

**Submission to the Senate Committee on Foreign
Affairs, Defence and Trade inquiry:**

**Criminal Code Amendment (Cluster Munitions
Prohibition) Bill 2010**

Submitted by Act for Peace
21 January 2011



1. About Act for Peace

Act for Peace (AfP) is the international aid agency of the National Council of Churches in Australia and have been assisting victims of conflict around the world for over 60 years.

AfP is also a member of the global ACT Alliance, whose 33,000 staff are providing assistance worldwide to people affected by conflict, disaster and poverty.

We are currently working with partners in many cluster munitions and landmine affected countries and including on cluster munitions clearance in Iraq and Cambodia.

Patricia Garcia, Associate Director of International Programs at AfP was the NGO delegate on the Australian delegation to the *First Meeting of State Parties to the Convention on Cluster Munitions* held in Vientiane, Laos from 8- 12 November 2010.

AfP was also involved in the *Stop Explosive Investments* campaign, led by the Uniting Church in Australia.

For more information about AfP and our work, please see www.actforpeace.org.au.

2. Introduction

AfP congratulates the Australian Government on its support of the *Convention on Cluster Munitions* ('the Convention') and of the *First Meeting of State Parties*. We also congratulate AusAID on its 2010-2014 Mine Action Strategy, which includes funding for cluster munition clearance.

We welcome the introduction of this Bill as there are several important and positive aspects. For example, the Bill covers explosive bomblets, includes extraterritorial jurisdiction and defines transfer to include both the actual transnational movement of cluster munitions and the transfer of title, which provides an effective means of suppressing the trade in cluster munitions. The criminal offence provisions also provide for a maximum term of imprisonment of 10 years, which appropriately reflects the seriousness of these crimes. AfP commends these aspects of the Bill to the Committee and recommends their retention.

However, AfP also has several significant concerns about this Bill. AfP submits the following comments and recommendations to assist the Committee in its deliberations.

At the outset AfP asks the Committee not to confine itself to the criminal law aspects of the Convention when considering how well this Bill implements Australia's specific treaty obligations. The legislative approach adopted by Australia will not only serve its own domestic interests but is an important influence on other States Parties and countries that have yet to accede to the treaty. AfP believes that examination of the Bill should take into account the influential global role Australia can play on this important humanitarian issue. The adoption of domestic legislation is a form of State practice and provides evidence of a

State party's interpretation of its international legal obligations and preferred policy position. Consequently, a fundamental question is whether and to what extent the present Bill effectively contributes to the object and purpose of the Convention, which is the universal elimination of cluster munitions.

AfP welcomes the opportunity to make this submission and would welcome the opportunity to make an oral submission.

3. Summary of Recommendations

This submission makes the following recommendations:

- 4.1 *That a more comprehensive legislative framework be introduced that encompasses criminal, administrative and civil law aspects of the treaty.*
- 5.1 *That the Government put on the public record its unambiguous interpretation that Article 1 includes a prohibition on investment in the development and production of cluster munitions in any jurisdiction by private and public Australian entities regardless of whether that activity is being carried out in the jurisdiction of a non-State Party.*
- 5.2 *That the Government consults with investor stakeholders and brings forward a more comprehensive package of legal measures, which includes a ban on investment and a framework for divestment.*
- 7.1 *That the phrase '...never under any circumstances' be inserted into s72.38.*
- 8.1 *That s. 72.39 be amended to include the Article 3(6) requirements of a 'limited number' and 'not exceed the minimum number...'*
- 9.1 *That a wider legislative framework be adopted to achieve a better level of Convention compliance, including a statutory duty that requires the Commonwealth to:*
 - *notify Non-State Party coalition partners of Australia's obligations under the Convention; and*
 - *enter good faith negotiations to discourage the use, stockpiling, retention or transfer of cluster munitions in joint operation when agreeing on rules of engagement.*
- 10.1 *That s.72.42(1) be removed to prevent foreign stockpiling on Australian territory.*

4. Need for a Cluster Munitions Convention Act 2011 (Cth)

The Bill introduces a suite of criminal offences intended to implement Australia's obligations under Articles 1 and 9 of the Convention. However, this Bill does not provide Parliament with a comprehensive model that meets all of Australia's Convention obligations. A comprehensive legal framework would achieve a more complete, visible and unambiguous

national commitment to the universal elimination of cluster munitions. By contrast, AfP refers the Committee to the Anti-Personnel Mines Convention Act 1998 (Cth). The Anti-Personnel Mines Convention Act 1998 (Cth) serves as a useful model for the incorporation of an important humanitarian treaty against which the current Bill can be judged. It provides a single overarching statute that achieves a more comprehensive treaty implementation.¹

