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January 19, 2011

Dr. Kathleen Dermody
Committee Secretary
Senate Standing Committee on Foreign Affairs, Defence and
Trade
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Dr. Dermody,

Please find attached a submission to the Senate Committee on Foreign Affairs, Defence and Trade from Human Rights Watch and Harvard Law School's International Human Rights Clinic regarding the Committee's inquiry into the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 ("the Bill").

Please let us know if you have any questions. We would be happy to discuss our submission with the Committee by teleconference if necessary.

Thank you for your consideration.

Sincerely,

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Submission to the Senate Committee on Foreign Affairs, Defence and Trade on the Inquiry into the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

Submission from Human Rights Watch and
Harvard Law School's International Human Rights Clinic
January 2011

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I. Introduction

Human Rights Watch and Harvard Law School's International Human Rights Clinic (IHRC) appreciate this opportunity to make a submission to the Senate Committee on Foreign Affairs, Defence and Trade regarding its inquiry into the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010. The Bill seeks to allow Australia to ratify the Convention on Cluster Munitions by creating offenses for certain acts related to cluster munitions, as required by Article 9 of the convention. The Second Meeting of States Parties to the convention will be held in September 2011 in Beirut, and we hope to see Australia participating there as a state party.

Human Rights Watch and IHRC thank Australia for its efforts to ratify the Convention on Cluster Munitions and to codify the prohibitions on use, production, transfer, and stockpiling of the weapons and assistance with those activities. However, our organizations wish to call attention to certain provisions of the Bill that may, as written, fail to achieve, or even run counter to, the convention's goals. We are especially concerned by provisions of the Bill that permit activities that should be understood as prohibited by the convention. These activities include:

- assisting with cluster munition-related activities during joint military operations;
- explicitly allowing stockpiling, retention, and transfer of cluster munitions by foreign military allies in Australia;
- retaining cluster munitions without clear limits on retention numbers or rigorous reporting; and
- permitting investment in the production of cluster munitions.

The Bill should be amended to prohibit these activities. In addition, we call on Australia to fulfill its legal responsibility to implement the convention's positive obligations, including working to universalize the convention and promote its norms, discouraging use of cluster munitions, notifying allies of convention obligations, and providing cooperation and assistance to other states parties.

Below we present our comments on and recommendations for specific provisions of the Bill that should be changed, supplemented, or preserved. We urge the Senate Committee on Foreign Affairs, Defence and Trade to revise the Bill in order to give strong effect to the Convention on Cluster Munitions and to bring Australia in line with its international commitments.

II. Who We Are

Human Rights Watch is one of the world's leading independent organizations dedicated to defending and protecting human rights and international humanitarian law. The Arms Division of Human Rights Watch in particular has taken a preeminent role in documenting the harm to civilians caused by cluster munitions and landmines, and its research and analysis has informed the international campaigns to ban these weapons.

IHRC is part of the Harvard Law School's Human Rights Program and is a center for critical thought and active engagement in human rights. Each year, IHRC partners with local and international nongovernmental organizations around the world to advance human rights and international humanitarian law through legal and policy analysis, advocacy, field research, and litigation.

HRW and IHRC have collaborated on this submission as well as many other projects surrounding the Convention on Cluster Munitions. The two organizations have jointly produced three papers regarding the convention's interpretation and implementation. *Staying True to the Ban: Understanding the Prohibition on Assistance in the Convention on Cluster Munitions* argued for understanding the convention to prohibit assistance absolutely, even during joint military operations.¹ *Fulfilling the Ban: Guidelines for Effective National Legislation to Implement the Convention on Cluster Munitions* details the elements that strong implementation legislation should include when incorporating both the positive and negative obligations of the convention.² Most recently, Human Rights Watch and IHRC collaborated on a short Q and A about the convention's provisions on interoperability and assistance.³

Human Rights Watch has been involved in the campaign to ban cluster munitions for the past decade, and IHRC has been since 2005. Both organizations were substantially involved in the Oslo Process, which culminated in the adoption of the convention, and in subsequent meetings, such as the First Meeting of States Parties of the convention held in November 2010 in Vientiane, Laos.

¹ Human Rights Watch, *Staying True to the Ban on Cluster Munitions: Understanding the Prohibition on Assistance in the Convention on Cluster Munitions*, June 2009, <http://www.hrw.org/en/news/2009/06/22/staying-true-ban-cluster-munitions>.

² Human Rights Watch and Harvard Law School's International Human Rights Clinic, *Fulfilling the Ban: Guidelines for Effective National Implementation Legislation to Implement the Convention on Cluster Munitions*, June 2010, <http://www.hrw.org/node/90721>.

