



Non-Proliferation Legislation Amendment Bill 2006

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Law and Bills Digest Section

Contents

Purpose.....	2
Background.....	2
Financial implications.....	4
Main provisions	4
<i>Australian Federal Police Act 1979</i>	4
<i>Chemical Weapons (Prohibition) Act 1994</i>	4
<i>Comprehensive Nuclear Test-Ban Treaty Act 1998</i>	5
<i>Nuclear Non-Proliferation (Safeguards) Act 1987</i>	5
Concluding comments	6
Endnotes.....	6

Non-Proliferation Legislation Amendment Bill 2006

Date introduced: 6 December 2006

House: Senate

Portfolio: Foreign Affairs

Commencement: The main provisions (Schedule 1) commence on the day after Royal Assent except for item 28, Schedule 1, which will commence on the day when amendments done to the Convention on the Physical Protection of Nuclear Material take effect.

Purpose

To amend the *Nuclear Non-Proliferation (Safeguards) Act 1987*, the *Comprehensive Nuclear Test-Ban Act 1998*, the *Chemical Weapons (Prohibition) Act 1994*, and the *Australian Federal Police Act 1979*. The amendments are being made to enable Australia to implement its international obligations with respect to new physical protection measures called for by the [2005 Amendment to the Convention on the Physical Protection of Nuclear Material \(CPPNM\)](#) ('the 2005 Amendment'). As noted in the second reading speech,¹ the bill allows the majority of provisions to come into effect ahead of entry into force of the 2005 Amendment.

Background

In 2003 the Government made significant amendments to the *Nuclear Non-Proliferation (Safeguards) Act 1987* (the 'Safeguards Act') to strengthen Australia's arrangements for the security of nuclear material and related information. Amendments were made to widen or create offences, including making it an offence to establish a nuclear or related facility without a permit, an offence to 'communicate information to someone else' which 'could prejudice the physical security of nuclear material or an associated item' and an offence to breach a duty to ensure the physical security of information that could be used for nuclear weapons or other nuclear explosive devices.

For a detailed analysis of that bill and background material on Australia and non-proliferation, the Comprehensive Nuclear Test Ban Treaty (CTBT) and related issues see [Bills Digest No. 35 2003-04](#).

The Convention on the Physical Protection of Nuclear Material ('the CPPNM') entered into force on 8 February 1987 and is deposited with the International Atomic Energy Agency (IAEA).

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Australia signed the CPPNM on 22 February 1984 and ratified it on 22 September 1987. The current status list of Parties to the CPPNM has 122 States and the European Atomic Energy Community as parties and these include China, the Republic of Korea, India, and the United States of America². Notably, Iran and North Korea are not parties.

The CPPNM is implemented under the *Nuclear Non-Proliferation (Safeguards) Act 1987*, covering the mishandling of nuclear material in a way likely to cause death or serious injury to any person or substantial damage to property, obtaining nuclear material illegally, or threatening to use nuclear material to cause death or serious injury to any person or substantial property damage. This Bill proposes amendments to allow implementation of the proposed changes to the CPPNM. The changes were adopted by a 2005 international conference of parties to the CPPNM and are known as the ‘2005 Amendment.’

The 2005 Amendment will come into force after two-thirds of the Parties to the CPPNM have ratified or otherwise accepted the 2005 Amendment. To date, only seven Parties have done so.³ Some of the provisions of the 2005 Amendment relevant to the interpretation of the Bill currently before Parliament are outlined here.

The title of the CPPNM is expanded to include protection of nuclear facilities. The Preamble to the CPPNM is also replaced completely by a new Preamble in the 2005 Amendment. The paragraph relating to criminal offences is expanded to both include coverage of ‘nuclear facilities’ and also expands the paragraph to reflect an urgent need to strengthen existing offences. There is a new paragraph which reflects the desire ‘to avert the potential dangers posed by illicit trafficking, the unlawful taking and use of nuclear material and the sabotage of nuclear material and nuclear facilities, and noting that physical protection against such acts has become a matter of increased national and international concern’.

