24 November 2020

Mr Masood Karimpour  
Chief, Terrorism Prevention Branch  
United Nations Office on Drugs and Crime  
Vienna International Centre  
1400 Vienna, Austria

Dear Mr Karimpour,

I have the honour to refer to the International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT), the depositary of which is the Secretary-General of the United Nations (UN).

I refer to your letter of 30 September 2020, requesting support for UNODC’s efforts to develop a website on ICSANT, which will host relevant resources, including national legislation giving effect to the criminalisation requirements of Article 2 of ICSANT.

In response to the aforementioned request, Australia hereby informs the UNODC (as mandated by the UN General Assembly to promote adherence to, and implementation of, the 19 international legal instruments against terrorism, including ICSANT) that the domestic laws and regulations listed in the attached table give effect to the provisions of Article 2 of ICSANT. As requested, a copy of the relevant provisions of the implementing legislation is also attached.

The following is a summary of how specific Australian statutes and regulations give effect to the criminalization provisions of ICSANT:

1. Sections 38C through 38E of the Nuclear Non-Proliferation (Safeguards) Act 1987 give effect to paragraphs 1 and 2 of Article 2 of ICSANT.

2. Section 8A of the Nuclear Non-Proliferation (Safeguards) Act 1987 and Division 11 of the Criminal Code Act 1995 give effect to paragraphs 3 and 4 of Article 2 of ICSANT.

Yours sincerely,

[Signature]

Dr John M Kalish  
A/g Director General
## Australian legislation implementing the International Convention for the Suppression of Acts of Nuclear Terrorism

<table>
<thead>
<tr>
<th>ICSANT Provisions</th>
<th>Corresponding laws [Nuclear Non-Proliferation (Safeguards) Act 1987 unless otherwise indicated]</th>
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<tr>
<td><strong>Article 2</strong></td>
<td></td>
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<tr>
<td>1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:</td>
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| (a) Possesses radioactive material or makes or possesses a device: | Possession of radioactive material or Convention device  
  s38C (1)(a) and s38C (1)(b)  
  Making a convention device  
  s38C (2)(a) and s38C (2)(b) |
| i. With the intent to cause death or serious bodily injury; or | s38C (1)(c)(i)  
  s38C (2)(c)(i) |
| ii. With the intent to cause substantial damage to property or to the environment; or | s38C (1)(c)(ii)  
  s38C (2)(c)(ii) |
| (b) Uses in any way radioactive material or a device, or uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material: | Using radioactive material  
  s38D (1)(a) and s38D (1)(b)  
  Using or damaging Convention device  
  s38D (2)(a) and s38D (2)(b)  
  Using or damaging nuclear facility  
  s38D (3)(a) and s38D (3)(b) |
| i. With the intent to cause death or serious bodily injury; or | s38D (1)(c)(i)  
  s38D (2)(c)(i)  
  s38D (3)(c)(i) |
| ii. With the intent to cause substantial damage to property or to the environment; or | s38D (1)(c)(ii)  
  s38D (2)(c)(ii)  
  s38D (3)(c)(ii) |
| iii. With the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing an act. | s38D (1)(c)(iii)  
  s38D (2)(c)(iii)  
  s38D (3)(c)(iii) |
| 2. Any person also commits an offence if that person: |
| (a) Threatens, under circumstances which indicate the credibility of the threat, to commit an offence as set forth in paragraph 1(b) of the present article; or | s38E(1) |
| (b) Demands unlawfully and intentionally radioactive material, a device or a nuclear facility by threat, under circumstances which indicate the credibility of the threat, or by use of force. | s38E(2) |
| 3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article. | s8A  
  Criminal Code Act 1995  
  s 11.1 Attempt |
4. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of the present article; or

(b) Organizes or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of the present article; or

(c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

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<tr>
<td>s8A</td>
<td>Criminal Code Act 1995 s 11.2 Complicity and common purpose</td>
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<tr>
<td>s8A</td>
<td>Criminal Code Act 1995 s 11.2A Joint commission s 11.3 Commission by proxy</td>
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<td>s8A</td>
<td>Criminal Code Act 1995 s 11.4 Incitement s 11.5 Conspiracy</td>
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Part III  Offences
Division 2A  Offences relating to nuclear terrorism

Section 38A

Division 2A—Offences relating to nuclear terrorism

38A  ADF members not liable for prosecution

Nothing in this Division makes a member of the Australian Defence Force acting in connection with the defence or security of Australia liable to be prosecuted for an offence.

