

Minority report by Labor members

Introduction

1.1 In the main, Labor members of the committee support the findings of the majority report but believe that some important matters warrant a stronger emphasis.

Humanitarian concerns

1.2 Many of the submissions to the inquiry drew attention to the use of cluster munitions over the past 40 years and the extent of harm they have caused to civilians both during and after a conflict. They underscored the serious humanitarian problems posed by the use of cluster munitions in countries including Laos, Cambodia, Vietnam, Chechnya, Kosovo, Afghanistan and Iraq. The Medical Association for Prevention of War suggested that 98% of known casualties from cluster munitions are civilians of which at least 27% are children.¹ Austcare World Humanitarian Aid explained that cluster munitions pose a threat to civilians in two ways:

- The bomblets dispersed by the munition 'often stray from military targets causing death and injury to civilians'—when 'used near populated areas, their effects have proved impossible to contain'. Landmine Action suggested that the affected areas are often 'as large as 3–4 soccer fields'.
- The unexploded remnants from cluster munitions threaten the lives and livelihoods of civilian communities for years after the conflict has ceased.²

1.3 Many of the submissions drew attention to the death and 'terrible physical and psychological suffering for civilians' caused by the use of cluster munitions. They emphasised that children are particularly vulnerable.³ UNICEF Australia's Chief Executive, Ms Carolyn Hardy, noted that the legacy of unexploded cluster bombs violates a number of articles of the Convention on the Rights of the Child, including

1 Medical Association for Prevention of War (Australia) and Australians for Lebanon, *Submission 6A*, p. 1; See also Handicap International and the Cluster Munition Coalition (CMC), *Submission 14*, p. [2]; These submissions have cited a November 2006 report by Handicap International, *Fatal Footprint*. It reviewed the effect of cluster munitions use in the 26 known countries where they have been used since 1973 and reported that of the 11 044 confirmed casualties, only 124 were military personnel.

2 Austcare World Humanitarian Aid, *Submission 2*, p. 3 and Landmine Action UK, *Submission 5A*, p. 1.

3 Peace Organisation of Australia, *Submission 1*, p. 1, Medical Association for Prevention of War (Australia) and Australians for Lebanon, *Submission 6*, p. 6; Australian Network to Ban Landmines and Uniting Church of Australia (Synod of Victoria and Tasmania), *Submission 8*, pp. 3 and 7–8; Mines Action Canada, *Submission 15*, p. 1; Landmine Action UK *Submission 5A*, p. 1.

those which 'relate to a child's right to life, to a safe environment in which to play, to health, clean water, sanitary conditions and adequate education'.⁴ She said:

Experience in conflict zones such as Lebanon has shown that it's the young who are getting injured and dying. Children are being killed because they see a shiny metal object and they often go and pick it up and play with it.⁵

1.4 Ms Hardy also noted that:

Children who are fortunate enough to survive a cluster bomb blast often have permanent physical scars, as well as emotional trauma that haunts them for years.⁶

1.5 Civilians returning to their homes and places of work are at risk from unexploded ordnance. Indeed, ordinary daily activities such as fetching water, gathering food, or herding stock can be dangerous. This situation has arisen in South Lebanon which is highly dependent on agriculture. A report released by the United Nations Office for the Coordination of Humanitarian Affairs in September 2006, found that South Lebanon's agricultural land 'is heavily contaminated with cluster bombs'.⁷ It noted that 'the sheer amount of unexploded ordnance that remains in South Lebanon, one of the poorest areas of the country, will hamper the future social and economic livelihood of the region':

Farmers, in areas feared to contain cluster bombs, have not been able to irrigate or harvest their current crops and are unable to plant the winter crop, be it wheat, lentils, chickpeas or other vegetables. Next year's agriculture cycle will also be affected if, as is likely to be the case, substantial numbers of cluster bombs are not cleared until the end of 2007.⁸

1.6 Unexploded remnants of war pose a grave threat to civilians for years after a conflict has ended.

Labor members' views

1.7 Labor Members believe that the suffering and disruption caused to civilian communities by the use of cluster munitions is intolerable and that Australia must take a leadership role to ensure that the use of cluster munitions will not continue to inflict harm on civilian populations.

