A** and **31A** of the **Safeguards Act** to various Commonwealth offences listed in **section 13** of the **Australian Protective Services Act** where protective services officers can make arrests without a warrant if they reasonably suspect an offence is being or has been committed.

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Schedule 2 – Nuclear Test Ban

Item 1 of Schedule 2 proposes to replace **section 2** of the **CTBT Act** with a new provision enabling commencement of various parts of the Act before the CTBT comes into force internationally. Under the new provision, the following parts of the CTBT Act will commence on Proclamation by the Governor-General:

- **Part 2** which deals with the ban on nuclear explosions
- **Part 4 Division 1** which deals with the establishment and operation of monitoring facilities, and
- **Parts 5 and 6** which deal with establishment of Australia's national authority for the CTBT and with miscellaneous matters.

The following parts of the CTBT Act will only commence when the CTBT comes into force:

- **Part 3** dealing with clarification and consultation on Treaty compliance, and with the conduct of on-site inspections, and
- **Part 4 Divisions 2 and 3** which confer powers in relation to use of land for monitoring facilities.

Criticism of the Bill

During a public hearing on the Bill by the Senate Foreign Affairs, Defence and Trade Legislation Committee on 8 September 2003, concerns were expressed that the new offences proposed for the Safeguards Act would criminalise legitimate protest activities and penalise 'whistleblowers' for exposing safety issues in Australia's nuclear industry.

The Australian Conservation Foundation commented:

above all, we question sections like item 45, which creates an offence for unauthorised access to areas restricted under a permit that is issued under the provisions of the act...this offence applies to any area, vehicle, aircraft or ship. That is a very broad definition....

We believe that it is putting communities in fear not only of an industrial activity in the form of moving radioactive waste—an imposed industrial activity—but also in that they are not sure whether or not they can stand on or beside the road to protest.... We do not believe that is advancing the cause of a credible international nuclear safeguards regime. We must keep coming back to the name and the intent of this legislation. ACF looks at this and sees non-proliferation. We support moves towards

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an enhanced and effective international non-proliferation regime—but not one that can be used to cut down the legitimate and important democratic space to discuss matters of real public interest.¹⁹

According to a representative of Greenpeace Australia Pacific:

The recent example...of the whistleblower talking about the construction errors [with the new Lucas Heights reactor] is a very good way of highlighting those problems. If it were not for the fact that the whistleblower had the bravery to speak out...it would appear there would have been a significant cover-up of those problems and that the reactor containment vessel would not have been built to the highest possible standard...

The penalties in these provisions—two years jail, for instance—would provide a massive disincentive to a whistleblower or, in fact, any organisation revealing details of nuclear activities that they believed the public had a right to know about. But I do not believe that they are going to provide a real disincentive to a terrorist organisation with ulterior motives or more sinister objectives.²⁰

Concerns were expressed about the wording of the proposed offences. For example, proposed section 26A had 'a very broad wording that could capture actions that do not prejudice safety and where there is no intent to prejudice safety. That is quite a concern under that section.'²¹

Concerns were also raised about whether local councils could legitimately obtain information about transportation of nuclear material through their areas and pass this on to residents; and about the proposal in the Bill allowing protective service officers to arrest a person without a warrant if they reasonably suspect that one of the new offences has been committed.

In response, the Assistant Secretary of the Australian Safeguards and Non-Proliferation Office, Mr Andrew Leask, noted that in proposing the measures in the Bill:

we are concerned...about the physical protection of nuclear materials and facilities. We are specifically concerned about the security of nuclear facilities and material from theft and sabotage.²²

Mr Leask stated that 'whistleblowers' raising safety issues with the local nuclear industry should not be caught by the proposed new offences (although this could depend on the particular details revealed)²³ and that the Bill would not have any impact on 'lawful, legitimate protest'.²⁴ According to Mr Leask, the Bill:

does seek to make gaining access to designated areas...a more serious offence than simply the offence of trespass under normal and ordinary circumstances. That is what it is designed to do. The bill also gives us, as you pointed out, the right to designate—and, bear in mind, it is a designation; it is not an automatic thing—other forms of areas or transport as special areas for purposes of this Act... It is simply designed to

