The Senate

Standing Committee on Foreign Affairs, Defence and Trade

Cluster Munitions (Prohibition) Bill 2006

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Acronyms

ADF	Australian Defence Force
ANBL	Australian Network to Ban Landmines
BLU	Bomb Live Unit
CCW	Convention on Certain Conventional Weapons
CMC	Cluster Munition Coalition
DPICM	dual–purpose improved conventional munition
ERW	explosive remnants of war
ICRC	International Committee of the Red Cross
IHL	international humanitarian law
MACC	mine action coordination centre
MAPW	Medical Association for Prevention of War
MLRS	Multiple Launch Rocket System
NGO	non–government organisation
POA	Peace Organisation of Australia
UN	United Nations
WMD	weapon of mass destruction

Recommendations

Recommendation 1

5.50 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

5.51 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

5.52 The committee recommends that the Department of Defence ensures that the acquisition or development of any cluster munitions or sub-munition 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

5.53 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.

Recommendation 5

5.54 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

5.55 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

5.56 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

5.57 The committee recommends that the bill not be passed.

Recommendation 9

5.58 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.

Chapter 1

Introduction

Background

1.1 On 5 December 2006, Senator Lyn Allison, leader of the Australian Democrats, introduced the Cluster Munitions (Prohibition) Bill 2006 into the Senate, also on behalf of Senator Bob Brown, leader of the Australian Greens, and Senators Mark Bishop and Andrew Bartlett. On 7 December, the Senate referred the bill to the Senate Standing Committee on Foreign Affairs, Defence and Trade for inquiry and report by 29 March 2007. On 29 March 2007, the Senate granted the committee an extension to its reporting date to 10 May 2007, which was further extended to 31 May 2007.

Purpose of the bill

1.2 The stated purpose of the bill is to ensure that innocent civilians in conflict zones are not maimed, killed, or put at risk as a result of Australians possessing, using or manufacturing cluster munitions. In particular, the bill is intended to prevent members of the Australian Defence Force (ADF), whether serving in Australia or elsewhere, and whether serving with the ADF or any other defence force, from being involved in the deployment of cluster munitions.

1.3 The bill would specifically prevent Australian persons from intentionally developing, producing, otherwise acquiring, stockpiling, retaining, transferring or engaging in military preparations to use cluster munitions, container units or sub-munitions. The bill extends to acts undertaken by Australian citizens outside Australia, on board Australian ships and aircraft, and undertaken by the ADF on behalf of another country.

1.4 The offences would not apply to acts undertaken with the intention of clearing unexploded sub-munitions, educating civilians about the dangers of cluster munitions or destroying and decommissioning such munitions. If an offence is committed under the bill, the munition would need to be cleared, removed or destroyed in accordance with Australia's international obligations regarding the explosive remnants of war (ERW).

1.5 Under the bill, the Minister for Defence would be required to table in both Houses of the Federal Parliament a report on stockpiles and a decommissioning plan, within three months of the commencement of the Act. All cluster munitions in the possession of the ADF would be required to be decommissioned within one year.

Submissions

1.6 The committee advertised the inquiry on its website and in *The Australian* on 12 December 2006, 7 February 2007 and 21 February 2007. The committee wrote to

the Minister for Foreign Affairs, the Hon. Alexander Downer MP, the Attorney-General, the Hon. Philip Ruddock MP, and the Minister for Defence, the Hon. Dr Brendan Nelson MP, on 12 December 2006 to invite them or their departments or related agencies to make a submission. A number of other organisations, commentators, academics and stakeholders were also contacted and invited to make submissions to the inquiry.

1.7 Although the committee agreed that the submissions were sufficiently comprehensive not to require a public hearing, it wanted to allow ample opportunity for people and organisations to respond to matters raised in submissions. It also wanted to seek a direct response from Defence on a number of issues. Consequently, the committee wrote directly to people who had made a submission drawing their attention to Defence's submission and inviting them to comment on it. The committee also placed a number of written questions on notice to Defence (see Appendix 2). The response of the Department of Defence has been included as Appendix 3. Over the course of the inquiry, the committee received a total of fifteen submissions as well as five re-submissions responding to points raised in the Defence submission, which are listed in Appendix 1.

Acknowledgement

1.8 The committee thanks those who assisted with the inquiry.

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 sub-munitions ('bomblets' or 'grenades' respectively) for saturation coverage of a large area. Sub-munitions are the small explosive-filled or chemical-filled projectiles that comprise the payload for dispersal. Container units can contain any number of sub-munitions, from units to thousands.

2.3 Sub-munition based weapon systems that contain a very small number of sub-munitions not designed for area saturation, especially such as precision guided projectiles, are often not considered cluster munitions. Also, non-lethal sub-munition 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 sub-munitions…function by delivering sub-munitions 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

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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 sub-munitions 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 sub-munition 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 sub-munitions.[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 sub-munitions.

