

Chapter 4

Provisions of the Bill

4.1 In the absence of any existing specifically-targeted constraints either in domestic legislation or international treaties and law, the provisions of the Cluster Munitions (Prohibition) Bill 2006 (hereafter the bill) are designed to introduce prohibitions against the ADF or any Australian persons possessing, using or manufacturing cluster munitions. In particular, it is aimed at ensuring civilians in conflict zones are not maimed, killed or put at risk as a result of Australian involvement in the deployment of cluster munitions.

4.2 The bill outlines:

- legal definitions of cluster munitions, container units and sub-munitions;
- new offences relating to cluster munitions including the range of circumstances relating to their application; and
- the responsibilities of the Minister for Defence for decommissioning cluster munitions and removing the ERW in instances where any cluster munitions have been deployed.

4.3 The bill applies to matters within the legislative power of the Commonwealth under paragraphs 51 (vi) and 51 (xxix) of the Constitution, the naval and military defence of the Commonwealth and States and control of the forces to execute and maintain the laws of the Commonwealth, and external affairs, respectively. Chapter Two of the *Criminal Code*—governing general principles of criminal responsibility—would apply to offences contained in the bill. The bill would extend and not limit the common law in relation to writs of mandamus, prohibition or certiorari or an injunction or declaration under the Constitution or *Judiciary Act 1903* if the individual is an Australian citizen ordinarily resident in Australia.

Definitions for the purposes of the bill

4.4 The bill provides definitions of cluster munitions, container units and sub-munitions. It defines cluster munition as '[a] munition or device which is specifically designed to cause death or harm by deploying one or more sub-munitions'. Sub-munition is defined as 'a munition which is carried within the container unit of a cluster munition and which is deployed from the container unit'. Container unit is described as 'that part of a cluster munition which is intended to transport one or more sub-munitions from the point at which the cluster munition is fired to the point at which the sub-munitions are deployed'.¹

1 Clause 6.

New offences under the bill

4.5 Part Two of the bill defines the offences relating to cluster munitions. To commit an offence a person must intentionally:

- develop, produce, otherwise acquire, stockpile or retain cluster munitions, container units or sub-munitions; or
- transfer, directly or indirectly cluster munitions, container units or sub-munitions to another person; or
- use a cluster munition, container unit or sub-munitions; or
- engage in military preparations to use cluster munitions, container units or sub-munitions.²

4.6 The penalty for any of the above transgressions would be imprisonment for life.

4.7 The bill extends to members of the ADF serving in or outside Australia, serving with the ADF or any other defence force, as well as actions undertaken on Australian ships and aircraft. It stipulates that a member of the ADF 'must not intentionally engage in military preparations to assist a member of the defence force of another country to use cluster munitions, container units or sub-munitions'.³ Any command to a member of the ADF to contravene the bill would not be considered lawful under section 27 of the *Defence Force Discipline Act 1982*.⁴

4.8 Part Three stipulates that the new offences of the Cluster Munitions (Prohibition) Bill 2006 would not apply to activities undertaken in order to:

- clear or render safe sub-munitions that are ERW;
- educate civilians regarding the dangers of cluster munitions, container units or sub-munitions; or
- decommission or destroy sub-munitions.⁵

Decommissioning, destruction and removal of cluster munitions

4.9 Part Four of the Cluster Munitions (Prohibition) Bill 2006 requires the Minister for Defence to ensure the decommissioning or destruction of any cluster munitions, container units and sub-munitions under the control of the ADF within one year of the commencement of the Act. The Minister would also be obliged, within three months of the commencement of the Act, to table a report in both Houses of Parliament outlining the extent of any such holdings in the possession or control of the

2 Clause 10.

3 Clause 11.

4 Clause 13.

5 Clauses 14–15.

ADF, whether in Australia or overseas, and delineating a plan for the decommissioning or safe destruction of these holdings.

4.10 Australia would be required to remove or destroy any deployed cluster munitions in accordance with its international obligations regarding ERW, specifically under Protocol V to the CCW. Australia was involved in the negotiations of this protocol and consented to the instrument on 4 January 2007. It is due to enter into force on 4 July 2007.

Summary

4.11 If passed, the key effect of the bill would be to introduce a list of offences related to prohibiting intentional Australian involvement in the possession, use or manufacture of cluster munitions, punishable by life imprisonment. The definitions and provisions pertaining to the use of cluster munitions would prevent possession, use of, or involvement with, any sub-munition based weapon in any circumstances other than for removal, destruction, decommissioning or civilian education regarding cluster munitions. The bill would also prohibit engagement in military preparations with allies to use cluster munitions, container units or sub-munitions.

4.12 The bill would impose requirements on the Minister for Defence to decommission any current holdings of cluster munitions. Further, Australia would be prevented from any future development or acquisition of cluster munitions, and obliged to remove ERW in the case of any that have been deployed. The provision of the bill on ERW does not impose any additional obligations and cites Australia's adherence and responsibilities under existing international law, notably Protocol V to the CCW.