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make it more serious to get into or onto a lorry or other vehicle transporting nuclear material covered by this Act... It does not, if you like, prevent people from legitimately protesting about a convoy if they should find out about it and choose to protest, but it does make getting onto or into the vehicle a more serious offence... A person would commit an offence if they were to enter an area or get onto or into a vehicle.²⁵

Mr Leask noted that a local council 'might be' liable for 'prejudicing physical security' if it informed residents of the 'route, timing and the type and nature of the vehicle' involved in an impending transportation of nuclear material through its area.²⁶ Mr Leask indicated that giving protective service officers the ability to make arrests without a warrant was necessary because information could be compromised in the time needed to obtain a warrant.²⁷

The full report of the Senate Foreign Affairs, Defence and Trade Legislation Committee into the Bill is available on the Committee's [website](#).²⁸

Concluding Comments

Whistleblowers, Protests and the Safeguards Act

As the Government says, the proposed changes to the Safeguards Act 'will strengthen Australia's arrangements for the protection of nuclear facilities, material and related information',²⁹ helping to ensure the security of such items against access by terrorists. However, based on the evidence of the Australian Safeguards and Non-Proliferation Office to the Senate Foreign Affairs, Defence and Trade Legislation Committee, these changes are also intended, at least in part, to place boundaries around protest activities in Australia in relation to nuclear facilities and material.

Restricting Access

Proposed section 31A of the Safeguards Act will prevent protesters entering designated areas or climbing onto designated ships, aircraft, or vehicles – with offenders having the evidential burden of proving an honest and reasonable mistake to avoid imprisonment for six months. This would appear to be a response to some of the protest activities conducted by groups such as Greenpeace in recent years.

Parliament will need to decide whether the current security environment justifies such restrictions.

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Prohibiting Communication

The potential liability of whistleblowers, protesters and others such as local Councils under **proposed section 26A** (communicating information that could prejudice the physical security of nuclear material and associated items) is more problematic.

The relevant communication for the purpose of section 26A can be between any two people. This leads to the type of concern expressed by Australian Greens leader Senator Bob Brown:

It would mean, for example, that a councillor from the Sutherland Shire Council who flagged that a shipment was about to leave Lucas Heights to go to a nuclear waste dump somewhere, could be sent to jail. So would the journalist who reported the matter.³⁰

As witnesses to the Senate inquiry noted, a person need not *intend* to prejudice the security of nuclear material etc to be guilty of an offence under section 26A. Nor does the proposed section limit offences to situations where prejudice to the physical security of such material is *'likely'* or *'would reasonably be expected to occur'* etc. In contrast to existing section 26, there is no stipulation in proposed section 26A that a person must be acting *'without reasonable excuse'* before an offence is committed.

Where, as in proposed section 26A, the 'fault' element of an offence under Commonwealth law is not specified, the *Criminal Code Act 1995* states that 'recklessness' as to the prohibited result is needed for an offence to be committed.³¹ This means that a person will only be guilty of an offence under section 26A if:

- the person 'is aware of a substantial risk' that the physical security of nuclear material could be prejudiced, and
- 'having regard to the circumstances known to him or her, it is unjustifiable to take the risk'.³²

A 'whistleblower', protester, or member of a local Council etc would have a defence under proposed section 26A if:

- the communication could not prejudice the physical security of nuclear material (e.g. raising a construction or safety issue with the aim of *improving* physical security – although, as the Australian Safeguards Office warned the Senate inquiry, this might depend on the level of detail publicly revealed)
- they were not aware of a 'substantial risk' that the physical security of nuclear material could be prejudiced, or
- if they were aware of such a risk, it was justifiable in the circumstances to take this risk (e.g. in the case of 'whistleblowers' this might include exposing a substantial

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safety issue after getting nowhere with internal complaints; in the case of local Councils it could cover warning residents on safety grounds to stay away from a convoy of nuclear material etc).

