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JOINT STANDING COMMITTEE ON TREATIES

Reference: Treaties tabled on 13 May 2009

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**JOINT STANDING
COMMITTEE ON TREATIES**

Monday, 22 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: Senators Birmingham and Cash and Mr Forrest, Ms Hall, Mr Murphy, Ms Neal, Ms Parke, Mr Simpkins and Mr Kelvin Thomson

Terms of reference for the inquiry:

To inquire into and report on:

Treaties tabled on 13 May 2009

WITNESSES

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WEICHARD, Mr Greg, Director, Iraq and Middle East Section, Australian Agency for International Development (AusAID) 9

Committee met at 10.01 am

BICKFORD, Ms Victoria, Acting Director, International Legal Cooperation Section, International Assistance and Treaties Branch, International Crime Cooperation Division, Attorney-General's Department

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Agreement between Australia and the Socialist Republic of Vietnam concerning the Transfer of Sentenced Persons

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 three treaty actions which were tabled in the parliament on 12 March and 13 May 2009. I thank witnesses for being available for this hearing. We will now take evidence on the Agreement between Australia and the Socialist Republic of Vietnam concerning the Transfer of Sentenced Persons. I call representatives from the Department of Foreign Affairs and Trade and from the Attorney-General's Department. 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 any introductory remarks before we proceed to questions.

Ms Jackson—Thank you very much, Chair, for the opportunity to appear before you this morning. Given the time that has elapsed since the committee looked at a transfer of prisoners treaty, I propose to make an opening statement.

Australia's international transfer of prisoners, or ITP, scheme has been in place since 2002. The purpose of the scheme is to reintegrate prisoners into society by allowing them to apply to serve their sentences in their home country, without the language and cultural barriers which can reduce their prospects of rehabilitation. Once transferred, prisoners continue to be punished, as far as possible, in accordance with their original sentence.

The legislative framework for the ITP scheme is contained in the International Transfer of Prisoners Act 1997. The act operates in conjunction with Australia's multilateral and bilateral ITP treaties, which are brought into effect by regulations made under the act. The Australian government is committed to expanding the scope of the ITP scheme, especially with Australia's regional partners in law enforcement cooperation. To date Australia has developed ITP treaties with Thailand, Cambodia and Hong Kong. Australia is also a party to the Council of Europe Convention on the Transfer of Sentenced Persons, which enables us to transfer prisoners to and from the convention's 62 other state parties.

The negotiation of a bilateral treaty with Vietnam, a key regional partner, has been a priority for the Australian government for some years. As at 17 June 2009, there were 28 Australians known to be imprisoned in Vietnam. Five of those are still awaiting trial. Most of the remainder are serving very long sentences of 20 years to life imprisonment. According to the Australian Bureau of Statistics prisoner census, there are 684 prisoners in Australia who claim to have been born in Vietnam. That makes them the third largest number of prisoners in Australia after Australians and New Zealanders. At present, Vietnam is not party to any other bilateral or multilateral agreement that would enable us to transfer prisoners with Vietnam.

The proposed agreement with Vietnam would strengthen Australia's bilateral relationship with Vietnam and it would also be a tangible demonstration of Australia's commitment to law enforcement cooperation in the region. This agreement is consistent with the requirements of the ITP Act and with our other treaties. Most importantly, every transfer requires the consent not only of the prisoner but of both governments, the government of Vietnam and the government of Australia. The consent of a state or territory for an incoming prisoner is also required. It would be from the state or territory in which the prisoner would be housed. If a prisoner is serving a sentence for a state offence, that outgoing prisoner also requires the consent of the state. Prisoners are only eligible to transfer to Australia if they are Australian nationals or are permitted to travel to, enter and remain in Australia indefinitely and also have community ties to a state or territory. Vietnam will only accept prisoners who are Vietnamese nationals.