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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 sub-munitions are designed to penetrate concrete, thereby shattering and cratering runway surfaces to prevent use by enemy aircraft.[8] But, in his submission to the inquiry, Dr Ben Saul, senior lecturer and co-ordinator, International Law, Sydney University, noted the military utility of cluster munitions has to factor in their imprecision in targeting, costs of removal of failed sub-munitions and restrictions imposed on the mobility of advancing military forces.[9]

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.[10] This has been referred to as the benefit of 'economy of use'.[11] 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.[12]

2.10 The submission to the inquiry by the Israeli Military Industries outlined some examples of cluster munition development. These include the US Dual-Purpose-Improved-Conventional-Munitions (DPICM), which 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. Israeli Military Industries 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.[13]

2.11 The evolution of cluster munition development has included non-lethal forms to damage and disable military-sensitive dual-use infrastructure, and production of modified designs to minimise the production of explosive remnants of war (ERW). The former include the production of anti-electrical weapons, such as employed in Iraq in 1990–1991 and Kosovo in 1999. With these weapons, each sub-munition

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

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

12 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).

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

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.[14] 'Smart' sub-munitions have also 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 (paragraphs 2.2–2.4).

2.12 Other trends have included development of self-destruction and self-deactivation features if sub-munitions 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 'unacceptable' failure rates of some cluster munitions, Israel has developed and supplied to various countries M85 sub-munitions, which have self-destruct features. IMI's testing regime for its munitions includes computer simulation, advanced ballistics techniques as well as proving ground firing tests. In its submission to the inquiry, IMI stated 'our testing suggests the M85 cluster device has a hazardous dud rate of 0.06%'.[15] The Israeli Military Industries submitted that the UK used these cluster sub-munitions in the 2003 Iraq War. A UK Ministry of Defence spokesperson was reported as stating that the carrier shell 'leaves no unexploded sub-munitions'. This was due to the redundant fusing to ensure self-detonation and design to allow detonation at extreme angles.[16] Between 2003 and November 2006, the UK has provided different accounts of the failure rates of the M85 in its arsenal of between one and five per cent.[17] The US also has made efforts to reduce the failure rates of cluster munitions in its arsenal.[18]

2.13 The uses of cluster munitions have also changed over time, especially as awareness of the humanitarian impact has altered the norms of use. For example, Human Rights Watch has stated that most of the Iraqi civilian casualties during the 2003 Iraq War were caused by artillery delivery of cluster munitions, rather than air-drop. It 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,

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14 Federation of American Scientists, *CBU-94 "Blackout Bomb" and BLU-114/B "Soft-Bomb"*, 7 May 1999, http://www.fas.org/man/dod-101/sys/dumb/blu-114.htm (accessed 17 February 2007).

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

16 Craig Hoyle, 'UK Confirms Use of Cluster Munitions', April 2003, *Jane's Defence Weekly*; Armada International 2/2004; noted in Israeli Military Industries, *Submission 3*, pp. 16-17.

17 Lord Dubbs, *House of Lords Debates*, 15 December 2006, column 1731. He stated, '…Adam Ingram said on 16 June 2003 that the failure rate of these smart bombs was 2 per cent. An MoD paper of March 2005 put the failure rate at 1 per cent. However, on 8 November this year, Adam Ingram said that these weapons had a 95 per cent success rate.'

18 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).

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.[19]

Humanitarian concerns

2.14 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

2.15 The size of the footprint of cluster munitions can be considerable, especially if large numbers of sub-munitions 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 sub-munition design, altitude of sub-munition dispersal, wind and environmental conditions, and terrain factors such as gradient.[20] Nevertheless, the Australian Red Cross argued that the use of cluster munitions in populated areas where there are both civilian and military installations, personnel or objects will invariably result in civilian casualties.[21]

Explosive Remnants of War

2.16 The other prime concern with cluster munitions is that many fail to detonate or are designed for later detonation, either of which can explode when disturbed including in the post-conflict environment. 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.[22] Austcare World

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19 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).

20 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).

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

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

Humanitarian Aid submitted that over 40 per cent of the casualties from ERW recorded in 1973–1997 were caused by cluster sub-munitions.[23]

2.17 The Federation of American Scientists has noted the major difference between ERW cluster sub-munitions and placed mines is that sub-munitions 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 sub-munitions can penetrate the surface and the UN Mine Action Coordination Centre (MACC) has reported finding sub-munitions that have penetrated the ground by up to 50 centimetres.[24] 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 sub-munitions may not be identified by detection technology or can rise to the surface in areas that have been cleared.[25]

2.18 The CMC has argued that cluster sub-munition 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 sub-munitions because they are seen as potential providers of valuable scrap metal. According to the CMC, in addition to casualties, failed sub-munitions can prevent the use or rehabilitation of community infrastructure and services and deter economic activity and land development.[26] The Australian Network to Ban Landmines (ANBL) and the Uniting Church of Australia Synod of Victoria and Tasmania voiced similar concerns. 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.[27]

2.19 Also, brightly coloured sub-munitions—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

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

24 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).