³ Human Rights Watch and Harvard Law School's International Human Rights Clinic, *Q&A on Interoperability & the Prohibition on Assistance*, November 2010, <http://www.hrw.org/en/news/2010/11/06/convention-cluster-munitions>.

III. Background of the Convention on Cluster Munitions

The Convention on Cluster Munitions is a groundbreaking legal instrument that prohibits use, production, transfer, and stockpiling of cluster munitions, as well as assistance with any of these activities. The convention also establishes a set of strong positive obligations. Under these obligations, states parties must clear their territory of cluster munition remnants, assist victims, and provide cooperation and assistance to other states parties. States parties are also required to work toward universalization of the convention, promote the convention's norms, discourage cluster munitions use, and notify allies of their convention obligations. Finally, transparency requirements mandate that states parties report on their progress in implementing positive obligations enumerated in the convention.

The Convention on Cluster Munitions was opened for signature on December 3, 2008. It entered into force and became binding international law for states parties on August 1, 2010. As of January 19, 2011, 50 states had ratified the convention, indicating their intent to be legally bound by all the convention's provisions, and 108 had signed it, meaning that they have agreed to the treaty in principle and are prohibited from violating its "object and purpose."⁴

Under Article 9 of the convention, states parties are required to "take all appropriate legal, administrative and other measures to implement this Convention." States parties must adopt "penal sanctions to prevent and suppress any activity prohibited to a State Party" and implement the positive obligations contained in the convention.

IV. Procedural History of the Bill

Australia was an active participant in the negotiation of the Convention on Cluster Munitions and among its original signatories. On March 12, 2009, Australia initiated the formal ratification process for the convention by tabling a National Interest Analysis in Parliament that presented the potential benefits and obligations that would arise from ratifying the convention.⁵ On June 15 and 22, 2009, the Parliament's Joint Standing Committee on Treaties (JSCOT) held public hearings on the convention, which included statements by

⁴ Vienna Convention on the Law of Treaties, adopted May 23, 1969, 1155 U.N.T.S. 331, entered into force January 27, 1980, art. 18.

⁵ Australian Department of Foreign Affairs and Trade (DFAT), National Interest Analysis [2009] ATNIA 5: Convention on Cluster Munitions, tabled March 12, 2009, http://wopared.parl.net/house/committee/jsct/12march2009/treaties/munitions_nia.doc (accessed November 30, 2010).

representatives from the Australian Department of Defence and the Department of Foreign Affairs and Trade (DFAT).⁶

In its August 18, 2009 Report 103, JSCOT announced its support for the ratification of the convention (Recommendation 3).⁷ JSCOT also expressed its concerns, however, that “some of the terms contained in the Convention are not clearly defined and may provide an avenue by which Australia could participate in actions which may contravene the humanitarian aims of the Convention.”⁸ JSCOT therefore recommended that the drafters of potential implementation legislation give special consideration to “preventing inadvertent participation in the use, or assistance in the use, of cluster munitions by Australia” (Recommendation 2).⁹

The Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 was introduced in the House of Representatives on October 27, 2010 and in the Senate on November 22, 2010.¹⁰ The Selection of Bills Committee found the Bill to be “inconsistent with recommendations made by JSCOT,” and on October 28, 2010 the Senate referred the Bill to the Senate Committee on Foreign Affairs, Defence and Trade for inquiry and report.¹¹

V. Recommendations: Elements to Strengthen

Below we identify key provisions of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 that would benefit from revision or further clarification. Our comments are aimed at ensuring full implementation of the convention and preventing measures that fail to achieve or undermine the convention’s goals.

⁶ JSCOT, *Treaties Tabled on 12 March 2009*, *Commonwealth of Australian, Official Committee Hansard*, June 15, 2009, <http://www.aph.gov.au/hansard/joint/commtee/12192.pdf> (accessed January 13, 2011); JSCOT, *Treaties Tabled on 13 May 2009*, *Commonwealth of Australia, Official Committee Hansard*, June 22, 2009, <http://www.aph.gov.au/hansard/joint/commtee/12193.pdf> (accessed January 13, 2011).

⁷ “Convention on Cluster Munitions,” in JSCOT, *Report 103: Treaties Tabled on 12 March and 13 May 2009*, August 18, 2009, <http://www.aph.gov.au/house/committee/jsct/13may2009/report/chapter3.pdf> (accessed January 13, 2011), p. 27.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Parliament of Australia, *ParlInfo Search*, “Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010”, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4487%22> (accessed January 13, 2011).

¹¹ Senate Selection of Bills Committee, *Report No. 13 of 2010*, October 28, 2010, http://www.aph.gov.au/Senate/committee/selectionbills_ctte/reports/2010/rep1310.pdf (accessed January 13, 2011); Parliament of Australia, *ParlInfo Search*, “Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010.”