The agreement specifies that sentences will be enforced by the continued enforcement method. This means that the receiving country continues to enforce the sentence, as far as possible, as originally imposed by the sentencing country. However, if necessary the sentence can be adapted to make it compatible with the law of the receiving state but it can never be harsher than the original sentence imposed. Furthermore, the judgement against the prisoner must be final. It must not be capable of further appeal.

The agreement imposes a requirement of dual criminality, which means that the offence for which the offender was convicted and sentenced must also be an offence in the receiving country. This requirement can be waived with the agreement of the parties to the treaty. The prisoner must also have at least one year of his sentence remaining to be served at the time he applies for transfer. This is because of the length of time that it takes to process an application for transfer and secure the agreement of all parties to the transfer. This requirement can also be waived by agreement between the two countries.

In terms of the costs of transfer, these are borne by the receiving party. However, some or all of these costs can be recovered from a prisoner, providing the prisoner is informed of this in advance and consents to the transfer on that basis. Once a prisoner is transferred, the ongoing

costs of the prisoner being imprisoned are the responsibility of the receiving country. The sentencing country retains jurisdiction, to modify or cancel the prisoner's conviction and sentence, after the prisoner has been transferred.

Arrangements for the international transfer of prisoners have been supported by successive Australian governments for humanitarian and rehabilitative reasons. The agreement is expected to reduce the financial and emotional burden on Australians who have family members imprisoned in Vietnam. This is more so because letters and phone calls to and from Australians detained in Vietnam must be in Vietnamese. This is a significant hardship for those who only speak English. Transfers under this agreement will allow prisoners to retain direct family contact during their incarceration thereby reducing the costs of visiting and corresponding. The agreement is also expected to relieve demands on Australia's consular officials in Vietnam, who are required to provide assistance to Australian prisoners and their families in Vietnam. The repatriation of prisoners to their home countries will enable prisoners to undertake vocational and educational programs in prison which might not be available to foreign prisoners. One substantial benefit flowing from the ITP scheme is that it provides the Australian and Vietnamese governments with the opportunity to grant conditional release to prisoners at the end of their non-parole periods. This would enable them to participate in release on parole or licence and also in weekend and home detention schemes, which gradually reintegrate prisoners into society.

In conclusion, arrangements to enable the international transfer of prisoners are becoming increasingly important in the administration of justice and arrangements are in place between a growing number of countries. The agreement will reduce the burden on the friends and family of prisoners, assist in enabling Australians to serve their sentences within the Australian prison system, and increase their prospects of successful rehabilitation. Thank you very much, Chair.

CHAIR—Thank you. I should advise the committee members that there is a meeting of the joint opposition parties scheduled for 11 am and we are therefore proposing to conclude by that time. Given that we have got cluster munitions as well, it would be desirable to be able to move onto that around 10.30 am. I intend to rest my struggling voice by allowing others to ask questions. Melissa Parke has the call.

Ms PARKE—Thank you, Chair. There is a submission to the inquiry from the Foreign Prisoner Support Service which argues that there is an emerging pattern at state and territory level whereby prisoners undergoing financial hardship are denied transfers due to an inability to reimburse the state or territory government for travel costs. Are you aware of any cases under the international transfer of prisoners scheme where prisoners have been denied transfer due to an inability to reimburse travel costs? Is this a common occurrence? How do governments determine if reimbursement of travel costs should be sought?

Ms Jackson—Since the travel costs are usually borne by state and territory governments and state and territory governments can refuse their consent on any basis including costs, it is not really possible for us to isolate the particular reason why a state has refused transfer. But we do know, particularly with New South Wales, that the issue of costs is a significant one.

Ms PARKE—Do you think that this is right? Do you think that Australian prisoners overseas who have the opportunity to come back to Australia and serve out their term in an Australian

prison close to their family and friends should be denied that possibility because they do not have enough money?

Ms Jackson—The agreement between the Australian government and the states and territories enables the state and territory governments to recover costs for prisoner transfer, so that it is a matter for the states and territories.

Ms PARKE—That is something that we can negotiate with the states and territories, isn't it?

Ms Jackson—It would be. But the costs of some of these transfers are significant and many of the offenders who have been convicted of drug trafficking or fraud do have substantial resources at their disposal.

