



Provisions of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

**WRITTEN SUBMISSIONS AND VIEWS OF
AUSTRALIAN LAWYERS FOR HUMAN RIGHTS THE
SENATE FOREIGN AFFAIRS, DEFENCE AND TRADE
COMMITTEE**

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Prepared by Matthew Zagor, Member of National Committee, ALHR

INTRODUCTION

This document comprises the written submissions of Australian Lawyers for Human Rights (**ALHR**) to the Senate inquiry into the Provisions of the *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*. The Bill aims to implement Australia's obligations under the *Convention on Cluster Munitions* (the Convention) as a step towards ratification. The Convention not only bans the use, production and stockpiling of cluster munitions, but also prohibits parties from assisting non-states parties with acts banned by the Convention.

ALHR is grateful for the opportunity to comment on this important step towards ratification of the most important weapons treaty of the past decade.

ABOUT ALHR

1. ALHR is a voluntary human rights organisation established in 1993. It comprises a network of Australian lawyers active in the practice and promotion of international human rights law standards in Australia.
2. ALHR has over 1,700 members and has active National, State and Territory committees.
3. ALHR is a member of the Australian Forum of Human Rights Organisations and bi-annually attends the Commonwealth Attorney General's Non-Governmental Organisations (**NGOs**) Forum of Human Rights and Department of Foreign Affairs and Trade Human Rights NGO Consultations. ALHR also attends the annual United Nations (**UN**) High Commissioner for Refugees NGO dialogue.
4. ALHR regularly informally briefs and discusses human rights issues with Australian Parliamentary Service Staff, policy advisors, the media and the general public.
5. ALHR is available for further comment and discussion in relation to the Bill as required.

ALHR'S POSITION

6. ALHR welcomes the government's commitment to the ratification of the *Convention on Cluster Munitions* and its incorporation into domestic legislation. However, we express our concern at the manner of the Convention's implementation as reflected in the draft legislation. ALHR calls on the Committee to recommend amendments to better reflect the terms of the Convention, to bring the legislation into line with the correct interpretation of Australia's obligations under the Convention, and to act as a model for other nations to emulate.
7. Specifically, ALHR calls on the Committee to recommend the strengthening of the prohibition clause by inserting the words 'never in any circumstances' as appears in article 1 of the Convention, the insertion of an objects section to assist in interpretation of the statute, the replacement of the intent requirement in the offence provision with a recklessness standard, and a clarification of the 'interoperability' provisions (cl 72.41 and 72.42) to protect the integrity of the treaty by maintaining the prohibition on assistance. Moreover, we call on the Committee to send a strong recommendation to

the government to remove the provision allowing for the transfer and stockpiling of these heinous weapons on Australian sovereign territory by non-state parties.

8. Combined with the unduly narrow reading of the interoperability clause, the legislation in its present form would bring Australia in potential breach of its obligations, and undermine the effectiveness of the Convention. In brief, the Convention must be read in the context of its clear and unambiguous purpose to pursue and promote the universal eradication of these weapons, and in light of the instrument's character as an international humanitarian law (IHL) treaty. The principles of IHL must thus be applied to its interpretation, drawn not least from principles of humanity and from the dictates of public conscience.
9. To the extent that this submission does not cover all aspects of the legislation, ALHR endorses the submission of Human Rights Watch. Our submission is largely designed to supplement and complement the recommendations made therein, primarily, by reference to and application of the rules of treaty interpretation with respect to the fundamental and absolute nature of the prohibition in article 1, the non-waiver character of the interoperability clause in article 21, and the inadequacy of the implementation of these provisions in the Bill.

SUMMARY OF RECOMMENDATIONS

10. In summary, ALHR recommends as follows:

Recommendation 1: The Bill should better reflect the text of the Convention.

Recommendation 2: The words 'never under any circumstances' which appear in article 21 of the Convention should be incorporated into the offences clause 72.38.

Recommendation 3: The Bill should incorporate an objects clause that reflects the terms of the Convention's preamble to assist in interpretation of the statute.

Recommendation 4: Clause 72.41 should be brought into line with the correct interpretation of article 21 (the interoperability clause). Specifically, it should be amended so as not to read as a waiver clause.