38B  Definitions

In this Division:

*Convention device* has the same meaning as *device* has in the Nuclear Terrorism Convention.

*government facility* has the same meaning as *State or government facility* has in the Nuclear Terrorism Convention.

*nuclear facility* has the same meaning as in the Nuclear Terrorism Convention.

*radioactive material* has the same meaning as in the Nuclear Terrorism Convention.

38C  Possessing radioactive material or Convention device, or making Convention device

*Possession of radioactive material or Convention device*

(1) A person commits an offence if:

(a) the person possesses material or a thing; and

(b) the material or thing is radioactive material or a Convention device; and

(c) the person intends to use the material or device, or to make it available to be used, to cause:

(i) the death of, or serious bodily injury to, an individual; or
(ii) substantial damage to property or to the environment.

Penalty: Imprisonment for 20 years.

Making a Convention device

(2) A person commits an offence if:
(a) the person makes a thing; and
(b) the thing is a Convention device; and
(c) the person intends to use the device, or to make it available to be used, to cause:
   (i) the death of, or serious bodily injury to, an individual; or
   (ii) substantial damage to property or to the environment.

Penalty: Imprisonment for 20 years.

38D Using radioactive material, or using or damaging Convention device or nuclear facility

Using radioactive material

(1) A person commits an offence if:
(a) the person uses material; and
(b) the material is radioactive material; and
(c) the person intends the use of the material:
   (i) to cause the death of, or serious bodily injury to, an individual; or
   (ii) to cause substantial damage to property or to the environment; or
   (iii) to compel a person or group of persons (including an international organisation or a legislative, executive or judicial institution of the Commonwealth, a State or a Territory, or of a foreign country) to do or refrain from doing any act or thing.

Penalty: Imprisonment for 20 years.
**Part III**  Offences  
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Section 38D

*Using or damaging Convention device*

(2) A person commits an offence if:

(a) the person uses or damages a thing; and

(b) the thing is a Convention device; and

(c) the person intends the use of, or damage to, the thing:

(i) to cause the death of, or serious bodily injury to, an individual; or

(ii) to cause substantial damage to property or to the environment; or

(iii) to compel a person or group of persons (including an international organisation or a legislative, executive or judicial institution of the Commonwealth, a State or a Territory, or of a foreign country) to do or refrain from doing any act or thing.

Penalty: Imprisonment for 20 years.

*Using or damaging nuclear facility*

(3) A person commits an offence if:

(a) the person uses or damages a facility; and

(b) the facility is a nuclear facility; and

(c) the use or damage causes radioactive material to be released, or creates a risk of radioactive material being released; and

(d) the person intends the use of, or damage to, the facility:

(i) to cause the death of, or serious bodily injury to, an individual; or

(ii) to cause substantial damage to property or to the environment; or

(iii) to compel a person or group of persons (including an international organisation or a legislative, executive or judicial institution of the Commonwealth, a State or a Territory, or of a foreign country) to do or refrain from doing any act or thing.

Penalty: Imprisonment for 20 years.
38E Threats and demands

(1) A person commits an offence if the person threatens to do an act that would be an offence against section 38D.

Penalty: Imprisonment for 20 years.

(2) A person (the offender) commits an offence if:

(a) the offender demands that another person:
   (i) create material, a thing or a facility; or
   (ii) allow the offender, or another person, access to, or control of, material, a thing or a facility; or
   (iii) make material, a thing or a facility available to the offender or another person; and

(b) the material, thing or facility is (or would, if created, be) radioactive material, a Convention device or a nuclear facility; and

(c) the demand is made by force or threat of force, or by any form of intimidation.

Penalty: Imprisonment for 20 years.

38F Jurisdictional requirement

A person commits an offence under this Division only if one or more of the following paragraphs applies:

(a) the conduct constituting the alleged offence occurs:
   (i) wholly or partly in Australia; or
   (ii) wholly or partly on board an Australian ship or an Australian aircraft;

(b) at the time of the alleged offence, the person is an Australian citizen;

(c) at the time of the alleged offence, the person is a stateless person whose habitual residence is in Australia;

(d) the conduct is subject to the jurisdiction of another State Party to the Nuclear Terrorism Convention established in
accordance with paragraph 1 or 2 of Article 9 of the Convention, and the person is in Australia;
(e) the alleged offence is committed against a government facility of the Commonwealth, or of a State or Territory, that is located outside Australia;
(f) the alleged offence is committed against:
   (i) an Australian citizen; or
   (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory;
(g) by engaging in the conduct constituting the alleged offence, the person intends to compel a legislative, executive or judicial institution of the Commonwealth, a State or a Territory to do or omit to do an act.

