

## Chapter 5

### Main findings

5.1 All submissions to the inquiry raised concerns about the use of cluster munitions and their potential adverse humanitarian impact, especially as ERW. However, there was disagreement about the appropriateness of the definition and scope of the ban on cluster munitions proposed in the bill. This was especially the case regarding the potential for discriminate use of submunition based weapon systems, the efficacy of technical design advances to ameliorate the impact on civilian populations and the possibility of use of cluster munitions in conformity with IHL.

#### Support for the bill

5.2 The committee received nine submissions supporting the bill, including from the Peace Organisation of Australia (POA), Austcare World Humanitarian Aid, Landmine Action UK, the Australian Red Cross, Mr David Bath, Mr Kieran Bennett, Mr Christopher Flynn, a joint submission from the Medical Association for Prevention of War (MAPW) and Australians for Lebanon, and a joint submission from the Australian Network to Ban Landmines (ANBL) and the Uniting Church of Australia Synod of Victoria and Tasmania. All underscored the moral importance of the bill with respect to the adverse humanitarian impact of cluster munitions (as outlined in chapter two).

Formatted: Bullets and Numbering

5.3 Late submissions were also received from Austcare, Landmine Action UK, as well as a joint submission from the Cluster Munition Coalition and Handicap International reiterating or expressing their support for the bill.

5.4 POA, Austcare and Landmine Action UK highlighted the importance of the bill as a positive step for the protection of civilians and an impetus to efforts for an international treaty on cluster munitions. They considered this to be especially important considering existing international instruments have failed to prevent or regulate the use of cluster munitions.

5.5 The submissions from POA and Mr David Bath were especially supportive of the definition of cluster munitions. POA noted the bill goes further than similar overseas bills because it concludes that cluster munition use 'is unacceptable in all circumstances'.<sup>1</sup> It described this principle as 'arguably one of the most important features of this Bill'.<sup>2</sup> POA supported the list of offences as comprehensive and the appropriateness of a penalty of life imprisonment for transgressions. It also endorsed the extra-territorial operation of the bill, noting that offences would most likely occur outside Australian territory.

---

1 Peace Organisation of Australia, *Submission 1*, p. 10.

2 Peace Organisation of Australia, *Submission 1*, p. 5.

5.6 Austcare, POA and Mr Bath highlighted clause 11 of the bill—pertaining to assistance to foreign countries in the use of cluster munitions—as especially important considering the past military engagement by the ADF with allied countries. In particular, POA supported the provision under the bill that 'Australia would not...be lawfully permitted to assist the United Kingdom or the United States in preparations for cluster munition use'.<sup>3</sup> Mr Bath also highlighted that this provision would prohibit the development, acquisition or involvement in assisting allies regarding any submunition based system.<sup>4</sup>

### ***Suggested amendments***

5.7 Austcare, ANBL and Landmine Action UK all suggested minor amendments to the provisions of the bill relating to offences. Austcare suggested that the bill make clear that it would be an offence not only for ADF personnel to use cluster munitions but also to assist or provide support in the production, transfer, and stockpiling of the weapon. It indicated that this could be achieved through additions of text to modify the purpose of the bill in subclause 3(2), as well as the offences in paragraph 10(d) and clauses 11–13.<sup>5</sup> Similarly, ANBL proposed an amendment be made to clauses 10 and 11 of the bill to prevent members of the ADF or any other Australian from providing 'any assistance' in the production, transfer or stockpiling of cluster munitions, in addition to the existing provisions to ban intentional involvement in military preparations to use cluster munitions.<sup>6</sup> Landmine Action UK also suggested the bill could be strengthened in paragraph 10 (a) in this fashion.<sup>7</sup>

5.8 MAPW said that 'a legitimate case' could be made for the exclusion of submunition based weapon systems not designed for area saturation from the provisions of the bill, as they 'would be less of a humanitarian concern'.<sup>8</sup> ANBL noted that such an exemption would be consistent with the intentions of the February Oslo Conference and agreed it could be considered, provided certain independently verified standards of reliability were used. ANBL also agreed that amendments could be made to accommodate Defence Department's concerns about the ambiguity regarding the inclusion of unmanned vehicles in the definition of cluster munitions and to allow the ADF to maintain—but not produce—a very small stockpile for removal training and countermeasure development.