Recommendation 5: Clause 72.41(b) should clarify that the prohibition on assistance in clause 72.38(2) is not waived.

Recommendation 6: Clause 72.42 on acts by military personnel of countries not party to the Convention violates Australia's international obligations under the Convention and should be deleted.

Recommendation 7: Clause 72.38(2)(c) should be amended to incorporate a recklessness standard of liability.

Recommendation 8: The Committee should recommend text prohibiting direct and financial support to the manufacturers of cluster munitions.

Recommendation 9: The Committee should recommend the prohibition of retention of all live cluster munitions.

SUBMISSIONS

Implementing Australia's Obligations under the Convention on Cluster Munitions – Principles of Treaty Interpretation

11. According to the Explanatory Memorandum, the Bill 'includes the legislative measures necessary to ensure consistency between Australian law and the Convention on Cluster Munitions.' ALHR welcomes this step. It remains concerned, however, that the Bill in its current form fails to live up to this objective and may in some respects result in a breach of Australia's obligations under the Convention. It reaches this conclusion on the basis of the application of the accepted rules of treaty interpretation in the area of international humanitarian law (IHL) and in light of the practice and opinion of other states parties with respect to their obligations under the Convention.
12. The general law of treaties, as codified in the Vienna Convention on the Law of Treaties (VCLT),¹ governs the interpretation of the Convention. Articles 31 and 32 of the VCLT set out the key interpretative rules:²

Article 31 General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- a. Leaves the meaning ambiguous or obscure; or
- b. Leads to a result which is manifestly absurd or unreasonable.

¹ The Vienna Convention was ratified by Australia on 13 June 1974 and came into force on 27 January 1980 (see Vienna Convention on the Law of Treaties [1974] ATS 2).

² It is now established that these articles reflect customary international law. See *Case concerning Sovereignty over the Islands of Ligitan and Sipadan (Indonesia v Malaysia)*, 17 December 2002, ICJ, 23-4.

The humanitarian and universal disarmament purpose of the CMC

13. Article 31(1) codifies the rule that treaties must be interpreted in good faith according to the ordinary meaning of their terms in context and in the light of their object and purpose. The 'context' can be discerned 'the immediate surroundings of a provision, as well as the structure or scheme underlying it or the treaty as a whole.' The 'object and purpose' of the Convention can be ascertained, in part, by turning to the preamble to the Convention, as provided for in Article 31(2) of the VCLT.

14. Although not binding or establishing obligations, the preamble to the Convention affirms its fundamental humanitarian and disarmament purpose, placing the Convention squarely within the corpus of international humanitarian law whose aim is the protection of both civilians and combatants from the indiscriminate and disproportionate threats of weapons and methods of warfare which cause unnecessary suffering. The preambular paragraphs each reflect an intention by the parties to treat cluster munitions as inherently problematic and incompatible with the existing principles of IHL, *regardless of their potential military relevance*. This much is apparent in the most widely cited of the preambular provisions, paragraph 2, which asserts the States Parties are:

Determined to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned
[emphasis added]

15. The purpose of eradication based on unnecessary suffering is reflected throughout the provisions of the Convention, including in the core prohibitions in article 1 and in the positive obligations with respect to clearance, victim assistance and risk reduction in articles 4-6.

16. The relevance of the IHL nature of the Convention is emphasised in the final paragraph of the preamble:

Basing themselves on the principles and rules of international humanitarian law, in particular the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited ...
[emphasis added]

17. The principles of IHL are therefore relevant to the interpretation of the treaty and its provisions, making up the 'relevant rule of international law applicable' in these circumstances, as provided for in article 31(3)(c) VCLT.