1. Offences—Section 72.38

- *Recommendation:* Preface all offences in Section 72.38 with the phrase “under any circumstances” (e.g., “A person commits an offence if *under any circumstances* the person does any of the following with a cluster munition”) (emphasis added).

To match the prohibitions of the convention, Section 72.38 should include the phrase “under any circumstances,” which is found in the chapeau of Article 1(1). Under Article 1(1), States Parties undertake “never under any circumstances” to engage in prohibited activities related to cluster munitions. The phrase “under any circumstances” is significant because it emphasizes that the convention’s prohibitions are comprehensive and apply during both international and non-international armed conflicts, as well as in situations that do not rise to the level of armed conflict. The phrase underlines the importance of foreclosing exceptions to these restrictions.

2. Interoperability—Section 72.41

2a. *Participation in Joint Military Operations—Section 72.41 (chapeau) and 72.41(a)*

- *Recommendation:* Revise Section 72.41 to make clear that all of the convention’s prohibitions continue to apply during joint military operations. Specifically, amend Section 72.41 by:
 - deleting Sections 72.41(a), (b) and (c);
 - replacing the phrase “... doing an act if:” with the phrase: “... merely participating in military cooperation or operations with a foreign country that is not a party to the Convention on Cluster Munitions”;¹² and
 - replacing the word “acts” with “participation” in the current section title.¹³

As written, Section 72.41 might be interpreted to allow activities during joint military operations that should be understood as prohibited by the convention. In particular, it might

¹² The new version, with changes in italics, would read: “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 offense *by merely participating in military cooperation or operations with a foreign country that is not a party to the Convention on Cluster Munitions.*”

¹³ Alternatively, Section 72.41 of the Bill could be amended by :

- replacing, in 72.41(a), the phrase “the act is done in ...” with “the act consists merely of participation in ...”;
- deleting Sections 72.41(b) and (c); and
- replacing the word “acts” with “acts of participation” in the current section title.

This new version, with changes in italics, would read: “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 offense by doing an act if: (a) the act *consists merely of participation* in military cooperation or operations with a foreign country that is not a party to the Convention on Cluster Munitions.”

be understood to allow assistance with banned activities. Under the Bill's formulation, Australian personnel may be permitted, for example, to participate in the planning of attacks involving cluster munitions, or to create rules of engagement that permit use of the weapon. If adopted, this interpretation would essentially allow Australian military personnel to load and aim the gun, so long as they did not pull the trigger. JSCOT expressed concerns about such an outcome, stating that "some of the terms contained in the convention are not clearly defined and may provide an avenue by which Australia could participate in actions which may contravene the humanitarian aims of the convention."¹⁴ We strongly recommend that Section 72.41 be revised to ensure that military operations with a state not party do not become a loophole in the Bill's prohibitions.

Section 72.41 is meant to implement Article 21(3) of the convention, which explicitly allows for participation in joint military operations. Article 21(3) should be understood as a clarification of, and not (as the Explanatory Memorandum to the Bill suggests) a qualification of or exception to Article 1's prohibitions.¹⁵ In other words, Article 21(3) clarifies that, in the particular context of joint military operations, military personnel may *participate* in such operations without violating the convention; it does not, however, give them license to *violate* the prohibitions of convention. The proposed Section 72.41 takes the opposite approach and adopts language that seems to go further than Article 21(3). While Article 21(3) unambiguously states only that states parties "may engage" in joint military operations, the Bill creates a defense for many acts during such operations that on their face violate the convention.

We recommend that the Committee revise the Bill to reflect the continued application of the convention's prohibitions—including the prohibition on assistance—during situations of interoperability. Implementing this interpretation will be consistent with the text of the convention and will uphold the convention's object and purpose of eliminating cluster munitions and the humanitarian harm they cause.

Revising Section 72.41 to reflect this interpretation of Article 21(3) would not interfere with Australia's military partnerships or restrict its ability to participate in joint military operations with states not party to the convention.¹⁶ It would also protect individual soldiers from

¹⁴ "Convention on Cluster Munitions," in JSCOT, *Report 103: Treaties Tabled on 12 March and 13 May 2009*, p. 27.

¹⁵ Parliament of Australia, House of Representatives, "Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010: Explanatory Memorandum," 2010, p. 12 [hereinafter "Explanatory Memorandum"].

