



AUSTRALIAN NETWORK TO BAN LANDMINES AND CLUSTER MUNITIONS INC

Submission to Senate Foreign Affairs, Defence and Trade Committee

Subject: Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

Organisation: The Australian Network to Ban Landmines and Cluster Munitions (ANBLC)

Representative: Lorel Thomas, National Coordinator.

Email: lorelt@optusnet.com.au

Phone: 03 9803 5139

Preamble

The Australian legislation should reflect the spirit of the Convention on Cluster Munitions and be a positive example for other countries considering accession. Wording which allows actions contrary to the spirit of the Convention should be expressly and categorically excluded.

The detailed submission which follows outlines the eight specific areas in which the present Australian draft legislation falls short of adherence to the spirit and intent of the treaty.

Lorel Thomas

National Coordinator

Australian Network to Ban Landmines and Cluster Munitions.

PO Box 445
Walkerville SA 5081

National Coordinator
Email: lorelt@optusnet.com.au
Phone: 03 9803 5139

website <http://australia.icbl.org/>



Background on the Australian Network to Ban Landmines and Cluster Munitions.

The Australian Network to Ban Landmines and Cluster Munitions was formally incorporated in 1999 as the International Campaign to Ban Landmines-Australian Network Inc. However, intense campaigning for a mine ban treaty was underway from 1991 onwards.

Since the Entry into Force of the Mine Ban Treaty in 1999 our network has been active in advocating universalisation of that treaty and continuing mine action.

In more recent years much of our focus has been on campaigning against the use of cluster munitions. Hence our name change in 2010 to formally recognize our work in this area and to better focus our campaign towards the future.

Again, we were active in advocating for a treaty and again we will work towards universalisation of the Convention on Cluster Munitions, signed by Australia in December 2008 in Oslo.

Australia now seeks to ratify this convention, a move that is a formal commitment to eradicate cluster munitions.

Any State Party making this commitment should be prepared to enact legislation that reflects a strong and unequivocal interpretation of the convention, condemning for all time and under all circumstances the use of these weapons.

The ANBLC does not believe that the current draft legislation achieves these aims.

Areas of Concern:

Offences - Article 1 of the Convention.

1. Interoperability - Article 21 of the Convention
2. Jurisdiction - Article 9 of the Convention
3. Transit - Articles 1 and 9 of the Convention
4. Foreign Stockpiles - Articles 1 and 9 of the Convention
5. Retention - Article 3 of the Convention.
6. Investment
7. Positive Obligations - Article 6 of the Convention

A detailed analysis of each area of concern and recommended remedial action for each follows:

PO Box 445
Walkerville SA 5081
National Coordinator
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Re: (1) 72.38 Offences relating to cluster munitions.

The Convention on Cluster Munitions aims “to put an end for all time to the suffering and casualties caused by cluster munitions”. It is therefore imperative that domestic legislation of States Parties uses the strongest possible wording in furtherance of that aim.

By omitting specific and strong wording in the following section the draft Australian legislation opens the door for a weak interpretation of the Convention’s provisions.

Existing draft wording:

A person commits an offence if the person does any of the following with a cluster munition:

- a) uses it;*
- b) develops, produces or otherwise acquires it;*
- c) stockpiles or retains it;*
- d) transfers it to anyone.*

This fails to abide by the spirit of the treaty which states that *Each State Party undertakes never under any circumstances to*

- (a) Use cluster munitions;*
- (b) Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;*
- (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention*

The omission of the words “never under any circumstances” has significant ramifications, and impacts upon a number of sections, including 72.41 and 72.42 which are both major concerns.

The Explanatory Memorandum acknowledges the wording of the Convention and yet the draft legislation omits those vital words.

Recommendation

§ That the wording be changed to:

A person commits an offence if, under any circumstances, the person does any of the following with a cluster munition:

- (a) uses it;*
- (b) develops, produces or otherwise acquires it;*

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- (c) stockpiles or retains it;*
- (d) transfers it to anyone;*
- (e) encourages or induces anyone to use it.*

Re: (2) 72.41 Defence-Acts done by Australians in military cooperation with countries not party to Convention on Cluster Munitions

A person who is an Australian citizen, is a member of the Australian Defence Force or is performing services under a Commonwealth contract does not commit an offence against section 72.38 by doing an act if:

- (a) the act is done in the course of military cooperation or operations with a foreign country that is not a party to the Convention on Cluster Munitions; and*
- (b) the act is not connected with the Commonwealth:*
 - (i) using a cluster munition; or*
 - (ii) developing, producing or otherwise acquiring a cluster munition; or*
 - (iii) stockpiling or retaining a cluster munition; or*
 - (iv) transferring a cluster munition; and*
- (c) the act does not consist of expressly requesting the use of a cluster munition in a case where the choice of munitions used is within the Commonwealth's exclusive control*

This section is of particular concern as it clearly violates a number of provisions listed under Article 1 of the Convention.