18. The preamble includes a reference to two of these core IHL principles: 'the principles of humanity' and the 'dictates of public conscience':

Reaffirming that in cases not covered by this Convention or by other international agreements, civilians and combatants remain under the protection and authority of

the principles of international law, derived from established custom, from the principles of humanity and from the dictates of public conscience
[emphasis added]

19. A similar provision, known as the Martens Clause, appeared in the very first modern IHL treaty, the 1899 Hague Regulations, and was incorporated into the four Geneva Conventions and the two Additional Protocols. Drawing upon the Hague Regulations, the International Court of Justice identified 'elementary considerations of humanity' as a general principle of international law relevant to the elucidation of state responsibilities and obligations in its very first decision in the *Corfu Channel case*,³ and subsequently confirmed the relevance of the principle when considering obligations with respect to the use of weapons in the *Nicaragua case* and the *Nuclear Weapons Advisory Opinion*.⁴ Buttressed by the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, the practice of international tribunals demonstrates that the principles of humanity and dictates of public conscience are relevant for the interpretation of IHL treaties. In his seminal analysis of the application of the principles by tribunals over the past 100 years, Antonio Cassese concluded:⁵

In case of doubt, international rules, in particular rules belonging to humanitarian law, must be construed so as to be consonant with general standards of humanity and the demands of public conscience.

20. It should be noted that courts have used the above principles to reject *a contrario* arguments such as those being made by the Australian government with respect to the interoperability clause – the view, in other words, that conduct which is not mentioned in article 21 is therefore not prohibited.⁶ Such a presumption cannot legitimately be made in humanitarian law treaties. This point will be explored in more detail below.

21. Importantly, states parties have determined not just to cease the production, use and storage of these weapons, but have taken on an obligation to promote and pursue their **universal eradication**. Paragraphs 4-5, and 19 of the Preamble are as follows:

Deeply concerned also at the dangers presented by the large national stockpiles of cluster munitions retained for operational use and **determined to ensure their rapid destruction,**

Believing it necessary to contribute effectively in an efficient, coordinated manner to resolving the challenge of **removing cluster munition remnants located throughout the world, and to ensure their destruction.**

Emphasising the desirability of attracting the adherence of all States to this Convention, and **determined to work strenuously towards the promotion of its universalisation** and its full implementation,

³ *Corfu Channel (United Kingdom v Albania)* [1949] ICJ Rep 4, p. 22.

⁴ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, pp. 112–114; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ 226, p. 257, 262.

⁵ Antonio Cassese 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 *European Journal of International Law* 187, 212.

⁶ *Ibid* 207-208.

[emphasis added]

22. This purpose is implemented *inter alia* in the nature of the prohibition in article 1 and its inclusion of the prohibition on assistance, by the jurisdictional and territorial nature of the obligation to impose penal sanctions in article 9, and in particular by the positive obligation in article 21 to encourage non-parties to become party to the Convention and to promote its norms.
23. Finally, related to the 'objects and purpose' test is the principle of effectiveness applicable to international humanitarian law treaties. This principle stresses the integrity of a treaty and is founded on the notion that effective content be given to all its terms.⁷ With respect to international humanitarian law and human rights treaties, the principle of effectiveness requires an expansive rather than restrictive reading of provisions.⁸
24. In sum, the humanitarian and universal disarmament purposes of the Convention are manifest in the preamble and must be considered in the interpretation of all its substantive provisions. The Convention's purpose is the eventual universal eradication of these arms and the prohibition of their use in all circumstances. States that have become party to the treaty must be taken to endorse such objectives. Moreover, states parties have agreed that the principles of humanity that underpin humanitarian law are applicable to the interpretation of obligations under the Convention. These principles, complemented by the principle of effectiveness, require an expansive rather than restrictive reading of a state's obligations under the Convention, and a rejection of a *contrario* arguments absent clear words.

Detailed Recommendations:

1. Incorporating the Text of the Convention

Recommendation 1: The Bill should better reflect the text of the Convention.

25. The High Court of Australia has recognized the applicability of the VCLT to the interpretation of treaty obligations as implemented in statutory form.⁹ However, the Court has also indicated that its starting point when interpreting statutes will always be the Australian legislation itself; it is loathe to subordinate municipal law to the demands of a Convention.¹⁰ Where Parliament has failed to incorporate the full text of a treaty (as, for instance, is the case with *the Convention relating to the Status of Refugees* which is only partly incorporated in the *Migration Act 1958* (Cth)), there is a risk that an interpretation inconsistent with treaty obligations will result, as the text of the statute will prevail.

⁷ The principle can be discerned in the Latin maxim: 'ut res magis valeat quam pereat' (That the thing may rather have effect than be destroyed.)

