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The Secretary
Joint Standing Committee on Treaties
House of Representatives
Parliament House, Canberra ACT 2600
By email: jsct@aph.gov.au

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Dear Secretary

Please accept this short, late submission to the Standing Committee's **Inquiry into ratification of the Convention on Cluster Munitions**. The Sydney Centre for International Law is a leading centre of research and policy in international law in Australia and the Asia-Pacific region. At Sydney Law School I research and teach in international humanitarian law and I am a member of the International Law Association's International Committee on the Compensation of Victims of Armed Conflict.

This submission strongly supports Australia's ratification of the Convention on Cluster Munitions for the following reasons:

1. Cluster munitions pose a significant humanitarian threat due to their relative imprecision in targeting, the likelihood of unlawfully *indiscriminate* use (because of the dispersal of large numbers of sub-munitions, over large areas, for prolonged periods), and the considerable costs involved in identifying and rendering harmless those many sub-munitions which fail to explode on impact. The adverse impacts on non-combatants when used against military objectives in civilian population centres are of particular concern. Unexploded cluster munitions not only threaten physical injury to civilians, but also severely disrupt development and livelihoods, by rendering agricultural land unsafe after conflict has ended. Internationally, serious concerns have been raised about the effects of cluster munitions on civilians in conflicts in Laos, Cambodia, Vietnam, Afghanistan, Iraq, Kuwait, Chechnya, the former Yugoslavia and Kosovo, and southern Lebanon.

3. Humanitarian law currently does not expressly prohibit cluster munitions, which are subject to the ordinary rules on the means and methods of warfare. In some cases, the use of cluster munitions may comply with the principles of distinction, discrimination, proportionality and necessity; for example, where they are used against massed enemy formations in areas which are clearly distinguished from civilian populations and civilian objects. However, in many cases, the general rules of humanitarian law contained in the 1907 Hague Regulations, 1977 Additional Protocol I and the 1980 Convention on Conventional Weapons, have not effectively or successfully limited civilian casualties from cluster munitions. Further regulation is justified; there is strong international and domestic support for the Convention; and Australia should actively support its humanitarian purpose.

3. Some armed forces perceive military advantage in using cluster munitions against concentrations of enemy combatants, vehicles and other military targets, since their wide area of dispersal increases the chances of damaging or destroying military objects, while reducing the resources required to individually target and attack each military object. However, in most cases the military utility of cluster munitions will be outweighed by the uncontrollable risks of harming civilians which typically accompany their use.

4. In purely military terms, the military advantage gained by deploying cluster bombs must be evaluated in light of their relative imprecision in targeting, and the considerable costs involved in identifying and rendering harmless those many sub-munitions which fail to explode upon impact, including the inconvenience or restricted mobility caused to advancing military forces which deployed them prior to occupying territory. Technological improvements (such as self-destruction or neutralization mechanisms and targeting technology for sub-munitions) have not been sufficient to counter the adverse humanitarian effects from most cluster munitions.

Clarification of the Scope of Inter-Operability

4. The Convention allows for interoperability with States that are not party to the Convention (article 21(3)), addressing the pragmatic concern to ensure that joint operations with foreign military forces (such as the United States) are not adversely affected. Interoperability of coalition forces is undoubtedly important for security reasons.

5. However, the scope of the inter-operability carve out provision requires further clarification. Article 1(c) of the Convention requires States Party not to '[a]ssist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention'. Article 21(3) then provides that:

Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.

Article 21(4) then provides an exception to in Article 21(3), the effect that Australia would not be permitted to ‘expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control’. The National Interest Analysis states that ‘Australia will continue to work with allies and partners on a common understanding of how Article 21 will operate in practice and in compliance with the Convention’.

6. One interpretation of these provisions would allow Australia to, for example, request US air support of Australian forces in a joint operation in circumstances where Australian forces do not expressly request US aircraft to use cluster munitions, but where Australian forces know or reasonably believe that US aircraft are likely to be carrying cluster munitions. In my view, such an interpretation is plausible within the rules of treaty interpretation.

7. However, such an approach would not well serve the humanitarian purposes of the Convention on Cluster Munitions, since it would permit Australian forces to be intimately involved in a non-State party’s use of cluster munitions and hence in likely harm to civilians. *As an operational matter, 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. The humanitarian and moral costs involved in such reliance are not justified by the convenience of an inter-operability approach which essentially turns a blind eye to what our coalition partners do.

9. In different contexts, Australian forces already operate under rules of engagement which differ from those of coalition partners. Australian forces already often take different approaches to their allies in matters of targeting, proportionality and other issues of legal interpretation and assessment. In this light, if Australia is serious about regarding cluster munitions as a prohibited weapon because of its adverse humanitarian effects, then interoperability should not be regarded as a relevant consideration or justification for use.

Domestic Enactment

10. Australia should promptly legislate to fulfil its obligation under article 9 of the Convention to enact criminal offences to prevent and suppress prohibited activities. Australian could use its domestic legislation to widen its understanding of the literal interpretation of article 21 identified above, in order to better serve the Convention’s protective humanitarian purpose and to preclude *unprincipled* interoperability.

Yours sincerely