Ms HALL—If I could follow on from that question of Melissa's, are there negotiations taking place between the Commonwealth and the states, particularly New South Wales, to try and resolve that problem?

Ms Jackson—The former Minister for Home Affairs has written to the New South Wales minister seeking a reconsideration of the New South Wales position on this issue.

Ms HALL—And there has been no response as yet?

Ms Jackson—No.

Ms HALL—Thank you.

CHAIR—We will go to John Forrest.

Mr FORREST—Thank you, Chair. Ms Jackson, when you were talking about the potential number of prisoners that would be involved I was trying to keep up with the figures. I think you said 28 Australians were interned in Vietnam.

Ms Jackson—Yes.

Mr FORREST—What is the opposite or reverse situation? How many Vietnamese are interned in Australia?

Ms Jackson—There are about 645 people in Australian prisons who say they were born in Vietnam. How many of those are now Australian citizens we are not in a position to say.

Mr FORREST—There is an imbalance there. Another question I have is in regard to something you said about an offence, if an offence does not exist in the receiving country. Could you tease that out for me? I imagine that could be quite an issue as some of the offences for which Australians are interned in Vietnam do not exist in Australia. Is that a likely assumption?

Ms Jackson—Most of the Australian prisoners who are currently in Vietnam are there for drug offences. I think there is one there for murder and one there for a culpable driving offence.

So for the prisoners who are in Vietnam at the moment dual criminality would not be an issue. But in any event Australia and Vietnam can agree to waive that particular requirement.

Mr FORREST—I am wondering about parole conditions once these prisoners are interned in Australia. We have a fairly generous consideration of parole. How would that work when the original country might have a very strong view, so they have sentenced someone for 20 years and they expect that to be served. How will that work?

Ms Jackson—The sentence to be served is agreed between the three parties—both governments and the prisoner, before they are transferred. But the conditions of parole after the person has been transferred are solely a matter for the Australian government.

Mr FORREST—And that is in the agreement?

Ms Jackson—Yes.

Senator CASH—I would like to pursue the question that Mr Forrest was asking in relation to incompatibility of sentences. It is article 8, I believe, that provides:

If the sentence is by its nature or duration incompatible with the law of the receiving Party, the receiving Party may adapt the sentence in accordance with the sentence prescribed by its own law for a similar offence.

My question is in three parts. Are there sentences permitted by Vietnam that are incompatible with Australian law due to their nature or duration? If there are, could you please provide examples. How would the adaptation of such sentences be agreed? How would Australia adapt a sentence handed down in Vietnam for which there is no corresponding offence in Australian law—for example, a sentence which is not classified as criminal by Australian law?

Ms Jackson—Normally the sentences which have been imposed in Vietnam are lengthy terms of imprisonment. And for drug offences, murder and so on, there is no difficulty with incompatibility. If they do not have a non-parole period specified, we would normally negotiate with the other country to identify an appropriate period that might correspond to the non-parole period. That would be agreed by the two governments and the prisoner before transfer occurred.

Senator CASH—Just picking up on that point, the prisoner also has to agree.

Ms Jackson—Yes.

Senator CASH—So, if there was a Vietnamese prisoner in an Australian jail and the Australian government and the Vietnamese government came to an agreement whereby that prisoner could be transferred back home, but the prisoner said, ‘I don’t think so,’ the prisoner has not given his or her agreement so this treaty does not take effect.

Ms Jackson—That is the end of the story.

Senator CASH—Sorry, I interrupted you in relation to my original question.

Ms Jackson—I think the second part of your question was about how agreement is reached. Normally, the receiving country would indicate that it proposes to enforce a sentence in a particular manner. And then when the transferring country agrees to that, and it has the details of that sentence before it, it can of course negotiate something a little different. But it is a process of negotiation, originally, between the two governments, and then the prisoner can consent or otherwise.

