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JOINT STANDING COMMITTEE ON TREATIES

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**JOINT STANDING
COMMITTEE ON TREATIES**

Monday, 15 June 2009

Members: Mr Kelvin Thomson (*Chair*), Senator McGauran (*Deputy Chair*), Senators Birmingham, Cash, Farrell, Ludlam, Pratt and Wortley and Mr Briggs, Mr Forrest, Ms Hall, Mr Murphy, Ms Neal, Ms Parke, Mr Simpkins and Ms Vamvakinou

Members in attendance: Senator Birmingham, Senator McGauran, Senator Pratt, Senator Wortley, Mr Briggs, Mr Forrest, Ms Hall, Mr Murphy, Ms Neal, Ms Parke, Mr Simpkins, Mr Kelvin Thomson,

Terms of reference for the inquiry:

To inquire into and report on:

Treaties tabled on 12 March and 13 May 2009

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Committee met at 10.33 am

BRAITHWAITE, Mrs Justine Nina, Director, Administrative and Domestic Law Section, Department of Foreign Affairs and Trade

MASON, Mr David, Executive Director, Treaties Secretariat, International Legal Branch, Department of Foreign Affairs and Trade

MOORES, Ms Anne, Assistant Secretary, Protocol Branch, Department of Foreign Affairs and Trade

Agreement on Employment of the Spouses and Dependants of Diplomatic and Consular Personnel between Australia and the Portuguese Republic

CHAIR (Mr Kelvin Thomson)—I declare open this public hearing for the Joint Standing Committee on Treaties ongoing review of Australia's international treaty obligations. The committee will take evidence on two treaty actions which were tabled in the parliament on 12 March and 13 May 2009. We will hear from witnesses representing the Department of Foreign Affairs and Trade, the Attorney-General Department, AusAID and the Department of Defence. I thank witnesses for being available for this hearing. We will now take evidence on the agreement on the employment of spouses and dependants of diplomatic and consular personnel between Australia and the Portuguese Republic. I call representatives from the Department of Foreign Affairs and Trade.

Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. If you nominate to take any questions on notice, could you please ensure that your written response to questions reaches the committee secretariat within seven working days of your receipt of the transcript of today's proceedings. I invite you to make introductory remarks before we proceed to questions.

Ms Moores—Thank you, Chair, I do have an opening statement to make. This agreement that we are looking at today between Australia and the Portuguese Republic forms part of a series of bilateral employment agreements and arrangements that Australia has concluded with countries in which the Australian government has a diplomatic or consular presence. The purpose of such arrangements is to allow the dependants of Australian diplomatic and consular personnel to engage in paid employment while posted in another country, and, on a reciprocal basis, to enable dependants of diplomatic and consular officials posted to Australia to engage in paid employment. This agreement will apply to dependants of the Australian Embassy in Lisbon, and for Portugal it will apply to the dependants of personnel of the Portuguese Embassy in Canberra and the Portuguese Consulate-General in Sydney.

Such agreements are important to Australia for a number of reasons. They assist the Australian government in recruiting and retaining high-quality employees with dependants willing to serve abroad. Dual-income families are now an accepted part of Australian life and many spouses have established careers. Moreover, the financial commitments facing families today often make it unattractive for a spouse to cease work in order to accompany his or her partner on an overseas

posting. The lack of opportunity for spouses and dependants of diplomatic and consular personnel to engage in paid employment overseas therefore acts as a disincentive either for officers with families to serve overseas or for their families to join them on their posting. While bilateral employment agreements do not guarantee employment for dependants they at least allow for that possibility. Furthermore they enable the Australian government agencies represented abroad to deliver on their broader commitment of providing family-friendly work environments.

We generally prefer that arrangements take the form of an instrument of less-than-treaty status. The main reason is that Australian law already permits dependants of diplomatic and consular officials to work in Australia; it is already provided for under migration regulations and it is therefore not normally necessary for us to conclude an arrangement-of-treaty status. However the domestic legal regimes in some countries require an arrangement-of-treaty status and this is the case for Portugal. Issues pertaining to taxation and social security regimes under Portuguese law go beyond the scope of a memorandum of understanding. Negotiations for employment arrangements are based on a standard Australian text and the agreement that we are looking at today broadly follows that text.

Ms PARKE—When you say that issues of taxation go beyond an MOU and that is why it is called a treaty, what will be the arrangement with regard to taxation?

Ms Moores—The normal arrangement is that people who work abroad are liable for the taxation regime in the country that they live. So if we have dependants in Portugal who engage in paid employment they would pay tax under the Portuguese taxation system and the same applies here in Australia where dependants of Portuguese diplomatic or consular personnel in Australia would pay tax to the Australian Taxation Office, the same as any worker in Australia.

Ms PARKE—How is a spouse or dependant defined for the purposes of the agreement? Does it include same-sex partners and so on?