5.9 While the Australian Red Cross supported the comprehensive ban on the use of cluster munitions proposed in the bill, it also suggested amendments to regulate the

---

3 Peace Organisation of Australia *Submission 1*, p. 6.

4 David Bath, *Submission 11*, p. 1.

5 Ausctare World Humanitarian Aid, *Submission 2*, p. 5.

6 Australian Network to Ban Landmines and the Uniting Church of Australia Synod of Victoria and Tasmania, *Submission 8*, p. 15.

7 Landmine Action UK, *Submission 5*, p. 1.

8 Medical Association for Prevention of War (Australia), *Submission 6A*, p. 4.

use of cluster munitions in the event that a ban cannot be supported. This proposal would involve a prohibition on the uses of cluster munitions that are inconsistent with IHL, notably where military targets are collocated with civilians or civilian sites. Further, in instances when cluster munitions are used, the Australian Red Cross argued requirements should be imposed for ensuring significant decreases in the failure rates, the inclusion of reliable deactivation mechanisms for unexploded submunitions, the mapping and subsequent removal of unexploded cluster munitions and observation of obligations under Protocol V of the CCW.<sup>9</sup>

5.10 Austcare noted that the defences in Part Three were appropriate, especially for a bill to prohibit cluster munitions. However, it underscored the need for additional provisions or legislation to address the need to remove ERW, education and decommissioning.<sup>10</sup>

### Concerns about the bill

5.11 The committee received three submissions highlighting concerns about the bill from the Australian Department of Defence, Israeli Military Industries—a cluster munitions manufacturer—and from Dr Ben Saul, Senior Lecturer in international law at the University of Sydney. These noted that the bill does not distinguish between what they understand as legitimate uses of cluster munitions under IHL and designs that have no or minimal humanitarian impact. In particular, they highlighted concerns about the breadth and ambiguity of the definitions under the bill and that it proposes a comprehensive ban on the use of cluster munitions and submunition based weapon systems.

5.12 Dr Saul does not support an absolute prohibition on cluster munitions. However he also states:

*'The inability of existing humanitarian law to limit civilian casualties from cluster munitions justifies further legislation.'*

The submission goes on to recommend that 'Australia should support international initiatives to regulate cluster munitions' and in particular Australia should legislate domestically to' prohibit a raft of uses of cluster munitions.

5.13 Defence maintained that the bill does not provide any additional protections for civilian populations that are not already inherent in Australia's international obligations. However, it argued the bill contains provisions that will impact on the ADF's capability development and operational effectiveness. Defence has noted that 'if enacted it [the bill] will put Australia at a serious military disadvantage in future

---

9 The Australian Red Cross, *Submission 9*, pp. 4-5.

10 Ausctare World Humanitarian Aid, *Submission 2*, p. 6.

conflicts, which would be detrimental to our national interest'.<sup>11</sup> In particular, Defence summarised its concerns with the bill as:

- its extremely broad definitions,
- its prohibitions on acquiring advanced sub-munition capabilities,
- the operational difficulties it would cause when the ADF operates (as it commonly does) with allies and with coalitions,
- its failure to make provision for the development by the ADF of countermeasures to cluster munitions,
- its failure to make provision for training ADF personnel in rendering cluster munitions safe, and
- the effective pre-emption of Australia's position in current negotiations on cluster munitions.<sup>12</sup>

5.14 Defence argued that the provisions delineating the purpose of the bill—to ensure Australians are not involved in cluster munition use that poses humanitarian problems—are unnecessary. It acknowledged the potential for some cluster munitions to pose humanitarian hazards, but that these arise when cluster munitions are used in violation of IHL. Defence noted that use of cluster munitions against civilian populations is already restricted under IHL. It stressed that ADF personnel 'are trained in the laws of armed conflict which form an integral part of ADF targeting decisions'.<sup>13</sup> Also, Defence highlighted that Australia is a party to the Protocol V to the CCW, which already imposes obligations for it to take remedial measures to remove ERW.<sup>14</sup>

**Deleted:** and when the submunitions fail to explode as intended.

5.15 It should be noted, as mentioned in chapters two and three of this report, that the users of cluster munitions do not always observe IHL and that IHL does not necessarily provide sufficient protection for civilian populations. Indeed, a number of submitters asserted that the use of cluster munitions has 'consistently contradicted the principles of International Humanitarian Law'.<sup>15</sup> ANBL was critical of Defence's failure to acknowledge that 'the design of many cluster munitions makes them, like anti-personnel landmines, open to misuse with consequences that leave a legacy that in some cases lasts for decades'.<sup>16</sup> MAPW stated:

The Department of Defence's persistent attempt to portray the humanitarian hazards of cluster munitions as an aberration rather than the norm with