¹⁶ Australia expressed concern about the future of joint military operations at the Dublin negotiating conference and during the June 2010 JSCOT hearings. See "Summary Record of Opening Ceremony and First Session of the Plenary," Dublin Conference on the Convention on Cluster Munitions, CCM/CW/SR/1, May 19, 2008; "Convention on Cluster Munitions," in

liability for acts during such operations.¹⁷ The proposed amendment to Section 72.41 provides a defense for activities during joint military operations, as long as they do not go beyond mere participation to include violations of the convention. Experience with the Mine Ban Treaty shows that states are fully capable of abiding by a prohibition on assistance while cooperating with the armed forces of states not party.¹⁸

2b. Activities Prohibited during Joint Military Operations—Section 72.41(b)

- *Recommendation:* As an alternative to deleting Sections 72.41(b) and (c) as suggested under the previous Recommendation 2a, amend Section 72.41(b) to clarify it is only an illustrative list of activities prohibited during joint military operations by:
 - (1) revising the chapeau of Section 72.41(b) to state: “the act is not connected with performing activities prohibited under the Convention on Cluster Munitions, *including:*”; and
 - (2) amending Section 72.41(b) to add a subsection (v): “assisting with any of the above activities” and replacing the “and” in Section 72.41(b)(iv) with an “or.”

Section 72.41(b) essentially copies the language of Article 21(4), enumerating some of the activities that are prohibited during joint military operations. Section 72.41(b) should be revised, however, to clarify that the list is an illustrative and not exhaustive set of activities prohibited during such operations. Interpreting and implementing Article 21(4) as exhaustive would permit a range of activities (for example, participating in the planning of attacks or creating rules of engagement that permit cluster munition use) that should be understood as prohibited by the convention. The “exhaustive” approach is inconsistent with the treaty’s object and purpose to eliminate cluster munitions and the humanitarian harm they cause. It also runs counter to the positive obligations contained in Article 21(1) and (2)—to promote the convention’s norms and discourage cluster munitions use by others because it is not logical to allow assistance with use and require discouragement of use in the same article.

The word “including” in Section 72.41(b) should be used to indicate that the list is

JSCOT, *Report 103: Treaties Tabled on 12 March and 13 May 2009*, p. 27; JSCOT, *Treaties Tabled on 12 March 2009, Commonwealth of Australia, Official Committee Hansard*, June 15, 2009; JSCOT, *Treaties Tabled on 13 May 2009, Commonwealth of Australia, Official Committee Hansard*, June 22, 2009.

¹⁷ Australian legislators expressed concern about liability for Australian soldiers in joint military operations at the June 2010 JSCOT hearings. See JSCOT, *Treaties Tabled on 12 March 2009, Commonwealth of Australia, Official Committee Hansard*, June 15, 2009; Statements by Senator Birmingham and Mr. Briggs, in JSCOT, *Treaties Tabled on 13 May 2009, Commonwealth of Australia, Official Committee Hansard*, June 22, 2009.

¹⁸ Human Rights Watch, *Staying True to the Ban on Cluster Munitions*, pp. 6-8.

illustrative. In addition, Section 72.41(b) could add a subsection (v), explicitly stating that the prohibition on assistance continues to apply during joint military operations. Assistance should be understood as any act or omission that proximately contributes to anyone's engagement in an activity prohibited to a state party under the convention.

2c. Expressly Requesting Use of Cluster Munitions—Section 72.41(c)

- *Recommendation:* Amend Section 72.41(c) clearly to prohibit military personnel from requesting any cluster munitions strikes.

Under Section 72.41(c), Australians participating in joint military operations commit an offense if they “expressly request[]” cluster munition use when “the choice of munitions used is within the Commonwealth’s exclusive control.” This language is drawn from Article 21(4) of the convention, but as discussed above, Article 21(4) should not be understood as an exhaustive list of prohibited activities. As written, Section 72.41(c) implies that members of the Australian armed forces could request a cluster munition strike so long as the choice of munitions was not in their “exclusive” control. For example, under Section 72.41(c), Australians could request a strike knowing or suspecting that cluster munitions would be used; they could also expressly request a cluster munitions strike if the decision was subject to review by a superior and thus not in their “exclusive” control. These requests come dangerously close to use, and Human Rights Watch and IHRC recommend that Section 72.41(c) be amended to prohibit such requests explicitly.

3. Jurisdiction over Foreign Military Personnel—Section 72.42

- *Recommendation:* Remove section 72.42 because it exempts—in violation of the convention’s Article 9—the military personnel of states not party from the convention’s prohibitions while they are on Australian territory.

Section 72.42 provides a defense for non-Australian citizens who are “connected to” the armed forces of states not party. As a result, troops and other military personnel from states not party are exempt from prosecution for certain acts done on Australian territory that are prohibited by the convention, in particular, stockpiling, retention, and transfer.¹⁹ This exemption violates Article 9 of the convention, which specifies that national implementation measures shall include penal sanctions for violations of the convention “by persons or on

¹⁹ The Explanatory Memorandum to the Bill makes the intention of the section clear when it states, “The military personnel of countries that are not party to the Convention are not required to comply with the Convention’s obligations, and should not be subject to the offences in proposed section 72.38 while they are in Australian territory.” “Explanatory Memorandum,” p. 14.

territory under its jurisdiction or control.” The purpose of the sanctions is both to punish people who commit prohibited acts and to deter others from violating the prohibitions. By affording immunity to foreign military personnel, Section 72.42 undermines the aims of the convention and runs counter to a state party’s obligation under Article 21(1) and (2) to encourage states not party to adopt the convention’s norms. It also does not provide the protection for Australian troops that the government is seeking because it applies only to foreign troops. The section should therefore be removed.