Ms Moores—The definition is in article 1. It defines a member of the family as a person who the receiving state has accepted as such and who forms part of the official household and it includes: spouses; unmarried dependant children under 21 years of age; unmarried dependant children under 25 years of age who are in full-time attendance as students at a post-secondary educational institution; and unmarried dependant children who are suffering from a physical or mental disability where there is no age limit. In the term ‘spouse’ the definition is the definition that is applied when we accredit and recognise somebody as a member of the household. So in Australia we recognise same-sex partners and we recognise heterosexual de facto partners as well as married partners. Portugal does not currently recognise same-sex partners for the purposes of diplomatic accreditation, so because this agreement only applies to those partners who are recognised for diplomatic accreditation it currently would not apply to same-sex partners. But if the Portuguese policy on this were to change because the agreement says ‘spouses’ it would then extend more broadly to same-sex partners.

Ms PARKE—Does it include unmarried partners?

Ms Moores—I might have to take that on notice but I do not believe Portugal does recognise de facto heterosexual partners. I will get somebody to check that for you.

Ms PARKE—Does this agreement have any implications for permitting spouses and dependants to work anywhere in the European Union or is it just confined to Portugal?

Ms Moores—It is just confined to Portugal. To be recognised as a dependant, you have to form part of the household. To form part of the household, you have to be living with the person who is accredited, so you have to be in the same house. If you are not in the same house, you are not recognised as part of the household and this would not apply to you.

Mr FORREST—This agreement is just with the Republic of Portugal, but we obviously have agreements similar to this with other nations as well.

Ms Moores—Yes, we do.

Mr FORREST—Do we have a list of those?

Ms Moores—We can submit a list. We have treaty-level agreements with six countries—Portugal would make the seventh—and we have 31 less-than-treaty-status arrangements. We are in negotiations with seven countries to conclude similar further agreements.

Mr FORREST—Could you supply the committee with that list?

Ms Moores—We certainly can.

Mr FORREST—The only other question I have is about extending arrangements beyond Portugal to nearby nations, such as Spain, France or other EU nations. Is that an extension of this agreement?

Ms Moores—No, it has to be bilateral, so we would have to have an agreement with each country in the European Union separately. We currently have a number of agreements with European Union countries: Belgium, France, the Netherlands and Spain at treaty level; Germany, I think, at less-than-treaty status; and also Poland, Sweden and the UK. The policy of the government is to conclude an agreement in every country in which we have a diplomatic or consular presence, so the broad policy is that eventually we hope to have a full suite of either arrangements or agreements covering every country.

Mr BRIGGS—Is it common for the spouses of diplomatic staff to work?

Ms Moores—Obviously it varies depending on people's individual circumstances, but it is a very strong view on the part of staff of the department and their families that they should have the opportunity to work, and certainly one of the issues on which people seek advice before applying for a posting is whether their spouse or children would be able to work in that country. It is certainly a factor that affects their decision on whether to apply for a posting or not.

Mr BRIGGS—It has been a factor in people applying?

Ms Moores—Yes, certainly.

Mr BRIGGS—That would be in certain countries, obviously, that do not have the agreements.

Ms Moores—It varies. If you have an agreement, it makes a country a more attractive posting if you have a spouse who would like to pursue paid employment while overseas.

Mr BRIGGS—Prior to this treaty with Portugal, were spouses allowed to work or was it unknown?

Ms Moores—In some countries, even without an agreement, there can be a policy that allows it to happen, but it is certainly much better from our perspective that we have something formal in place so that it does not rely on the whims of whoever is in the position to make those decisions at the time. Also, it covers the sorts of general legal aspects, such as what happens to people's immunities and privileges and those sorts of things, so it is certainly our preference that there be a formal agreement, either a treaty or a less-than-treaty status arrangement, in place so that there is no confusion or misunderstanding about the ability of the person to seek work.

Mr MURPHY—Are there any limitations on the variety of work that a spouse could undertake?

Ms Moores—There is one limitation in the treaty itself, in article 2, paragraph 2, which talks about what happens if the member of the family requires a security clearance and therefore only nationals of the receiving state can do the job. For instance, if you want to work in the Australian Public Service, that would not be open to a dependant of a foreign country. Also, sometimes when we are given requests to approve for dependants to work here in Australia we will make some judgments about whether that would be suitable given the nature of the work. For instance, we had a request for somebody to open a family day care centre out of their house. Diplomatic premises are inviolable—they cannot be entered—and we decided that it would not be appropriate for somebody to be in charge of children in premises that could not be entered by people wanting to do inspections, by police or by emergency services. So it would be up to the receiving state, either Australia or Portugal, to make decisions on a case-by-case basis.

Senator McGAURAN—Why Portugal?

Ms Moores—It is just one on the long list of countries that we either do not have an agreement with yet or are negotiating with. And it is a country in which we have a diplomatic presence.

Senator McGAURAN—But you haven't with Germany?

Ms Moores—We do have one with Germany, already.

Senator McGAURAN—You have one with Germany? I thought you said you had not.

Ms Moores—No, we have a less-than-treaty status arrangement with Germany.

Senator McGAURAN—Less than treaty?

Ms Moores—It just means that it is not a treaty but it covers exactly the same conditions. Most of our arrangements with other countries on employment for dependents are not treaties. Usually there is a treaty if the country's own domestic legal situation requires them to have a treaty to offer this to our dependents.

Senator McGAURAN—So it is not as if something has prompted this—like a request from the ambassador or something?

Ms Moores—No, we made the request to start this, because we have a policy of making requests of every country in which we have a diplomatic or consular presence.