---

11 Department of Defence, *Submission 10*, p. 6.

12 Department of Defence, *Submission 10*, p. 6.

13 Department of Defence, *Submission 10*, paragraph 15.

14 Department of Defence, *Submission 10*, pp. 1–2.

15 Austcare World Humanitarian Aid, *Submission 2*, p. 1.

16 Australian Network to Ban Landmines and the Uniting Church of Australia Synod of Victoria and Tasmania, *Submission 8A*, p. 1.

these weapons is disingenuous. The weapons are by nature non-discriminatory. They contaminate wide areas.<sup>17</sup>

5.16 POA argued that:

...current international legal regime is inadequate in preventing the use of cluster munitions and, therefore, a treaty relating specifically to cluster munitions should be created at the soonest opportunity.<sup>18</sup>

As noted earlier, MAPW has drawn attention to problems with clearing ERW.

### ***Committee view***

~~5.17~~ The committee acknowledges that IHL does not offer adequate protection to civilian populations. Cluster munitions have been used consistently in or near civilian populations in violation of IHL. But in particular, there is insufficient protection for civilians from the ERW legacy of cluster munitions. As MAPW has argued, Protocol V to the CCW provides valuable but limited protections and relies on cooperation from the users of cluster munitions that historically has not been forthcoming or has been insufficient. The committee hopes that the increasing trend towards incorporation of self-destruction or self-neutralisation capabilities will help remedy this situation but notes additional measures probably will be required.

5.18 The following section examines whether the bill as drafted is the most appropriate and practical means of ensuring that 'innocent civilians are not harmed as a result of Australians possessing, using or manufacturing cluster munitions'.

### ***The scope of the ban***

5.19 Dr Saul indicated he does not support an absolute prohibition on the use of cluster munitions, as would be legislated in the bill (Part Two). He noted:

In some cases, the use of cluster munitions will comply with the [international humanitarian law] 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.<sup>19</sup>

5.20 He stated that cluster munitions should not be banned because they do not inherently violate IHL. However, he advocated that the Australian Government support initiatives to regulate the use of cluster munitions because they often have been used contrary to the constraints of IHL. He indicated his views 'roughly correlate' with the initiatives proposed by the Norwegian Government for the February Oslo Conference, including prohibition of use of cluster munitions in or near civilian

---

17 Medical Association for Prevention of War (Australia), *Submission 6A*, p. 1.

18 Peace Organisation of Australia, *Submission 1*, pp. 4–5.

19 Dr Ben Saul, *Submission 7*, p. 1.

populations, prohibition of indiscriminate and unreliable cluster munitions and destruction of stockpiles of such weapons.<sup>20</sup>

5.21 Defence also opposed the comprehensive nature of the ban on cluster munitions proposed under the bill. It noted that the scope of this prohibition is not substantially supported in international circles by the states parties to the CCW and that none of the current international initiatives on cluster munitions propose a total ban. According to Defence, most of the international initiatives focus on regulation and addressing the need to ensure cluster munition use is within the principles of IHL and restrictions are imposed on unreliable munitions that create ERW. Defence informed the committee of measures being taken to ensure that any cluster munition used by the ADF would be designed to prevent harm to civilian populations.

### ***Australia's capability development***

5.22 Defence raised concerns about the definition of cluster munitions under the bill (clause six) and its impact on Australia's capability development. Defence noted that submunition based weapon systems that would be precluded by the bill include those not designed for area saturation and developed to minimise the probability of becoming ERW. These advanced systems possess some of the features common to cluster munitions but are generally not considered to be within this class of weapon and have been excluded from legislative regulation in other countries (see chapter two), but would be banned under this bill. In particular, Defence is in the process of acquiring an advanced submunition based weapon system capability for use against mobile armoured vehicles. Such systems consist of a very small number of submunitions—probably between two and ten—guided targeting, and self-destruction or self-neutralisation capabilities. Defence has argued the trend in submunition weapon development is towards advanced, limited submunition, guided systems designed for minimal humanitarian impact.<sup>21</sup>

5.23 Further, Defence noted that such advanced submunition based systems provide an efficient means of neutralising multiple targets at long range and with minimal risk to Australian personnel. In answer to a written question on notice, Defence provided additional information on the range of newer technologies and design features that help 'to minimise their potential to create adverse humanitarian effects'. It cited the case of an advanced submunition that Defence is in the process of acquiring which if no target is detected in the search area the sub-munition 'will commence a self destruct sequence.' According to Defence, this development means that the submunition is 'designed not to produce an ERW'. It explained further:

Most advanced sub-munitions, including the system that Defence is in the process of acquiring, have precision targeting capabilities. This enables the application of a precisely targeted projectile with only one or two sub-munitions. As a result, they do not need to be dispensed in significant

---

20 Dr Ben Saul, *Submission 7*, pp. 1–3.

21 Department of Defence, *Submission 10*, pp. 3–4.

numbers, and it is not necessary to saturate a large area with dumb bomblets, which is the approach taken with older cluster munitions.<sup>22</sup>

5.24 In summary, Defence informed the committee that:

...advanced sub-munitions possess a range of newer technologies and design features which help to minimise their potential to create adverse humanitarian effects as a result of a conflict. In addition, ADF observance of existing legal obligations would ensure that the possibility of unintended damage, and the risk to civilians, was even further reduced.<sup>23</sup>

5.25 Defence argued that prohibiting acquisition or development of such systems would place Australian forces at a disadvantage against potential adversaries and reduce or remove its margin of superiority. It would also force the ADF to rely on higher yield, lower accuracy weapons that would pose a greater risk to ADF personnel, civilians and civilian objects.<sup>24</sup>

5.26 Also, Defence maintained that the breadth of the definition of cluster munitions under the bill and the ambiguity of terms such as 'device', 'fired' and 'harm' could capture development or acquisition of broader weapon systems not intended to be considered cluster munitions. In particular, it would preclude development or acquisition of more advanced, reliable and discriminating emergent technologies such as unmanned aerial vehicles and surface and underwater vessels. The trend in development of these platforms is towards smaller weapons to be integrated into larger, autonomous delivery vehicles to enhance safety by removing the need for personnel to penetrate enemy territory to deliver a payload. Existing precision guided weapons are short range and thereby contain higher risk to personnel than some emergent, remote, unmanned technologies.<sup>25</sup>

5.27 Israeli Military Industries also recommended that the bill narrow its definition and prohibition to distinguish between different types of cluster munitions. In particular, it noted that new area-saturation cluster submunitions have been developed with extremely low failure rates to reduce the impact on civilian populations and should be seen as legitimate weapons that can be used responsibly. It noted that these are increasingly being marketed to other countries.<sup>26</sup>

5.28 Few submitters, however, were convinced of the reliability of the new generation of cluster munitions, especially the self-destruction and self-neutralisation mechanisms of area-saturation cluster munitions. ANBL was of the view that 'most of the technical reforms proposed to cluster munitions could only partially address the

Deleted: Not all

---

22 Defence answer to written question on notice no. 2.

23 Defence answer to written question on notice no. 2.

24 Department of Defence, *Submission 10*, pp. 3–4.

25 Department of Defence, *Submission 10*, pp. 3–4.

26 Israeli Military Industries, *Submission 3*, pp. 2–3.

humanitarian problems caused by cluster munitions'. It questioned whether 'they are a workable basis for enhanced protection or would be sufficiently broadly adopted by countries'.<sup>27</sup> MAPW was definite in its view. It argued that 'as weapons are supposedly rendered more accurate, unfortunately, we do not see a commensurate reduction in the civilian cost of warfare'. It noted that technological advances may offer some benefit in terms of civilian protection in some situations but cannot 'be relied on to deliver this result'. The Association noted that:

- 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;
- self-destruct mechanisms fitted to cluster munitions can and do fail;
- technologically advanced weapons are almost invariably more expensive than older weapons which limits their use.<sup>28</sup>

5.29 Despite reservations about the new technologies, MAPW and ANBL acknowledged Defence's concerns about the scope of the ban on cluster munitions proposed by the bill and agreed that the provisions could potentially be amended. Nevertheless, MAPW concluded that a comprehensive ban that captured more reliable weapons designed to minimise any adverse humanitarian impact would be preferable to inadequate regulation that allowed the perpetuation of the use of weapons that pose hazards to civilian populations.

5.30 MAPW said, in relation to cluster munitions that contain only two submunitions:

..... clearly these weapons would be of less humanitarian concern than those that disperse hundreds of sub-munitions, and a legitimate case could be put for their exclusion from the Cluster Munitions (Prohibition) Bill. Any exclusions from the bill however should be absolutely clear-cut with no room for ambiguity or different interpretation.