4 Peace Organisation of Australia, *Submission 1*, p. 7.

5 UNICEF Australia, Media Centre, 'UNICEF Australia Supports Cluster Ban', 5 December 2006, <http://www.unicef.org.au/mediaCentre-Detail.asp?ReleaseID=709> (assessed 6 May 2007)

6 UNICEF Australia, Media Centre, 'UNICEF Australia Supports Cluster Ban', 5 December 2006, <http://www.unicef.org.au/mediaCentre-Detail.asp?ReleaseID=709> (assessed 6 May 2007)

7 United Nations Office for the Coordination of Humanitarian Affairs, *A Lasting Legacy: The Deadly Impact of Cluster Bombs in Southern Lebanon*, September 2006.

8 United Nations Office for the Coordination of Humanitarian Affairs, *A Lasting Legacy: The Deadly Impact of Cluster Bombs in Southern Lebanon*, September 2006.

International Protections

1.8 Although a number of submitters noted that International Human Rights Law (IHL) offers protection to civilians from harm by the use of cluster munitions, the reality is that the use of this munition has caused and continues to cause civilian deaths and injuries. Dr Ben Saul, University of Sydney, was of the view that 'the inability of existing humanitarian law to limit civilian casualties from cluster munitions justifies further regulation'.⁹ Austcare World Humanitarian Aid noted that recent conflicts have demonstrated that the fundamental principles of IHL have been 'undermined'.¹⁰

1.9 A message recently delivered to the Third Review Conference of the Convention on Certain Conventional Weapons on behalf of the United Nations Secretary-General, Kofi Annan, urged states to comply fully with international humanitarian law. He noted, however, that:

recent events show that the atrocious, inhumane effects of these weapons—both at the time of their use and after conflict ends—must be addressed immediately, so that civilian populations can start rebuilding their lives.¹¹

1.10 The September report from the United Nations Office for the Coordination of Humanitarian Affairs recorded that:

The density of cluster bombs in south Lebanon appears to be higher than that witnessed in Kosovo and Iraq, with a greater concentration in built-up areas and agricultural land, according to UNMACC.¹²

1.11 Statistics contained in this report indicate that:

Unexploded cluster bombs have been killing or wounding on average three people a day since 14 August. At least 15 people have died during this period and 83 others wounded, as of 18 September. Most of these casualties have occurred as people checked their homes or fields.

1.12 Furthermore, it estimated that the time taken to destroy the majority of unexploded cluster bombs would be about 24 to 30 months, double the time initially thought because of the escalating numbers of unexploded bombs being identified.¹³

9 Dr Ben Saul, *Submission 7*, p. 2.

10 Austcare World Humanitarian Aid, *Submission 2*, p. 3.

11 Message by United Nations Secretary-General Kofi Annan to the Third Review Conference of the Convention on Certain Conventional Weapons, at the Palais des Nations in Geneva from 7 to 17 November 2006. The message was delivered on his behalf by Tim Caughley, Director of the Conference on Disarmament Secretariat and Conference Support Branch and Deputy Secretary-General of the Conference on Disarmament. See also *Submission 4*, United Nations Mine Action Service, Department of Peacekeeping Operations.

12 United Nations Office for the Coordination of Humanitarian Affairs, *A Lasting Legacy: The Deadly Impact of Cluster Bombs in Southern Lebanon*, September 2006.

1.13 Recent conflicts where cluster munitions have been used, make it clear that despite IHL, such munitions continue to cause the death and injury of civilians, who through no fault of their own, have been caught up in a conflict. Many submissions supported this view and in particular cited the inadequacy of Protocol V.¹⁴

1.14 Submissions by Austcare World Humanitarian Aid, as well as the Cluster Munitions Coalition and Handicap International highlighted the limitations of Protocol V. In particular, Austcare stated:

Protocol V does not provide an adequate response to the humanitarian problem resultant from the use of cluster munitions. Protocol V is limited to the post-conflict context and falls short of providing regulatory measures to control the use of ERW-producing weapons during conflict situations...Moreover, although the provisions of Protocol V are binding on all signatory States, there is no mechanism to enforce compliance.¹⁵

1.15 Therefore, the Cluster Munitions Coalition and Handicap International concluded that additional measures were needed and that these 'would not duplicate existing obligations...would be complementary, would reinforce existing and emerging international standards of practice' and could easily be incorporated into national measures on other banned munitions, such as anti-personnel landmines.¹⁶

Labor members' view

1.16 Labor members of the committee believe that current international law is not adequately addressing the use of cluster munitions and is failing to protect civilian populations from the effects of the use of cluster munitions.

Recent international developments

1.17 A number of countries have responded to what they see as a failure by the international community to prevent the unacceptable harm caused to civilians by the use of cluster munitions. The majority report detailed these recent developments.

1.18 In its submission, the Department of Defence stated that the Australian Government 'shares domestic and international concerns about humanitarian hazards associated with the use of *some* cluster munitions and...is working actively to ameliorate these effects.' A number of submissions took issue with this assertion.

13 United Nations Office for the Coordination of Humanitarian Affairs, *A Lasting Legacy: The Deadly Impact of Cluster Bombs in Southern Lebanon*, September 2006.

14 Austcare World Humanitarian Aid, *Submission 2A*, p. [1]; Medical Association for Prevention of War (Australia) and Australians for Lebanon, *Submission 5A*, p. [1]; Landmine Action UK, *Submission 6A*, p. 2.

15 Austcare World Humanitarian Aid, *Submission 2A*, p. 2.

16 Handicap International and the Cluster Munition Coalition (CMC), *Submission 14*, p. 1.

They pointed out that Australia was not one of the 46 nations present at the Oslo Conference on Cluster Munitions.¹⁷ Australian Network to Ban Landmines stated:

Australia was not represented at the meeting in Oslo, with the Australian Government stating that it was not invited. It is our understanding that the meeting was open to all states that wished to attend.¹⁸

1.19 Landmine Action noted further that Australia has 'not engaged in international negotiations on cluster munitions, choosing only to support a limited discussion mandate within the UN Convention on Certain Conventional Weapons (CCW)'.¹⁹ It must be acknowledged, however, that since the receipt of the submissions, official representatives from Australia attended the follow-up meeting to the Oslo Conference, which was held in Peru from 23-25 May 2007.

Labor members' views

1.20 While fully endorsing recommendation 7, Labour members stress that Australia should be taking a more active leadership role in advocating a ban on cluster munitions that cause unacceptable harm to civilians. To date, the Australian government has shown no such inclination to lead and has tended to follow. It is notable that until recently, Australia has only been involved in the CCW forum and elected not to participate in the meeting in Oslo. However, the Oslo forum evolved out of widespread frustration that the discussions within the CCW were not progressing or likely to yield any tangible progress in introducing measures related to addressing the adverse humanitarian impact of cluster munitions. Australia did attend the follow-up meeting in Peru.

1.21 The Labor members call on the Australian Government to make a public statement that unequivocally supports international efforts to ban the use of cluster munitions that cause unacceptable harm to civilians and to strengthen this statement by demonstrating a willingness to participate in all international forums working toward this objective.

Defence's concerns

The acquisition of advanced sub-munitions

1.22 One of Defence's main objections to the Bill was that it would 'exclude Australia's potential to exploit new emergent technologies that would be *more capable, discriminating and reliable* than existing munitions'. The definition of cluster munitions as provided in the bill would, according to Defence, have the unintended

17 Landmine Action UK, *Submission 5A*, p. [1]; Australian Network to Ban Landmines and Uniting Church of Australia (Synod of Victoria and Tasmania), *Submission 8A*, p. 3.

18 Australian Network to Ban Landmines and Uniting Church of Australia (Synod of Victoria and Tasmania), *Submission 8A*, p. 3.

19 Landmine Action UK, *Submission 5A*, p. [1].

consequence of preventing the acquisition of advanced, sophisticated systems. These would include limited number, precision guided sub-munition based weapon systems as well as, 'weapon-carrying unmanned Aerial Vehicles, Surface Unmanned Vessels, and Underwater Unmanned Vehicles'.