Mr FORREST—Just further to that, has it been a limiting factor in attracting staff to Portugal? Is that why it is—

Ms Moores—I would have to take that on notice. I do not have an in-depth knowledge of staff posted to Portugal.

Ms HALL—On that, is it your goal to have a similar treaty with every country in which we have a post?

Ms Moores—That is the long-term goal. Yes.

Senator McGAURAN—I think Senator Forrest touched on this. It is a bit of a surprise. Why not just a blanket EU agreement or treaty? Why does it have to be bilateral?

Ms Moores—I think the ability to offer that is not an EU-wide competency. My understanding is that it has to be on each individual country.

Senator McGAURAN—Well, in that case why is it so slow? Why hasn't all this been done a long time ago?

Ms Moores—Different countries give greater or lesser priority to this issue. For us it is a very high priority, given the nature of our staff and the fact that they have spouses who have careers and want to work. Not all countries have those same demands from their diplomatic personnel. So, while we place a very high priority on that, it is not always the same level of priority placed by other countries. Also, we are negotiating a lot of bilateral agreements and this is only one of them. Sometimes things do not get done as quickly as we might hope.

Senator McGAURAN—I am just surprised that it is not as old as diplomacy itself—the fact that a spouse would take the opportunity to—

Ms Moores—I think it is a reasonably recent phenomenon that you had families with partners who had their own careers and who wanted to engage in paid employment.

Senator McGAURAN—How recent?

Ms Moores—I would say that occurred in the last couple of decades, probably.

Senator McGAURAN—Twenty years. I would have thought so, too. Is there the same long, drawn-out process in, say, the United States and South America as there is in the European attachments?

Ms Moores—I do not know how long every one of our agreements has taken to negotiation but certainly some of the ones we have on our books have taken a long time.

Senator McGAURAN—Do we have any in South America, for example?

Ms Moores—We have agreements with Brazil and with Venezuela. We are currently negotiating one with Colombia and Argentina. We have one with Ecuador. I think that covers South America. Sorry, I am informed that we have one with Chile.

CHAIR—The National Interest Analysis indicates that the Portuguese Republic had a domestic legal imperative to conclude a treaty. What was that?

Ms Moores—They need a legal basis to be able to allow dependents to work and to be able to tax them and cover them with social security.

CHAIR—Thank you very much for attending today. If the committee has any further questions, the committee secretariat may seek further comment from you at a later date.

Ms Moores—Thank you.

CHAIR—We will now take evidence on the Convention on Cluster Munitions.

[10.50 am]

SKILLEN, Mr Geoffrey James, Principal Legal Officer, Attorney-General's Department

SHERWIN, Mr Alistair, Assistant Director-General, Middle East and West Asia Branch, AusAID

BROWN, Air Vice Marshal Geoffrey Charles, Deputy Chief of Air Force, Department of Defence

PERKS, Mr Murray, Assistant Secretary, Export and Arms Control, Department of Defence

FRENCH, Dr Greg, Assistant Secretary, International Legal Branch, Department of Foreign Affairs and Trade

MASON, Mr David, Executive Director, Treaties Secretariat, International Legal Branch, Department of Foreign Affairs and Trade

RAWSON, Ms Jennifer, First Assistant Secretary, International Security Division, Department of Foreign Affairs and Trade

Convention on Cluster Munitions

CHAIR—Thank you for coming this morning. Although the committee does not require you to give evidence on oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. If you nominate to take any questions on notice, could you please ensure that your written response to questions reaches the committee secretariat within seven working days of your receipt of the transcript of today's proceedings? I now invite you to make an opening statement.

Ms Rawson—Good morning. I do not have an opening statement to make and I think that is also the case for my colleagues from other departments. I mention to the committee that the National Interest Analysis is available and that reflects our collective views on the importance of the treaty and why it is in Australia's interests to move towards ratification. When the Minister for Foreign Affairs, Mr Smith, signed the treaty in Oslo last December, he referred to the very strong humanitarian outcome that had been achieved by the negotiation of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. That certainly was a very strong objective for Australia in the negotiations.

CHAIR—Does anyone else wish to say anything before we move to questions? Under article 9 of the convention, Australia will be required to enact legislation which criminalises any activity prohibited under the convention. Australia has not yet ratified the convention, but I

wonder whether any consideration has been given to this legislation and what form might such legislation take?

Mr Skillen—In the normal course of events, the government would, as a matter of formality, make a decision to ratify the convention at a particular point in time and then develop the legislation. No formal steps have yet been taken to develop or draft the legislation; that will come at a later stage of the proceedings. The only thing I can add is that, obviously, we are conscious of the obligation in article 9 and we will be guided by it when it comes time to draft the legislation.

CHAIR—Can I also ask about the United States' position on the convention. In December last year, the United States opposed it. In March of this year, President Obama signed into law a permanent ban on most US cluster bomb exports but yet the US has still not committed to signing or ratifying the convention. Do you have any views on the current United States position or way of thinking? What implications does that have for other non-signatories, like China, Russia and Israel?