5.31 In its submission responding to the Department of Defence submission, ANBL said:

Should the committee wish to accommodate the desire of the Department of Defence to acquire advanced submunitions while implementing the *Cluster Munitions (Prohibition) Bill 2006*, a way forward would be an amendment to the Bill that allowed for a schedule of 'advanced' submunitions that were exempted from the Bill by virtue of meeting standards that ensured that the submunitions would not cause unacceptable harm to civilians. Such a Bill would then appear consistent with the broad intentions of the declaration that came out of the Oslo meeting in February.

**Formatted:** Bullets and Numbering

**Comment:** It is misleading to equate 'cluster munitions that contain only two submunitions' with 'submunition based weapon systems not designed for area saturation'. Likewise, the ANBL's accommodation of advanced submunitions is more stringent than the paraphrasing suggested.

**Formatted:** Level1

27 Australian Network to Ban Landmines and the Uniting Church of Australia Synod of Victoria and Tasmania, *Submission* 8, p. 14.

28 Medical Association for Prevention of War (Australia), *Submission* 6A, p. 3.



The classification of such submunitions as exempted from the Bill should be subject to rigorous standards backed up with thorough independent testing in realistic conditions.<sup>29</sup>

Formatted: Quote

5.32 While the Australian Red Cross supported the comprehensive ban on the use of cluster munitions proposed in the bill, it also suggested amendments to regulate the use of cluster munitions in the event that a ban cannot be supported. This proposal would involve a prohibition on the uses of cluster munitions that are inconsistent with IHL, notably where military targets are collocated with civilians or civilian sites. Further, in instances when cluster munitions are used, the Australian Red Cross argued requirements should be imposed for ensuring significant decreases in the failure rates, the inclusion of reliable deactivation mechanisms for unexploded submunitions, the mapping and subsequent removal of unexploded cluster munitions and observation of obligations under Protocol V of the CCW.<sup>31</sup>

Deleted: <#>¶  
MAPW acknowledged that 'a legitimate case' could be made for the exclusion of submunition based weapon systems not designed for area saturation from the provisions of the bill, as they 'would be less of a humanitarian concern'.<sup>30</sup> ANBL noted that such an exemption would be consistent with the intentions of the February Oslo Conference and agreed it could be considered, provided certain independently verified standards of reliability were used. ANBL also agreed that amendments could be made to accommodate Defence's concerns about the ambiguity regarding the inclusion of unmanned vehicles in the definition of cluster munitions and to allow the ADF to maintain—but not produce—a very small stockpile for removal training and countermeasure development.

### Committee view

5.33 The committee accepts Defence's explanation that the bill would, if enacted, effectively 'preclude development or acquisition of more advanced, reliable and discriminating emergent technologies'. According to Defence, 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 submunition based weapon systems intended to minimise humanitarian impact.

Formatted: Bullets and Numbering

Formatted: Bullets and Numbering

5.34 The committee is of the 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 ERW. It also incorporates weapon systems often excluded from definitions of cluster munitions—such as the limited submunition, guided systems with self-destruction or self-neutralisation mechanisms—and potentially those not considered to be cluster munitions in any other sense—such as unmanned platforms.

### Training and countermeasures

5.35 Defence noted that part of the ADF's capability development includes training in countermeasures against weapon systems, including cluster munitions. Australia maintains a small number of inert cluster munitions for the purpose of training specialists in the identification and removal of cluster munitions that could be used by adversaries.<sup>32</sup> Defence noted that clauses 14 and 17 of the bill do not allow the

Formatted: Bullets and Numbering

<sup>29</sup> ANBL *Submission 16 March 2007*, p.3 & 4

Formatted: Not Superscript/ Subscript

<sup>31</sup> The Australian Red Cross, *Submission 9*, pp. 4-5.

Formatted: Space After: 6 pt

<sup>32</sup> Department of Defence, *Submission 10*, paragraph 31.

maintenance of cluster munitions for research and training purposes and would oblige the ADF to destroy these holdings.<sup>33</sup> The bill would also require the Minister for Defence to destroy or decommission 'all cluster munitions, container units and submunitions' under the control of the ADF.<sup>34</sup>

**5.36** In response to a written question on notice, Defence emphasised that countermeasures encompass more than training for the removal of cluster munitions as ERW. In this regard, it explained in detail the problems it believes that the proposed legislation would create:

The aim of the countermeasure research is to provide Defence with an understanding of the range of cluster munitions threats the ADF could face on operations and to advise the ADF on the procedures and capability enhancements needed to counter these threats. Advice on disposal to protect both the ADF and the wider civilian community is only one element of the work.