1.23 In this respect, Defence has noted the comprehensive ban proposed under the bill goes beyond most measures discussed in international forums. Defence argued: 'there is no substantial support for such a ban' from states parties to the CCW and that the provisions exceed those proposed by the International Committee of the Red Cross and the Oslo Conference, which focused on prohibiting only cluster munitions that are 'inaccurate and unreliable', or 'have unacceptable humanitarian consequences' respectively.²⁰

1.24 Labor members accept the finding of the majority report that the bill would, if enacted, effectively 'preclude development or acquisition of more advanced, reliable and discriminating emergent technologies'. They accept Defence's explanation that, the prohibition 'would place Australian forces at a disadvantage against potential adversaries and reduce or remove its margin of superiority'. Furthermore, such a ban would mean that Defence could not acquire any sub-munition based weapon system, whether or not it was generally considered to be a cluster munition, and including those intended to minimise humanitarian impact. It is noted that both Landmine Action UK as well as the Cluster Munitions Coalition and Handicap International have conceded precision-guided munitions, such as in the process of being procured by Defence and that would be banned under the bill, 'do not pose a greater risk to civilians' and constitute legitimate alternatives to general cluster munitions.²¹

1.25 In this regard, Labor members agree with the majority report's view that the definition of cluster munitions in the bill is too broad and does not take proper account of advances being made in weapon systems that are designed to ensure greater precision and to remove the likelihood of producing ERW.

1.26 Labor Senators note, however, the doubts raised by some submitters about assertions concerning the reliability of these advanced sophisticated munitions. For example, the Medical Association for Prevention of War (Australia) noted that technological advances, 'while possibly offering some benefit in terms of civilian protection in some situations, cannot necessarily be relied on to deliver this result'. Submitters cited two reasons—reliability and expense—for questioning the veracity of statements made about the reliability and accuracy of the new technology.

20 Department of Defence, *Submission 10*, p. 1.

21 Landmine Action UK, *Submission 5A*, p. 1; Also cited in Handicap International and the Cluster Munition Coalition (CMC), *Submission 14*, p. 1.

Reliability

1.27 The reliability of technologies can depend on the context in which they are used—battlefield conditions are often very different from weapons testing environments and 'reliability' can vary significantly. The Medical Association for Prevention of War (Australia) noted that self-destruct mechanisms fitted to cluster munitions can and do fail. Furthermore it argued that a low failure rate of 1% may look attractive but when millions of cluster munitions are used tens of thousands of live munitions result. The Australian Network to Ban Landmines pointed out that deminers regularly report 'failure rates well above the claims made by manufacturers and by military sources, where new cluster munitions are usually tested under ideal conditions and on hard ground'. Mines Action Canada noted the 'overwhelming humanitarian evidence' that these sorts of weapons inherently pose unacceptable risks to civilians' and Austcare referred to the poor track record to date.²²

Expense of new technology

1.28 Technologically advanced weapons are 'almost invariably more expensive than older weapons and this limits their use greatly'.²³

Verification of the reliability and accuracy of the new technology

1.29 The Medical Association for Prevention of War considered the use of advanced munitions that 'would be of less humanitarian concern than those that disperse hundreds of sub-munitions. It agreed that 'a legitimate case could be put for their exclusion from the Bill with the qualification that 'any exclusions should be absolutely clear-cut with no room for ambiguity or different interpretations'.²⁴

1.30 In response to Defence's intention to obtain an advanced sub-munition capability, Mines Action Canada asked; 'What studies, tests and evaluations have been undertaken regarding the potential humanitarian risks of the advanced sub-munition capability?' Landmine Action asked a similar question.²⁵

1.31 Mines Action Canada and Austcare stressed that it is up to governments to prove that their cluster munitions would not cause unacceptable harm to civilians by 'demonstrating conclusively that a particular weapon system does not cause unacceptable harm'.²⁶ Austcare maintained that the government would have the

