

Appendix 3

Answers from the Department of Defence

**SENATE INQUIRY: CLUSTER MUNITIONS (PROHIBITION) BILL 2007
REPLIES TO QUESTIONS ASKED OF THE DEPARTMENT OF DEFENCE**

1. Could the bill be amended to conform to Australia's international position?

The international proposals currently being discussed 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 for precision targeting, and self-neutralisation or self-destruction, and so on – have yet to be identified.

We anticipate that these technical discussions will take place at a meeting of the Certain Conventional Weapons Convention in June 2007 (as well as later in 2007), but also be raised at an International Committee of the Red Cross Committee workshop in April 2007, and a meeting in Lima to be held in late May 2007.

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.

Is the Australian Government's position in international fora firmly established or is it still evolving?

Officials from relevant agencies will seek Government direction in response to the still evolving international negotiations.

2. Will the specific 'advanced submunition' weapon system to be acquired by Defence possess technical criteria related to this generic class designed to minimise impact on humanitarian populations, such as low failure rates, precision guided capabilities and self-destruction requirements?

Yes.

If so, which attributes?

Advanced sub-munitions take advantage of a range of newer technologies and design features which help to minimise their potential to create adverse humanitarian effects. In particular, they often have reliable self-destruction and self-neutralisation capabilities. These capabilities substantially decrease the likelihood of these munitions becoming explosive remnants of war.

For example, in the case of an advanced sub-munition solution which Defence is in the process of acquiring, if no target is detected in the search area, the advanced sub-munition will commence a self-destruct sequence. This sequence includes a series of highly reliable self-destruction mechanisms, any one of which is enough to destroy the sub-munition. As a result, this type of advanced sub-munition is designed so as not to produce an explosive remnant of war.

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 numbers, and it is not necessary to saturate a large area with dumb bomblets, which is the approach taken with older cluster munitions. When these bomblets also have high failure rates, depending in part upon the age of the cluster munition and the technology used, they can pose an ongoing humanitarian hazard as explosive remnants of war.

As stated in the Defence submission on this bill, the use of advanced sub-munitions, as for all means and methods of warfare, is governed by the principles of International Humanitarian Law, including distinction and proportionality. Under these principles, parties to a conflict must at all times distinguish between civilian and military objectives and must not launch 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. Australian Defence Force (ADF) personnel are trained in the law of armed conflict, which form an integral part of ADF targeting decisions.

In summary, 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.

What such criteria is used in the acquisition of sub-munition based weapon systems, noting that Defence may also pursue new, similar emergent technologies?

Technical characteristics such as precision targeting, self-destruction and self-neutralisation are relatively standard for advanced sub-munition systems.

Defence considers a broad range of criteria in acquiring weapons systems, and Defence is careful to comply with Australia's obligations under International Humanitarian Law and the law of armed conflict in the acquisition of all weapons systems for operational use.

3. Considering the overall, global trend of past use of cluster munitions has had little consideration for civilian populations, would Australian involvement with planning cluster munitions use result in a greater consideration for their humanitarian impact than otherwise would be the case?

When "planning the use of cluster munitions", as with any munitions, states are required to observe their international and domestic legal obligations. These rules are equally applicable to the ADF as they are to the defence forces in those states that currently use cluster munitions. ADF members receive training in the law of armed conflict and, when on operations, have ready access to advice from military legal officers so that they may use all weapons systems in accordance with the law. An informed and vigorous application of the existing international law by all states will result in a minimisation of the humanitarian impact of cluster munitions.

4. Noting that Part 2 of the bill, relating to the offences, only considers activities related to cluster munitions to be offences when they are 'intentional', would inadvertent support to cluster munitions operations, such as when the responding unit determines the weapons used, result in a breach of the bill?

Defence has serious concerns with:

- the consequences of the way the terms "assistance", "cluster munitions" and "intentionally" can be interpreted for the offences in Part 2 of the bill; and
- the consequences of the lack of clarity relating to the fault element of the offences in Part 2 of the bill.

While it is not Defence's role or function to provide legal interpretations of terms contained in a bill and what would result in a breach of a bill, the breadth of meaning that can be given to a number of terms, and the lack of clarity relating to the fault element, could potentially exclude the ADF from an unacceptably large area of conduct. As stated in Defence's submission and in the reply to the question below, conduct which might potentially give rise to a breach of the bill ranges from support to allies during peacetime or while on operations, to inadvertent use of cluster munitions while on operations.