Assuming the Bill is amended, Australia should make clear to its allies as well as its own military personnel the legal obligations laid out in its final implementation legislation. If an ally that is not a state party is aware of the potential liability persons on Australian territory face, it is less likely to put its own military personnel, or those seconded to it from Australia, at risk by ordering them to act in contravention of the legislation. Notification will thus help eliminate the situation in which a soldier has to choose between disobeying an order and facing liability under Australian law for an act he or she was ordered to do.

The Bill’s Explanatory Memorandum justifies the defense laid out in Section 72.42 as necessary to continue the joint military operations permitted under Article 21(3). It does not address the provision’s relationship with Article 9. The Bill and the memorandum recognize that certain activities—use, development, production, and acquisition—are so problematic that there is no defense for them even for foreign military personnel. The Bill and memorandum create a different standard for stockpiling, retention, and transfer. This distinction is inconsistent with the Convention on Cluster Munitions, which establishes the same absolute prohibitions and requires penal sanctions for all of those activities.

3a. Foreign Stockpiling—Section 72.42(1)

➤ *Recommendation:*

- (1) Add specific language to the Bill that prohibits the hosting of foreign stockpiles; or
- (2) Alternatively, remove 72.42(1) as it allows foreign stockpiling.

Section 72.42(1), which allows Australia to host foreign stockpiles of cluster munitions, should be removed because it runs counter to Articles 1 and 9 of the convention. Allowing foreign forces to stockpile cluster munitions violates the prohibition on assistance because it facilitates stockpiling and can potentially aid in the use of cluster munitions. The language of Article 1(1)(c) makes clear that states parties should not “assist, encourage or induce *anyone*”—including foreign military personnel—to engage in “any” acts that the convention prohibits. In addition, Section 72.42(1) permits foreign military personnel to do an act—

stockpile cluster munitions—prohibited by the convention. As discussed above, granting such immunity violates Article 9.

No other state has explicitly allowed for foreign stockpiling in its implementation legislation, and several nations have said they view the convention to ban the hosting of foreign stockpiles. Austria stated that the “foreign stockpiling of cluster munitions on the national territory of States Parties is prohibited by the Convention.... Should a State Party to the Convention allow a foreign state to stockpile cluster munitions on its territory, this action would be in violation with the provision entailed in Article 1 paragraph c that prohibits assistance.”²⁰ Colombia noted that it “absolutely rejects any manner of ... storage of foreign cluster bombs in Colombian territory.”²¹ Guatemala wrote that it “considers that the stockpiling of cluster munitions of other countries in the territory of a State Party to the Convention ... is prohibited according to Article 1 of the Convention.”²² Slovenia stated “in our view, the Convention also contains the prohibition of ... stockpiling of cluster munitions by third countries on the territory of each State Party. Therefore, such activities are illegal and not allowed on the territory of the Republic of Slovenia.”²³ Australia should at least remove the provision on foreign stockpiling and should preferably replace it with a provision banning hosting of foreign stockpiles.

3b. Transit—Section 72.42(1)

➤ *Recommendation:*

- (1) Add language to the Bill that prohibits the transit of cluster munitions; or
- (2) Alternatively, remove 72.42(1) which specifically allows transit.

Section 72.42(1) also runs counter to Articles 1 and 9 by allowing transit of cluster munitions across or through Australia’s national territory, airspace, or waters. The prohibition on assistance should be read to ban the transit of cluster munitions because transit facilitates acts proscribed by the convention, namely transfer and use of cluster munitions.²⁴ In addition, Section 72.42(1) grants such immunity for an act that should be understood as prohibited, in violation of Article 9.

²⁰ Letter from Amb. Alexander Marschik, director for disarmament, arms control and non-proliferation, Austrian Federal Ministry for European and International Affairs, to Human Rights Watch, March 9, 2009.

²¹ Response to Landmine and Cluster Munition Monitor questionnaire by the Ministry of Foreign Affairs, Colombia, March 26, 2010.

²² Letter No. 136/ONU/09 from the Permanent Mission of Guatemala to the UN in Geneva, March 19, 2009.

²³ Letter from Samuel Zbogar, minister, Slovenian Ministry of Foreign Affairs, April 20, 2010.

²⁴ Transit can also be understood as a form of transfer, which is prohibited by the convention.