The report of the Australian Joint Standing Committee on Treaties (JSCOT) of August 2008 explicitly noted that: "Article 21(4) reaffirms the obligation that States Parties cannot assist, encourage or induce the use of cluster munitions by another State."

Yet as it stands the legislation allows for Australian soldiers to engage in actions such as participating in planning a cluster munitions strike, agreeing to rules of engagement where cluster munitions would be used, training others in the use of cluster munitions and even calling for a cluster munitions strike provided that the choice of munitions used was not exclusively under Australian control.

In ratifying the Convention on Cluster Munitions the State Party agrees, never under any circumstances, to

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(c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.

Calling for a cluster munitions strike under the guise of not being in sole control of the operation is nevertheless encouraging and inducing an ally to engage in an activity prohibited to a State Party under the Convention.

Simply to omit those vital words “under any circumstances,” from the Australian legislation, and therefore feel free to ignore them violates both the integrity of the Convention and the integrity of the Australian government.

This indemnifying of actions prohibited by the Convention is disingenuous and morally suspect. The overriding principle is that it is a criminal act for a State Party to *use* cluster munitions or to *assist, encourage or induce anyone else to do so, under any circumstances.*

Article 21.3 allowing a State Party to work with a country not party to the Convention should not be viewed as giving licence to engage in prohibited acts. The statement in the Explanatory Memorandum that 21(3) “qualifies” the prohibitions in Article 1 expressly violates the spirit and intention of the Convention. Article 21 neither negates nor qualifies the ban on assistance.

Article 21 was designed to allow State Parties to work with non-state parties. It was never meant to allow military personnel of the State Party to engage in prohibited acts and should not be interpreted in this fashion.

Joint operations can be carried out without the personnel of a State Party being required to carry out any prohibited activities. This has been amply proven with the Mine Ban Treaty, so a clear and workable precedent has been set. Arguments to the contrary will be politically motivated, rather than by humanitarian concerns, again running counter to the intent and spirit of the Convention.

Recommendation

§ That the legislation explicitly state that the prohibitions listed under Article 1 of the Convention apply at all times and under all circumstances, including during joint operations with a country not Party to the Convention. In particular it should be explicitly stated that Australian personnel cannot request a cluster munitions strike.

Re: (3) 72.42 Jurisdiction

Section 72.42 exempts the military personnel of non-states parties from the convention’s prohibitions while they are on Australian territory. Article 9 of the Convention specifically mandates the inclusion of penal sanctions for violations of the Convention by anyone under the jurisdiction or control of the State Party.

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Specifically, the allowance of transit and stockpiling of foreign cluster munitions is of grave concern. No other country's implementation legislation explicitly allow for transit and foreign stockpiling. There are many things on which Australia should take the lead. This is not one of them

These two issues are discussed separately below.

Recommendation:

72.42 - Delete this exemption.

Re: (4) 72.42 Defence-acts by military personnel of countries not party to Convention on Cluster Munitions.

Transit of Cluster Munitions

This section of the legislation expressly contradicts the spirit and intent of the Convention which prohibits State Parties from assisting others to use cluster munitions. This negation of 72.38 - Offences relating to cluster munitions- allows for transit of cluster munitions across Australian land, sea or airspace by a foreign ally. This clearly "assists" someone to transfer and indirectly, use, cluster munitions, something categorically classed as an offence under Article 1 of the Convention. This section is also a clear violation of Article 9 of the Convention, which states that:

Each State Party shall take all appropriate legal, administrative and other measures to implement this Convention, including the imposition of 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. (ANBLC emphasis.)

Many states have already stated explicitly that they believe the Convention does not allow transit of cluster munitions. In their domestic legislation Austria and Germany have included specific language banning transit. Thirteen other states have publicly recorded that they interpret the Convention to proscribe transit. By including this exemption the Australian Government would be flying in the face of a compelling and wide spread interpretation of the Convention.

Recommendations

- § Delete this exemption
- § Include specific wording prohibiting transit.

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Re: (5) 72.42 Defence-acts by military personnel of countries not party to Convention on Cluster Munitions

Foreign Stockpiles

The same arguments apply here as for the allowance of foreign transit of cluster munitions across Australian territory. Clearly, allowing a foreign ally to stockpile cluster munitions on Australian soil is a breach of the Convention's obligations. The words of the Convention state that"

Each State Party undertakes never under any circumstances to:

(c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.