Ms Rawson—I will answer that and then ask colleagues to supplement my answer if necessary. My understanding is that the United States has certainly not made the decision to sign or ratify the convention. There has been no indication, that I am aware of, of a change in policy of moving towards signature or ratification. However, in June last year the United States did announce a new policy on cluster munitions. Under that policy, by the end of 2018, the US military will no longer use cluster munitions which, after arming, resulted in more than one per cent unexploded ordnance across the range of intended operational environments. There are also some other more detailed aspects of that policy in terms of transferring such cluster munitions and the obligations on states that were to acquire them.

There are more details if the committee is interested. Basically, looking at not using cluster munitions that result in more than that one per cent unexploded ordnance by 2018 is clearly intended to have the humanitarian objective of limiting the harm that can be caused by unreliable munitions, but it does not go as far as the provisions of the convention itself. Do you have anything to add, Murray?

Mr Perks—The US statement of policy was signed off by the Secretary of Defense, Dr Gates, on 19 June. That is binding on all elements of the US armed forces. As Ms Rawson has said, it applies to the conditions of use and transfers that may take place before 2018. It also reminds commands of the US adherence to Protocol V of the CCW about explosive remnants of war. There are a number of parts of the policy there that have been authoritatively stated by the Secretary of Defense.

Mr BRIGGS—I have a follow-up question to the chair's question on signatories and ratification. In the briefing notes we have, it says that 96 countries had signed the convention and eight countries had ratified it. Is that still the case? Are those still the numbers?

Ms Rawson—There are eight ratifications and 96 signatories, so yes.

Mr BRIGGS—Presumably we have the eight ratifications. Do the signatories include Iran?

Ms Rawson—No.

Mr BRIGGS—Syria?

Ms Rawson—No.

Mr BRIGGS—Lebanon?

Ms Rawson—Yes.

Mr BRIGGS—What about Great Britain, France and Germany?

Ms Rawson—Yes. The United Kingdom has signed and so have France and Germany.

Mr BRIGGS—As far as you are aware, are they intending to ratify?

Ms Rawson—As far as we are aware.

Mr BRIGGS—Do you know whether Iran and Syria are opposed, or have they simply not signed? We have a list here of countries that are opposed: China, Russia, the United States, India, Israel and Pakistan. I am interested in the status of Iran and Syria.

Ms Rawson—I am not aware of the position that those countries took in the negotiations, but we could happily find that information and provide it to you.

Mr BRIGGS—If you can, that would be great.

Ms PARKE—I preface my comments by saying that I have worked for the UN in Kosovo and in Lebanon during the war between Hezbollah and Israel. I saw for myself the insidious and grotesque consequences of the use of cluster munitions, so I was concerned to read a submission to this inquiry from the Australian Lawyers for Human Rights which argued that, during the convention's negotiation, Australia advocated a narrow definition of cluster munitions so that Australia could acquire and use the M85 submunition produced by Israel Military Industries Ltd. My first question is: is the submunition capability that has been or is being acquired by Defence similar or the same as the M85 submunition?

Ms Rawson—To start, I say that that aspect of the submission that you read out is incorrect. Australia does not have and, as far as I am aware, has never had any intention of acquiring the Israeli M85. In the negotiations, Australia's position was to have a definition that would achieve the humanitarian objective of avoiding unacceptable harm to civilians. We certainly consider that that objective has been achieved by the definition that has been agreed in the convention. I ask my Defence colleagues to talk about the aspect of the SMArt 155.

Mr Perks—The SMArt 155 has been acquired and has entered into ADF stocks. It is a munition that is not defined as a cluster munition under the convention. It is an anti-tank shell, fired from a 155 mm gun and it involves two advanced submunitions, which identify a target, are sensor-fused and have self-destruction and self-neutralisation features. The ADF acquisition is

consistent with the obligations under the convention. I repeat the information from my Foreign Affairs colleague that Australia has not acquired the M85 munition.

Ms PARKE—How is the SMArt 155 different from the M85?

Mr Perks—I understand that, in terms of the number of submunitions and the features of them—particularly lack of self-neutralisation and self-destruction features—make the M85 a munition that is defined as a cluster under the convention. The SMArt 155 has two submunitions. Both of them are larger than four kilograms, and that is part of what the convention defines as a cluster munition. They are sensor-fused. They have infrared and millimetre-wave radar detectors, which detect a target. They also have self-neutralisation and self-destruction features, so they meet the requirements under the convention's definition and are therefore not a cluster munition. I understand that the M85 is defined as a cluster munition under the convention.

Ms PARKE—The submission argues that the M85 submunition also contains self-destruct and self-deactivation mechanisms.

Air Vice Marshal Brown—The problem with the M85 is that it is actually mechanically fused, so it is a less reliable fuse source, but the SMArt 155 has only two submunitions. They each weigh 13.5 kilos, so they are well within the definition.

Ms PARKE—Have they been tested for their reliability for self-destruction?

Air Vice Marshal Brown—All those sorts of tests are carried out by the Defence Material Organisation before we get them so it is a highly reliable weapon.

Ms PARKE—In Lebanon, a large number of M85s were found that were unexploded because they had failed to detonate and self-destruct as designed.

Air Vice Marshal Brown—A lot of that was to do with the fact that they were mechanically fused. Older weapons have a mechanical fusing mechanism.

Mr MURPHY—Does AusAID's mine action program also involve helping to clear up mines?