Recommendation:

4..1 *That a more comprehensive legislative framework be introduced that encompasses criminal, administrative and civil law aspects of the treaty.*

5. Investment in the manufacturing of cluster munitions

AfP is concerned that proposed ss.72.38 (1) and (2) do not explicitly include investment activity per se however, there is a question as to whether an Australian corporation or person may be caught by these provisions if they have sufficient knowledge and intent and are sufficiently connected with the development or production of cluster munitions. The inquiry process provides an opportunity to clarify this issue.

Investment by public and private funds in companies that manufacturer cluster munitions or their components is wholly inconsistent with the object and purpose of the Convention, which is to achieve the universal elimination of cluster munitions through the banning of certain activities. To this end, Article 1, among other things, explicitly bans the development, production or transfer of cluster munitions and assistance that contribute to these activities. AfP believes that the better view is that Article 1 includes a prohibition on investment as a form of assistance. The alternative view would leave Australian citizens and corporations to invest in and derive profit from the development, production and sale of prohibited weapons.

In 2009, DFAT stated in evidence to the Joint Standing Committee on Treaties that it considered it 'doubtful' that Article 1 includes investment, however, the issue would be examined as part of the process of developing the legislation.² The Joint Standing Committee on Treaties recommended that Australia adopt a policy of prohibiting investment in companies that develop or produce cluster munitions.³

The Government should explain to the Parliament its view on investment and Article 1, and how it intends to implement the ban. A broader legal framework could provide for a clear ban on investment with a timeframe for divestment and civil and, if necessary, criminal sanctions to enforce the ban.

¹ The policy of maintaining a single Criminal Code does not preclude the development of an overarching *Cluster Munitions Convention Act 2011* that includes amendments to the Criminal Code and, where necessary, other relevant Acts.

² DFAT, Submission 71, p.2; Ms Jennifer Rawson, Transcript of Evidence, 22 June 2009, as cited in Joint Standing Committee on Treaties, Report 103, August 2009, p.21.

³ Joint Standing Committee on Treaties, Report 103, August 2009, p.27.

Australia would not be acting alone if it adopts this approach. According to research by Human Rights Watch referred to in its submission, Belgium, New Zealand and Luxembourg have banned public and private financial institutions from investing in companies that produce cluster munitions and Ireland has banned public institutions from doing so. The Swiss Parliament has adopted motions requiring the government to draft legislation prohibiting investment in all banned weapons. We understand that Bulgaria, Lebanon and Mexico have advised Human Rights Watch and Action on Armed Violence that they interpret the Convention as banning investment in cluster munitions production. Human Rights Watch also report that government pension funds in Ireland, New Zealand, Norway and Sweden have divested illustrating State practice. These examples are evidence of State practice and an important influence on the interpretation of treaty obligations.

Recommendations:

- 5.1 *That the Government put on the public record it's unambiguous interpretation that Article 1 includes a prohibition on investment in the development and production of cluster munitions in any jurisdiction by private and public Australian entities regardless of whether that activity is being carried out in the jurisdiction of a non-State Party.*
- 5.2 *That the Government consults with investor stakeholders and brings forward a more comprehensive package of legal measures, which includes a ban on investment and a framework for divestment.*

6. Positive obligations

'Positive obligations' denote a State's obligation to engage in an activity to secure the effective enjoyment of a fundamental right, as opposed to the obligation to merely abstain from human rights violations. Positive obligations include stockpile destruction, clearance and risk reduction education and victim assistance. These obligations are core to the Convention and are all legal obligations. Australia has also stated that it wants to lead on issues such as clearance and victim assistance and is Friend of the President on clearance and so the legislation should reflect this commitment.

In addition to the positive obligations of the Convention found in Article 21 there are specific provisions for international co-operation and assistance under Article 6 and for victim assistance under Article 5.

We would welcome further consideration by Government and the Committee as to how these positive obligations can be reflected in an overarching statute. For example, it is possible to explicitly require international development assistance to be based on the principles and goals of the Convention and implemented in a manner consistent with Australia's obligations. Such provisions would entrench the policy framework in statute and prevent the drift that often occurs over time and under pressure from competing goals.