Implied freedom of political communication

Three High Court cases in the 1990s – *Australian Capital Television* (1992), *Nationwide News* (1992) and *Lange* (1997) established an implied constitutional right of political communication. It may be possible to use this implied right to challenge both proposed section 31A and proposed section 26A of the Safeguards Act.

The freedom of political communication extends to any non-verbal actions which are intended and are capable of expressing ideas about government and the policies/politics of the Commonwealth or the States, i.e. it extends to expressive *conduct* such as protests (*Levy v Victoria* 1997).

Communication through protests or other means of ideas about nuclear materials or facilities in Australia could clearly have some influence on the people's choice of government. So it would undoubtedly qualify as 'political' communication.

The freedom of political communication is not absolute. It needs to be balanced with other principles, values and elements of Australia's constitutional system. In addition, it does not act as a personal defence, but as a limitation on the Government's legislative powers.

A law cannot restrict freedom of political communication unless:

- (i) it is enacted to fulfil a *legitimate purpose* (of Australia's constitutional system); and
- (ii) the restriction is *appropriate* and *adapted* to fulfilment of that purpose.

Proposed section 31A restricting access to areas containing nuclear material or vehicles, ships or aircraft transporting such material would be more likely to survive a challenge based on the freedom of political communication. In *Levy* the High Court held that a State law preventing duck hunting protesters going onto land validly overrode freedom of political communication in interests of public safety and order.

Proposed section 26A, on the other hand, prohibits any form of communication about any information between any two people that 'could prejudice' the physical security of nuclear material. The lack of qualification on either the type of information or the people to whom information cannot be passed suggests the High Court may look closely at whether this provision unduly restricts the implied freedom of political communication.

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The section does not, for instance, limit prohibited communications to 'information about nuclear material' or 'classified' information, nor limit the persons who are prohibited from receiving such information to e.g. 'those who could threaten national security or the physical security of nuclear material' etc.

If the High Court was asked to consider proposed section 26A, it would need to balance legitimate security considerations against the effect on political discussion of nuclear issues. As Harris points out:

the validity of the restrictions on political communication would depend upon a balancing of the public interest served by the legislation and the degree of limitation of the freedom. The balancing process used to determine whether restrictions on political communication are unconstitutional involves the application of a proportionality test – the interest served by the legislation would have to be proportionate to the inroad on the freedom, and the freedom could only be limited to an extent that is reasonably necessary to serve the interest.³³

Powers of Arrest

Concerns were raised before the Senate inquiry about the power of Australian protective service officers to make an arrest without a warrant where they suspect one of the new offences under the Safeguards Act is being or has been committed.

These new offences, however, are merely being added to the range of offences under various Commonwealth laws in relation to which protective service officers can already make arrests without a warrant.³⁴ These include existing offences under the Safeguards Act.

Prohibiting Nuclear Explosions

Constitutional Basis

Domestic implementation of international treaties such as the CTBT is generally authorised by the external affairs power in the Constitution.³⁵ However, in *Victoria v Commonwealth (Industrial Relations Case)* (1996), the High Court cautioned that international instruments would justify the use of the external affairs power only where they imposed an *obligation*. It might be queried whether the CTBT imposes any *obligation* on Australia to implement domestic legislation before the treaty comes into force internationally.

However if the external affairs power is not available to authorise domestic implementation of sections of the CTBT Act before the CTBT comes into effect internationally, the defence and/or the implied nationhood power may be available for this purpose.

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United States Nuclear Tests

As noted above, the Bush administration is opposed to the CTBT and has reserved the right to resume nuclear weapons tests.

The Bill proposes that Australia should be able to implement parts of the CTBT Act – including Part 2 banning nuclear explosions – before the United States and other nuclear capable nations ratify the CTBT. Part 2 has an extraterritorial operation, making it an offence under the CTBT Act for an Australian citizen to participate in causing a nuclear explosion (through testing or otherwise).³⁶ Section 5 of the CTBT Act states, however, that the 'Crown' (i.e. including any employee of the Commonwealth) cannot be prosecuted for an offence under the Act.

