

Dissenting Report

Australian Democrats

The Australian Democrats want a ban on cluster bombs for use in the Australian Armed Forces and reject the Committee's findings that the newer self-destruct munitions should be exempt from any ban. Evidence shows that these weapons still carry serious failure rates and cause unacceptable humanitarian harm.

The Democrats are disappointed that the Department of Defence not only opposes the prohibition on all cluster munitions, as set out in this bill, but also that it will, for the first time in history, acquire submunitions for operational purposes. We consider that this will diminish Australia's capacity to persuade other countries to take seriously the impact of cluster munitions on civilians. In a submission to the Committee's inquiry, the Medical Association for Prevention of War said:

A major reason for calling for the prohibition of *all* cluster munitions is that such a call has a clear focus, purpose and demand. It cannot be mounded to fit around policies that violate its central humanitarian concern, and it does not rely on regulations relating to the way in which these weapons may be used.

It is possible that, in the process of banning all cluster munitions, some weapons from this class that pose less risk to civilians than others will be prohibited. However, we ask: Is this not a better outcome than another distinct possibility – prolonged discussions over precisely which technical characteristics will be allowed and how a regime of regulation will be enforced, with ongoing attempts on the part of nations to exploit loopholes, while the inevitable consequence of civilian casualties continues unabated.¹

We thank the Senate Standing Committee on Foreign Affairs, Defence and Trade for its work in inquiring into the Cluster Munitions (Prohibition) Bill 2006 but disagree with a number of the findings and recommendations of the majority report and, in some cases, the use of evidence.

Appended to this report are Chapters 2 and 5, marked to show the changes in reporting on the evidence that we consider ought to be made.

The inquiry was timely given the huge humanitarian cost to the civilians of Lebanon last year after more than a thousand cluster bombs were dropped, leaving the country littered with more than a million bomblets devices, high numbers of which will go on to kill and maim civilians on a regular basis.

The Committee was also reminded in the submissions that cluster bomb use in Iraq, Afghanistan and even in conflicts many decades ago in, for instance, Vietnam and Cambodia remain a serious threat.

1 Medical Association for the Prevention of War (Australia) *Submission* 15 March 2007, p. 4.

On 7 November 2006, the UN Secretary-General called on States Parties to the Convention on Certain Conventional Weapons to 'immediately address the atrocious, inhumane effects of cluster munitions at the time of their use and long after conflict ends' and to 'devise effective norms that will reduce and ultimately eliminate the horrendous humanitarian and development impact of these weapons'.²

UNICEF Australia said unexploded cluster bombs left over from conflict violate a number of articles of the Convention on the Rights of the Child, including those which relate to a child's right to life, to a safe environment in which to play, to health, to clean water, to sanitary conditions and to adequate education.³

The inquiry was also opportune, given the developments in introducing an international agreement on prohibiting or limiting the use of cluster munitions.

For these reasons, the Democrats consider that a public hearing would have been appropriate. Submitters were given the opportunity to make supplementary submissions commenting on the DoD submission, which was useful but a poor substitute for direct questioning.

We also question the selective use of evidence, both from submissions and from a wide range of Internet-sourced documents, to support the case that advanced, self-destruct munitions had been developed that substantially reduce the impact on civilians and should be exempt from any ban.

We do not consider the position on either the limited ban or the acquisition of submunitions to have been justified and focus in this report on the arguments advanced by the Department of Defence (DoD).

The Department of Defence case

Submissions challenged the DoD claim that the Australian Government 'shares domestic and international concerns about the humanitarian hazards ... and ... is working actively to ameliorate these effects'. They said that this statement did not in any sense convey that concern, pointing out that 98 per cent of the victims of cluster munitions are civilians and 27 to 70 per cent of those were children. MAPW challenged the notion that the humanitarian problem could be attributed to just 'some' cluster munitions, saying the humanitarian problem reflected the nature of cluster munitions as a non-discriminatory class of weapons.⁴

2 United Nations Mine Action Service *Submission* 15 February 2007, p. 2.

3 The Peace Organisation of Australia *Submission* January 2007, p.7.

4 Medical Association for Prevention of War (Australia) supplementary submission 15 March 2007

Challenged too were DoD's claims that cluster munitions were 'acknowledged as having legitimate military utility' and that 'hazards arise as a result of their inappropriate use'.⁵

ANBL and the Synod of Victoria and Tasmania reminded us that similar arguments were advanced prior to the development of the Convention on the Prohibition of Anti-Personnel Mines. Countries said that it was only as a result of inappropriate use that they may have breached principles of International Humanitarian Law.

This argument applies to most Conventions, including much of IHL itself, as it is only after the new instrument comes into force that a new definition of legality applies. Of course moral, ethical and humanitarian considerations remain unchanged both pre and post introduction of the legal instrument.

However, it remains the view of the ANBL and the Synod of Victoria and Tasmania that the design of many cluster munitions makes them, like anti-personnel landmines, open to easy misuse with consequences that leave a legacy that in some cases lasts for decades.⁶

MAPW argues that persistent attempts to portray the humanitarian hazards of cluster munitions as an aberration rather than the norm was disingenuous.

Arguments that propose how cluster munitions could be used more humanely may be theoretically attractive but the difficulty is that they do not reflect reality Handicap International's stance in favour of a total ban on cluster munitions ... stems not from IHL but from the experience of its staff working in areas affected by cluster munitions.

International negotiations on cluster munitions

DoD argued that domestic legislation such as this bill may restrict and/or compromise Australia's position in international forums, particularly the Convention on Certain Conventional Weapons. It argues too that the Conventional Weapons Convention and its five protocols did not require domestic implementing legislation and that none of the current international initiatives went as far as this bill in banning cluster munitions.

MAPW called this alarmist and said it was 'not supported by examples of situations where a nation has taken a principled stand to uphold the welfare of civilians and suddenly been deprived of forums in which to promote its stance. In fact forums can be created, as the Norwegian Government has done on the issue of cluster munitions, and as the Canadian Government did extraordinarily successfully with the issue of landmines.'⁷

5 Department of Defence *Submission* 10, paragraph 4.

6 Australian Network to Ban Landmines *Submission* 16 March 2007, p.1.

7 Medical Association for Prevention of War (Australia) *Submission 6A*, p. 2.

Mines Action Canada pointed out that Belgium banned cluster munitions and Norway and Austria have national moratoria in place, yet these national steps have not affected their ability to play strong, constructive and leading roles in international negotiations on cluster munitions.⁸

Dr Ben Saul argued that 'it does not follow that *freedom to negotiate in international forums* should trump considerations in favour of an immediate domestic legislative response. Domestic legislation may play an important role in shaping the international response.'