7. Section 72.38 - Criminal Offence Provisions

Throughout the Bill the drafters have largely been faithful to the language of the Convention. However, we note that the Convention phrase '*under any circumstances*' is omitted from the subsection 72.38(1).

The phrase means that the prohibition applies to situations of international and non-internal armed conflict as well as times of peace. The language expresses the overriding objective of the treaty which is to put an end to the suffering and casualties caused by cluster munitions, that persist in times of peace as abandoned and unexploded munitions continue to maim and kill innocent civilians.

The domestic law serves to embody the spirit and intention of the treaty as well as providing the technical mechanism to enforce the ban on certain activities. Further, the inclusion of '*...never under any circumstances*' in Article 1 makes it an operative part of the treaty and not merely part of the interpretive context set out in the Preamble. Consequently, we consider the better legal policy approach is to reflect this language in the domestic law and, if necessary, explain its meaning to avoid later judicial misinterpretation. This can be achieved by including a Note, which is a common drafting practice.

Recommendation:

7.1 *That the phrase '*...never under any circumstances*' be inserted into s72.38.*

8. Section 72.39 - Retention and Transfer of Cluster Munitions

Proposed s. 72.39 confers on the Minister for Defence a limited discretion to authorize specific members of the ADF or other Commonwealth public officials to acquire or retain specified cluster munitions for particular purposes (training in detection, clearance and destruction, development of cluster munitions counter measures, and destruction). The provision incorporates Article 3 (6).

Under Article 3 (6) States parties are permitted to acquire and retain cluster munitions for the development of and training in detection, clearance and cluster munitions counter measures. The first sentence of Article 3(6) only permits the acquisition and retention of a '*limited number*' of cluster munitions. The second sentence imposes a mandatory obligation that the '*...amount of explosive sub-munitions retained or acquired shall not exceed the minimum number absolutely necessary for these purposes*'.

The intention of Article 3(6) is not reflected in current proposed s.72.39, which qualifies the Minister's discretion by reference only to permitted purposes but not the quantity. To assist the Committee, AfP refers to comparable s.8 (2) Anti-Personnel Mines Convention Act 1998 (Cth), which states that:

The Minister must ensure that the total number of anti-personnel mines that are the subject of permissions under subsection (1) does not exceed the minimum number absolutely necessary

for the purposes of the development of, and training in, any or all of the techniques referred to in that subsection.

In its present form s.72.39 is not sufficiently consistent with Australia's Convention obligation and nor is it consistent with the approach to anti-personnel mines.

Recommendation:

8.1 *That s. 72.39 be amended to include the Article 3(6) requirements of a 'limited number' and 'not exceed the minimum number...'*

9. Section 72.41 - Joint Military Operations Article 21 (1) – (4)

AfP is concerned that Australia's approach to interoperability will undermine the overriding objective of the Convention and is inconsistent with Australia's own specific Convention obligations. In its present form s.72.41 provides a defence to the offences set out in s.72.38 and permits ADF personnel, Australian citizens or other performing services under a Commonwealth contract to do a prohibited act as part of military cooperation with a Non-State Party provided:

- the act is 'not connected with the Commonwealth' doing a prohibited act; and,
- does not involve an express request for use of cluster munitions when the Commonwealth does not have exclusive control over the choice of munitions.

The Explanatory Memorandum states that s. 72.41 gives effect to paragraphs (3) and (4) of Article 21.

In June 2009, the Department of Defence explained to the Joint Standing Committee on Treaties that Convention obligations will prevent an ADF officer from being either 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 [is] that of a pilot actually dropping cluster munitions –'.

However, ADF personnel or persons acting under a Commonwealth contract, may provide 'other forms of vital assistance', including planning, intelligence, logistics and other support roles and carry out senior roles in coalition headquarters.⁴ In other words, the Department did not regard the Convention as creating any obligation limit to other forms of cooperation that may amount to direct or indirect assistance to a 'prohibited act'.

In fact, in its present form the provision provides a broad immunity for all prohibited acts in situations of military cooperation where the act is 'not connected with the Commonwealth'. This enables ADF personnel and other Australians or Commonwealth contractors to engage in otherwise prohibited activity on the grounds that their actions are not the actions of

⁴ Air Vice Marshall Geoffrey Brown, Transcript of Evidence, 22 June 2009, pp. 11-12, as cited Joint Standing Committee on Treaties, Report 103, August 2009, p.21.