The bill places an undue criminal responsibility burden on members of the ADF when this is essentially a question of policy for the Government as to the acquisition and use of a particular

weapons system. The legal obligations on an ADF member, the complexity and uncertainty that surround operational decisions, and the operational judgments required of an ADF member are already quite extensive. It is more appropriate that the focus of debate be on the acquisition policy for munitions rather than legislation which would have the effect of criminalising the actions of ADF members.

Have or are Australians routinely involved in military preparations for cluster munition use with allied partners?

The proposed definition of "cluster munitions" in the bill is very wide and would capture a good many situations which, on a narrower view, could not reasonably be understood or characterised as involvement with cluster munitions. If we apply this narrower understanding of cluster munitions, Australian personnel are *not* "routinely involved in military preparations for cluster munition use with allied partners" in the sense of ordering use of cluster munitions, or assisting to load cluster munitions, and so on.

But a broad interpretation of "military preparations" could include inadvertent or indirect forms of involvement. For instance, if coalition partners use cluster munitions, it is clearly possible that Australian personnel may be involved in processes leading to the employment of these munitions. For example, Australian soldiers calling in air support from a coalition partner may be aware that the partner has the capacity to use such munitions, even though these soldiers will not necessarily know what munitions the aircraft assigned to respond to their call for assistance is carrying or will use, and would not direct that a particular munition (including a cluster munition) be used.

Similarly, Australian personnel involved in airspace management (including both air traffic control and combat control), may be aware that a coalition aircraft is capable of, or even is, carrying cluster munitions. However, the Australian personnel would not be involved in commanding or ordering that such a munition be used.

Also, Australian personnel involved in the planning and tasking of coalition aircraft in operations are involved in designating specific targets. These personnel would not, however, stipulate the specific weapon types to be used on these tasks nor would they know the particular weapon types being used by coalition partners on these specific targets.

At different times we may also have logistics personnel embedded within coalition forces that use cluster munitions, and their duties may indirectly and/or inadvertently involve military preparations for cluster munitions use.

If Australian personnel were in command situations and unable to call in cluster munitions support, what would be the effect on troops in these situations and would they be at greater risk?

As outlined above, during armed conflict, air support is usually called on in situations of high risk to ground elements. In many cases Australian ground troops rely on coalition air assets for this support and ADF personnel would not necessarily know the type of weapon being used to support them; they would simply be calling for a military effect. A ban on cluster munitions would prevent ADF personnel from calling for air support from coalition partners who employ cluster munitions; or, alternatively, it would require ADF personnel to interrogate supporting aircraft before they attack to discover the weapons they intend using, and either accept or reject their support based on the weapons they carry. In either circumstance, the risk to the ADF (and other coalition) personnel would be greatly increased.

In general, if cluster munitions were the only, or most effective munitions available, and they could be legitimately and lawfully employed, then an inability to call in that support would very likely result in greater risk.

5. Do the countermeasures simply refer to the training for removal of cluster munitions as explosive remnants of war, or do they refer to a wider array of research and system development?

The countermeasures refer to more than training for disposal. 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.

If this refers simply to training for removal of cluster munitions as explosive remnants of war, would that be covered by the existing defences in Part 3 of the bill pertaining to conduct related to clearing submunitions?

See answer to the question immediately above. Countermeasures encompass more than training for removal of cluster munitions as explosive remnants of war. 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

If not, why not and how could the existing language be amended to remedy this situation?

See above answers.

A blanket ban on very broadly defined "cluster munitions" would not be acceptable to the Australian Government, nor, we understand, to most states.

As was identified in the Defence submission, as well as in recent international negotiations, there is still considerable disagreement amongst the experts on how to best regulate cluster munitions. All countries face a considerable challenge in distinguishing those "cluster munitions" which when used inappropriately cause a major explosive remnant of war risk, from those advanced sub-munition capabilities which do not pose similar risks. Recent domestic legislation in Belgium, for instance, was enacted on the basis of a decision to decommission its existing cluster munitions stockpile.

Several forthcoming international meetings, including a Certain Conventional Weapons Convention Group of Government Experts meeting in June 2007, will include a particular focus on cluster munitions. This will include discussion on the factors affecting their reliability, and their technical and design characteristics, with a view to minimising the adverse humanitarian effect of these munitions. It is not possible at this stage to predict the likely outcomes of international negotiations on cluster munitions but if domestic legislation is enacted prematurely, Australia's negotiating position in international forums may be restricted and/or compromised and the legislation may require significant revision.