DoD argued that international talks included initiatives such as preventing cluster munitions from being used near concentrations of civilians. MAPW dismissed this saying 'it was difficult to imagine a location that is both of military significance and is also absolutely devoid of adjacent civilian populations or any agricultural or other purpose'.⁹

For all its concern about the provisions of this bill restricting our position in international negotiations, Australia did not take part in the Oslo Conference on Cluster Munitions on 22-23 February 2007. The conference was open to all states and attended by 46 governments. It aimed to stimulate further international regulation of cluster munitions, in response to the failure of the 2006 Convention of Conventional Weapons conference to agree on such regulation and agreed to:

1. Conclude by 2008 a legally binding international instrument that will:
 - (i) prohibit the use, production, transfer and stockpiling of cluster munitions that cause unacceptable harm to civilians, and
 - (ii) establish a framework for cooperation and assistance that ensures adequate provision of care and rehabilitation to survivors and their communities, clearance of contaminated areas, risk education and destruction of stockpiles of prohibited cluster munitions
2. Consider taking steps at the national level to address these problems.
3. Continue to address the humanitarian challenges posed by cluster munitions within the framework of international humanitarian law and in all relevant for a.
4. Meet again to continue their work, including in Lima in May/June and Vienna in November/December 2007, and in Dublin in early 2008, and welcome the announcement of Belgium to organise a regional meeting.

8 Mines Action Canada *Submission* 5 April 2007, p. 2.

9 Medical Association for Prevention of War *Submission* 15 March 2007, p. 1.

Of the 46 countries that attended and signed up to the declaration, 17 have also produced cluster munitions, including the UK, Sweden, Switzerland, Spain, South Africa, Netherlands, Italy, Germany, France, Egypt, Canada, Belgium and Argentina.

The second meeting of the Oslo Process, in which Australia did participate, took place in Lima, Peru, from 23 – 25 May 2007. Human Rights Watch rightly criticised Australia and a small number of other states for promoting the exemption of large categories of submunitions from the ban.

Protocol V and Explosive Remnants of War

DoD argued that Australia agreed to be bound by Protocol V to the Conventional Weapons Convention on 4 January 2007 obliging it to:

mark, clear, remove or destroy, explosive remnants of war present in its territory; record, retain and transmit information regarding use of explosive ordnances; and take precautions for the protection of civilians and humanitarian missions.

Protocol V also contains a technical annex which sets out voluntary measures for States producing or procuring munitions to ensure that reliability standards are maintained. States are encouraged to undertake generic preventative measures, including but not limited to, manufacture, testing, management and training in order to reduce the failure rates of explosive ordnance.¹⁰

DoD argued that the entry into force of Protocol V made aspects of the bill unnecessary.

MAPW pointed out that Protocol V is limited to setting out the responsibility to clear ERW after weapons have been used. The Protocol does not cover the indiscriminate effects of cluster munitions during attacks and leaves civilians vulnerable until they are cleared. This can take years and there is no certainty that all will be cleared. MAPW cited the case of Lebanon, where villagers and farmers were being mutilated or killed at an average rate of 2-3 per week. Furthermore, maps provided by Israel lacked the necessary detail to expedite cluster bomb clearance.¹¹

According to Mines Action Canada the provisions of Protocol V are binding on all States Parties, although there is no mechanism to enforce compliance and a new cluster munition treaty would not duplicate existing obligations.

Rather its obligations to provide assistance and protect civilians from the post conflict threat would be complementary, would reinforce existing and emerging international standards of practice and would be integrated into national practice on clearance of mines and USO and assistance to

10 Department of Defence submission, p. 2.

11 MAPW *Submission*, 15 March 2007, p. 2.

survivors and affected communities. Many countries which have ratified Protocol V have also signed the Oslo Declaration.¹²

Dr Saul advises that the 2003 Protocol V on Explosive Remnants of War (under the 1980 Convention on Conventional Weapons) encourages (but does not require) countries to 'examine ways and means of improving the reliability of explosive ordnance that it intends to produce or procure, with a view to achieving the highest possible reliability (article 9 and annex).

International Humanitarian Law

DoD pointed out that cluster and submunitions are not illegal per se under any arms control agreement or International Humanitarian Law but are governed by the principles of International Humanitarian Law requiring parties to a conflict to distinguish between civilian and military objectives and prohibiting parties from launching an attack which may be expected to cause incidental loss of life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated by such an attack.

Dr Ben Saul advises that:

Humanitarian law 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 will 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.

While they are not inherently indiscriminate, cluster munitions may be *unlawfully indiscriminate* if they are used in contexts where they 'cannot be directed at a specific military objective' or where their 'effects cannot be limited to military objectives as required (1977 Additional Protocol 1, art 51(4)(b) and (c))

... 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. The general rules of humanitarian law do not appear to have been successful in constraining serious harm to civilians by cluster munitions, not least because of the dispersal of large numbers of submunitions, over large areas, for prolonged periods.¹³

The Democrats make the point that International Humanitarian Law has, in conflict after conflict and for decades, has been unable to deliver on many of its laudable objectives. Australia, whilst not armed with cluster munitions, is a party to the various

12 Mines Action Canada *Submission*, 5 April 2007, p. 2.

13 Dr Ben Saul *Submission* 19 February 2007, paragraph 3, 5 and 7.

MAPW also pointed that technologically advanced weapons are almost invariably more expensive than older weapons and this limits their use greatly. China and Russia have indicated that they would not replace all their submunitions and the US permits use of older, less 'reliable' stock.

Israel used American-made cheap cluster munitions against the people of Lebanon despite the fact that Israel Military Industries produces cluster bombs with a lower failure rate, and the decision to do so was made purely on economic grounds.¹⁷

The subject of submunitions failure rates was central to this inquiry and terms used were often misleading, particularly the distinction drawn in the majority report between so called hazardous and non-hazardous submunitions.

Israel Military Industries claimed the 'proven hazardous rate of their M85 cluster device was 0.06 per cent'. IMI did not support this claim with details of the testing regime that delivered this finding but, importantly we understand from Mr Colin King, the de-miner from the UK, referred to in Chapter 2, clause 2.30, that this failure rate relates to those which failed to detonate on impact *and* also failed to self-neutralise.

Leaving aside the contestable question of the reliability of these tests in simulating operational conditions, submissions argued that what makes these devices with 'self-destructing' or 'self-neutralising' mechanisms so dangerous is the relative ease with which they can be de-activated by handling or impact. This is discussed further in Chapter 2.