25 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.*

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

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

change to the colour of the rations to avoid confusion and further civilian deaths.[28] The Medical Association for Prevention of War (MAPW) and the ANBL noted that parachuted sub-munitions suspended in trees have also been attractive to children, as have spherical sub-munitions that resemble balls.[29]

The problem of failure rates

2.20 All ammunition has some degree of failure, but even a small failure rate of cluster sub-munitions 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.[30]

2.21 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 sub-munitions have been five per cent or less, while it has not had strict requirements for others. According to the report, overall reliability of sub-munitions launched during the First Gulf War was 97 per cent. It noted the failure rates for the M77 sub-munitions of the Multiple Launch Rocket System (MLRS) were particularly problematic, ranging from 2–23 per cent, resulting in 154–1,777 undetonated sub-munitions per full launcher load (12 rockets containing 644 sub-munitions each), which could be delivered at 60 second intervals.[31]

2.22 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 sub-munitions.[32] 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.[33] Therefore, various NGOs have maintained that most of the cluster munitions remaining in global

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28 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).

29 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.

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

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

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

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

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).[34]

2.23 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 sub-munitions was seven per cent.[35] Also, ANBL pointed out that the UN MACC has revealed 631 unexploded M85 sub-munitions—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 sub-munitions were the more advanced types with self-destruction capabilities. Further, he noted that without data on how many of these sub-munitions were deployed, it is unclear whether this number is indicative of the number launched and failure rate.[36] 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.

Effect of recent uses of cluster munitions

2.24 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 sub-munitions were dropped in six weeks.[37] Also, it has suggested an estimated 248 056 sub-munitions were dropped over Afghanistan in six months during 2001–2002 and between 1.8 and two million sub-munitions 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 sub-munitions respectively in the First Gulf War, Afghanistan and the 2003 Iraq War.[38]

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

35 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.

36 Cited in 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).

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

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

2.25 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 sub-munitions failing and becoming ERW.[39] 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 sub-munitions.[40] 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.[41]

2.26 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 sub-munitions. The attacks caused one death and 12 injuries with the low casualties possibly resulting from incorrect usage, according to Human Rights Watch. Israel has not disclosed any information about the failure rate or the ERW legacy.[42]

2.27 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 sub-munition 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 sub-munitions were detected and destroyed.[43] NGO estimates of the casualties caused by cluster munitions in the 2003 Iraq War have suggested deaths have been in the hundreds.[44] The UN has reported 26 deaths and 162 injuries from all

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39 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).

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

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

42 Human Rights Watch, *Lebanon/Israel: Hezbollah hit Israel with cluster munitions during conflict*, 19 October 2006, http://hrw.org/english/docs/2006/10/18/lebano14412.htm (accessed 20 April 2007).

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

44 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).

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.[45] An Australian humanitarian mission to South Lebanon has reported that a third of these casualties have been children.[46]

Committee view

2.28 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.

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

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45 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).

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

Chapter 3

Regulations and controls on the use of cluster munitions

3.1 This chapter provides context to the bill by considering the international instruments governing the use of cluster munitions, efforts to develop additional such instruments and unilateral action that has been taken in various countries regarding cluster munitions. Many of the submitters brought these measures to the attention of the committee to help it in developing its view on the bill.

International instruments governing the use of cluster munitions

3.2 The use of cluster munitions is not specifically prohibited or regulated by any international legal instrument, other than the norms of international humanitarian law (IHL) governing the conduct of hostilities. This particularly involves the Geneva Conventions and Additional Protocols. Article 48 of Additional Protocol I requires the parties to a conflict to 'distinguish between the civilian population and combatants, and between civilian objects and military objectives'.[1] Article 51 is also of particular relevance noting that:

> Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol.[2]

3.3 Article 57 also requires parties to a conflict to take precautionary measures regarding civilian populations and installations during attacks including requirements to:

> Do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects….Take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects….Refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian 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.[3]

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1 Protocol I: Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.

2 Protocol I: Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.

3 Protocol I: Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.

3.4 The *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* of 1993 and the Geneva Protocol of 1925 for Chemical Weapons outlaw the production, stockpiling and use of chemical weapons, which includes chemical cluster munitions.

3.5 Although conventional or high explosive cluster munitions can function like landmines, they are not specifically covered under the 1997 *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and their Destruction* (Mine Ban Treaty or the Ottawa Treaty), which entered into force on 1 March 1999. The treaty prohibits the use of anti-personnel landmines, which it describes as those 'designed to be exploded by the presence, proximity or contact of a person'.[4] Therefore, sub-munitions that are ERW because they fail to function as designed are not covered by the treaty, whereas those that are specifically designed as anti-personnel mines have been prohibited.

3.6 Another international instrument of relevance to cluster munitions is Protocol V on Explosive Remnants of War to the 1980 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—also referred to as the Convention on Certain Conventional Weapons (CCW). This instrument addresses the use of weapons that cause excessive injury or suffering to combatants or have an indiscriminate impact on civilians. The CCW has protocols restricting the use of landmines, blinding lasers, incendiary weapons, munitions that cause injury by non-detectable fragments, as well as for remedial efforts to minimise the impact of ERW (Protocol V).