Note: A person commits an offence under this Division even if the conduct occurs in circumstances to which the Nuclear Terrorism Convention does not apply because of Article 3.

38G Double jeopardy and foreign offences

If a person has been convicted or acquitted of an offence in respect of conduct under the law of a foreign country, the person cannot be convicted of an offence under this Division in respect of that conduct.

38H Attorney-General’s consent needed to bring proceedings for offence under this Division

(1) Proceedings for an offence under this Division must not be commenced without the Attorney-General’s written consent.

(2) However, a person may be arrested, charged, remanded in custody, or released on bail, in connection with an offence under this Division before the necessary consent has been given.

38J Evidentiary certificates

(1) The Foreign Affairs Minister may issue a certificate stating any of the following matters:
Offences Part III
Offences relating to nuclear terrorism Division 2A

Section 38J

(a) that the Nuclear Terrorism Convention entered into force for Australia on a specified day;
(b) that the Convention remains in force for Australia or any other State Party on a specified day;
(c) a matter relevant to the establishment of jurisdiction by a State Party under paragraph 1 or 2 of Article 9 of the Convention.

(2) The Immigration Minister may issue a certificate stating that:
(a) a person is or was an Australian citizen at a particular time; or
(b) a person is or was a stateless person whose habitual residence is or was in Australia at a particular time.

(3) In any proceedings for an offence under this Division, a certificate under this section is prima facie evidence of the matters in the certificate.
Part 2.4—Extensions of criminal responsibility

Division 11

11.1 Attempt

(1) A person who attempts to commit an offence commits the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

(2) For the person to be guilty, the person’s conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

(3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

(3A) Subsection (3) has effect subject to subsection (6A).

(4) A person may be found guilty even if:

(a) committing the offence attempted is impossible; or
(b) the person actually committed the offence attempted.

(5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.

(6) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(6A) Any special liability provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose), section 11.2A.
Section 11.2

(joint commission), section 11.3 (commission by proxy), section 11.5 (conspiracy to commit an offence) or section 135.4 (conspiracy to defraud).

11.2 Complicity and common purpose

(1) **A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.**

(2) For the person to be guilty:
   
   (a) the person’s conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
   
   (b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:
   
   (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
   
   (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(3A) Subsection (3) has effect subject to subsection (6).

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
   
   (a) terminated his or her involvement; and
   
   (b) took all reasonable steps to prevent the commission of the offence.

(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the other person has not been prosecuted or has not been found guilty.
Section 11.2A

(6) Any special liability provisions that apply to an offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of subsection (1).

(7) If the trier of fact is satisfied beyond reasonable doubt that a person either:

(a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or

(b) is guilty of that offence because of the operation of subsection (1);

but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.

11.2A Joint commission

Joint commission

(1) If:

(a) a person and at least one other party enter into an agreement to commit an offence; and

(b) either:

(i) an offence is committed in accordance with the agreement (within the meaning of subsection (2)); or

(ii) an offence is committed in the course of carrying out the agreement (within the meaning of subsection (3));

the person is taken to have committed the joint offence referred to in whichever of subsection (2) or (3) applies and is punishable accordingly.

Offence committed in accordance with the agreement

(2) An offence is committed in accordance with the agreement if:

(a) the conduct of one or more parties in accordance with the agreement makes up the physical elements consisting of conduct of an offence (the joint offence) of the same type as the offence agreed to; and

(b) to the extent that a physical element of the joint offence consists of a result of conduct—that result arises from the conduct engaged in; and
Section 11.2A

(c) to the extent that a physical element of the joint offence consists of a circumstance—the conduct engaged in, or a result of the conduct engaged in, occurs in that circumstance.

Offence committed in the course of carrying out the agreement

(3) An offence is committed in the course of carrying out the agreement if the person is reckless about the commission of an offence (the joint offence) that another party in fact commits in the course of carrying out the agreement.

Intention to commit an offence

(4) For a person to be guilty of an offence because of the operation of this section, the person and at least one other party to the agreement must have intended that an offence would be committed under the agreement.

Agreement may be non-verbal etc.