For the accurate assessment of the threats to the ADF and the effective development of countermeasure techniques and capabilities Defence needs access to both live and inert munitions for evaluation and testing.

...

Part 3 of the bill only provides protection for Australians who are involved with 'clearing or rendering safe sub-munitions which have been deployed but which have not exploded'. There is no protection in the bill for Australians involved in training for such activities. Nor is there any protection for Australians involved in research related to such activities.

Finally, as the bill does not permit the acquisition of cluster munitions for research or training purposes and requires all cluster munitions in the possession of the ADF to be destroyed, this would not leave Defence with any munitions to train its personnel or conduct countermeasures research as described above. This would limit our ability to provide for the safety of ADF, allied and civilian personnel in operations and also significantly increase the risk to ADF involved in countering and clearing the munitions.<sup>35</sup>

### ***Committee view***

**5.37** The committee accepts that the ADF needs access to cluster munitions for training and to conduct countermeasures research. This is in order to protect ADF personnel but also to assist in ameliorating the impact of cluster munition ERW on civilian populations by enhancing readiness to assist in potential removal operations. The committee notes that the bill as drafted would not allow these activities.

---

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

34 Clause 17.

35 Defence answer to written question on notice no. 5.

### ***Australia's operational ability***

5.38 Defence noted that Australia adheres to its obligations under IHL, so the bill would not offer additional protections against Australian involvement with cluster munition use. However, Defence argued it would undermine the ADF's interoperability and, thereby, long-term capability development. The ADF would not be able to contribute to, or gain experience from, modern coalition combat operations. These exclusions would be likely to increase over time, as more allied partners take advantage of more sophisticated cluster munitions and submunition based weapon systems being developed and incorporate them into their armed forces. The interoperability of Australian and allied forces was highlighted in the Defence 2000 White Paper as an important capability and a crucial factor in achieving superiority in theatre.<sup>36</sup>

5.39 In particular, Defence argued the restrictions of clause 11—regarding military planning with allies—would potentially undermine the capacity of the ADF to contribute to coalition headquarters where use of cluster munitions could be planned. In instances where ADF personnel were in command positions, they would be put in situations where they could inadvertently transgress the provisions of the bill. Integrated ADF personnel involved in planning and conducting operations may need to call on coalition support in circumstances where the coalition unit determines the weapons used, which could include cluster munitions as defined under the bill. An alternative would be that ADF personnel would be restricted from calling in appropriate support, enhancing the risk to operational forces.<sup>37</sup>

5.40 Defence pointed out that the provisions of the bill could result in unforeseen consequences and seriously undermine its capacity to contribute to a wide range of coalition activities. For example, due to the range of platforms that could use cluster munitions as defined by the bill, Defence indicated ADF personnel would be precluded from serving in a variety of support positions that could involve preparations to use cluster munitions. Examples provided included general logistics support—where indirect transfer of prohibited munitions could occur, air-space management duties—where personnel would not be able to discriminate between weapon systems used by the various aircraft, and target identification—where the use of particular munitions is decided by the forces directly involved.<sup>38</sup>

5.41 Some submitters questioned Defence's stand on the importance of interoperability. Dr Saul indicated that although the military requirement of interoperability is important, it should not preclude the development of restrictions in domestic law if necessary. He pointed out that the ADF already operates under different rules of engagement to its allies and has restrictions on assistance in the use

---

36 Department of Defence, *Submission 10*, pp. 4–5.

37 Department of Defence, *Submission 10*, pp. 4–5.

38 Department of Defence, *Submission 10*, p. 5. See also answer to written question on notice no. 4.

of outlawed weapons (such as WMD) or conducting of illegal actions.<sup>39</sup> ANBL made a similar point, noting that the ADF already collaborates with allied partners not party to the treaty prohibiting use of anti-personnel landmines.

5.42 MAPW also raised concerns about Defence's emphasis on the need for interoperability, military engagement with allies and capability development. MAPW considers Australia to be 'legally and morally' obliged to refuse cooperation with the use of cluster munitions, which it considers to be a 'non-discriminatory class of weapon'.<sup>40</sup> It argued that this moral imperative outweighed the capability development advantages. MAPW also reiterated growing concerns among humanitarian organisations (see chapter two) regarding the failure rates of even the newer and more sophisticated cluster munitions. It also noted that more advanced weapons are usually more expensive and often do not replace older versions in countries' arsenals.<sup>41</sup>

### ***Committee view***

5.43 The committee notes Defence's argument that the provisions of the bill could result in unforeseen consequences and seriously undermine its capacity to contribute to a wide range of coalition activities, continue capability development and fulfil national security requirements. It also takes account of the arguments that there is a moral imperative to ensure the actions of the ADF do not cause civilian suffering. The committee also notes the concerns of the submitters that the history of use of cluster munitions by other countries has shown insufficient regard for civilians and the protections of IHL.