Two new paragraphs are added to Article 1 of the CPPNM to insert definitions of ‘nuclear facility’ and ‘sabotage’. In the Bill, the definition of ‘nuclear facility’ is reproduced in **item 27**, and **item 33** reflects the definition of ‘sabotage’ by inserting an offence in relation to acts against nuclear facilities.

The 2005 Amendment also provides for expanded cooperation regarding measures to rapidly locate and recover stolen or smuggled nuclear material, mitigate or minimise the radiological consequences of sabotage and provides for greater cooperation amongst states in relation to extradition.

Both the CPPNM and the 2005 Amendment, in Article 2, clearly states that the Convention shall apply to nuclear material used for peaceful purposes. The replacement Article 2 adds a **new paragraph (Article 2.5)** that was not in the previous Article 2 which states the ‘this convention shall not apply to nuclear material used or retained for military purposes or to a nuclear facility containing such material’. Nor are the activities of armed forces and military forces governed by the Convention (**new Article 2.4(a)**).

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In international negotiations over the final text of the 2005 Amendment, CPPNM Parties discussed a proposal put by Argentina to insert a definition of the term ‘military forces of a State’. However the proposal could have led to difficulties in the implementation of the Convention for some other states and consensus could not be reached.⁴

New Article 2A sets out 12 fundamental principles to be applied to the protection regime.

The 2005 Amendment was reviewed by the Joint Standing Committee of Treaties. The relevant [report](#), tabled in October 2006, recommended ratification. Also, as noted in the concluding comments section of this Digest, the Bill was reviewed by the Senate Standing Committee on Foreign Affairs, Defence and Trade, again with a positive recommendation.

The Bill increases penalties for certain offences under the Safeguards Act. The rationale for the increases is to make the penalties consistent with comparable offences in Commonwealth legislation, including the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*, and with the potential seriousness of the offences⁵.

Financial implications

The Australian Safeguards and Non-Proliferation Office, Department of Foreign Affairs and Trade, states that the proposed treaty action is not expected to impose any direct financial costs on Australia complying with its obligations.⁶ The extension of regulation should be manageable within its existing resources. The Office notes that the further strengthening of physical protection arrangements at Lucas Heights could have some cost. The explanatory memorandum states that measures in the Bill will have little or no financial effect.

Main provisions

Amendments in Schedule 1

Australian Federal Police Act 1979

Item 1 inserts mention of **new subsection 29A(1)** of the *Nuclear Non-Proliferation (Safeguards) Act 1987* into the *Australian Federal Police Act 1979*. The effect of this is that the power of protective service officers to arrest without warrant will *not* apply to the new offence of decommissioning of a facility.

Chemical Weapons (Prohibition) Act 1994

Section 12 of the *Chemical Weapons (Prohibition) Act 1994* creates offences relating to chemical weapons. **Items 6 and 7** amend section 12 to extend the geographical jurisdiction for these offences to include situations where the conduct or a result of the

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conduct occurs overseas and relevant person an Australian citizen and or a resident of Australia.

Comprehensive Nuclear Test-Ban Treaty Act 1998

Item 8 repeals section 9 of the Act and extends the geographical jurisdiction for an offence against section 8 (of causing a nuclear explosion) so that it applies to an Australian citizen and/or a resident of Australia when the explosion and the conduct causing the explosion occurs outside Australia. Currently, in the case of both the relevant conduct and an explosion taking place outside of Australia, only an Australian citizen can be convicted under section 9 – not an Australian resident.

Nuclear Non-Proliferation (Safeguards) Act 1987

Items 16, 17, 20, 22, 24 and 26 extend the geographical jurisdiction for the offences to apply to an Australian citizen or **a resident of Australia** in cases where the relevant conduct takes place outside Australia. These offences relate to possession of nuclear material or associated item without permit, breach of duty to ensure security of associated technology, unauthorised communication of information, communication prejudicing security of nuclear material or associated item, false or misleading statements and unauthorised access to areas to which access is restricted under permit.