A number of states parties have taken steps to show that they believe transit is prohibited under the convention. Austria and Germany both prohibited transit in their national implementation legislation.²⁵ Furthermore, Bulgaria, Burkina Faso, Colombia, Ecuador, Ghana, Lebanon, FYR Macedonia, Malawi, Malta, Mexico, Slovenia, and Zambia have all stated that they interpret the convention to proscribe transit.²⁶

4. Retention of Cluster Munitions and Submunitions—Section 72.39

➤ Recommendation:

(1) Delete section 72.39; or

(2) Alternatively:

- Clarify that “specified cluster munitions” means “the minimum number absolutely necessary”; and
- Require rigorous annual reporting.

Section 72.39 allows for the retention of cluster munitions without specifying any limit or establishing annual reporting requirements. While Article 3(6) of the convention allows retention of cluster munitions for certain purposes such as developing training in cluster munition detection and destruction techniques, Human Rights Watch and IHRC do not consider retention necessary. For instance, no UN-accredited clearance organization is known to use live submunitions for training purposes.²⁷ Thus, implementation legislation should not include a clause explicitly allowing retention. The majority of stockpilers that have so far joined the convention and expressed a view on this issue have chosen not to retain cluster munitions. These states include Afghanistan, Angola, Austria, Colombia, Honduras, Moldova, Montenegro, Norway, Portugal, and Slovenia.²⁸

²⁵ Federal Law on the Prohibition on Cluster Munitions, *Austrian Federal Law Gazette*, no. 12/2008, as amended by Austrian Federal Law Gazette I, no. 41/2009, sec. 2; Act Implementing Article 26(2) of the Basic Law (War Weapons Control Act) (Ausführungsgesetz zu Artikel 26 Abs. 2 des Deutschen Grundgesetzes (Gesetz über die Kontrolle von Kriegswaffen), 1961, as amended 2009, <http://www.gesetze-im-internet.de/krwaffkontrg/BJNR004440961.html#BJNR004440961BJNG000404160> (accessed December 2 2010), sec. 18(a) (Germany). An unofficial English translation of Austria’s law specifically uses the word transit, while Germany bans transit by declaring it is prohibited to “transport [cluster munitions] through or otherwise bring them into or out of a federal territory.”

²⁶ See International Campaign to Ban Landmines (ICBL), *Cluster Munition Monitor 2010* (Ottawa: Mines Action Canada, 2010), p. 22 [hereinafter *Cluster Munition Monitor 2010*].

²⁷ *Ibid.*, p. 19.

²⁸ *Ibid.*, p. 2.

If Australia is unwilling to give up the option of permitting retention of cluster munitions and submunitions in its legislation, its legislation should at least establish certain safeguards. It should implement the convention's requirements that states parties retain only "the minimum number absolutely necessary." It should also require detailed annual reports as mandated by Article 3(8) of the convention. These reports should include information on both their plans and actual use of cluster munitions, the type and quantity retained, and recipient state parties if the state transfers cluster munitions. The reporting requirement allows for monitoring and will help ensure that Australia appropriately uses the weapons it claims it needs to retain.

5. Intent Requirement—Section 72.38

- *Recommendation:* Use a recklessness standard for fault for offenses instead of an intention standard.

The Bill sets a high threshold for liability,²⁹ requiring that a person *intend* an act be done in order to be liable for one of the offenses in Section 72.38.³⁰ Under this standard, individuals would not be liable for conduct if, for example, they were aware their conduct would result in cluster munition use (knowledge) or in a substantial, unjustifiable risk of use (recklessness). Using an intention standard in Section 72.38 thus makes it difficult to hold individuals liable for use, production, transfer, and stockpiling of cluster munitions or assistance with these prohibited acts even if they knew or should have known their conduct could lead to one of these activities. This result is in direct opposition to JSCOT's recommendation to "prevent inadvertent participation in the use, or assistance in the use, of cluster munitions by Australia."³¹

6. Penalties for Bodies Corporate—Section 72.38

- *Recommendation:* Codify the sanctions against bodies corporate.

In his October 27, 2010 second reading to the House of Representatives, Attorney-General Robert McClelland stated that the Bill carried penalties of up to 10 years imprisonment for

²⁹ The Bill sets this standard explicitly for assistance in Section 72.38(2)(c) and, according to the Explanatory Memorandum, implicitly for the other prohibitions in Section 72.38(1). With regard to the latter, although the Bill applies Division 11 ancillary liability (e.g., aiding and abetting) to the offenses in Section 72.38(1), ancillary liability also requires intention. Commonwealth Criminal Code of 1995 Schedule, Division 11.