It is for this reason that we understand the meeting on cluster munitions in Lima last week, 70 states, including Australia, agreed to no longer use those terms and at this and the Montreux conference in April a strong case was made that self-destruct mechanisms alone cannot be seen as the answer to ending the humanitarian impacts of cluster munitions.

Operational Issues

DoD advised that the prohibition in the bill on engaging in military preparations to assist a member of the defence force of another country to use cluster munitions would create excessive operational difficulties and that Australia placed a premium on interoperability between our forces and those of our allies, a capability that helps us to achieve an advantage over adversaries in a conflict.

Dr Saul recognised that interoperability of coalition forces was vital:

However, it is of some concern that Defence is seeking to exempt from liability Australian personnel who assist an ally to use (what would be) unlawful weapons under domestic law. By way of analogy, it would be

17 MAPW *Submission*, 15 March p. 3.

conventions, protocols and treaties under International Humanitarian Law but has nonetheless operated alongside other forces in some of these conflicts where almost all the victims of these weapons have been civilians.

Capability Considerations

DoD advised it was in the process of acquiring an advanced submunition capability for use against mobile armoured vehicles and argued that these were more discriminating than older generation cluster munitions technologies that were unreliable, lacked autonomous target detection and usually included a large number of small, low yield, 'dumb' bomblets that have the potential to become ERWs.

According to DoD each of these advanced munitions would possess a capacity for autonomous target detection and would self-destruct or self-neutralise (not detonate) if a target is not found. They were efficient methods of attacking identified and specific targets at a greater range and with less consequent risk to the attacking force and third parties than would otherwise be possible. A ban on all submunitions would mean our forces would need to rely on existing weapons which may have a higher yield, lower accuracy and attendant risks to deployed ADF personnel, civilians and civilian objects, which the DoD argued was at odds with the intention of the bill.

Mines Action Canada challenged this claim saying no evidence had been put forward that would substantiate the claim that the use of specific weapon system would have posed greater humanitarian risks in a specific situation in a specific conflict had cluster munitions not been available for use.¹⁴

DoD said an emerging trend in capability development was for systems which integrate small weapons into larger autonomous delivery vehicles, avoiding the need for 'manned assets' (such as aircraft) to have to penetrate defended territory.¹⁵

MAPW pointed out that whilst weapons are supposedly rendered more accurate, technological advances have not delivered a commensurate reduction in the civilian cost of warfare. They cite battlefield conditions being very different from testing environments and say that whether or not cluster bombs explode on impact with the ground depends on a number of factors such as delivery technique, the age of the munitions, the air temperature, the type of ground and whether they get caught in trees or other vegetation.

Even "self-destruct" mechanisms fitted to cluster munitions can and do fail. This was confirmed for MAPW by Handicap International in Lebanon, whose experience is that the M85 cluster bombs fitted with self-destruct mechanism can fail. (Both variants of the M85 with and without self-destruct mechanism were used in Lebanon.)¹⁶

14 Mines Action Canada *Submission* 5 April 2007, p. 3.

15 Department of Defence *Submission* 10, paragraphs 16 – 22.

16 MAPW *Submission* 15 March 2007, p. 3.

neither 'imprudent' nor productive of 'excessive operational difficulties' to require ADF personnel to refrain from assisting an ally to use forbidden chemical or biological weapons, or to commit unlawful reprisals against the civilian population of an adversary.

In different contexts, ADF personnel already operate under rules of engagement which differ from those of coalition partners. The ADF may also take different approaches to its allies in matters of targeting, proportionality and other issues of legal interpretation and assessment. In this light, if the Parliament (or an international treaty to which Australia becomes party) requires ADF members to refrain from assisting in the use of cluster munitions, interoperability is not a relevant consideration.¹⁸

Austcare argued that 'Australia should use its influence as a coalition partner to stigmatise the use of cluster munitions which cause unacceptable humanitarian harm. Moreover, the ADF is able to work successfully with a number of nations not signatory to other arms control conventions, including the United States'.¹⁹

Regulation, if not complete prohibition

Whilst many submissions were in favour of a complete ban on submunitions, some like the Australian Red Cross's submission also urged the committee to consider, as a minimum fallback, restrictions on the use of cluster munitions such that they could only be used in a manner consistent with the legal principles outlined in International Humanitarian Law which would require, at a minimum:

- a prohibition on the use of Cluster Munitions in situations where the military target is co-located with civilians or civilian sites, or facilities essential to the survival of the civilian population (including arable land);
- a significant decrease in the failure rate of submunitions;
- the inclusion of reliable deactivation mechanisms for unexploded submunitions
- appropriate rules for the mapping, marking and subsequent deactivation/removal of unexploded submunitions and,
- other requirements that would fully implement all of Australia's obligations under Protocol V of the Convention on Certain Conventional Weapons.²⁰

Dr Saul does not support an absolute prohibition on the use of cluster munitions but argued that the inability of existing humanitarian law to limit civilian casualties from cluster munitions justified further regulation. Most of his recommendations, as follows, correlate with those made by the Norwegian Government as part of its

18 Dr Ben Saul, *Submission* 13 March 2007.

19 Austcare World Humanitarian Aid *Submission* 12 April 2007 p.3.

20 Australian Red Cross *Submission* 22 February 2007, p. 5.

sponsorship of the inter-governmental Oslo Conference on Cluster Munitions this year:

- (i) prohibit the use of cluster munitions in or near civilian population areas
- (ii) prohibit cluster munitions which have indiscriminate effects due to their mode of delivery or pattern of dispersal
- (iii) prohibit cluster munitions which have high failure rates (more than 1%, whether in relation to exploding, self-destructing or self-neutralizing);
- (iv) prohibit the development, production and transfer (by any means and to any actor) of such cluster munitions;
- (v) destroy stockpiles of such cluster munitions
- (vi) record the location of areas in which cluster munitions are used, and disseminate such data to assist in clearance of unexploded munitions and in community education about the dangers of unexploded munitions;
- (vii) provide for the compensation of non-combatants injured by cluster bombs used by Australian armed forces, whether upon impact or by subsequent detonation of unexploded munitions.

ANBL suggested that:

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.

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. Failure rates in terms of 'live duds', claimed by manufacturers are often those under ideal conditions of hard flat ground and optimal deployment of the cluster munition.

The ANBL and Synod of Victoria and Tasmania also would not oppose a tightening of the definitions in the Bill to ensure that it only covers cluster munitions and unmanned weapon systems as outlined in paragraphs 21 and 22 of the Department of Defence submission.²¹

21 ANBL *Submission* 16 March 2007, p. 3.

The Democrats recommend that the Cluster Munitions (Prohibition) Bill 2006 is passed without amendment but we remain open to further discussion and negotiation to deliver on the stated purpose of the bill – 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 or being involved in any way in the deployment of cluster munitions by the defence forces of other countries.