⁸ *Corfu Channel case (Merits) (UK v Albania)* ICJ Reports 1949, 4 at 24; *Rights of Passage case (Preliminary Objections)* ICJ Reports, 1957, 125 at 142; *Laguna del Desierto case* (1994) 113 ILR 1, 45.

⁹ *A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225, 349 – 352 (McHugh J), 332 (Brennan CJ), 369-370 (Gummow J).

¹⁰ As the Court said in *MIMA v QAAH* (2006) 231 CLR 1 at [34], 'despite these respects in which the Convention may be used in construing the Act, it is the words of the Act which govern'.

26. It is therefore of paramount importance that the legislation properly reflect the terms of the international treaty as the omission of important text removes crucial context for the interpretation of statutory provisions. The Bill at present fails in this respect.

Recommendation 2: The words ‘never under any circumstances’ which appear in article 21 of the Convention should be incorporated into the offences clause 72.38.

27. At present the cl 72.38 reads ‘A person commits an offence if the person does any of the following with a cluster munitions:...’ This is clearly intended to implement the general obligations in article 1 which provides: ‘Each State Party undertakes never under any circumstances to:...’

28. ALHR calls on the Committee to recommend that the words ‘never under any circumstances’ be inserted in clause 72.38, the offences clause, to bring it into line with the core prohibitions in article 1 of the Convention.

29. Read in the context of the universal prohibition purpose reflected in the preamble, and in light of its structural position in the Convention as a whole, the wording of article 1 reflects an intention for the prohibition contained therein never to be suspended, excluded or waived. It also emphasizes the applicability of the prohibition in all circumstances – whether in international or non-international armed conflict, or during situations that do not amount to armed conflict such as civil unrest.

30. By omitting the words ‘never in any circumstances’, the meaning of the prohibition is significantly altered, and the context by which other clauses in the statute are to be read may also be impacted. One presumes that the drafters of the Bill, who will be aware of the omission, did not intend the legislation to implement a weaker obligation domestically than that which Australia has undertaken internationally. At present, however, this would appear to be the case. This weaker prohibition also allows for cl 72.42, which at present waives the operation of cl 72.38, to appear less problematic.

Incorporating an Objects Clause

Recommendation 3: The Bill should incorporate an objects clause that reflects the terms of the Convention’s preamble to assist in interpretation of the statute.

31. As noted, the proper interpretation of the Convention relies upon an identification of the humanitarian and universal disarmament purposes evident in the preamble. Although an Australian court may refer to the Convention’s preamble when interpreting the statute, ALHR recommends that an objects clause be inserted into the text to enable a court better to interpret its terms. Without an objects provision, for instance, the interoperability clause in cl 72.41 may be read without due consideration being given to the context and purpose in which it appears in the treaty. This situation would be exacerbated if the positive obligation in article 21 to encourage non-parties to ratify and to promote its norms remains omitted.

32. The inclusion of objects clauses in human rights statutes is common. See, for instance, the objects clauses in the *Sex Discrimination Act 1984* (Cth), and the *Disability Discrimination Act 1992* (Cth).

33. ALHR suggests the following wording for an objects clause in 72.37:

The purpose of this Subdivision is:

(a) to give effect to the Cluster Munitions Convention, including its purposes which are, inter alia:

(i) to put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned,

(ii) to ensure the full realisation of the rights of all cluster munition victims and recognising their inherent dignity,

(iii) to provide assistance to cluster munition victims, including medical care, rehabilitation and psychological support, as well as providing for their social and economic inclusion,

(iv) provide age- and gender-sensitive assistance to cluster munition victims and to address the special needs of vulnerable groups

(v) to enhance the protection of civilians from the effects of cluster munition remnants in post-conflict environments

(vi) to work strenuously towards the promotion of its universalisation and its full implementation,

(b) to implement these purposes by :

(i) prohibiting the use, production, transfer, retention and stockpiling of cluster munitions; and

(ii) prohibiting any acts or omissions that assist another person to use, produce, transfer, retain or stockpile cluster munitions;

(iii) encouraging States not party to the Convention on Cluster Munitions to join the Convention and promote its norms.