³⁰ Intention is the most difficult standard to prove of the four fault standards provided under Australian criminal law (Intention, Knowledge, Recklessness, and Negligence) and requires that the defendant means to engage in the criminal conduct. Commonwealth Criminal Code of 1995 Schedule, secs. 5.1, 5.2 and 5.6.

³¹ "Convention on Cluster Munitions," in JSCOT, *Report 103: Treaties Tabled on 12 March and 13 May 2009*, p. 27.

individuals, or \$330,000 for bodies corporate.³² These penalties, however, were not codified in the Bill.³³ We recommend adding the penalties for bodies corporate to the text of Section 72.38 in order to clarify that the legislation applies to corporations as well as people.

VI. Recommendations: Additional Elements to Implement

The Bill leaves out certain elements that Australia should implement in this legislation or elsewhere to comply fully with its obligations under the convention on Cluster Munitions.

1. Prohibition on Investment

- *Recommendation:* Prohibit direct and indirect investment of public and private funds in the production of cluster munitions and their components.

The Bill does not explicitly prohibit investment in the production of cluster munitions. The lack of a prohibition on investment is directly counter to JSCOT Recommendation 2, which states that the “legislation should prevent investment.” Further, the Australian attorney-general, in a speech to the House on November 18, 2010 said that the convention’s prohibition on assistance extends to investment in companies that produce cluster munitions when the investor “intends to assist, encourage or induce the development or production of cluster munitions....”³⁴ The Bill should explicitly ban investment because it assists with a prohibited act, that is, the production of cluster munitions. Production cannot be curtailed and cluster munitions eliminated if a state party allows direct or indirect financial support to manufacturers of the weapons. Because private investors often provide important financial support to such companies, the ban should extend to private funds.

Several states have banned investment in their implementing legislation including Belgium, Ireland, Luxembourg and New Zealand.³⁵ Belgium prohibits financial institutions, whether

³² Attorney-General Robert McClelland, Second Reading of Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, October 27, 2010, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3A%22r4487%22%20Dataset%3Ahan%20sardr,hansards%20Title%3A%22second%20reading%22;rec=8 (accessed January 13, 2011).

³³ We recognize that Australian criminal law provides automatic penalties for bodies corporate based on the imprisonment terms for individuals. See Crimes Act 1914, secs. 4AA and 4B, http://www.austlii.edu.au/au/legis/cth/consol_act/ca191482/ (accessed January 13, 2011). Because these automatic penalties are discretionary, however, we urge Australia to include the penalties for bodies corporate in the text of the Bill.

³⁴ Speech by Attorney General Robert McClelland to the House, November 18, 2010.

³⁵ Act on the prohibition of the financing of production, use and possession of antipersonnel mines and submunitions (Loi interdisant le financement de la fabrication, de l’utilisation ou de la détention de mines antipersonnel et de sous-munitions), *Le Moniteur Belge*, April 26, 2007, www.stopexplosiveinvestments.org/legislation (accessed October 31, 2010), p. 22122; Cluster Munitions and Anti-Personnel Mines Act 2008, no. 20-2008, sec. 12-13 (Ireland); Law of 4 June 2009 on the

public or private, from investing in companies producing cluster munitions. Luxembourg and New Zealand criminalize investment by public or private entities in companies that produce cluster munitions, and Ireland bans investment of public money in such companies. In addition, France has declared that its national implementation law's prohibition on assistance bans both direct and indirect financing of cluster munition production,³⁶ while the United Kingdom's legislation has been understood to ban direct financing.³⁷

2. Positive Obligations

- *Recommendation:* Implement the positive obligations of the convention through legislation supplemented by other administrative measures or polices.

Human Rights Watch and IHRC recommend implementing the convention's positive elements through legislation as the best way to set clear binding rules and ensure that Australia is fulfilling all of its treaty obligations. Australia could supplement such legislative measures with administrative or other ones that provide more details. We recognize that the positive obligations may not fit best in the criminal code statute under discussion here, but Australia should be sure to implement them as well as the convention's prohibitions expeditiously.

Most relevant to Australia, Article 21(1) and (2) of the convention requires a state party to fulfill certain positive obligations. Specifically, a state party must encourage states not party to the convention to ratify or accede to it and notify states not party of its obligations under the convention. A state party must also promote the convention's norms and make its best efforts to discourage other states from using cluster munitions. Implementing these positive requirements would facilitate the spread of the convention's norms and strengthen the stigma against cluster munition use. Australia should require, preferably through legislation, the implementation of Article 21(1) and (2). For example, the legislation could designate a government agency that is responsible for coordinating these activities.

implementation of the Convention on Cluster Munitions, opened for signature in Oslo on 3 December 2008 (Loi du 4 juin 2009 portant approbation de la Convention sur les armes à sous-munitions, ouverte à la signature à Oslo le 3 décembre 2008), *Memorial Journal Officiel du Grand-Duché de Luxembourg*, A-no. 497, 2009, art. 3; Cluster Munitions Prohibition Act 2009, Public Act 2009 no. 68, sec. 10(2) (New Zealand).