3.7 Protocol V was negotiated by the CCW Group of Government Experts and adopted on 28 November 2003. It entered into force on 12 November 2006. The protocol provides for post-conflict remedial measures to minimise the risks and effects of ERW and, therefore, broadly addresses undetonated cluster munitions. It requires states parties to remove ERW and record and transmit information regarding the use of ordnance likely to become ERW to facilitate such removal.[5] Protocol V only addresses post-conflict measures, and does not delineate any specific preventative measures or refer to particular weapon systems, such as cluster munitions. Nevertheless, Article nine of Protocol V urges states parties 'to take generic preventive measures aimed at minimising the occurrence of explosive remnants of war'. The technical annex prescribes that states producing or procuring munitions should take

4 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 3 December 1997.

5 Protocol V on Explosive Remnants of War 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, 28 November 2003.

appropriate efforts to ensure the greatest reliability possible including with respect to manufacturing, storage and training.[6]

3.8 The Medical Association for Prevention of War (Australia) was concerned that Protocol V does not adequately protect civilians from the effects of cluster munitions. It stated that:

> Protocol V sets out the responsibility to clear ERW after weapons have been used. It necessarily leaves civilians vulnerable for the period until the ERW are cleared (and given the impossibility of performing 100% clearance of any given area, indefinitely after that, albeit to a lesser extent). Clearing ERW takes years. In the meantime, civilians either abandon their land or risk death and mutilation.[7]

3.9 Most observers believe that cluster munitions are not inherently indiscriminate and can be used in a fashion consistent with IHL. In its submission to the inquiry, the Australian Red Cross suggested that the use of cluster munitions in densely civilian populated areas would violate IHL and the principles of distinction, discrimination, proportionality and feasible precautions. Also according to the Red Cross, such breaches could be considered war crimes under Article 8 (2) (b) of the Rome Statute of the International Criminal Court.[8] This article considers war crimes to include:

> Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.[9]

3.10 On the other hand, a number of submitters argued that cluster munitions are prone to 'misuse'. Human Rights Watch noted that many uses have breached IHL and some uses have been consistently indiscriminate.[10] Indeed, Austcare World Humanitarian Aid suggested that the use of cluster munitions in recent conflicts has demonstrated that the 'fundamental principles of IHL have been undermined'.[11] In Dr

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6 Protocol V on Explosive Remnants of War 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, 28 November 2003.

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

8 The Australian Red Cross, *Submission 9*, pp. 2-4.

9 The International Criminal Court, *Rome Statute of the International Criminal Court,* 16 January 2002, p. 11.

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

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

Saul's view 'the inability of existing humanitarian law to limit civilian causalities from cluster munitions 'justifies further regulation'.[12]

Efforts to strengthen international instruments

Official government diplomatic efforts

3.11 Most international discussions about the use of cluster munitions have focused on the CCW. The CCW operates on a consensus basis and the third review conference of states parties to the conference was held on 7–17 November 2006 in Geneva. There has been division within the states parties to the CCW about whether cluster munitions are sufficiently regulated by existing IHL or new specific measures are required. Discussions by the Group of Government Experts within the CCW are due to occur in June 2007 to consider the application and implementation of IHL on ERW. The focus will be on cluster munitions, including their reliability and technical and design developments, to minimise their adverse humanitarian impact.

3.12 Due to a perceived lack of progress in the CCW including concerns that the mandate of the June discussions was too limited, in November 2006, Norway commenced a process to develop a new treaty. It would ban certain—as yet undefined—types of cluster munitions that are deemed to cause serious hazards to civilians. The Oslo Conference on Cluster Munitions was held from 21–23 February 2007 and involved representatives from 49 governments, as well as various NGOs and international agencies including the UN, the International Committee of the Red Cross (ICRC) and representatives of the CMC organisations.

3.13 Forty-six of the participating countries agreed that by 2008 they would conclude a legally binding international instrument to prohibit cluster munitions that 'cause unacceptable harm to civilians', establish a framework for cooperation in cluster munition ERW removal and rehabilitation, and continue to address cluster munitions within other forums including IHL and at national levels.[13] These countries, according to ANBL, included 36 per cent of global cluster munition stockpilers and 50 per cent of the producers.[14] The next meeting towards development of the legal instrument was held in Peru from 23–25 May 2007. Australia attended the Peru meeting and engaged in international negotiations regarding this initiative.[15]

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12 *Submission* 7, paragraph 8.

13 *Declaration of the Oslo Conference on Cluster Munitions*, 23 February 2007, http://www.regjeringen.no/upload/UD/Vedlegg/Oslo%20Declaration%20(final)%2023%20February%202007.pdf (accessed 5 March 2007).

14 Australian Network to Ban Landmines and the Uniting Church of Australia Synod of Victoria and Tasmania, *Submission 8A*, p. 2.

15 As the meeting was held after this report was prepared and circulated, the meeting's findings were not considered in the preparation of this report.