Mr Sherwin—Yes, it does. It does not distinguish between cluster munitions and mines or other remnants of war. The parts of our strategy which are about mine clearance, stockpile destruction and victim and survivor assistance are provided in relation to all of those types of munitions. Consequently, the program that we have meets articles 5 and 6 of the new convention on cluster munitions.

Mr MURPHY—What sort of a contribution do we make to that? Everything you see in the media indicates that trying to clean up these mines is an enormous task.

Mr Sherwin—It is. The contribution in this financial year is a little over \$20 million to a range of countries. I can give you some examples if you like. There is \$5 million for mine clearance in Afghanistan as well as \$200,000 for international support work for that country through the International Centre for Humanitarian Demining. There is also substantial support

for Cambodia, Iraq, Laos, Lebanon—which was just mentioned—and Vietnam. We also provide other support for global activities to promulgate the merits of both the mine convention and this newer convention, as well as the activities and efforts of states. We also try, through this support, to encourage state parties to adopt the conventions, to take action to clean up munitions and to help victims et cetera.

Mr MURPHY—Obviously, it is a very dangerous job. Have many of our citizens been injured or, in the worst case, lost their lives as a result of some of these devices exploding?

Mr Sherwin—I am not aware of any Australians having been injured. I would have to take that on notice. We fund very well-organised people like the United Nations in Afghanistan, who apply very rigorous training and safety procedures. I would have to take on notice your question as to whether any casualties have arisen from that, but, in particular, I am not aware of any Australians having been injured in activities undertaken through AusAID's mine action program.

Mr MURPHY—Thank you.

Ms Rawson—Mr Murphy, the overall figure for the mine action strategy from 2005 to 2010 will be \$75 million. That comes on top of the \$100 million from the eight years prior to the implementation of that mine action strategy, so Australia has sustained a very strong record in providing clearance assistance for landmines, cluster munitions and other unexploded ordnance.

Mr MURPHY—My personal view is that it is money well spent.

Dr French—We see articles 5 and 6 as important new developments in international law in general and international humanitarian law in particular. They are creating broader obligations with respect to victim assistance and international cooperation, seeking to end the scourge of cluster munitions. To that extent, we see this as another very important positive aspect of this convention, which, in many senses, goes beyond international humanitarian law in this respect.

Senator BIRMINGHAM—Thank you all for providing your time and evidence today and for your work on this, which is, I agree, a very important issue. It is useful sometimes to put these sorts of conventions into perspective by reference to the conventions that have been developed and which are already operating. How does this convention compare in its terms, scope and global acceptance to those around landmines or other initiatives that might be comparable?

Ms Rawson—I will start off and then ask colleagues to add their contributions. I think it is important, in looking at the support that this convention has drawn, to acknowledge that it is in its very early stages. I do not have figures for ratifications or accessions to the mines convention, but I think there would be a very significant number of countries involved, whereas this convention, only having been negotiated last year and opened for signing in December, is still at an early stage. It has not entered into force and will not do so until there are 30 ratifications.

That said, to have about 90 countries sign up when it was open for signature in Oslo does signify very substantial international support for the convention. We would certainly expect that over time, as countries go through their processes for ratification, there will be a significant number of states party to it. As my colleague Mr French said, its specific provisions with regard to victim assistance and clearance obligations do broaden international law in those respects, so

it is significant for that. I think we would characterise it as building on and adding to the growing body of international humanitarian law.

Senator BIRMINGHAM—Noting that you do not have figures for the convention on land mines or other relevant examples with you at present, it would be useful for us to have them. I am looking to see whether a similar pattern possibly emerged there that the convention reached a certain point of global acceptance and has, as you say, gained greater acceptance and greater signing and ratification from other countries since it initially came into force, and whether we can look to that as a model that this could similarly apply to.

Ms Rawson—We can certainly find you those figures. We should be able to do it from when it was opened up to the present day.

Senator BIRMINGHAM—Another issue is related to defence cooperation. Of course most of Australia's international defence activities are in cooperation with other countries—with our allied countries and the United States in particular. How will Australian personnel be covered by this convention in their operations with those other countries?

Ms Rawson—The first point I would make is that in fact Australia is already compliant as a signatory with the object and purpose of all aspects of the convention. We will fully implement our obligations under it, including in respect of article 21 of the convention, which was the provision agreed specifically to permit states' parties to continue to conduct military cooperation and operation with non-state parties, such as the United States, that might continue to retain and use cluster munitions. That continued cooperation is qualified to the extent that the states' parties in pursuing that cooperation must not themselves use cluster munitions or request that the cluster munitions be used when the choice of munitions is within their exclusive control. So it has those qualifications on it. As is also required by article 21, Australia will encourage states that are not party to the convention to accede to it—with the goal of attracting the adherence of all the states. At this stage of the ratification process, government is still looking at all the legal and operational and policy considerations that are relevant to article 21 and other provisions of the convention, including, as we heard earlier, how that might need to be reflected in legislation. Also, in terms of complying with its obligations, the ADF will need to review and amend as necessary any directives and rules of engagement and also to conduct awareness training for its members.

So certainly that article 21 was a very important provision in the negotiations. Australia and a number of other countries, while certainly wanting to be able to sign up to the convention, also recognised the importance of being able to continue, in terms of defence cooperation, coalition operations and UN peacekeeping, to cooperate with those countries which do not, either from the beginning or for some time, become parties to the convention. I will ask if the ADF have anything to add to that.