SENATOR LYN ALLISON

Chapter 2

Background

2.1 This chapter provides an overview of definitional issues, Australia's history regarding cluster munitions, the military applications of such weapons and humanitarian concerns about their use. These issues provide necessary background to the provisions of the bill and have been brought to the attention of the committee by various submissions to the inquiry.

What are cluster munitions?

2.2 There is not yet an accepted international legal definition of cluster munitions. But broadly defined, cluster munitions are air-dropped or ground-launched shells (carrier or container units) that eject a payload of multiple small submunitions ('bomblets' or 'grenades' respectively) for saturation coverage of a large area. Submunitions are the small explosive-filled or chemical-filled projectiles that comprise the payload for dispersal. Container units can contain any number of submunitions, from units to thousands.

2.3 Submunition based weapon systems that contain a very small number of submunitions not designed for area saturation, especially such as precision guided projectiles, are often not considered cluster munitions. Also, non-lethal submunition based systems, such as for producing smoke, illumination, propaganda and pyrotechnics as well as anti-electrical weapons, are not usually considered cluster munitions. This has been evident in the Belgian legislation and United Kingdom bill to prohibit cluster munitions, as well as the declaration of the Oslo Conference on cluster munitions held from 21–23 February 2007 (all of which are discussed in chapter three). These exclusions are generally acknowledged by the Cluster Munition Coalition (CMC)—an international network established in 2003 to campaign to stop civilian casualties from cluster munitions. The CMC generally considers that:

Cluster munitions consist of both a parent carrier munition and several explosive submunitions...function by delivering submunitions over a wide area from aircraft or land-based systems...[and] are area weapons.¹

2.4 However, some commentators adopt very broad definitions of terminology related to cluster munitions. For example, the United Nations (UN) Mine Action Service defines cluster munitions as 'containers designed to disperse or release

1 Thomas Nash, *Stop Cluster Munitions: Stop Killing Civilians*, February 2007, <http://www.stopclustermunitions.org/dokumenti/dokument.asp?id=24> (accessed 14 February 2007).

multiple sub-munitions', and considers submunitions to be 'any [conventional] munition that, to perform its task, separates from a parent munition'.²

Australia and cluster munitions

2.5 From the 1970s to the 1990s, Australia manufactured and maintained limited quantities of cluster munitions for testing purposes, including the Karinga cluster bomb and the US CBU-58B. During this period, Australia tested between 10 and 20 cluster munitions at the Woomera test range in South Australia.³

2.6 Australia does not currently produce cluster munitions or possess a stockpile for deployment, and has never used them in a military conflict. However, Australia possesses some inert cluster munitions for training specialists in the identification and disposal of such explosive ordnance and countermeasures development.⁴ The Australian Department of Defence also is in the process of acquiring an advanced submunition weapon system capability, which will be designed with features to minimise the impact on civilian populations.⁵ Recent conflicts to which Australia has been a party, such as in Afghanistan and Iraq, have involved the use of cluster munitions by Australia's allies.⁶

Military uses of cluster munitions

2.7 The use of cluster munitions dates back to World War II. The German SD-2 (*Sprengbombe Dickwandig 2 kg*) or butterfly bomb was used as a strategic weapon against both civilian and military targets and, subsequently, similar weapons were employed by both sides in the conflict. Since World War II, cluster munitions have been used in many major conflicts including in more than 20 countries. According to most estimates, approximately 70 states currently stockpile cluster munitions, which includes over 200 varieties and billions of submunitions.⁷

2.8 Cluster munitions have been most commonly used against infantry concentrations, although they also have been developed for anti-armour, anti-runway, mine-scattering and chemical warfare purposes. Many modern cluster munitions contain a mixture of anti-armour, anti-personnel and anti-materiel submunitions.

2 United Nations, *Proposed definitions for cluster munitions and sub-munitions: Statement to the Working Group on Explosive Remnants of War*, 8 March 2005.

3 Senator Ian Campbell, *Senate Hansard*, answer to question on notice, 7 November 2006, question 2616.

4 Department of Defence, *Submission 10*, paragraph 31.

5 Department of Defence, *Submission 10*, pp. 3, 5.

6 Australian Network to Ban Landmines and the Uniting Church of Australia Synod of Victoria and Tasmania, *Submission 8*, p. 13.

7 Norwegian Ministry of Foreign Affairs, *Background paper to the Oslo Conference on Cluster Munitions*, February 2007, p. 1, <http://www.regjeringen.no/upload/UD/Vedlegg/Hum/OsloCCM%20background%20paper%201502.pdf> (accessed 5 March 2007).

Anti-runway submunitions are designed to penetrate concrete, thereby shattering and cratering runway surfaces to prevent use by enemy aircraft.⁸

2.9 Dr Saul, pointed out that cluster munitions have been considered by some military planners to have utility in allowing higher efficiency and wide area targeting of grouped or moving personnel and vehicles or large installations. He also noted that the use of cluster munitions reduces the resources necessary for individual targeting (such as in terms of platforms and logistics) and the risk to personnel.⁹ This has been referred to as the benefit of 'economy of use'.¹⁰ In some cases, according to the Federation of American Scientists, use of cluster munitions has formed a key tactical response and concept of operations involving certain military contingencies.¹¹

2.10 Israel Military Industries Ltd (IMI) in their submission to the inquiry said the US Dual-Purpose-Improved-Conventional-Munitions (DPICM) were designed as anti-armour and anti-personnel weapons during the Cold War to halt an invasion of Central and Western Europe by superior numbers of Soviet tank forces. IMI asserted the DPICMs have been considered a 'force multiplier' and are from four to eight times more efficient than conventional high-explosive ammunition in destroying such targets. It also noted cluster munitions have been effective in countering battery fire, such as during the First Gulf War, where they were nicknamed 'rain of steel' by Iraqi forces.¹²

Formatted: Bullets and Numbering

2.11 However, Dr Saul argued that:

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 on impact, including the inconvenience and restricted mobility caused to advancing military forces which deployed them prior to occupying territory.¹³

2.12 The UN Commission of Inquiry on Lebanon, however, said the use of cluster munitions by the Israel Defence Force was of no military advantage and was in contradiction to the principles of distinction and proportionality.

8 Federation of American Scientists: Military Analysis Network, *Cluster Bombs*, 26 June 1999, <http://www.fas.org/man/dod-101/sys/dumb/cluster.htm> (accessed 13 February 2007).