Should there be any Australians not employed by the Commonwealth involved in overseas nuclear weapons testing programs – including in the United States – they would be covered by the prohibition in Part 2 of the CTBT Act. Parliament might note that participation in overseas nuclear weapons programs would already be an offence under Australian law by virtue of the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*.³⁷

Endnotes

- 1 Greg Sheridan, 'North Korea: live and let die', *The Australian* 17 July 2003, p. 9.
- 2 *ibid.* A 'Sisyphean' task is one that can never be completed. From Sisyphus in Greek mythology, who was condemned to the eternal task of rolling a large stone to the top of a hill, from which it always rolled down again.
- 3 Main source: Department of Foreign Affairs and Trade website at: <http://www.dfat.gov.au/globalissues/>.
- 4 Chairman's Statement, Brisbane Meeting, 9-10 July 2003 (at: <http://www.dfat.gov.au/globalissues/psi/index.html>).
- 5 *ibid.*
- 6 See press release from Senator the Hon. Robert Hill, Minister for Defence (<http://www.minister.defence.gov.au/Hilltpl.cfm?CurrentId=3111>) and joint press release by Hon. Alexander Downer MP, Minister for Foreign Affairs and Senator Hill (http://www.foreignminister.gov.au/releases/2003/joint_counter_terrorism.html).
- 7 Australian Strategic Policy Institute, *Australia's Defence After September 11*, Issue Three.
- 8 *Australian Financial Review* 13.8.2003 p. 7.
- 9 *The Australian*, 1 September 2003.

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- 10 Christine Gallus MP, *Second Reading Speech*, House Hansard, 26 June 2003, p. 16467.
- 11 Sidney Drell, James Goodby, Raymond Jeanloz, and Robert Peurifoy, 'Strategic Choice: New Bunker Busters Versus Nonproliferation', *Arms Control Today*, Mar. 2003, v.33(2), pp. 8-10.
- 12 Annex 2 to the CTBT lists these countries as:
Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Democratic People's Republic of Korea, Egypt, Finland, France, Germany, Hungary, India, Indonesia, Iran (Islamic Republic of), Israel, Italy, Japan, Mexico, Netherlands, Norway, Pakistan, Peru, Poland, Romania, Republic of Korea, Russian Federation, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Vietnam, Zaire.
- 13 *The Sydney Morning Herald*, 27 March 2002.
- 14 *Second Reading Speech*, House Hansard, 26 June 2003, p. 16467.
- 15 <http://www.aph.gov.au/library/pubs/bd/1997-98/98bd190.htm>.
- 16 *Explanatory Memorandum*, p. 4.
- 17 Section 5.6.
- 18 Criminal Code Act section 5.4.
- 19 Senate Foreign Affairs, Defence And Trade Legislation Committee: *Non-Proliferation Legislation Amendment Bill 2003: Discussion*, 8 September 2003, p. 3.
- 20 *ibid*, p. 5.
- 21 Ms Helen Oakey, Greenpeace Australia Pacific, *ibid*, p. 5.
- 22 *ibid*, p. 13.
- 23 *ibid*, p. 17.
- 24 *ibid*, p. 17.
- 25 *ibid*, pp. 9, 17.
- 26 *ibid*, p. 13.
- 27 *ibid*, p. 11.
- 28 http://www.aph.gov.au/Senate/committee/fadt_ctte/nonproliferation_bill/report/report.pdf.
- 29 *Second Reading Speech*, House Hansard, 26 June 2003, p. 16467.
- 30 *Sydney Morning Herald*, 9 September 2003.
- 31 Criminal Code Act section 5.6.
- 32 Criminal Code Act section 5.4.
- 33 Bede Harris, *Essential Constitutional Law*, pp. 105-106, based on *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 143 (per Mason CJ).

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- 34 Australian Protective Service Act section 13.
- 35 Section 51 (29).
- 36 CTBT Act sections 8 and 9.
- 37 Sections 6 and 11.

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