Senator CASH—What would happen if the prisoner was an Australian prisoner in Vietnam and an agreement was reached under this treaty and the Australian was transferred back to Australia to serve their sentence here, and once they are here Australia breached the terms of the negotiated sentence? What would happen then?

Ms Jackson—The treaty provides that disputes are to be handled, in the first instance, between the two central authorities—which are the Attorney-General’s Department in our case and, I think, the Ministry of Public Security, in Vietnam’s case. If the two agencies are not able to resolve that dispute it then moves to the diplomatic arena and it is resolved there. The ultimate sanction, of course, is that the country that considers there has been a breach does not agree to future transfers.

Senator CASH—In relation to the treaties that are currently in place between Australia and Cambodia, Hong Kong and Thailand, do you have the numbers of prisoners in Australia that have been sent back to their home countries and vice versa? I am happy for someone else to ask questions while you are trying to find the information.

Mr MURPHY—Are we waiting for an answer?

CHAIR—I am inviting you, Mr Murphy, to ask questions while we get the answer to that one.

Mr MURPHY—Ms Jackson, are you aware whether there are any Australian prisoners in Vietnam or any Vietnamese prisoners in Australia whom the government has indicated they would not give consent to transfer?

Ms Jackson—No, there have been no discussions of that kind.

Mr MURPHY—Have there ever been any instances in your experience where a government has refused to consent to transfer a prisoner?

Ms Jackson—Yes. There have been instances where that has occurred. Quite frequently the Australian government will refuse to transfer a prisoner where the sentence that is proposed to be enforced in the receiving country is considered too lenient by the Australian government. It is intended to be a scheme for rehabilitation, not an easy way of reducing your sentence.

Senator BIRMINGHAM—Australia has a multilateral agreement with the Council of Europe Convention for the Transfer of Sentenced Persons and similar agreements with Cambodia, Hong Kong and Thailand. How go negotiations with Indonesia?

Ms Jackson—They are proceeding very slowly. It has to be recognised that Indonesia has no agreements at all for international prisoner transfer nor does it have any domestic legislation which would underpin such a process, which, at least for Australia, is critical in providing the authority to release the person from prison to serve the sentence somewhere else and also to

enable us to lawfully imprison a person, who has not been sentenced in Australia but in a foreign country, within our prison system. So that is a fairly critical deficiency with Indonesia's domestic laws.

Senator BIRMINGHAM—Are they still proceeding, albeit at snail's pace, or have they essentially reached a stumbling block?

Ms Jackson—They have been progressing very slowly. They are raised constantly in ministerial visits but the reaction from the Indonesians has been relatively muted, to say the least.

Senator BIRMINGHAM—Thank you, Ms Jackson.

Ms HALL—Is there any difference between this agreement and other agreements we have for the transfer of prisoners?

Ms Jackson—There is a slight difference in wording in particular clauses but there is no significant difference in substance from the other agreements.

Ms HALL—Will there be any difference in the way it operates?

Ms Jackson—No.

Ms HALL—I would also note that you say in your submission that this particular agreement has widespread community support, but I am not aware of the consultation process. Was there a consultation process and if not, why not?

Ms Jackson—There is a formal mechanism of consultation with the states and this agreement was put through that process. I am not aware of any community consultation which occurs on any of our bilateral agreements in the criminal justice area. Whether there was consultation at the time the scheme was first introduced, I am afraid I cannot say.

Ms HALL—Going back to that cost question, I wonder if there has been a history of prisoners being refused transfer because of that cost factor and if you envisage there will.

Ms Jackson—As I said at the outset, any party whose consent is required to effect a transfer can refuse a transfer and does not need to provide reasons for refusing. So we would not be in a position to say where a state has declined a transfer.

Ms HALL—Sorry. I understand you said that before I came in.

CHAIR—Unless there are any other further questions, I might thank you very much 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.

Senator CASH—Chair, if my questions could be taken on notice.

Ms Bickford—We can answer them now if you like. Since the ITP scheme has come into force, four prisoners have transferred to Australia from Hong Kong and five from Thailand. We have had no prisoners so far transferring from Australia to any of the countries with which we have a bilateral treaty.