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

10 Mark Hiznay, 'Operational and Technical Aspects of Cluster Munitions, 2006, *Disarmament Forum*, p. 16.

11 The Federation of American Scientists is a non-profit organisation of scientists that publishes extensively on scientific and technical matters, especially of foreign, security and defence policy significance; Federation of American Scientists: Military Analysis Network, *CBU-97/CBU-105 Sensor Fuzed Weapon BLU-108/B Sub-munition*, 23 January 1999, <http://www.fas.org/man/dod-101/sys/dumb/cbu-97.htm> (accessed 13 February 2007).

12 Israeli Military Industries, *Submission 3*, p. 13.

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

2.13 According to Human Rights Watch, ERWs in the Iraq war '..... impeded Coalition troop movements, and they have killed coalition troops both during and after hostilities.'¹⁴

2.14 Handicap International's finding that 98% of known cluster munitions casualties are civilians,¹⁵ challenges the notion that cluster munitions are militarily and strategically effective.

2.15 The Mennonite Central Committee advises

The Rockeye Cluster Bomb consists of three primary assemblies: a nose with an MK339 mechanical time fuze, the dispenser which contains 247 MK 118 bomblets or submunitions, and the tail assembly.⁽³⁾

The MK 118 bomblet consists of a cone-shaped charge warhead, the fuzing system, and tail assembly. When the bomblet is freed from the dispenser, it falls freely through the air, arming itself on the way to the target.⁽⁴⁾

The MK 118 bomblet weighs 1.32 pounds, and contains a shaped charge capable of piercing 7.5 inches of armor and 31 inches of reinforced concrete. The .4 pounds of high explosives in each bomblet produce a jet of super heated gas, creating up to 250,000 psi at the point of impact.⁽⁵⁾

If the tip of the bomblet hits a hard surface, the shaped charge is set off. If the bomblet hits a soft target, a firing pin sets off the warhead, which fragments and sends shrapnel through the air at high velocity. The 247 bomblets disperse over an area roughly the size of a football field.⁽⁶⁾

Rockeye dud rates were reported to be extremely high during the Gulf War, reaching 30-40 percent and creating "a major problem over large areas of Kuwait."⁽⁷⁾ Following a mission to Kuwait in November of 1992, Richard Johnson, Project Manager for Mines Countermines and Demolitions reported that "the Rockeye duds were predominant and had to be very high compared to other submunitions."¹⁶

2.16 In response to humanitarian concerns, efforts are being made to develop cluster munitions that produce fewer unexploded ordnances or explosive remnants of war (ERWs).

2.17 So called non-lethal forms have also been developed to damage and disable military-sensitive dual-use infrastructure, including the production of anti-electrical weapons, such as BLU-114/B "soft bomb" employed in Iraq in 1990–1991 and Kosovo in 1999, the effects of which are largely confined to the targeted electrical power facility, with minimal risk of collateral damage, according to the Federation of

14 [Human Rights Watch Off Target Report, p. 103](#)

15 [Handicap International Issue 19 of Ban Mines Newsletter](#)

16 [The Mennonite Central committee Cluster Munitions in the US Arsenal, 2000, <http://mcc.org.clusterbombs/resources/research/death/chapter1.html#73A6> \(accessed 21 February 2007\).](#)

American Scientists. With these weapons, each submunition contains a small explosive charge that detonates above the target and disperses reels of fine conductive fibre to produce short circuits in high voltage power lines and electrical substations.

2.18 However Human Rights Watch advises that although these weapons are designed to temporarily incapacitate electricity supplies, in Iraq, for instance, they completely destroyed many transformers when wires appeared to have been melted by intense fire.

The attacks caused significant and long-term damage, and the civilian cost was high [the] director of al-Nasirivya General Hospital, told Human Rights Watch that the loss of power was a huge impediment to the proper treatment of war wounded. No one died as a direct result of the power loss, but the hospital's generators were taxed to their limit and it had to do away with some non-critical services.

2.19 'Smart' submunitions have been developed to use sophisticated guidance systems to locate and attack specific targets, especially armoured vehicles. As has already been argued in this chapter, guided systems and anti-electrical weapons often have not been considered to be cluster munitions

2.20 Other trends have included development of self-destruction and self-deactivation features if submunitions reach the ground without locating a target or fail to explode on impact. Following concerns about the harm caused by cluster munitions to civilians and the failure rates of some cluster munitions, IMI has developed and supplied to various countries M85 submunitions, which have self-destruct features. IMI's testing regime for its munitions includes computer simulation, advanced ballistic techniques as well as proving ground firing tests. In its submission to the inquiry, IMI stated 'our testing suggest the M85 cluster device has a hazardous dud rate of 0.06%¹⁷

2.21 Landmine Action UK argues in their submission that it is misleading for manufacturers to draw distinctions between 'hazardous' and 'non-hazardous' munitions, based on the notion that those munitions fitted with 'self-neutralising' or 'unarmed' technologies become non-hazardous on the ground even if unexploded:

Specifically in relation to the M85 it should be noted that an unarmed submunition can easily become armed if a small piece of metal on the side of the fuzing mechanism is removed. This could happen either on striking the ground or if children, for example, were trying to dismantle the item. Although IMI sometimes assert that these items cannot be armed once fired this is not the case – intrusive contact is actually common in environments with dense unexploded ordnance contamination (indeed the Australian Government has funded detailed research into such intrusive handling of

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Comment: IMI does not claim that its M85 submunitions were tested with computer simulation, advanced ballistic techniques or provind ground firing tests.

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17 Israeli Military Industries, *Submission 3*, pp. 1-2, 8, 14.

ordnance in Cambodia because this was found to be the leading cause of accidents.)¹⁸

2.22 The Israel Military Industries submitted that the UK used these cluster submunitions in the 2003 Iraq War. A UK Ministry of Defence spokesperson was reported as stating that the carrier shell 'leaves no unexploded sub-munitions, since these feature a secondary time-sensitive arming device which detonates failed rounds within 15 seconds of hitting the ground.' The report went on to say that should any bomblets be left, however 'we know where we are using these munitions and we are committed to clearing any unexploded ordnance left by them ...'¹⁹

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2.23 The Australian Network to Ban Landmines in its submission said the recent conflicts in Iraq and Lebanon showed the reliability of self-destruct mechanisms was open to question.