There is no ambiguity here: a State Party may not assist anyone to engage in an activity prohibited to a State Party. The ban on stockpiling of cluster munitions is a basic tenet of the Convention and one which the Australian government should not attempt to subvert. The inclusion of sub-sections to our legislation allowing flagrant breaches of the Convention's obligations is simply unacceptable.

Recommendations

- § Delete this exemption
- § Include specific wording forbidding stockpiling of foreign cluster munitions on Australian territory.

Re: (6) 72.39 Defence-acquisition or retention authorized by Defence Minister.

Notwithstanding the fact that Article 3 (6) of the Convention allows for limited numbers of cluster munitions retained for training in detection and clearance techniques or for the development of counter measures, we would argue strongly that Australia should not retain any live cluster bombs.

Australia does not presently possess cluster bombs and thus would need to acquire them. This is an unnecessary and undesirable step to take. A number of countries have formally recognized that live cluster bombs are not necessary for training purposes and have decided in favour of no retention.

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Available, sophisticated technology also allows for research and development tests to be carried out without the use of live cluster munitions. These tests provide an accurate and predictable

study enabling the analysis of the correct angle of contact, the distance to object and other necessary data. Live cluster bombs are not necessary and should not be retained.

The policy of the Cluster Munition Coalition, of which the ANBLC is a member, is that no live cluster bombs should be retained by any State Party.

The inclusion of this section in the Australian legislation would set a precedent for similar inclusions by other countries. Thus it could open the way to abuse which again flies in the face of the spirit and intent of the treaty.

Again, we should learn from our experience with the Mine Ban Treaty. Abuses of the retention clause did occur, with countries retaining operational quantities of mines.

Australian legislation should therefore give no credence to, nor encouragement of, the argument for retention. If the Australian Government is to take seriously the following words from the Preamble to the Convention, *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* our legislation must specifically prohibit any retention of live cluster munitions.

If any live clusters are retained the treaty specifically states that:

The amount of explosive submunitions retained or acquired shall not exceed the minimum number absolutely necessary for these purposes

Section 72.39 of the draft Australian legislation does not specify the number allowed to be retained, nor does it even comply with the basic requirement of the treaty by stipulating that only “the minimum number absolutely necessary” may be retained.

Neither does this section establish basic reporting requirements which are an essential obligation of Article 3 (8) of the Convention.

Recommendations

- § Delete the section allowing retention on the authorization of the Minister.
- § Include wording stating that no live clusters will be retained.
- § At the very least, include a maximum number or clusters to be retained
- § Include reporting conditions if any live clusters are to be retained.

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Re: (7) Investment

At present the Australian draft legislation does not include any specific wording prohibiting investment in companies that manufacture cluster munitions.

The Cluster Munition Coalition and the Australian Network to Ban Landmines and Cluster Munitions consider that the prohibition on assistance includes the prohibition on investment in the manufacture of cluster munitions.

The 2008 report of the Australian Joint Standing Committee on Treaties specifically recommends that: “the Australian Government and the Australian Defence Force (ADF) have regard to the following issues when drafting the legislation required to implement the *Convention on Cluster Munitions*, and when developing policies under which the personnel of the ADF operate:

- § the definition of the terms ‘use’, ‘retain’, ‘assist’, ‘encourage’ and ‘induce’ as they apply in Articles 1, 2 and 21 of the *Convention on Cluster Munitions*;
- § preventing inadvertent participation in the use, or assistance in the use, of cluster munitions by Australia; and
- § 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.

Precedents have been set for the inclusion of specific wording banning investment in domestic legislation. To varying degrees, New Zealand, Ireland, Luxembourg and Belgium have all introduced legislation to ban financing of, and investment in, cluster munitions.

A number of other states have also publicly declared that they consider investment to be a form of assistance and therefore proscribed by the Convention.

Recommendations

- § The inclusion of specific wording imposing penal sanctions on investment of both public and private money in the manufacture of cluster munitions.
- § Further, the legislation should prohibit Australian investment in the production of components to be exclusively and/or primarily used in cluster munitions.

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Re: (8) Positive Obligations.

We congratulate the government on the emphasis on the criminality of certain actions related to cluster munitions. However we are disappointed that this legislation is an amendment to existing legislation and not a stand alone statute. A stand alone statute would allow for expression of the positive obligations incumbent on a State Party.

Recommendations

- § Include a provision encouraging universalisation of the treaty,
- § Include a provision for international co-operation and assistance.
- § Include a note from the Minister to Parliament, outlining Australia's commitment to its positive obligations.

Conclusion.

To truly enact the following words from the Preamble to the Convention:

"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," the Australian Government must show the way with a strong and definitive interpretation of the treaty.

The current wording does not fully achieve this objective nor does it meet the very clear intent of the convention to unequivocally, and for all time, end the suffering caused by cluster munitions.

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