[10.33 am]

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

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

WEICHARD, Mr Greg, Director, Iraq and Middle East Section, Australian Agency for International Development (AusAID)

SKILLEN, Mr Geoffrey James, Principal Legal Officer, Office of International Law, Attorney-General's Department

Convention on Cluster Munitions

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

Thank you for coming back to give further evidence following our hearing last week. Given that you made the opening statement, it is up to you as to whether you wish to say anything further before we move to questions.

Ms Rawson—There were a number of questions raised last week that we undertook to get back to you on. If it is agreeable to the committee, I might just pick up a number of those and then take any further questions. It should not take too long, on my part, to go through those issues. I will then defer to my Defence colleagues for a bit more detail on one or two issues.

At last week's hearing, I think it was Mr Briggs who asked about the position of the Iran and Syria in the negotiations. Neither country participated at all in the negotiations on the convention. I might also add in that context neither of them have signed other conventional

arms-control conventions such as the Convention on Certain Conventional Weapons or the mine ban convention so, to that extent, their position is consistent in not signing and being involved in the cluster munitions convention negotiations.

I should also add that since last week the figures that I provided to the committee about the number of signatories and the number of ratifications have changed. There have been two more signatories since then, Nigeria and Jamaica, which brings the number of signatories to 98, and two more ratifications, Albania and Spain. That means there are now 10 ratifications.

Senator Birmingham asked about the number of signatories to the mine ban convention. There are currently 156 states party to that convention. There are two other signatories that have signed but not ratified that convention, the Republic of Marshall Islands and Poland. There were also some questions about how long that convention took to come into force. The mine ban convention required ratification by 40 states to enter into force. It was opened for signature on 3 December 1997 and entered into force on 1 March 1999, which is six months after the 40th ratification. I also have, if the committee is interested, a chart that shows the time over which the ratifications occurred for that convention and that gives an idea of how long that takes. I will pass that to the secretariat.

Ms Parke also asked about an issue of investment in companies that produce cluster munitions. The convention itself prohibits states' parties from directly or indirectly developing or producing cluster munitions or assisting, encouraging or inducing anyone to engage in activities prohibited by the convention. That is, the convention does not explicitly prohibit investment in companies that develop or produce cluster munitions nor does it define the term 'assist'.

Australia has interpreted the word 'assist' to mean actual and direct physical participation in any activity prohibited by the convention in regard to, for example, the mine ban convention. That is the interpretation of 'assist' that has been taken by Australia. Under that interpretation it is therefore doubtful that investment in companies that develop or produce cluster munitions is prohibited by the convention. But I should emphasise that the government—as we discussed last week—has not yet considered the terms of the legislation to implement the obligations of the convention, and issues such as the interpretation of 'assist' will need to be looked at there.

Mr Murphy, I think, asked about Australians killed or injured as a result of cluster munitions. DFAT has done a search of its consular database and not been able to identify any cases with 'cluster' and/or 'injury' in the case load. That does not mean, of course, that no Australians have been injured by cluster munitions but only that we have not been able to identify any in the consular case load. The advice I have received from my AusAID colleagues is that no aid personnel involved in Australia's mine action strategy and the clearance activities undertaken under it have been injured nor, to the best of my Defence colleagues' knowledge, have any uniformed Australian personnel been injured in cluster munitions clearance in recent years, but they may wish to add to that later. Senator Birmingham also asked for further advice about article 21—the interoperability issue. Ms Neal also asked some questions on training issues. I will ask my Defence colleagues to talk on those particular aspects.

Air Vice Marshal Brown—I have got a short opening statement which I think will answer the majority of questions. I think it was clear at the last hearing that the committee would benefit from more detail on the application of the treaty, particularly in relation to interoperability.

The convention does achieve the aim of decreasing the spread of cluster munitions and does protect innocent victims of war from the danger of unexploded munitions, but article 21 of the convention was agreed specifically to permit state parties to continue to conduct military cooperation and operations with non-state parties to the convention such as our ally the United States. The United States is likely to continue to retain cluster munitions in their military inventory and use them in conflicts.