34. The inclusion of an objects clause would not only assist in the interpretation of the legislation consistent with Australia's international obligations, but would clearly articulate to the domestic and international community the nature and extent of Australia's commitment towards the Convention and its object of eradicating cluster munitions.

2. Giving Proper Effect to the Interoperability Provision: Article 21 and cl 72.41

Recommendation 4: Clause 72.41 should be brought into line with the correct interpretation of article 21 (the interoperability clause). Specifically, it should be amended so as not to read as a waiver clause.

Recommendation 5: Clause 72.41(b) should clarify that the prohibition on assistance in clause 72.38(2) is not waived.

35. ALHR has serious concerns about the present incorporation of the interoperability clause in clause 72.41.

36. ALHR brings to the attention of the Committee the various reports of Human Rights Watch on the interoperability clause, in particular *Staying True to the Ban on Cluster Munitions Understanding the Prohibition on Assistance in the Convention on Cluster Munitions* (June 2009). These reflect the dominant position of the international community with respect to the interpretation of article 21 of the treaty.

37. Consistent with the rules of treaty interpretation outlined above, ALHR notes the following:

- Article 1 of the Convention obliges each State Party 'never under any circumstances' to use, develop, produce, acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions'.
- Article 1 also obliges states not to 'assist, encourage or induce anyone to engage in any activity' prohibited under the Convention.
- The prohibition on assistance must be considered to be a fundamental object of the Convention, inseparable from and interconnected to the prohibitions on use, development, acquisition, and transfer.
- A prohibition on assistance is consistent with the humanitarian purpose of the Convention and its universal eradication obligation; its inclusion is thus essential to the Convention's efficacy.
- Read in the context of the universal prohibition purpose reflected in the preamble, and in light of its structural position in the Convention as a whole, the terms and context of article 1 reflects an intention for the prohibition contained therein – including the prohibition on assistance – never to be suspended, excluded or waived. It would require very explicit words to waive the absolute nature of the prohibition in a subsequent article.
- The text of article 21 does not express a clear intention to waive the prohibition in article 1. This ambiguity is reflected in the fact that the provision has been the subject of scrutiny and discussion during the negotiations.
- The position of the majority of states that have become parties to the Convention, as evident in their implementation legislation and statements made at the preparatory conferences and Meeting of States Parties, is that article 21 does not waive article 1's prohibitions, including the prohibition on assistance.
- Consistent with article 31(1) VCLT, the interoperability clause must also be read in the context of the provision within which it appears.
- It is thus relevant that article 21(1) and (2) oblige each State Party to encourage others to become party to the Convention, to discourage such States from using cluster munitions, and to promote its norms. This is consistent with both the absolute prohibition obligation in article 1 and the manifest purpose of the Convention to bring about universal disarmament and prohibition of these munitions – 'to put an end for all time', 'to ensure their rapid destruction', 'to ensure their destruction' and 'to work strenuously towards the promotion of its universalisation'.

- At present, these positive obligations and the object of universalisation do not appear in the statute, let alone in clause 72.41 which instead suspends the operation of the prohibition in clause 72.38.
- Article 21(3) provides that ‘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.’
- Article 21(4) lists activities that nonetheless remain prohibited, notably the development, stockpiling, use or express request of use of cluster munitions ‘in cases where the choice of munitions used is within its exclusive control.’
- At present, the Australian government’s interpretation of these provisions represents a restrictive interpretation of international obligations by treating the list in article 21(4) as exhaustive. This would appear to be based on a presumption that states parties intended to be bound by the least of any obligation which could be read from the provision.
- Read consistently with the principles of international humanitarian law, and specifically the principle of humanity and dictates of public conscience asserted as applicable in the preamble and confirmed as a general principle of international law by the ICJ, ICTY and eminent jurists, and complemented by the principle of effectiveness, a restrictive interpretation of article 21 should be rejected. As noted above, international legal practice is to treat such treaties as subject to interpretation consistent with a principle of humanity that requires an expansive rather than restrictive interpretation of prohibitions protecting human life, especially in cases of doubt. The preamble, which refers repeatedly to applicability of IHL principles, indicates an express intention to treat the Convention in this manner.
- Consistent with these principles, international law requires a reading that rejects a *contrario* arguments such as those being made by the Australian government with respect to the interoperability clause – the view that conduct which is not mentioned in article 21 is therefore not prohibited.
- Consequently, the list of activities that appear in article 21(4) should be interpreted as illustrative, and not exhaustive; article 21 can not be viewed as creating an exemption from the clear and unambiguous non-derogable prohibition in article 1.
- The absence of a clear derogation or limitation clause such as appears in human rights treaties with respect to specific rights further cements this view.¹¹