Air Vice Marshal Brown—No, at the moment we do not see any major operational issues from being signed up to the convention.

Senator BIRMINGHAM—In practical or operational terms, I guess the key comes down to part 4C, in article 21, which is what it is to use cluster munitions. I think it is fairly clear that it would be a breach of the convention for Australia itself to initiate the use of cluster munitions,

but do we have a clear fix on what the implications would be for an Australian plane in a joint operation under the command of the US, or what the implications would be for Australian personnel serving on a US plane in some joint operation?

Ms Rawson—As I said, government is still considering all those operational implications. At this stage I think to try to get into particular scenarios would probably not be helpful to the committee. But as I said, government and the ADF will certainly ensure that Australia is compliant with article 21, including, as you said, that Australia will not itself use cluster munitions or request the use of cluster munitions when the choice of munitions is within our exclusive control.

Senator BIRMINGHAM—I am supportive of the convention personally, but I would have thought that it was important to ascertain some of those particular scenarios and operational issues before Australia ratified the convention, not after we ratified it.

Ms Rawson—As I said, that process is going on, and the outcome of that will be reflected, if necessary, in terms of the legislation that is drafted. It will also be reflected in the ADF's directives, rules of engagement and the awareness training that it undertakes. So certainly those aspects will be looked at. As I said, because that process is still underway, to try to look at particular scenarios is, I think, in the end not helpful because we do not have all the information available yet.

Senator BIRMINGHAM—This committee does not have all the information available to it, so I am not sure how we are supposed to make a recommendation. I understand what you are saying, Ms Rawson, but I do not find it particularly helpful to the process of this committee doing its work if we are meant to, as a committee looking at Australia's international treaties and obligations, seriously consider the implications of them before we make a recommendation to the parliament as to whether they should or should not be ratified. It is not particularly feasible for us to operate in a situation where departments come to the table and basically tell us that they will make those decisions after we make our recommendation.

Ms Rawson—I would only reiterate the point that Australia is already complying with the object and purpose of the convention. It will be compliant, as you have heard from Air Vice Marshal Brown, and we do not anticipate any major interoperability issues with regard to article 21. But to get into particular scenarios that will need to be looked at carefully when rules of engagement et cetera are drafted is certainly beyond my capacity, I am sorry, and I do not think other colleagues are in a position to do that either.

Senator PRATT—I want to return to the topic of unexploded munitions. I am sure Ms Parke has continuing questions on this. I want to ask about submunitions that do fit within the convention as being allowed for use. One of the submissions talks about the implications of M85 submunitions—that they have to search the area and clear them in order to meet humanitarian standards. I would expect that, irrespective of whether a submunition is inside or outside the convention, if a submunition is unexploded it would not meet humanitarian standards for communities to go about their business, or are the submunitions that are allowable under this convention so harmless that people can go about their ordinary business?

Ms Rawson—The convention defines what a cluster munition is. We had an earlier discussion in terms of the SMArt 155 and that is not included in the definition. I think colleagues gave some of the reasons why that particular munition does not fit the definition, and also why the possibilities of unexploded ordnance are addressed by the features of that munition.

Senator PRATT—I accept that they might not represent the same level of risk because they disarm themselves. Are they so little risk that people can go about their ordinary business?

Air Vice Marshal Brown—Can I give an example because I think it is probably easier to do that. Cluster munitions are often sensor-fused type munitions these days. To give an example, the BLU97 is an anti-armour munition. As they come out, if they do not actually find their target they are programmed to explode 50 feet in the air. If that fails, there is a neutralisation device on the submunition.

Senator PRATT—So we would not be allowed to be in a room with an unexploded M85 submunition. If there were one of these other submunitions unexploded in the room with us right now, would we be allowed to be here?

Mr Perks—I think any submunition is an issue of concern. But I think the issue is addressed in Protocol V, which deals with the disposal of explosive remnants of war. Australia of course is compliant with Protocol V and there are obligations on the Defence Force in respect of that protocol to keep information about where munitions are used, what type, what dates, what numbers and those kinds of things. There are also obligations to clean up any unexploded munitions and, if it is not possible to do so, to provide information to the state that occupies the area. So all those things are spelt out. Australia complies already with Protocol V. The SMArt 155 or indeed any other type of munition used by the ADF will be affected by our Protocol V obligations. Those are the obligations that we are meeting currently in the conflicts that the ADF is committed to.

Senator PRATT—How do you go about working with civilians, communities and states when there are unexploded Australian munitions? How do you go about working to make sure that communities are not affected by those?

Mr Perks—There are a number of procedures, I think, going back to the first year's record keeping and then having an obligation to mitigate any unexploded ordnance. I think there is also an obligation for providing information not only to local communities but also to humanitarian organisations who may be working in the area, and they are also mentioned in Protocol V. The ADF provides information to local communities, it provides information, protective equipment, risk education and information to official visitors that enter areas for which the ADF has operational responsibility and the deployed forces, of course, will have the relevantly trained explosive ordnance technicians who would be involved in clearing, marking and destroying items.