Importantly, Australia is already compliant with the objectives and the purpose of the convention. We are not currently involved in conflicts where cluster munitions are being used. The interoperability issue is most likely to become relevant if Australia becomes involved in a major conflict against conventional forces, particularly against armoured forces. That is the most likely circumstance under which our partners and allies would use cluster munitions. Cluster munitions were used by the United States and other nations in the initial conflicts in Afghanistan in 2001 and Iraq in 2003. Even taking this into account, this convention will allow Australia to continue to work effectively in a coalition during a major conflict. I think the simplest way to understand the interoperability provisions in the convention is that ADF personnel should be not be the first or the last in the chain of command when cluster munitions are used. That is, ADF personnel must not be engaged in actually deploying the cluster munitions—an example I gave last time was that of a pilot actually dropping cluster munitions—nor should they be at the top of the chain of command with ultimate responsibility and exclusive control over the choice of using cluster munitions.

However, ADF personnel can support the coalition in a wide variety of roles, even if cluster munitions are used by one of the coalition partners. They could still be employed in planning, intelligence, logistics and other support roles. All these roles would be allowed under the convention, but the fact that the convention allows it does not mean that the ADF personnel will necessarily be doing these jobs. It is very common for the ADF to place additional restrictions on personnel through directives and rules of engagement. Through our rules of engagement we place limits upon the kinds of roles and tasks that our personnel carry out, and that is in accordance with the strategic direction of government.

While the convention allows a wide range of support roles in a conflict where cluster munitions are used, this can be controlled by government to shape the ADF involvement, depending on the nature of the conflict. To ensure Australia complies with its obligations under the convention, the Australian Defence Force will need to review and issue explicit directives and rules of engagement and conduct awareness training. We will continue to monitor the approach to interoperability by other parties to the convention and we will continue to monitor and discuss the implications of Australia's obligations under the convention with the United States and seek to preserve the greatest degree of interoperability with the US that is consistent with our obligations under the convention, as we have done with other arms control measures.

Turning to a couple of specific questions that were referred to by the committee secretariat, I would like to provide a response to the first two of these questions and then turn to my colleagues to provide responses to the remaining ones. The first question related to military cooperation with the United States and a comparison between the cluster munitions convention and the mine ban convention.

These conventions have some important distinctions. In particular, unlike landmines, cluster munitions will likely be used by partners and allies in future major conflicts. There is no clause for interoperability in the mine ban convention, so these conventions will operate in a very different manner. Australian military cooperation with the United States is conducted in accordance with our obligations under the mine ban convention. The United States has not used antipersonnel landmines in a joint operation with Australia since Australia ratified the mine ban convention in 1998. However, in any circumstances where the US or a coalition partner was planning to use antipersonnel mines, ADF personnel would be prohibited from planning, requesting or executing missions that used these mines and be prohibited from providing support for such mines, such as refuelling the aircraft that carry them.

Under Australia's declaration to the mine ban convention, we could carry out indirect support activities such as providing security for a coalition partner that is using antipersonnel landmines. There are fairly strict conditions under the mine ban convention. ADF personnel are used to these kinds of restrictions and they will always be covered by our rules of engagement.

Cluster munitions are a different type of weapon system to landmines, with a very different purpose. They are a key part of the US weapons inventory and the modern, sensor-fused varieties of cluster munitions are far more likely to be used in future conflicts than antipersonnel landmines. As I mentioned earlier, the cluster munitions convention allows a wide range of interoperability with states that are using cluster munitions. The ADF can continue to provide planning, intelligence, logistics and other support and carry out senior roles in coalition headquarters.