38. In brief, ALHR, along with other NGOs, most States Parties and commentators, and even JSCOT,¹² considers that article 21(3) and (4) does not waive the crucially important prohibition on assistance that appears in article 1(1)(c). Such a reading would be inconsistent with the context, object and purpose of the Convention, as well as the positive duties in article 21 to ensure that the Convention’s norms are spread widely through advocacy. This reading is confirmed by an interpretation of the provision consistent with the general principles of IHL recognized as applicable to the interpretation of international humanitarian law treaties.

¹¹ Common law courts have expressed a similar principle, noting that the *inclusio unius est exclusio alterius* rule ‘ought not to be applied, when its application, having regard to the subject matter to which it is to be applied, leads to inconsistency or injustice’ (Lopes LJ in *Colquhoun v Brooks* (1988) 21 QBD 52 at 65).

¹² In its August 2009 report, JSCOT found that ‘Article 21(4) reaffirms the obligation that States Parties cannot assist, encourage or induce the use of cluster munitions by another State.’ See Report 103 [3.18].

39. ALHR notes that, as long as the term assistance is clearly defined, the efficacy of article 21 is not impaired by an expansive interpretation. It still allows for parties to engage in military cooperation and operations with non-State Parties, and provides sufficient protection against prosecution merely by association. Indeed, as Human Rights Watch point out, the experience with the Mine Ban Treaty demonstrates that states parties can abide by a prohibition on assistance while cooperating with third parties.¹³
40. As the proposed legislation currently stands, Australia could potentially participate in many acts of assistance that run directly counter to the Convention's purpose, from planning an attack using cluster munitions, creating rules of engagement that permit their use by non-parties, hosting foreign stockpiles, providing security for stores of such weapons, refuelling vehicles transporting cluster munitions, and even identifying targets for attacks or calling in strikes.¹⁴
41. With respect to suggested alternative language for the provision, ALHR supports the recommendation of Human Rights Watch in their submission to this inquiry (pages 5-7), especially the use of the word 'including' in clause 7.41(b) to indicate the non-exhaustive nature of the list, as well as an express reference to the continuing prohibition on assistance.
- Recommendation 6: Clause 72.42 on acts by military personnel of countries not party to the Convention violates Australia's international obligations under the Convention and should be deleted.**
42. Not only does the Bill appear to waive the prohibition on assistance in cl 72.41, it expressly allows in clause 72.42 for the continuing stockpiling, retention or transfer of a cluster munition by a non-party in Australia - whether done with the use of a base, aircraft or ship. ALHR considers this provision to be in direct breach of Australia's obligations under the Convention.
43. As noted above, article 1 obliges each state party to undertake 'never in any circumstances' to stockpile, retain or transfer cluster munitions – **directly or indirectly**. It is similarly prohibited to **assist anyone** to engage in such activities.
44. Article 9 obliges states parties to impose penal sanctions 'to prevent and suppress any activity prohibited to a State Party under this Convention undertaken **by persons or on territory under its jurisdiction or control.**' There is no indication that the term 'persons' (in article 9) or 'anyone' (in article 1) was intended to refer solely to citizens and those non-citizens not engaged in military cooperation.
45. It is hard to read down these provisions so as to provide an exemption to non-parties and non-citizens in Australia, whether or not they are involved in military cooperation and operations with the ADF. Article 21 certainly does not provide for this, merely providing for military cooperation which, presumably, would occur outside a state's territory and jurisdictional control. Article 21 can not be read to suspend the operation

¹³ See analysis presented in Human Rights Watch, *Staying True to the Ban on Cluster Munitions Understanding the Prohibition on Assistance in the Convention on Cluster Munitions* (June 2009) 6-8.