Ms NEAL—Thank you for appearing before us. The NIA states that Australia does not possess any cluster munitions with the added provision, 'Other than non-operational stocks permitted for training purposes.' What non-operational stocks for training purposes are held by Australian Defence Forces? How many and where are they?

Air Vice Marshal Brown—As I get to that page it is probably worth talking about the reason why you have those stocks. It gets to the actual clean-up question in that we need to be able to train our explosive ordnance technicians so that they can move in and actually neutralise bomb-lots that are an issue. You cannot do that sort of training with simulators, you actually have to have quantities of some of this equipment.

Ms NEAL—The question still remains.

Air Vice Marshal Brown—Yes, I am just getting down to exactly what we have. We have two Russian-made cluster bombs containing 180 and 150 submunitions; two cassettes containing 12 Russian and former Soviet Union submunitions and two boxes containing nine and 20 former Soviet Union submunitions. That is what we have at the moment.

Ms NEAL—So fewer than 50. Where are they generally used?

Air Vice Marshal Brown—They are all used at our training institutions where we actually train the explosive ordnance technicians to be able to do this.

Ms NEAL—Where would that be?

Air Vice Marshal Brown—Orchard Hills is one of the main areas. I need to check exactly.

Mr Perks—And also the School of Military Engineering in Sydney where the engineers and EOD explosive ordnance technicians train. So they are in the training establishments where ADF people are trained.

Ms NEAL—None of this training is done overseas?

Mr Perks—No, I am not aware of any overseas training in these issues. I think, as part of the pre deployment training, ADF people are provided with the skills and familiarisation with these types of munition when they are deployed to areas where the munition may be found.

Ms NEAL—Your response was, ‘Not so far as I am aware.’ But the question is, really, does it occur or does it not? If you are not aware, would you please check and get back to me. Someone else may know one way or the other.

Air Vice Marshal Brown—I think that is a question that we can take on notice. There may be some sort of exchange positions that go on with this.

Ms NEAL—I appreciate that. Thank you.

Senator WORTLEY—It is proposed that Australia ratify the Convention on Cluster Munitions and we have had a number of questions put here today that still require answers. The information we have is that the convention will come into force six months after it has been ratified by 30 states and that, at this stage, eight countries have ratified. What sort of time frame are we looking at for ratification by those 30 states?

Ms Rawson—It is really hard to give you a definitive answer. Each country will need to go through its own policy, legal and other processes to move towards ratification, so I cannot put an estimate on that.

Senator WORTLEY—Can you say that it would be about 12, 24, or 36 months? Are you in a position to do that?

Ms Rawson—I could say any of them but I am not sure that I could say it with any authority. I think countries such as Australia who signed up to the convention hope that there will now be steady movement towards ratification by the 30 countries needed for the convention to enter into force, and then by an increasing number of states after that to build the number of states passing it. But I really cannot be specific as to timing because ratification really is in the hands of each country and its processes, including our own, obviously, with this hearing being a part of that.

Ms PARKE—I have a follow-up question to one that Senator Birmingham asked and I also have a separate question. Going to the question of interoperability and your response that you are still in the process of working out how the cluster munitions convention will work in practice, we do have a precedent in this sense of the landmines convention, to which Australia is party and the United States is not. I submit that the kinds of scenarios that Senator Birmingham put forward in terms of joint operations and such surely have already been tested in operations that Australia has been conducting with the United States in Afghanistan and in Iraq in terms of the landmines convention. Are there not parallels that can be drawn with the cluster munitions convention?

Ms Rawson—I am sorry, but I am not familiar with those particular aspects of the landmine convention. Perhaps my defence colleagues are.

Mr Perks—Yes. The landmine convention does not have any equivalent of article 21, permitting interoperability between states parties and non-states parties. So the situation is different in terms of the formal obligations that we are accepting. I think there is also a distinction in that the proportion of cluster munitions in the inventory of states such as the United States is higher as a percentage of the entire stock of munitions than was the case with landmines, so I think the likelihood of cluster munitions being used in intensive, high-level, state-on-state war fighting is different from the potential for use of antipersonnel landmines. So there are some distinctions in terms of the obligations and in terms of the likelihood of having to encounter the use of those munitions and, therefore, the types of preparation that we would need to do.

Senator WORTLEY—How do the joint operations work if Australia has signed up to the landmines convention and the US has not? How do we conduct joint operations where the US is using landmines?

Mr Perks—This is largely taken care of by the rules of engagement, the national directives that apply to Australians committed to combined operations and the awareness training and preparation of the ADF individuals when they are committed to operations, which address Australia's legal obligations and the obligations that Australia has taken on by way of international humanitarian law. Then there are the practical measures that I think are taken by personnel, depending on which job they happen to be doing. There are an extraordinary variety

of jobs where ADF people may be involved with non-states parties. This is one of the issues that Ms Rawson referred to in terms of scoping the impact. Basically, Defence takes pains to ensure that Australia's legal obligations are complied with in the jobs that ADF members do.

Ms PARKE—So that means that we do not participate in joint operations where the US uses landmines?

Mr Perks—We participate in joint operations. I am not aware of their having used landmines in recent operations. I am told by my colleagues that that is not the case. So it has not been a problem in the recent operational commitments that we have had.