The second question was about some of the terminology in the convention and how that would apply in the operational sense. In an operational sense, the ban on using cluster munitions will prohibit ADF personnel from physically firing, discharging or releasing cluster munitions. The ban does not prevent ADF members from working in coalition headquarters conducting planning, providing intelligence and logistics support where cluster munitions are being used. The ban on stockpiling and retaining cluster munitions prohibits Australia from procuring or holding cluster munitions for future operational use. The ban on transferring cluster munitions would mean that Australia would be prohibited from transferring control or ownership of cluster munitions if we had them. Cluster munitions are not part of the ADF weapons inventory and the ADF is prohibited from procuring them in the future. However, the convention specifically allows the ADF to continue to hold limited numbers of cluster munitions in order to train our personnel on how to deal with these weapons if they come across them on the battlefield. On that note, I would like to hand over to Murray Perks to answer a couple of the other questions.

Mr Perks—There are two questions I would like to address which arose from the previous hearing. The first one was: how many cluster munitions does Australia have for training purposes and where are those cluster munitions used in Australia? The Minister representing the Minister for Defence replied to a Senate question on notice No. 2616 on 4 December 2006 and 20 March 2007. The answer to that question was that Australia has two live cluster bombs with several hundred associated live submunitions. They originated in the former Soviet Union and were acquired by battlefield collection in Afghanistan in 2001. In addition, Defence has 13 inert bombs of various types that are used for training and countermeasures purposes. Defence also has some 2,320 inert submunitions. These are predominantly acquired from commercial suppliers of inert training aids. They are used for training purposes, including by ADF

ammunition technicians and engineers in the identification and disposal of such munitions and for explosives hazard awareness training for troops deploying to combat zones where such munitions may be encountered.

The live and inert bombs and submunitions are located in a number of ADF establishments. They are: the School of Military Engineering at Moorebank in New South Wales, which trains Army and Royal Australian Air Force explosive ordnance disposal technicians; the Army Logistics Training Centre at Bandiana and Bonegilla in Victoria, which trains ammunition technical officers; the School of Artillery at Puckapunyal in Victoria, which conducts training for artillery officers and other ranks; the Army Explosives Hazard Centre at 6th Engineer Support Regiment at Enoggera in Queensland, which trains deploying forces in explosives hazard awareness; the 1st Combat Engineer Regiment at Palmerston in the Northern Territory, which conducts explosive ordnance disposal training and hazard awareness training for deploying troops; the Directorate of Explosive Ordnance Services at Orchard Hills in New South Wales; the Defence Explosives Ordnance Disposal Training School, also at Orchard Hills, which provides training for Army and Air Force ammunition technical officers; and, finally, the Defence Science and Technology Organisation in Adelaide, which develops render-safe procedures and explosive ordnance disposal countermeasures.

The munitions that I have referred to include some samples of Karinga bombs and submunitions that were manufactured in Australia in the 1970s as part of the Karinga project. The list also includes the American CBU-58B cluster bombs which were acquired for comparison purposes with Karinga. Most of those trial munitions were disposed of in the early nineties, and the surviving munitions are now inert and cannot be used operationally. The bombs and the associated submunitions that I have described do not constitute an operational stock of cluster munitions as defined under the convention. Almost all of them are inert and their numbers and uses are consistent with the purposes of the convention. Accordingly, Defence will retain them.

Another question was asked about the provision of cluster munitions training overseas. The answer is that the majority of ammunition technical officer training is conducted in Australia, but a small number of ADF explosive ordnance technicians each year are given training overseas. In the US, this is conducted at the US Navy School of Explosive Ordnance Disposal at Eglin Air Force Base in Florida. The ADF technicians are taught by US instructors on US facilities about a wide range of explosive ordnance, both live and inert, which is owned by the US. The number and nature of the explosive ordnance varies, but cluster munitions and submunitions are included in the training. I understand that some ADF members go on similar courses run by the British armed forces in the United Kingdom.

CHAIR—Thank you for your responses following last week's hearing.