3.14 The ICRC held an expert meeting on cluster munitions from 18–20 April 2007 to clarify the technical, legal, military and humanitarian aspects of the use of cluster munitions in order to inform diplomatic discussions and help develop an appropriate international response.[16] At that meeting, Germany provided a draft protocol for the CCW regarding cluster munitions to be discussed at the Peru meeting in May.[17]

3.15 Australia supported the proposed June 2007 discussions during the third review conference of states parties to the CCW in November 2006, but did not attend the Oslo Conference. It has supported efforts to impose technical and targeting restrictions on cluster munitions to ameliorate the humanitarian impact, according to the Department of Defence.[18]

Non-government and humanitarian organisation views

3.16 There is a broad consensus within the international humanitarian community about the need for additional regulation of the production and use of cluster munitions. In its submission to the inquiry, ANBL pointed out that various treaties—such as the Mine Ban Treaty—have come into force to outlaw previously legal activities, as a result of the codification of moral and ethical constraints.[19] In its submission, MAPW noted that Protocol V of the CCW required additional protections, as it relies on information from the users of cluster munitions, which is often incomplete or not provided. As noted earlier, MAPW also argued that Protocol V does not provide any protections for civilians in the period between the creation of cluster sub-munition ERW and their clearance, which often takes years. MAPW argued that a new treaty on the use of cluster munitions would be an important mechanism for stigmatising and pressuring compliance from recalcitrant states.[20]

3.17 However, there is debate, including within the CMC, about the scope of any new international instrument. Some NGOs, most notably Handicap International, have proposed a blanket ban on the use of cluster munitions, considering them to be inherently indiscriminate weapons that inevitably create a disproportionate risk for

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16 International Committee of the Red Cross, 'ICRC statement to the Third Review Conference of the Convention on Certain Conventional Weapons', 7 November 2006, *ICRC Official Statement*.

17 The German draft has not been considered for this report, as it only became available during the final stages of the report's preparation and will be the subject of ongoing diplomatic discussion before agreement is reached. However, it provides a draft definition of cluster munitions that excludes several sub-munition based weapon systems. It also seeks to immediately prohibit the use of unreliable cluster munitions, phase-out reliable area-saturation cluster munitions and mandate the replacement of the use of these weapons with alternative systems.

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

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

20 Medical Association for Prevention of War (Australia), *Submission 6A,* pp. 2-4.

civilian populations. On the other hand, most humanitarian-focused NGOs, including Human Rights Watch and the ICRC, have proposed regulating, rather than banning, the use of cluster munitions.[21] In November 2006, the UN Secretary General also effectively promoted this view. He pointed out the need for greater adherence to IHL, including cessation of the use of cluster munitions against military assets in or near civilian populated areas. He also advocated an end to stationing military assets in such areas, a freeze on the transfer of cluster munitions that are known to be inaccurate and the development of technical requirements for new weapons to enhance their reliability and reduce their adverse humanitarian impact.[22]

3.18 The debate on whether to regulate or ban cluster munitions is partly due to an acknowledgement, among some organisations, of the military utility, legality and discrimination of application of some uses of the weapons, and an anticipation of the probable greater achievability or efficacy of regulation than prohibition. The advocates of regulation focus on some or all of the following: a moratorium on the use of cluster munitions; a ban on use of the weapons in or near civilian populated areas or with high-altitude delivery; a ban on certain types of cluster munitions that are inaccurate, unreliable or not equipped with dependable self-destruct or self-neutralisation mechanisms; and a requirement for mapping and reporting cluster munition use to assist in post-conflict removal.[23]

Unilateral action by various states

3.19 While international discussions regarding cluster munitions have been ongoing, some countries have taken unilateral action to limit their involvement with cluster munitions. Many of the submissions to the inquiry cited these measures, particularly the Belgian legislation, the UK bill and the actions taken by Norway.

3.20 In June 2006, Belgium issued a ban on the transportation, export, stockpiling, trade, production and 'carrying' (use) of sub-munitions, which were defined as those designed to separate from a parent munition to fulfil their tasks. A second law was passed clarifying that for the purposes of the ban, cluster munitions and sub-munitions did not include anti-electrical, smoke-producing or illuminating projectiles. They also excluded guided anti-armour sub-munition based systems not designed for area saturation and developed to explode only on impact. The ban also required Belgium to destroy its stockpiles of cluster munitions within three years. In December 2006, the Belgian Senate adopted a bill to prohibit investments in companies associated with the

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21 Stephen Goose, 'Humanitarian consequences and international response'. 18 March 2004, Presentation to the Conference *Cluster Bombs: Effective Weapon or Humanitarian Foe*; International Committee of the Red Cross, 'Cluster munitions: ICRC calls for urgent international action', 6 November 2006, *Press Release 06/120*.

22 UN Secretary-General Kofi Annan, *Message of UN Secretary-General to Third Review Conference on Convention on Certain Conventional Weapons*, 7 November 2006.