Australia and do not engage Australia's obligations under the Convention. This permits direct involvement in prohibited activity.

This provision also permits all forms of assistance including, for example, logistical support, human intelligence and signals support to identify targets. Consequently, while the person may not 'actually deploy' the cluster munitions, Australians may nevertheless be very closely involved in that deployment (or other prohibited activity).

Additionally, Australian personnel may legally request the use of cluster munitions where Australia does not have exclusive control over the choice of munitions, which is generally the case in joint operations.⁵ This leaves open the potential for Australians to request the use of cluster munitions in situations where Australia has concurrent jurisdiction.

A more Convention compliant interpretation is that Article 21 (3) provides a narrow exemption and that military cooperation with Non-State Parties does not per se violate Convention obligations. It is not broadly permissive. Article 21(4) affirms that the State Party's obligations under Article 1 remain in force even in the context of military cooperation. AfP's preferred view is that Article 21 (4) is a non-exhaustive illustration, and fundamental obligations under Article 1 continue to apply to the State Party even in situations of military cooperation. On this view, although military cooperation with a Non-State Party does not per se breach the Convention, the prohibition on 'assistance' 'encouragement' and 'inducement' applies in relation to cluster munitions activity otherwise prohibited to the State Party. AfP does not accept the Commonwealth's view that Article 21(4) is exhaustive and, by implication, permits assistance (and logically encouragement and inducement) to engage in prohibited acts.

Moreover, the Convention sets a minimum standard. The Commonwealth has constitutional power over defence matters and the Parliament has authority to adopt law and policy that takes into account a range of matters including, Australia's international reputation and domestic sentiment about the use of cluster munitions, as well as the object and purpose of the Convention.

There is, however, an operational overlap between military cooperation and provision of Australian assistance that directly or indirectly supports a Non-State Party engaging in prohibited activity. AfP believes this issue is too important to be left entirely on a case by case basis, and legislative direction by the Parliament is justified. AfP asks the Committee to turn its mind to a more detailed and clearly articulated policy on 'assistance' that is consistent with the Convention object and purpose. AfP's position is that all forms of Australian military cooperation should be as remote as possible from cluster munitions activity. We note also that the Joint Standing Committee on Treaties recommended in 2009 that ADF prevent inadvertent participation in the use, or assistance in the use, of cluster munitions by Australia.⁶

⁵ Dr B Saul, Submission 8, p.3, Joint Standing Committee on Treaties, Report 103, August 2009, p.21.

⁶ Joint Standing Committee on Treaties, Report 103, August 2009, p.27.

Finally, Australia's obligation to 'promote the norms of the Convention' and use its 'best efforts' to discourage the use of cluster munitions cannot be fully discharged if Australia also allows its personnel and technical resources to be deployed to assist in joint military operations where cluster munitions are used (Article 21(2)).

Recommendation:

- 9.1 *That a wider legislative framework be adopted to achieve a better level of Convention compliance, including a statutory duty that requires the Commonwealth to:*
- *notify Non-State Party coalition partners of Australia's obligations under the Convention; and*
 - *enter good faith negotiations to discourage the use, stockpiling, retention or transfer of cluster munitions in joint operation when agreeing on rules of engagement.*

10. Section 72.42 - Foreign Stockpiling of Cluster Munitions on Australian territory

Section 72.42 allows non State Parties in military cooperation with the ADF to stockpile cluster munitions on bases, aircraft and ship in Australian territory. AfP takes the view this s.72.42 is inconsistent with Australia's own Convention obligations not to stockpile cluster munitions on its own territory (Articles 1 and 9) or directly or indirectly transfer cluster munitions across state borders to 'anyone' (Article 1 (b)). It is also inconsistent with the Convention obligation to 'promote the norms of the Convention' and 'discourage the use of cluster munitions' by non-State parties (Article 21(2)).

Similarly, s.72.42 permits transit by ship or plane through Australian territory by non State parties in military cooperation with the ADF. Again, AfP believes this provision conflicts with Australia's own Convention obligations not to directly or indirectly transfer cluster munitions across state borders (Article 1). It is also inconsistent with the Convention obligation to 'promote the norms of the Convention' and 'discourage the use of cluster munitions' by non-State parties (Article 21(2)).

Recommendation:

- 10.1 *That s.72.42(1) be removed to prevent foreign stockpiling on Australian territory.*

Thank you again for the opportunity to provide this submission.

Signed:

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