Senator BIRMINGHAM—Very briefly—because I was meant to leave here about 10 minutes ago—thank you, Ms Rawson, Air Vice Marshal Brown and Mr Perks for those answers, which were most helpful. I appreciate the detailed follow-up from the previous hearing and I just wanted to place that on record. I have only one request. That is, if possible, could Ms Rawson or the Air Vice Marshal have extracted from the mine ban convention the relevant articles and extracts as they relate to relations and operations with other parties? That would be helpful just so that I and the committee can compare the wording from that convention as it relates to the

wording from the cluster munitions convention and the practical explanation that the Air Vice Marshal provided.

Ms Rawson—Senator, we would be happy to do that if we could, but I do not think the mine ban convention has an article comparable to anything in the cluster munitions convention such as article 21 on operability. One of the reasons that we made a declaration about it when Australia signed the convention was to go to the issue of interoperability. I can provide the committee with the text of the declaration which looks at the issue of interoperability that Australia made on the convention—it does not talk about it as such, but that is what it means—and also at how Australia will interpret some of the words, including ‘use’. If it would be helpful to the committee, we can provide you with the text of that declaration.

Senator BIRMINGHAM—A copy of that declaration would be useful. Thank you very much.

Ms HALL—Thank you very much. I did not hear your presentation last week but I have read the transcript. Listening to your opening statement, Air Vice Marshal, I am really quite concerned that the protocols in place for Australian service men and women are not very clear. I think it is all very fuzzy. I think that some of the tasks you identified could really be counter to what the protocol is about or to what we are looking at signing. I think that it needs to be tighter.

Is there any intention of trying to tighten that up? For instance, you said that dropping a bomb or firing a rifle would be considered inappropriate, but what about loading it? What about taking it to a certain place so that could happen? It is slightly different, but it is really part of the same issue. So you like might like to reassure me on that and to reassure me that there is going to be some definition of and protocol on what can be done that will not in effect be circumventing the protocol or going against its spirit. You also mentioned awareness training. What is involved in awareness training? That is quite broad also.

Air Vice Marshal Brown—Can I answer the first question. The convention is all of the articles. Article 21 is specifically written to maintain interoperability with our major ally. I could hand it across to the Attorney-General’s Department to explain what tightening we would do, but I see that article, from my point of view in the interoperability space and from an ADF point of view, as allowing us to maintain the spirit of the convention while operating with our major ally.

Ms HALL—I have read those articles, and I am still not reassured.

Air Vice Marshal Brown—Okay. Geoff, can you be of assistance?

Mr Skillen—In general terms, the appropriate way to interpret the key provisions of the convention is to start by looking at the key prohibitions that are set out in article 1 of the convention. Were it not for the existence of article 21, it would be very clear that state parties to the convention are not able to conduct any of those activities. But, as Air Vice Marshal Brown has indicated, article 21 was specifically included with the intention of allowing state parties a degree of flexibility when conducting military operations with other states that may not be party to the convention. So we see in article 21(3) a specific statement that says:

Notwithstanding the provisions of Article one of the convention and in accordance with international law, States parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.

That particular provision means that state parties are permitted to perform certain acts that would otherwise be prohibited under article 1 in the interests of continuing to engage in military cooperation with non-state parties. Finally, we need to look at article 21(4), which says that notwithstanding the provisions of article 21(3), there are certain things that remain prohibited to a state party, even when engaging in military cooperation with a non-state party pursuant to article 21(3).

To answer your specific question, I think that all we can say is that specific scenarios would be dealt with on a case-by-case basis. In other words, we would look at whether the activity itself was prohibited under article 1. If the answer to that question is yes, we would then need to look at article 21(3) in order to determine whether what we were proposing to do could properly be characterised as military cooperation with a non-state party. Finally, we would need to look at article 21(4) to determine that there was no specific prohibition in that paragraph on the activity in question.

CHAIR—Reluctant as I always am to interrupt things, Mr Simpkins is required to go elsewhere. 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 **Mr Murphy**):

That this committee authorises publication of the transcript of the evidence given before it at public hearing this day.

CHAIR—I also take a resolution that the document tabled as part of the inquiry into cluster munitions be received as a submission. There being no objection, it is so ordered.

Committee adjourned at 11.02 am