5.44 The committee considers that cluster munitions can be used in conformity with IHL and accepts the assurance of Defence of its emphasis on such strictures in training and target identification. However, the committee reiterates its concern about the broader effectiveness of IHL in terms of global uses, especially with respect to observance and prevention of the creation of cluster munition ERW.

### ***Compromise of Australia's negotiations***

5.45 Defence also argued that the broad scope of the prohibition under the bill would compromise and restrict Australia's negotiations in international forums.<sup>42</sup> It informed the committee that international proposals currently under discussion:

...involve banning cluster munitions which 'cause unacceptable harm to civilians', or are 'unreliable and inaccurate'. The precise technical definitions of these terms—in terms of failure rates, minimum requirements

---

39 Dr Ben Saul, *Submission 7A*, p. 1.

40 Medical Association for Prevention of War (Australia), *Submission 6A*, p. 1.

41 Medical Association for Prevention of War (Australia), *Submission 6A*, pp. 2-3.

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

for precision targeting, and self-neutralisation or self-destruction, and so on—have yet to be identified.<sup>43</sup>

5.46 According to Defence, international meetings to discuss such matters are expected to be held in April, May, June and some time later in 2007. It took the view that:

...until further clarity emerges from these meetings, it is not possible to anticipate the standards which are likely to apply. Therefore legislative action at this stage is premature.<sup>44</sup>

5.47 MAPW, Dr Saul and ANBL rejected Defence's argument that the development of domestic legislation would have a detrimental impact on Australia's international negotiating position. Dr Saul noted that although maintaining freedom to negotiate in international forums was important, he argued it should not prejudice the option of developing domestic legislation. Such legislation could shape Australia's negotiating position, especially following a parliamentary inquiry, that could be modified to be consistent with any international instrument that may be developed, or could be the basis of a reservation to the acceptance of a treaty.<sup>45</sup> ANBL argued that the participants of the February Oslo Conference did not consider that international engagement prejudiced their negotiating position, but used the opportunity to advance their views.

#### ***Committee view***

5.48 The committee is not persuaded by Defence's argument that in this instance Australia's negotiation position may be compromised. It acknowledges the bill would impose more restrictive standards on Australia than proposed internationally, but considers that this of itself would not impact on Australia's involvement in international forums to regulate broader global use.

#### **Conclusion**

5.49 The committee notes the stimulus that the bill has provided to discussions regarding cluster munitions and notes that this debate will probably extend beyond the life of this inquiry. It acknowledges and concurs with concerns about the use of cluster munitions and their potential humanitarian impact. However, the committee believes that the bill in its current form and without substantial redrafting is not the most appropriate means to address the problems created by the use of cluster munitions that kill and maim civilians.

5.50 The committee remains concerned that the bill does not anticipate the direction of cluster munition technical design developments and would preclude

---

43 Defence answer to written question on notice no. 1.

44 Defence answer to written question on notice no. 1.

45 Dr Ben Saul, *Submission 7A*, p. 1.

Australia's future development or acquisition of emerging or current systems designed to minimise or have no adverse humanitarian impact. Also, as indicated by Defence, the provisions of the bill would have various unintended consequences including preventing the use of weapon systems not generally considered to be cluster munitions. Therefore, and for reasons of capability development and ensuring the ADF can effectively operate, the committee accepts that Australia must retain the capacity to acquire advanced sophisticated submunition based weapon systems that are designed to minimise any adverse humanitarian impact. Furthermore, the committee notes the importance of Australia being able to collaborate with coalition forces in military operations that would use these advanced submunitions.

5.51 The committee also recognises that ADF members need access to cluster munitions to enable them to train in, and develop countermeasures against, such weapon systems. The bill as drafted would not permit the acquisition of cluster munitions for research or training purposes and would require the destruction of all cluster munitions in the possession of the ADF. Defence argued that, without munitions to train its personnel or conduct countermeasures research, its ability to provide for the safety of ADF, allied and civilian personnel in operations would be limited. It noted further that this situation would place ADF personnel involved in countering and clearing the munitions at a significantly increased risk.<sup>46</sup>

5.52 For the two preceding reasons, in particular, the committee does not support the bill as drafted. It notes that some of the submitters acknowledged these concerns and agreed that amendments could be made to refine the definition of cluster munitions and to include a reservation allowing the maintenance of cluster munitions for countermeasure development. However, the committee acknowledges other concerns raised by Defence, particularly with respect to interoperability and long-term capability development, which would be complicated further by amendments to the existing bill. Thus, the committee is of the view that simple amendments, such as re-defining cluster munitions, would not address the shortcomings in this proposed legislation and that the bill should not proceed.