In Lebanon, since the ceasefire, large numbers of unexploded submunitions with self-destruct mechanisms have been found. M85 cluster submunitions are manufactured in Israel and were used by Israeli ground forces during the recent conflict and by UK forces in Iraq in March 2003. The UK government has argued that the self-destruct mechanism means they leave very small numbers of unexploded ordnance stating the failure rate to be as low as 1%. However, there appears to be no evidence to back these claims and little consistency in the government's statements on the issue. In 2003, Secretary of State for Defence, Adam Ingram cited a 2% failure rate for the M85 but by November 2006 his statements indicate a failure rate of 5%²⁰

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2.24 According to the US Army's budget item justification in 2004, funding was sought for Guided MLRS weapons containing 414 submunitions that were '... for attacking area targets with improved accuracy and significantly reduced hazardous duds'²¹

Deleted: also has made efforts to reduce the failure rates of cluster munitions in its arsenal

2.25 The uses of cluster munitions have also changed over time, especially as public and NGO pressure over the humanitarian impact has altered the norms of use in some, if not all, defence force operations. For example, Human Rights Watch has stated that

In Iraq, U.S. and U.K. use of cluster bombs caused civilian casualties both during strikes and afterwards. Their air forces for the most part

18 Landmine Action UK comments on IMI submission, received 30/4/07

- 19 Craig Hoyle, 'UK Confirms Use of Cluster Munitions', April 2003, *Jane's Defence Weekly*, noted in Israeli Military Industries, *Submission 3*, pp. 16-17.
- 20 Lord Dubbs, *House of Lords Debates*, 15 December 2006, p.4, noted in Australian Network to Ban Landmines and the Uniting Church of Australia Synod of Victoria and Tasmania, *Submission 8*, p. 10.
- 21 Defense Technical Information Center, Army RDT&E Budget Item Justification No. 177: *MLRS Product Improvement Program*, (February 2004), <http://www.dtic.mil/descriptivesum/Y2005/Army/0603778A.pdf> (accessed 13 February 2007).

demonstrated, however, that they had learned some of the lessons of past wars, notably in dropping far fewer cluster bombs in populated areas. In contrast to Coalition ground forces, they significantly reduced the humanitarian harm of cluster strikes through better targeting and technology.²²

2.26 Most Iraqi civilian casualties during the 2003 Iraq War were caused by artillery delivery of cluster munitions, rather than air-drop. Human Rights Watch noted that military planners have decreased their reliance on air-delivery having learned from the casualties and imprecision caused by the larger area of effect (footprint) created by high altitude dispersal in the First Gulf War, Kosovo, Afghanistan and earlier conflicts. The UK has unilaterally phased out air-delivery of cluster munitions for these reasons. Further, the Human Rights Watch report supports the view of US military officials that the more planning that went into missions using cluster munitions, the more responsible the use and the fewer the civilian casualties.²³

Humanitarian concerns

2.27 Key humanitarian concerns with cluster munitions relate to the civilian casualties caused by the often large footprint and the unexploded ordnance following delivery that functions similarly to land mines. These factors have resulted in civilian casualties that are both immediate and often long outlive the conflict in which the cluster munitions have been deployed. Most of the submissions to the inquiry highlighted these effects and the data and reports by humanitarian organisations on the subject.

The area of effect and civilian populations

2.28 The size of the footprint of cluster munitions can be considerable, especially if large numbers of submunitions or high altitude delivery are employed. According to examples of use cited by a report of the Mennonite Central Committee, footprint sizes vary and can amount to areas in square kilometres but often are less than 500 square metres. Factors affecting the size of the footprint include cluster munition and submunition design, altitude of submunition dispersal, wind and environmental conditions, and terrain factors such as gradient.²⁴ Nevertheless, the Australian Red Cross argued that the use of cluster munitions in populated areas where there are both

²² [Ibid, p. 54-55](#)

²³ Lord Dubbs, House of Lords Debates, 15 December 2006, p.4; Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq*, p. 58. 2003, <http://hrw.org/reports/2003/usa1203/usa1203.pdf> (accessed 12 February 2007).

²⁴ The Mennonite Central Committee represents 15 Mennonite and Amish bodies in North America and specialises in providing worldwide humanitarian relief and advocacy of peace interests; Mennonite Central Committee, *Cluster Munitions in the US Arsenal*, 2000, <http://mcc.org/clusterbombs/resources/research/death/chapter1.html#73A6> (accessed 21 February 2007).

civilian and military installations, personnel or objects will invariably result in civilian casualties.²⁵

Explosive Remnants of War

2.29 Many cluster munitions fail to detonate or are designed for later detonation, either of which can explode when disturbed including in the post-conflict environment, acting as defacto landmines. Landmine Action UK noted in its submission to the inquiry that civilians in South-East Asia are still being killed or injured from cluster munitions, three decades following their use.²⁶ Austcare World Humanitarian Aid submitted that over 40 per cent of the casualties from ERW recorded in 1973–1997 were caused by cluster submunitions.²⁷

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2.30 The Federation of American Scientists has noted the major difference between ERW cluster submunitions and placed mines is that submunitions often are visible as they are typically not designed to burrow into the ground, whereas placed mines are usually deployed so that they are concealed. However, cluster submunitions can penetrate the surface and the UN Mine Action Coordination Centre (MACC) has reported finding submunitions that have penetrated the ground by up to 50 centimetres.²⁸ Various reports have suggested penetration is most likely to occur in instances where there have been soil movements, rain, melting snow, soft terrain such as ploughed land, or after having landed in water. In such instances, according to the UN Office for the Coordination of Humanitarian Affairs, cluster submunitions may not be identified by detection technology or can rise to the surface in areas that have been cleared.²⁹

2.31 The CMC has argued that cluster submunition ERW impact disproportionately on the developing world both in the humanitarian and socio-economic senses. It pointed out that civilians are often attracted to failed submunitions because they are seen as potential providers of valuable scrap metal. According to the CMC, in addition to casualties, failed submunitions can prevent the use or rehabilitation of community infrastructure and services and deter economic activity and land development.³⁰ The Australian Network to Ban Landmines (ANBL) and the Uniting Church of Australia Synod of Victoria and Tasmania voiced similar concerns.

25 The Australian Red Cross, *Submission 9*, p. 2.

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

27 Austcare World Humanitarian Aid, *Submission 2*, p. 4.

28 Human Rights Watch, 'Cluster bombs in Afghanistan', October 2001, *Human Rights Watch Background*, <http://www.hrw.org/backgrounder/arms/cluster-bck1031.htm> (accessed 15 February 2007).

29 Ross Mountain, 'A Call for a Freeze on the use of Cluster Munitions', 27 November 2003, *Statement by the Inter-Agency Standing Committee to the Meeting of State Parties to the CCW Convention*.