23 Thomas Nash, 'Stopping Cluster Munitions', 2006, *Disarmament Forum*.

production, use and stockpiling of cluster munitions, and included a list of landmine and cluster munition producers.[24]

3.21 The UK is also considering legislation that would prohibit the use, production, possession, procurement or transfer of cluster munitions. The definition of cluster munitions has been refined along the lines of that used in the Belgian legislation. For the purposes of the UK bill, cluster munitions are containers that disperse multiple explosive sub-munitions excluding WMD, electronic, landmine, propaganda, pyrotechnic and precision guided sub-munitions equipped with self-destruction or self-neutralisation capabilities.[25]

3.22 On 20 March 2007, the UK announced that it would immediately unilaterally withdraw all 'dumb' cluster munitions—those without guidance systems, self-destruction or self-neutralisation capabilities—from its arsenal. This comprises 28 million sub-munitions including the air-delivered RBL bomblets and artillery launched MLRS M26 grenades. However, it does not include the Israeli-made M85 sub-munition, which is designed for area saturation but has self-destruction features and was considered to be a legitimate weapon capable of being used in conformity with IHL. The unilateral action was taken for humanitarian reasons. It followed parliamentary consideration of a bill to prohibit a wider range of cluster munitions, a previous commitment to phase out 'dumb' weapons by 2015 and support during the February Oslo Conference for a legally binding international instrument to prohibit cluster munitions that have an unacceptable impact on civilians.[26]

3.23 In early 2006, Norway announced a moratorium on the use and testing of cluster munitions while it reviewed the reliability of the munitions in its stockpile. The moratorium was extended in October 2006 pending an international agreement about the acceptability of these munitions from a humanitarian perspective, following concerns about the use of cluster munitions in Lebanon. Norway had earlier initiated a self-imposed moratorium on air-delivery of cluster munitions.

3.24 The US is retrofitting 5 000 DPICM projectiles with self-destruction capabilities and in 2001 announced a failure rate requirement of less than one percent

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24 Tom Conway, *Cluster Munition Coalition Update: Mines Action Canada*, 25 July 2006, http://www.minesactioncanada.org/home/index.cfm?fuse=Home.News&ID=213, (accessed 19 February 2007).

25 United Kingdom House of Lords, *A Bill to Make Provision for the Control of Cluster Munitions; for the Destruction of such Munitions; and for Connected Purposes*, 23 November 2006, pp. 1-2.

26 BBC News, "Britain bans 'dumb' cluster bombs", 20 March 2007, http://news.bbc.co.uk/2/hi/uk_news/6472371.stm (accessed 21 March 2007); "UK to ban 'dumb' cluster bombs – report", 21 March 2007, http://www2.irna.ir/en/news/view/menu-239/0703190858171351.htm (accessed 21 March 2007).

for procurement of new sub-munitions.[27] On 14 February 2007, four Senators introduced legislation in the US Senate that, if enacted, would prevent funds being appropriated to any Federal department or agency for the purpose of using, selling or transferring any cluster munitions unless the sub-munitions had a 99 percent or higher functioning rate. Furthermore, the munitions would only be used against clearly defined military targets and not where civilians were known to be present or in areas normally inhabited by civilians. Finally, under the proposed legislation, if such cluster munitions were used, the President would be required to submit to the Senate Committee on Foreign Relations and the House of Representatives Committee on Foreign Affairs, 'a plan…for cleaning up any such cluster munitions and sub-munitions which fail to explode and continue to pose a hazard to civilians'. The proposed legislation, however, did contain a presidential waiver that would allow the President, under specified conditions including that it is vital to protect the security of the US, to fund the use, sale or transfer of cluster munitions that had a failure rate of more than one percent.[28] The bill has been referred to the Senate Foreign Relations Committee.

3.25 There has been parliamentary discussion on cluster munitions in several other countries, including Austria, Denmark, France, Germany, New Zealand, Norway, Sweden and Switzerland. These discussions also have focused on the adverse humanitarian impact, or the need for a ban or regulation of cluster munitions.[29] In many cases the government positions are evolving, still under consideration, or have not yet been clearly articulated. However, those that have been expressed—notably by Austria, Denmark and Germany—tend to convey hesitation about supporting comprehensive bans on cluster munitions. They focus on the need for adherence to IHL in their use and emphasise the importance of only using cluster munitions with advanced technical design specifications to lower failure rates to minimise their legacy as ERW.[30]

3.26 During the Oslo Conference in February, Austria and Bosnia-Herzegovina also announced national moratoriums. Several other countries including Argentina, Belgium, Canada, Denmark, France, Germany, Portugal, Sweden and Switzerland

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27 Human Rights Watch, *Essential Elements for Reducing the Civilian Harm of Cluster Munitions: Examples of Positive Policy and Practice,* (March 2006), http://hrw.org/arms/pdfs/munitionChart.pdf (accessed 19 February 2007).

28 A Bill to limit the use, sale, and transfer of cluster munitions, S 594 IS, 110th Congress, 1st Session. http://www.fas.org/asmp/resources/110th/S594is.htm (assessed 26 March 2007).

29 Human Rights Watch, *Essential Elements for Reducing the Civilian Harm of Cluster Munitions: Examples of Positive Policy and Practice,* (March 2006), http://hrw.org/arms/pdfs/munitionChart.pdf (accessed 19 February 2007).