5.53 Nevertheless, the committee notes that the government can and should take unilateral measures—in line with the growing international trend—to ensure Australia's future acquisition and use of submunition based weapon systems have appropriate regard for humanitarian consequences. These measures would not affect ADF capability development. They would reinforce perceptions of Australia as a good international citizen, complement measures pursued internationally by other countries and promote procurement and responsible uses of weapon systems in a fashion that avoids any unacceptable adverse humanitarian impact.

5.54 The committee also recognises the need for the effective international regulation of the use of cluster munitions to prevent unacceptable harm to civilians. It believes that the Australian government has an important contribution to make

---

46 Defence answer to written question on notice no. 5.

towards achieving a consensus within international instruments and forums on the use of cluster munitions. The focus on any such agreement should be on efforts to develop more responsible norms governing the use of cluster munitions, enhance post-conflict removal and promote technical design developments to minimise the humanitarian impact of ERW. The committee encourages the Australian government to strengthen its multilateral efforts towards the effective regulation of the use of cluster munitions.

### **Recommendation 1**

**5.55** The committee recommends that the government call for countries that use cluster munitions to strictly observe international law and humanitarian obligations in their use, particularly discrimination of targeting and no-use in or near civilian populated areas, and for all parties to a conflict to take appropriate measures to distinguish and distance military deployments from civilian populations.

### **Recommendation 2**

**5.56** The committee recommends that the Australian Defence Force continues to ensure, and reinforces during training, that any military involvement with use of cluster munitions including with allied partners is consistent with international humanitarian law obligations and due care for civilian populations.

### **Recommendation 3**

**5.57** The committee recommends that the Department of Defence ensures that the acquisition or development of any cluster munitions or submunition based weapon systems by the Australian Defence Force comprise only weapons designed to minimise the potential impact on civilian populations as explosive remnants of war. The munitions would have low failure rates and reliable self-destruction or self-neutralisation mechanisms, or be designs with high precision individual targeting capabilities.

### **Recommendation 4**

The committee recommends that prior to any procurement of cluster munitions the Department of Defence confirms these systems do not pose unacceptable harm to civilians. This would involve ensuring independent verification of the reliability of the failure rates and self-destruct or self-neutralisation mechanisms that would emerge under battlefield conditions.

The committee recommends that procurement of area-saturation cluster munitions by the Department of Defence Recommendation 5

**5.58** The committee recommends that the government call for countries maintaining cluster munitions to take all feasible means to ensure that, as soon as possible, stockpiles comprise only weapons designed to minimise the potential impact on civilian populations as explosive remnants of war. The munitions would have low failure rates and reliable self-destruction or self-neutralisation mechanisms, or be designs with high precision individual targeting capabilities.

**Recommendation 6**

**5.59** The committee recommends that the Department of Foreign Affairs and Trade actively encourages counterparts to ratify and adhere to Protocol V to the *Convention On Prohibitions Or Restrictions On The Use Of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious Or To Have Indiscriminate Effects*. This adherence is to ensure that upon the cessation of hostilities the users of cluster munitions and those upon whose territory such weapons have been used, provide necessary technical, financial, material or personnel assistance to facilitate the identification, clearance and removal of explosive remnants of war to minimise the impact on civilian populations.

**Recommendation 7**

**5.60** The committee recommends that the Department of Foreign Affairs and Trade strengthens efforts within international forums, especially but not limited to the *Convention On Prohibitions Or Restrictions On The Use Of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious Or To Have Indiscriminate Effects*, to build a consensus and standardise international regulation of the use, production and stockpiling of cluster munitions to facilitate minimisation of the impact on civilian populations. This engagement should be directed towards ensuring that any international treaties or instruments developed are influenced by and accommodate Australian interests.

**Recommendation 8**

**5.61** The committee recommends that the bill not be passed.

**Recommendation 9**

**5.62** The committee recommends that the Government consider foreign legislation that has been enacted or is currently before foreign parliaments that relates to the use of cluster munitions with a view to introducing similar legislation that would be relevant to Australia's circumstances.