30 Cluster Munitions Coalition, *Cluster Munitions: Civilian Effects of the Weapon*, www.stopclustermunitions.org/dokument1/dokument.asp?id+57 (accessed 22 March 2007).

They maintained that the denial of agricultural land has the potential to be particularly damaging, as affected communities are often in the developing world and supported by subsistence farming. These communities also have the additional burden of supporting the cost of caring for those disabled by ERW.³¹

2.32 Also, brightly coloured submunitions—designed to reduce the risk to civilians by increasing their visibility—have actually caused problems with children mistaking them for toys. In Afghanistan, US BLU-97 (Bomb Live Unit) cluster munitions were the same colour as humanitarian rations, resulting in a subsequent change to the colour of the rations to avoid confusion and further civilian deaths.³² The Medical Association for Prevention of War (MAPW) and the ANBL noted that parachuted submunitions suspended in trees have also been attractive to children, as have spherical submunitions that resemble balls.³³

The problem of failure rates

2.33 All ammunition has some degree of failure, but even a small failure rate of cluster submunitions can result in large numbers of unexploded ordnance, as they are often delivered in the hundreds or thousands and with rapid rates of fire. The Medical Association for Prevention of War (Australia) submitted:

While a low failure rate of, say, 1% looks attractive, when literally millions of cluster munitions are spread that translates to tens of thousands of live munitions still.³⁴

2.34 A report to a US Congressional inquiry stated that, in the past, US requirements for the failure rates for some of its stockpiled artillery launched submunitions have been five per cent or less, while it has not had strict requirements for others. According to the report, overall reliability of submunitions launched during the First Gulf War was 97 per cent. It noted the failure rates for the M77 submunitions of the Multiple Launch Rocket System (MLRS) were particularly problematic, ranging from 2–23 per cent, resulting in 154–1,777 undetonated submunitions per full launcher load (12 rockets containing 644 submunitions each), which could be delivered at 60 second intervals.³⁵

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

32 Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq*, 2003. <http://hrw.org/reports/2003/usa1203/usa1203.pdf> (accessed 12 February 2007).

33 Medical Association for Prevention of War (MAPW) and Australians for Lebanon, *Submission 6*, p. 8; Australian Network to Ban Landmines and the Uniting Church of Australia Synod of Victoria and Tasmania, *Submission 8*, p. 8.

34 *Submission 6A*, p. 3

35 United States General Accounting Office, *Report to Congressional Requestors: Operation Desert Storm, Casualties caused by Improper Handling of Unexploded US Submunitions*, pp. 5-6, 1993, <http://archive.gao.gov/t2pbat5/149647.pdf> (accessed 12 February 2007).

2.35 Various non-government organisations (NGOs), including MAPW in its submission to the inquiry, have argued that at this stage the problems of high failure rates for cluster munitions are not balanced by technical development of more reliable submunitions.³⁶ The aforementioned US report acknowledged that more technically sophisticated cluster munitions are often more expensive than standard weapons, thereby limiting their production and replacement of older designs.³⁷ Therefore, various NGOs have maintained that most of the cluster munitions remaining in global military arsenals are those that are known to have a record of higher failure rates. Nevertheless, there is increasing recognition of the problem of high failure rates and various countries have taken unilateral measures to reduce their reliance on such models (discussed in chapter three).³⁸

2.36 In their submissions, MAPW and ANBL cited an increasing concern among some NGOs that some of the failure-reduction measures developed for cluster munitions have been unsuccessful. ANBL noted the Combined Effects Munition of the BLU-97 was designed with two independent fuses to ensure detonation at any angle of impact. However, mine removalists have estimated the failure rate in Kosovo of these submunitions was seven per cent.³⁹ Also, ANBL pointed out that the UN MACC has revealed 631 unexploded M85 submunitions—designed for very low failure rates—were found in South Lebanon following the 2006 conflict. However, an international landmine and explosive expert has reported that three varieties of the M85 were found, one of which did not have self-destruction capabilities. He argued that it is unclear what proportion of the failed M85 submunitions were the more advanced types with self-destruction capabilities. Further, he noted that without data on how many of these submunitions were deployed, it is unclear whether this number is indicative of the number launched or the failure rate.⁴⁰ Despite debate about the accuracy of the statistics, the following section makes clear that the use of cluster munitions, including their use in recent conflicts, has injured and killed many innocent civilians including children.

Comment: The landmine expert, is Mr Colin King and the text read: "While both the self-destruct and non-self-destruct varieties have been found unexploded, further research is needed to determine their individual failure rates, the condition they were left in and why each variety failed to explode and/or self destruct. This implies that it is problematic for reports to refer to "the M85" without specifying which variety is meant." Mr King recently spoke at the Oslo conference on the dangers of seeing self-destruct mechanisms as a panacea to the humanitarian impact and considers the paraphrasing of this reference to have implied a position at odds with his position.

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

37 United States General Accounting Office, *Report to Congressional Requestors: Operation Desert Storm, Casualties caused by Improper Handling of Unexploded US Submunitions*, p. 5, 1993, <http://archive.gao.gov/t2pbat5/149647.pdf> (accessed 12 February 2007).

38 Stephen Goose, 'Humanitarian consequences and international response'. 18 March 2004, Presentation to the Conference *Cluster Bombs: Effective Weapon or Humanitarian Foe*.

39 Australian Network to Ban Landmines and the Uniting Church of Australia Synod of Victoria and Tasmania, *Submission 8*, pp. 5, 10; Medical Association for Prevention of War (Australia), *Submission 6A*, p. 3.

40 Daniele Ressler and Elizabeth Wise, 'Cluster Munitions and ERW in Lebanon', 2006, *Journal of Mine Action*, <http://maic.jmu.edu/journal/10.2/focus/resslerwise/resslerwise.htm>, (accessed 27 February 2007).