22 Austcare World Humanitarian Aid, *Submission 2A*, p. [1].

23 Medical Association for Prevention of War (Australia) and Australians for Lebanon, *Submission 6A*, p. 3.

24 Medical Association for Prevention of War (Australia) and Australians for Lebanon, *Submission 6A*, p. 4.

25 Landmine Action UK, *Submission 5A*, p. 1.

26 Mines Action Canada, *Submission 15*, [2]; Austcare World Humanitarian Aid, *Submission 2A*, p. [1].

responsibility to provide evidence 'that the advanced sub-munition capability it intends to acquire does not pose serious humanitarian problems'.²⁷

Labor members' views

1.32 Labor members accept that the bill as now drafted would not allow Defence to acquire more advanced, reliable and discriminating emergent technologies. In this regard, it endorses recommendations 3 and 4 but believes that the cautionary words of the submitters that raised concerns about the reliability of new technologies and the need for independent verification should be heeded and reflected more strongly in the recommendations. In particular, it is noted that Israeli Military Industries—a cluster munitions manufacturer—submitted to the inquiry that the failure rates of its M85 sub-munition were 0.06 percent. However, the majority report cited statements made in the UK Parliament that these munitions yield failure rates of between one and five per cent.

1.33 The Labor members note that Defence has only indicated an interest in acquiring more sophisticated, limited number, precision-guided sub-munition based weapon systems with reliable self-destruction mechanisms that are not designed to produce ERW. However, the Labor Senators of the committee consider the introduction of a legal instrument to ban the procurement, production or use of older systems to be highly desirable considering the adverse humanitarian impact that these systems have had on civilian populations.

Training and countermeasures

1.34 Defence noted that the bill does not permit the acquisition of cluster munitions for research or training purposes: that it makes no exception for using, producing or stockpiling cluster munitions for the purpose of developing countermeasures.²⁸

1.35 Mines Action Canada, Austcare as well as the Cluster Munitions Coalition and Handicap International, could see no impediment to amending the bill to allow the Australian Defence Force to retain cluster munitions for training in disposal or countermeasures. It noted, however, that the numbers retained would 'understandably be limited'.²⁹

Labor Members' views

1.36 Labor members accept the finding of the majority report that the ADF needs access to cluster munitions for training and to conduct countermeasures research. They note that the bill as drafted would not allow these activities. They also note that an amendment to the bill could resolve this difficulty.

27 Austcare World Humanitarian Aid, *Submission 2A*, p. [2].

28 Department of Defence, *Submission 10*, p. 5.

29 Mines Action Canada, *Submission 15*, p. [3].

Conclusion

1.37 Labor Senators believe that immediate action must be taken to ban the manufacture and use of cluster munitions that cause unacceptable harm to civilians.

1.38 Labour Senators believe that the Australian Government has not taken a strong enough stand on banning the use of these types of munitions. It recommends that Australia take a more active role in international forums advocating a ban on the manufacture and use of cluster munitions that cause unacceptable harm to civilians.

1.39 Labor members support the stated purpose of the bill which is 'to ensure that innocent civilians in conflict zones are not maimed, killed, or put at risk as a result of Australians possessing, using or manufacturing cluster munitions'. Having considered the evidence, it is not convinced, however, that the bill as drafted takes sufficient account of Defence's concerns. In particular, Labor members note Defence's concerns about not being able to acquire and/or use advanced cluster munitions designed so that they do not pose an unacceptable risk to civilians. They do note submitters concerns, however, about the need to ensure that any claims about the reliability of these munitions must be fully and comprehensively tested and their reliability independently verified.

1.40 The majority report recommended that the bill not proceed. Labor Senators believe that this might send the wrong message. It believes that the sponsors of the bill should withdraw the proposed legislation for the time being. This measure would allow them to consider the concerns raised by Defence and to take account of international developments. Labor Senators want to ensure that discussion of, and consultation on, legislation relating to the use of cluster munitions continues so that common ground can be established for the drafting of future legislation.

SENATOR MARK BISHOP

SENATOR JOHN HOGG

SENATOR STEVE HUTCHINS

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