¹⁴ Ibid.

of article 9; indeed, it only refers to article 1 (which, as argued above, is also not suspended so much as its operation clarified). It is simply unconscionable that a state which has committed itself to the universal eradication of these weapons and the promotion of the treaty's humanitarian norms would allow for cluster munitions to be brought to, transferred and retained on its territory. One need hardly go to the fundamental principles of IHL outlined above to reach such a conclusion, but they do provide added weight to this reading if necessary. The use of Australian infrastructure and territory amounts to clear assistance in breach of article 1, and facilitates the proliferation of cluster munitions, thereby defeating the object and purpose of the Convention, in addition to breaching articles 1 and 9.

46. We note that, according to Union Aid Abroad-APHEDA, '[n]o other country's implementation legislation explicitly allows for transit and foreign stockpiling.' We call on the Committee to urge the government to delete these provisions.

3. Incorporating a Recklessness Standard

Recommendation 7: Clause 72.38(2)(c) should be amended to incorporate a recklessness standard of liability.

47. Clause 72.38(2)(c) provides that a person must intend that an act be done in order to be held liable. ALHR considers this too high a threshold for liability. As currently drafted, it might relieve of liability a person *who knew or should have known* that their actions would result in the use of cluster munitions or were recklessly indifferent to their potential use. We note in this respect JSCOT's recommendation to 'prevent inadvertent participation in the use, or assistance in the use, of cluster munitions by Australia.'¹⁵

48. ALHR therefore calls on the Committee to recommend a recklessness standard be incorporated into the offence provision, and that it be explicitly retained as applicable to the interoperability clause. In this respect, we note the caution of Dr Ben Saul in his earlier submission to JSCOT:

7. ... Australia should be urged to include in its rules of engagement a requirement that Australian forces should not call upon military support from a non-State party where Australian forces know or reasonably believe that the other State will likely use cluster munitions.

8. By way of analogy, no-one would plausibly claim that Australian forces should be entitled to rely upon the military assistance of another State where our forces know or reasonably believe that that other State is likely to use prohibited chemical or biological weapons in support of our forces.

4. Other Provisions: Prohibiting Investment and Retention

Recommendation 8: The Committee should recommend text prohibiting direct and financial support to the manufacturers of cluster munitions.

¹⁵ Report 108 [3.770].

49. ALHR supports calls to clarify the prohibition on direct and indirect investment. Although the Convention does not expressly prohibit financial support to the manufacturers of cluster munitions, it is widely accepted as falling within the prohibition on assistance. According to the government's earlier submission to JSCOT, article 9 of the Convention requires Australia to enact legislation which criminalises any activity prohibited under the Convention.¹⁶ Its prohibition in statutory form would provide clarity to the definition of the term 'assist' and give guidance to the prosecution, defence and judiciary in any future proceedings. At present, these matters rely entirely upon prosecutorial policy and eventual judicial interpretation, thereby creating an unnecessary level of uncertainty.

50. ALHR note in this respect the recommendation of JSCOT that the government development legislation:

preventing investment by Australian entities in the development or production of cluster munitions, either directly, or through the provision of funds to companies that may develop or produce cluster munitions.¹⁷

51. ALHR notes that tackling internationally prohibited acts by targeting the financial means by which they are supported and maintained is an increasingly common and accepted approach, as evident in anti-terrorism legislation. Its inclusion would provide added efficacy to the objective of the Convention and implementing legislation.

52. As a potential model, ALHR brings to the Committee's attention the text of New Zealand's implementing legislation. The *Cluster Munitions Prohibition Act 2009*, section 10(2), states:

A person commits an offence who provides or invests funds with the intention that the funds be used, or knowing that they are to be used, in the development or production of cluster munitions

Recommendation 9: The Committee should recommend the prohibition of retention of all live cluster munitions.

53. ALHR strongly supports the position that the retention of cluster bombs is unnecessary. It refers to the submission of HRW on this point.

¹⁶ Department of Foreign Affairs and Trade, Submission to JSCOT, No. 7.1, p. 2.

¹⁷ Recommendation 2, Report 103, Treaties tabled on 12 March and 13 May 2009