Effect of recent uses of cluster munitions

2.37 Most of the data on cluster munition use and its legacy as ERW has been produced by NGOs active in international humanitarian work. This data has suggested that in the First Gulf War 61 000 cluster munitions containing 20 million submunitions were dropped in six weeks.⁴¹ Also, it has suggested an estimated 248 056 submunitions were dropped over Afghanistan in six months during 2001–2002 and between 1.8 and two million submunitions were delivered in Iraq in three weeks in 2003. A failure rate of five per cent would have resulted in an ERW legacy of one million, 12 400 and 90 000 unexploded submunitions respectively in the First Gulf War, Afghanistan and the 2003 Iraq War.⁴²

2.38 Cluster munitions were used in the fighting in South Lebanon and Israel during July–August 2006. The UN MACC estimated Israel fired up to 6 000 bombs, rockets and artillery shells each day during the 34 day conflict, with 90 per cent of the cluster munitions launched in the final three days. Also according to the UN, the cluster munitions had a 40 per cent failure rate resulting in possibly a million submunitions failing and becoming ERW.⁴³ In its submission to the inquiry, Israeli Military Industries pointed out that these were mostly the older and more failure prone M77, rather than the more sophisticated M85 submunitions.⁴⁴ The UN has indicated it will take another 12 months to clear the ERW, although an Australian humanitarian mission to South Lebanon has expressed concerns that this is an optimistic estimate. The Australian mission also noted that the primary locations of the cluster munition ERW included sites in or near residential houses, gardens and agricultural plantations.⁴⁵

2.39 Human Rights Watch has reported that Hezbollah also used cluster munitions during the conflict, although to a lesser degree. It was the first recorded use of cluster munitions by Hezbollah and of the particular Chinese-made model of cluster munitions. Israel initially withheld details about the strikes for security reasons, according to Human Rights Watch, but has since revealed that 113 cluster munitions were fired, containing 4 407 submunitions. The attacks caused one death and 12 injuries with the low casualties possibly resulting from incorrect usage, according to

41 Steve Goose, *Human Rights Watch World Report, Cluster Munitions: Toward a Global Solution*, 2004, <http://hrw.org/wr2k4/12.htm> (accessed 22 February 2007).

42 Austcare World Humanitarian Aid, *Submission 2*, p. 4.

43 BBC News, 'Million bomblets' in S Lebanon, 26 September 2006, http://news.bbc.co.uk/2/hi/middle_east/5382192.stm (accessed 13 February 2007).

44 Israeli Military Industries, *Submission 3*, pp. 13-15.

45 Medical Association for Prevention of War (MAPW) and Australians for Lebanon, *Submission 6*, pp. 6, 8.

Human Rights Watch. Israel has not disclosed any information about the failure rate or the ERW legacy.⁴⁶

2.40 Human Rights Watch has collected data on the legacy and removal of cluster munitions as ERW from the First Gulf War in 1991 until February 2003. It has suggested failed cluster submunition ERW from the First Gulf War resulted in 1 600 deaths and 2 500 injuries to civilians in Iraq and Kuwait. In 2002, more than ten years after the conflict and following prolonged and intensive clean-up campaigns, 2 400 failed cluster submunitions were detected and destroyed.⁴⁷ NGO estimates of the casualties caused by cluster munitions in the 2003 Iraq War have suggested deaths have been in the hundreds.⁴⁸ The UN has reported 26 deaths and 162 injuries from all types of ERW in the 2006 Lebanon conflict, with all the deaths and all but five of the injuries having been caused by cluster munitions.⁴⁹ An Australian humanitarian mission to South Lebanon has reported that a third of these casualties have been children.⁵⁰

Committee view

2.41 It is clear that the use of cluster munitions has and continues to kill and maim many civilians, including children, who through no fault of their own are caught up in a military conflict. In many cases, communities face enormous difficulties rebuilding their livelihoods because of ERW. In particular, the evidence available and presented to the inquiry clearly demonstrates the use of older model cluster munitions designed for area-saturation and without self-destruction or self-neutralisation mechanisms have had an enduring destructive humanitarian impact. It also underscores the potential impact of the large footprint associated with cluster munitions and the devastating consequences when used in the vicinity of civilians and residential areas. The committee accepts that there is an urgent need for measures to be taken to prevent the use of such deadly weapons from harming civilian populations.

2.42 However, the committee accepts that distinctions need to be made between different types of cluster munitions. In particular, this includes lethal designs and

46 Human Rights Watch, *Lebanon/Israel: Hezbollah hit Israel with cluster munitions during conflict*, 19 October 2006, <http://hrw.org/english/docs/2006/10/18/leban014412.htm> (accessed 20 April 2007).

47 Steve Goose, *Human Rights Watch World Report, Cluster Munitions: Toward a Global Solution*, 2004, <http://hrw.org/wr2k4/12.htm> (accessed 22 February 2007).

48 Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq*, 2003, <http://hrw.org/reports/2003/usa1203/usa1203.pdf> (accessed 12 February 2007).

49 Handicap International, *Ban Mines Newsletter: Handicap International's Newsletter on Landmines & Cluster Munitions*, January 2007, p. 2, http://en.handicapinternational.be/download/EN_Newsletter_19_FINAL.pdf (accessed 19 February 2007).

50 Medical Association for Prevention of War (MAPW) and Australians for Lebanon, *Submission 6*, p. 6.

those that are non-lethal but could still be used to damage military-sensitive infrastructure. It also includes the distinction between sub-munition based weapon systems that are, and those that are not, designed for area-saturation.. The latter includes limited number, precision-guided submunitions. The committee also welcomes design developments to minimise the humanitarian impact of area-saturation cluster munitions, such as self-destruction and self-neutralisation capabilities. However, it notes the conflicting information about the effectiveness of these modifications. The following chapter considers the international regime governing the use of cluster munitions.

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).

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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'.¹ It described this principle as 'arguably one of the most important features of this Bill'.² 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'.³ Mr Bath also highlighted that this provision would prohibit the development, acquisition or involvement in assisting allies regarding any submunition based system.⁴

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 11–13.⁵ 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.⁶ Landmine Action UK also suggested the bill could be strengthened in paragraph 10 (a) in this fashion.⁷

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'.⁸ 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 Austcare 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.⁹

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.¹⁰

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'.¹¹ 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.¹²

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'.¹³ 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.¹⁴

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'.¹⁵ 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'.¹⁶ 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.¹⁷

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.¹⁸

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.¹⁹

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.²⁰

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.²¹

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.²²

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.²³

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.²⁴

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.²⁵

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.²⁶

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

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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'.²⁷ 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.²⁸

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.

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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.

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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.²⁹

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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.³¹

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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'.³⁰ 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.

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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.³² Defence noted that clauses 14 and 17 of the bill do not allow the

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²⁹ ANBL *Submission 16 March 2007*, p.3 & 4

³¹ The Australian Red Cross, *Submission 9*, pp. 4-5.

³² Department of Defence, *Submission 10*, paragraph 31.

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maintenance of cluster munitions for research and training purposes and would oblige the ADF to destroy these holdings.³³ 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.³⁴

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.³⁵

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.³⁶

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.³⁷

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.³⁸

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.³⁹ 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'.⁴⁰ 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.⁴¹

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.⁴² 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.⁴³

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.⁴⁴

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.⁴⁵ 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.⁴⁶

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.