Penalties are significantly increased by **items 15, 18, 21, 25 and 32** for offences relating to possession of nuclear material, unauthorised communication of information, communication prejudicing security of nuclear material, obstruction of Agency inspector and use of nuclear material causing death or injury to persons or damage to property or the environment. For example, the maximum penalty for the offence of unauthorised communication of information in subsection 26(1) of this Act is increased from 2 years to 10 years imprisonment.

Item 13 inserts **new section 16B** to provide that the Minister may grant a permit to allow the decommissioning⁷ of a facility that has been established under section 28A of the Act. Conditions will apply to the granting of a permit including that the Director of Safeguards⁸ is satisfied that, amongst other matters, adequate physical security could be applied to nuclear material and associated items that are to be removed from the facility or otherwise dealt with (**new paragraph 16B(1)(c)**). **Item 23** makes it an offence with a penalty of 5 years imprisonment to decommission without a permit (**new section 29A**). It is an offence under section 25 of the Safeguards Act to contravene a condition or fail to observe a restriction under a permit with a penalty of 2 years imprisonment.

Items 27 and 28 will have the effect of inserting a definition of ‘nuclear facility’ that will reflect the definition in the Physical Protection Convention. Once the Convention enters into force the reference to the definition will be to the Convention, and until that event the definition will sit in the Safeguards Act.

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Item 29 inserts **new section 34A** to create an offence of carrying, sending or moving *nuclear material* into or out of Australia or a foreign country, except where this is done with ‘lawful authority’. The maximum penalty is ten years imprisonment. The Explanatory Memorandum comments that:

Since other Commonwealth legislation regulates the importation or exportation of goods fitting the definition of *nuclear material*, section 34A is inserted only to ensure consistency of Australian legislation with the language of the amended Convention.⁹

Item 33 inserts **new section 35A** to create the offence of doing an act that is directed against a nuclear facility or that interferes with the operation of a nuclear facility, intending or knowing that the act will cause or will be likely to cause death or serious injury to any person, or substantial damage to property or to the environment by exposure to radiation or by the release of radioactive substances. The penalty is imprisonment of 20 years to reflect the serious nature of this particular offence.

Item 41 amends section 38 to provide that proceedings against a person for an offence cannot be commenced unless the act or things (the offence) was done after the time when the CCPNM first required States to make the act or thing a punishable offence. **Item 43** extends section 38 so that the geographical jurisdiction of offences under Division 2 of the Act is expanded where the relevant act or things took place outside Australia. Such offences will now apply to an Australian resident or a body corporate incorporated in Australia in the same way as they currently apply to an Australian citizen.

Concluding comments

On 7 December 2006 the Senate referred the Bill to the Standing Committee on Foreign Affairs, Defence and Trade for examination and report by 8 February 2007. The Committee received 3 submissions on the Bill and concluded in its Report:¹⁰

..the bill in its current form adequately meets Australia’s new international obligations under the 2005 Convention to protect nuclear facilities and material for peaceful domestic use, storage and transport. The committee strongly supports continued Australian engagement in multilateral efforts on disarmament and non-proliferation.

Endnotes

1. Second reading speech on the Non-Proliferation Legislation Amendment Bill 2006, Senate, *Debates*.

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2. For a full list of signatories see:
http://www.iaea.org/Publications/Documents/Conventions/cppnm_status.pdf
3. See http://www.iaea.org/Publications/Documents/Conventions/cppnm_amend_status.pdf.
4. [Report by the Committee of the Whole](#), paragraph 6, p. 1.
5. For example, Explanatory Statement, item 15, p. 5.
6. [Physical Protection of Nuclear Material, Done at Vienna on 8 July 2005, \[2006\], ATNIA 14](#), paragraphs 15 and 15.
7. For an explanation of the decommission process see [HIFAR decommissioning](#) from the ANSTO website.
8. This statutory position is filled by the Director General of the Australian Safeguards and Non-Proliferation Office.
9. Explanatory Memorandum, p. 8.
10. Senate Standing Committee on Foreign Affairs, Defence and Trade, Non-Proliferation Legislation Amendment Bill 2006, [Report February 2007](#), paragraph 4.5, p.4.

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