30 Cluster Munitions Coalition, *New Cluster Munition Coalition Bulletin*, March 2006, http://www.stopclustermunitions.org/news.asp?id=16 (accessed 23 February 2007); Danish Ministry of Defence, 'Position of the Danish Government on Cluster Munitions', 18 March 2004, *Presentation to the Conference Cluster Bombs: Effective Weapon or Humanitarian Foe*, pp. 1-3; Cluster Munitions Coalition, *Urgent: Ask German MPs to Support Moratorium*, http://www.stopclustermunitions.org/news.asp?id=36 (accessed 27 February 2007).

have withdrawn from service, or indicated they will not procure—and in some cases deploy—cluster munitions with poor failure rates or lacking self-destruction or self-neutralisation capabilities.

Summary

3.27 In this chapter, the committee considered the international instruments governing the use of cluster munitions. Despite the existence of these instruments, the use of cluster munitions continues to cause death and serious injury to civilian populations. The committee notes that although there is disagreement about the need to ban or regulate cluster munitions, there is considerable momentum regarding the need to prevent the use of designs that cause unacceptable consequences to civilians.

3.28 Parliaments in a number of countries are responding to the inadequacy of current international protocols by considering unilateral action that would better regulate their use of these weapons. The legislation proposed in the different countries varies significantly in the extent of regulation to be imposed on the development and use of cluster munitions. However, these legislative measures consistently have refined the definition of cluster munitions—to different degrees—to allow certain designs that incorporate mechanisms to ensure they have no or minimal adverse humanitarian impact.

3.29 A number of parliamentarians in Australia have also introduced legislation intended to eliminate any possibility of civilians being harmed, killed or put at risk as a result of Australian involvement with cluster munitions. In the following chapter the committee considers this proposed legislation.

Chapter 4

Provisions of the Bill

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

4.2 The bill outlines:

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

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

Definitions for the purposes of the bill

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

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1 Clause 6.

New offences under the bill

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

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

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

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

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

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

Decommissioning, destruction and removal of cluster munitions

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

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2 Clause 10.

3 Clause 11.

4 Clause13.

5 Clauses 14–15.

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

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

Summary

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

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

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

5.3 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.

5.4 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.

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

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

5.5 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 sub-munition based system.[4]

Suggested amendments

5.6 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]

5.7 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.[8]

Concerns about the bill

5.8 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

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

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

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

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

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

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

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 sub-munition based weapon systems.

5.9 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 conflicts, which would be detrimental to our national interest'.[9] 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.[10]

5.10 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 and when the sub-munitions fail to explode as intended. 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'.[11] 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.[12]

5.11 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

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

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

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

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

principles of International Humanitarian Law'.[13] 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'.[14] 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 these weapons is disingenuous. The weapons are by nature non-discriminatory. They contaminate wide areas.[15]

5.12 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.[16]

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

Committee view

5.13 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.

5.14 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

5.15 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

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

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

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

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

> massed enemy formations in areas which are clearly distinguished from civilian populations and civilian objects. [17]

5.16 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 populations, prohibition of indiscriminate and unreliable cluster munitions and destruction of stockpiles of such weapons.[18]

5.17 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

5.18 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 sub-munition 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 sub-munition based weapon system capability for use against mobile armoured vehicles. Such systems consist of a very small number of sub-munitions—probably between two and ten—guided targeting, and self-destruction or self-neutralisation capabilities. Defence has argued the trend in sub-munition weapon development is towards advanced, limited sub-munition, guided systems designed for minimal humanitarian impact.[19]

5.19 Further, Defence noted that such advanced sub-munition 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,

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

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

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

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 sub-munition 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 sub-munition 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 numbers, and it is not necessary to saturate a large area with dumb bomblets, which is the approach taken with older cluster munitions.[20]

5.20 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.[21]

5.21 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.[22]

5.22 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.[23]

5.23 Israeli Military Industries also recommended that the bill narrow its definition and prohibition to distinguish between different types of cluster munitions. In

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

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

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

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

particular, it noted that new area-saturation cluster sub-munitions 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.[24]

5.24 Not all 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 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'.[25] 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.[26]

5.25 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.

5.26 MAPW acknowledged that 'a legitimate case' could be made for the exclusion of sub-munition based weapon systems not designed for area saturation from the provisions of the bill, as they 'would be less of a humanitarian concern'.[27] 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

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

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

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

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

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.

5.27 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 sub-munitions, the mapping and subsequent removal of unexploded cluster munitions and observation of obligations under Protocol V of the CCW.[28]

Committee view

5.28 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 sub-munition based weapon systems intended to minimise humanitarian impact.

5.29 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 sub-munition, 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

5.30 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.[29] Defence noted that clauses 14 and 17 of the bill do not allow the maintenance of cluster munitions for research and training purposes and would oblige the ADF to destroy these holdings.[30] The bill would also require the Minister for

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

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

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

Defence to destroy or decommission 'all cluster munitions, container units and sub-munitions' under the control of the ADF.[31]

5.31 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.[32]

Committee view

5.32 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.

Australia's operational ability

5.33 Defence noted that Australia adheres to its obligations under IHL, so the bill would not offer additional protections against Australian involvement with cluster

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31 Clause 17.