(5) The agreement:
   (a) may consist of a non-verbal understanding; and
   (b) may be entered into before, or at the same time as, the conduct constituting any of the physical elements of the joint offence was engaged in.

Termination of involvement etc.

(6) A person cannot be found guilty of an offence because of the operation of this section if, before the conduct constituting any of the physical elements of the joint offence concerned was engaged in, the person:
   (a) terminated his or her involvement; and
   (b) took all reasonable steps to prevent that conduct from being engaged in.
Person may be found guilty even if another party not prosecuted etc.

(7) A person may be found guilty of an offence because of the operation of this section even if:
   (a) another party to the agreement has not been prosecuted or has not been found guilty; or
   (b) the person was not present when any of the conduct constituting the physical elements of the joint offence was engaged in.

Special liability provisions apply

(8) Any special liability provisions that apply to the joint offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of this section.

11.3 Commission by proxy

A person who:
   (a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and
   (b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;

is taken to have committed that offence and is punishable accordingly.

11.4 Incitement

(1) A person who urges the commission of an offence commits the offence of incitement.

(2) For the person to be guilty, the person must intend that the offence incited be committed.

(2A) Subsection (2) has effect subject to subsection (4A).
Section 11.4

(3) A person may be found guilty even if committing the offence incited is impossible.

(4) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in respect of that offence.

(4A) Any special liability provisions that apply to an offence apply also to the offence of incitement in respect of that offence.

(5) It is not an offence to incite the commission of an offence against section 11.1 (attempt), this section or section 11.5 (conspiracy).

Penalty:

(a) if the offence incited is punishable by life imprisonment—imprisonment for 10 years; or

(b) if the offence incited is punishable by imprisonment for 14 years or more, but is not punishable by life imprisonment—imprisonment for 7 years; or

(c) if the offence incited is punishable by imprisonment for 10 years or more, but is not punishable by imprisonment for 14 years or more—imprisonment for 5 years; or

(d) if the offence is otherwise punishable by imprisonment—imprisonment for 3 years or for the maximum term of imprisonment for the offence incited, whichever is the lesser; or

(e) if the offence incited is not punishable by imprisonment—the number of penalty units equal to the maximum number of penalty units applicable to the offence incited.

Note: Under section 4D of the Crimes Act 1914, these penalties are only maximum penalties. Subsection 4B(2) of that Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of the offence, subsection 4B(3) of that Act allows a court to impose a fine of an amount not greater than 5 times the maximum fine that the court could impose on an individual convicted of the same offence. Penalty units are defined in section 4AA of that Act.
11.5 Conspiracy

(1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, commits the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the Crimes Act 1914.

(2) For the person to be guilty:

(a) the person must have entered into an agreement with one or more other persons; and

(b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and

(c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

(2A) Subsection (2) has effect subject to subsection (7A).

(3) A person may be found guilty of conspiracy to commit an offence even if:

(a) committing the offence is impossible; or

(b) the only other party to the agreement is a body corporate; or

(c) each other party to the agreement is at least one of the following:

(i) a person who is not criminally responsible;

(ii) a person for whose benefit or protection the offence exists; or

(d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.

(4) A person cannot be found guilty of conspiracy to commit an offence if:

(a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or

(b) he or she is a person for whose benefit or protection the offence exists.
Section 11.6

(5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
   (a) withdrew from the agreement; and
   (b) took all reasonable steps to prevent the commission of the offence.

(6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.

(7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

(7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

(8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

11.6 References in Acts to offences

(1) A reference in a law of the Commonwealth to an offence against a law of the Commonwealth (including this Code) includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to such an offence.

(2) A reference in a law of the Commonwealth (including this Code) to a particular offence includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to that particular offence.

(3) Subsection (1) or (2) does not apply if a law of the Commonwealth is expressly or impliedly to the contrary effect.

(4) In particular, an express reference in a law of the Commonwealth to:
Section 11.6

(a) an offence against, under or created by the *Crimes Act 1914*; or
(b) an offence against, under or created by a particular provision of the *Crimes Act 1914*; or
(c) an offence arising out of the first-mentioned law or another law of the Commonwealth; or
(d) an offence arising out of a particular provision; or
(e) an offence against, under or created by the *Taxation Administration Act 1953*;

does not mean that the first-mentioned law is impliedly to the contrary effect.

Note: Sections 11.2 (complicity and common purpose), 11.2A (joint commission), and 11.3 (commission by proxy) of this Code operate as extensions of principal offences and are therefore not referred to in this section.