Ms PARKE—Thank you.

Mr BRIGGS—Can I just follow up on Melissa's question. This is a very difficult point for us. The committee is expected to give a recommendation on this treaty. I think this is a very major aspect of the operation of the treaty. We heard earlier on in evidence from Mr Skillen that the government has not even begun to prepare the legislation yet. There are a couple of issues arising from that. Firstly, back on the topic of the ADF, you mentioned that it is much more common for the United States to use cluster munitions than landmines. I think that is accepted. So the chances of Australian personnel operating in a joint operation being exposed to the use of landmines are slim. The question that Senator Birmingham was pursuing is much more relevant to this. It went to the issue of this treaty. Are Australian personnel going to be exposed to a situation where they are potentially in breach of the convention?

Air Vice Marshal Brown—I do not believe they will be. Again, article 21, where it defines exclusive use of cluster munitions, gives a lot of protection.

Mr BRIGGS—Sure, but can you understand our concern that we do not know that yet? You say it is a scenario, Ms Rawson, but, with all due respect, it is a potentially likely scenario for us to be dealing with.

Ms Rawson—Certainly it is a likely scenario that at some stage in the future Australia will be participating in coalition operations with the United States and other countries that might use cluster munitions. When I was talking about scenarios, I was not trying to suggest that that would not be likely; I was really referring more to the particular details of that sort of scenario and what we might or might not do. What I would say to you is that, for each of those engagements, it is my understanding that the ADF operates according to specified rules of engagement for ADF personnel involved in whatever capacity in such operations. Australia's obligations under the convention are that we do not ourselves use or authorise the use of—if it is within our exclusive control—cluster munitions. The government and the ADF will ensure that the directives that defence personnel have in those circumstances will mean that Australia complies with the convention.

Mr BRIGGS—I accept that for the Australian state. I would not like to speak on Senator Birmingham's behalf—he does that well enough himself—but my concern is that an Australian Defence Force member will be exposed to that situation individually. The Australian state will not be authorising the ADF to use the munitions but an ADF member will be part of an operation where the munitions are used—which happens all the time.

Air Vice Marshall Brown—We are not signed up to the same conventions as the United States now, anyway. Individual personnel—and, in my case, they might be flying with an American squadron—would actually be given detailed ROE, which meant you will not be able to drop cluster munitions from that American aeroplane, for example. So it is taken care of in that scenario. Then it is up to the American squadron commander and whether they are willing to accept that. Previously in 2003, they were willing to accept those limitations that we had.

Senator BIRMINGHAM—I have no doubt that the ADF will come up with appropriate rules of engagement to ensure that Australian personnel are not in breach of the convention—that is fine. What I am trying to work out and ascertain—perhaps you could take it on notice Ms Rawson, and see what you can come to the committee with—is actually how the use of cluster munitions will be defined; that will impact on what defence has to write as its rules of engagement. I assume it comes to Article 21(4)(c), but is there any sort of support role in the use of them—it could be operating the air traffic control to a mission; anything like that—or is the use going to be very narrowly defined to dropping them out of our planes?

Ms Rawson—I think the convention itself defines use in terms of its self-use. It is referring specifically to the state party itself using, or authorising the use of, when it is within its exclusive control. It is talking specifically about the state party, not the other non-state parties with which the state party may be operating. We will certainly come back to you if we can define that in any more helpful terms.

CHAIR—Mr Simpkins has the call. We only have a couple more minutes to go, so I will invite him to ask questions.

Mr SIMPKINS—Under Article 2, the definition of cluster munitions is pretty well-defined to basically include those munitions which are indiscriminate in their technology. Why is it such a drama for some of the nations around the world to ratify this convention? Is it to protect their existing stocks of indiscriminate munitions or is it to protect industries that might still be producing these things?

Ms Rawson—It would be fair to say that those countries which have not, so far, indicated that they will sign up to them have a variety of reasons for that. You mentioned some produce and some use. For some countries it will be the case that the types of munitions that are defined by the convention as ‘cluster munitions’ still fulfil a military purpose that these countries regard as being necessary at this stage. Whether that view will evolve over time, I do not know. You heard earlier, in response to a question about US policy, that the United States itself certainly wants to move towards—and will move by 2018—to limiting the munitions that it does use to try and achieve a better humanitarian outcome.

CHAIR—I will take one more question and then our time for questions will be up. Mr Briggs has flagged the possibility of coming back and of having another crack at it, if this is the desire of the committee.

Ms PARKE—Belgium and Norway have restricted investment in companies that produce cluster munitions. Would Australian investment in companies that produce cluster munitions be viewed as assisting the production of cluster munitions and thus be prohibited under the convention?

Ms Rawson—As far as I am aware, the issue has not been considered by government. Clearly, the issue of ethical or socially responsible investments is one that goes more broadly than those of cluster munitions. But all I can say is that, to my knowledge, there has not been specific consideration of the issue by government at this stage.

CHAIR—Given the time, I will conclude the hearing for today. Thank you for attending to give evidence today. If the committee has any further questions, the committee secretariat may seek further comment from you at a later date.

Resolved (on motion by **Senator Wortley**, seconded by **Mr Briggs**):

That this committee authorises publication, including publication on the parliamentary database, of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 11.46 am