³⁶ Statement by Hubert Falco, secretary of state for defense, Summary Report of the National Assembly, XIII Legislature, Extraordinary Session of 2009-2010, July 6, 2010, http://www.assemblee-nationale.fr/13/cr/2009-2010-extra/20101008.asp#INTER_o (accessed October 29, 2010).

³⁷ Statement by Rt. Hon. Chris Bryant, House of Commons Debate, *Hansard*, Column 2WS, December 7, 2009, <http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm091207/wmstext/91207m0001.htm#0912073000100> (accessed October 29, 2010).

VII. Recommendations: Elements to Retain in the Bill

The Bill has several positive elements that should be retained in the final draft. As discussed above, the Bill incorporates the convention's categorical ban by making it a crime for an individual to use, develop, produce, or otherwise acquire, stockpile, or transfer cluster munitions. The Bill also criminalizes assistance with prohibited acts.

The Bill, in Section 72.44, explicitly covers explosive bomblets, which are munitions similar to submunitions but are released by a dispenser affixed to an aircraft. They pose the same humanitarian risks as cluster munitions because they have an area effect and are prone to failure. Including a ban on explosive bomblets avoids any loopholes, and helps ensure that weapons with the same harmful effects as cluster munitions do not continue to take a heavy toll on civilian lives. Ireland, New Zealand, and the United Kingdom have all clarified that their implementation legislation incorporates explosive bomblets.³⁸

In establishing extraterritorial jurisdiction in Section 72.38(3), the Bill prevents Australian citizens from escaping liability for violating the convention's norms. This provision is important to ensure that acts that involve cross-border activities, such as transferring cluster munitions, are not allowed. At least four states parties—Germany, Luxembourg, New Zealand, and the United Kingdom—have established extra-territorial jurisdiction in their implementation legislation.³⁹

The Bill's Explanatory Memorandum clarifies that the definition of transfer includes *either* movement over borders *or* transfer of title. This clarification shows that transfer should be understood broadly and is consistent with the common interpretation of the Mine Ban Treaty's definition, which is identical to that in the Convention on Cluster Munitions.⁴⁰

³⁸ Cluster Munitions and Anti-Personnel Mines Act 2008, sec. 6-7 (Ireland); Cluster Munitions Prohibition Act 2009, sec. 12 (New Zealand); Cluster Munitions (Prohibitions) Act 2010, Chapter 11, http://www.opsi.gov.uk/acts/acts2010/ukpga_20100011_en_1 (accessed September 19, 2010), sec. 1(3) (United Kingdom).

³⁹ War Weapons Control Act, sec. 21 (Germany); Bill Approving the Convention on Cluster Munitions (Projet de Loi portant approbation de la Convention sur les armes à sous-munitions), commentary to art. 2 (Luxembourg); Cluster Munitions Prohibition Act 2009, sec. 9 (New Zealand); and Cluster Munitions (Prohibitions) Act 2010, sec. 4 (United Kingdom).

⁴⁰ A commentator on the Mine Ban Treaty writes, "Although State practice is divergent, transfer appears to be either the physical movement of anti-personnel mines into or from national territory, or the transfer of title to and control over the mines." See Stuart Maslen, *Commentaries on Arms Control Treaties: Volume 1: The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction* (Oxford: Oxford University Press, 2005), sec. 2.61. For further discussion of the interpretation of transfer, see Bonnie Docherty, Lou Maresca, Richard Moyes, and Markus Reiterer, "Definitions," in Gro Nystuen and Stuart Casey-Maslen, eds., *The Convention on Cluster Munitions: A Commentary* (Oxford: Oxford University Press, 2010), pp. 226-227.

We commend Australia for incorporating these provisions within the Bill as it demonstrates the government's commitment to achieving the goals of the convention. We recommend preserving these elements of the Bill in the final version.

VIII. Conclusion

Australia's bill on the Convention on Cluster Munitions contains several key elements, but it should be strengthened significantly. In particular, it should clarify that the prohibition on assistance applies in all situations, including during joint military operations. It should remove the provisions that explicitly allow hosting of foreign stockpiles and transit by providing immunity for foreign military personnel who stockpile or transfer cluster munitions on Australian territory. It should remove the provision on, or at least, impose safeguards on the retention of cluster munitions and submunitions. It should add a prohibition on investment. Finally, Australia should implement the positive as well as negative obligations of the convention in this or other legislation. Adopting these revisions will ensure that Australia fully implements the Convention on Cluster Munitions in a manner consistent with the object and purpose of the convention.