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

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 sub-munition 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.[33]

5.34 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.[34]

5.35 Defence pointed out that the provisions of the bill could result in unforseen 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.[35]

5.36 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 of outlawed weapons (such as WMD) or conducting of illegal actions.[36] ANBL made

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

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

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

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

a similar point, noting that the ADF already collaborates with allied partners not party to the treaty prohibiting use of anti-personnel landmines.

5.37 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'.[37] 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.[38]

Committee view

5.38 The committee notes Defence's argument that the provisions of the bill could result in unforseen 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.

5.39 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

5.40 Defence also argued that the broad scope of the prohibition under the bill would compromise and restrict Australia's negotiations in international forums.[39] 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 for precision targeting, and self-neutralisation or self-destruction, and so on—have yet to be identified.[40]

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

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

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

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

5.41 According to Defence, international meetings to discuss such matters were 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.[41]

5.42 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, and 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.[42] 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

5.43 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

5.44 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.

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

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

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

ADF can effectively operate, the committee accepts that Australia must retain the capacity to acquire advanced sophisticated sub-munition 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 sub-munitions.

5.46 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.[43]

5.47 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.

5.48 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 sub-munition 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.

5.49 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 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

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

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

5.50 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

5.51 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

5.52 The committee recommends that the Department of Defence ensures that the acquisition or development of any cluster munitions or sub-munition 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

5.53 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.

Recommendation 5

5.54 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

5.55 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

5.56 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

5.57 The committee recommends that the bill not be passed.

Recommendation 9

5.58 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.

SENATOR MARISE PAYNE
CHAIR

Minority report by Labor members

Introduction

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

Humanitarian concerns

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

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

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

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

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

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

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

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

1.4 Ms Hardy also noted that:

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

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

> Farmers, in areas feared to contain cluster bombs, have not been able to irrigate or harvest their current crops and are unable to plant the winter crop, be it wheat, lentils, chickpeas or other vegetables. Next year's agriculture cycle will also be affected if, as is likely to be the case, substantial numbers of cluster bombs are not cleared until the end of 2007.[8]

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

Labor members' views

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

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

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

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

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

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

International Protections

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

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

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

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

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

1.11 Statistics contained in this report indicate that:

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

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

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

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

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

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

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

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

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

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

Labor members' view

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

Recent international developments

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

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

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

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

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

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

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

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

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

Labor members' views

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

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

Defence's concerns

The acquisition of advanced sub-munitions

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

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

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

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

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

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

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

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

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

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

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

Reliability

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

Expense of new technology

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

Verification of the reliability and accuracy of the new technology

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

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

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

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

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

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

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

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

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

Labor members' views

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

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

Training and countermeasures

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

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

Labor Members' views

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

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

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

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

Conclusion

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

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

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

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

SENATOR MARK BISHOP SENATOR JOHN HOGG

SENATOR STEVE HUTCHINS SENATOR MICHAEL FORSHAW

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.

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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]

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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.

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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 sub-munitions, 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

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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]

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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

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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

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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.

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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]

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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.

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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

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14 Human Rightrs 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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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]

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]

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]

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

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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.

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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]

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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

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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

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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/lebano14412.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.

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

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

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

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

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

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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 'suhmunition 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]

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]

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.

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

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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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.

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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.

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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 unforseen 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

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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 unforseen 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

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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

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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.

Appendix 1

Public submissions

1 Peace Organisation of Australia

2 Austcare World Humanitarian Aid

2A Austcare World Humanitarian Aid

3 Israel Military Industries Ltd (IMI)

4 United Nations Mine Action Service (UNMAS)

5 Landmine Action UK

5A Landmine Action UK

6 Medical Association for Prevention of War (Australia) and Australians for Lebanon

6A Medical Association for Prevention of War (Australia)

7 Dr Ben Saul, The University of Sydney

7A Dr Ben Saul, The University of Sydney

8 Australian Network to Ban Landmines and Uniting Church of Australia (Synod of Victoria and Tasmania)

8A Australian Network to Ban Landmines and Uniting Church of Australia (Synod of Victoria and Tasmania)

9 Australian Red Cross

10 Department of Defence

11 Mr David Thomas Bath

12 Mr Kieran Bennett

13 Mr Christopher J Flynn

14 Handicap International and the Cluster Munition Coalition (CMC)

15 Mines Action Canada

Appendix 2

Questions for the Department of Defence

1. Paragraph six of the Defence submission, relating to current international negotiations on cluster munitions notes that:

> Australia is presently involved in negotiations internationally on cluster munitions, including within the Conventional Weapons Convention. It is not possible at this stage to predict the likely outcomes of these negotiations and if domestic legislation is enacted, our negotiating position in international forums may be prematurely restricted and/or compromised. We also note that none of Australia's current obligations under the Conventional Weapons Convention and its five Protocols have required domestic implementing legislation.

The international humanitarian law pertaining to use of cluster munitions, the adverse humanitarian effect of these weapons, the international positions of various countries such as in the Conventional Weapons Convention and the positions of non-government humanitarian organisations are all well known. Noting that although domestic legislation may not be necessary and that other countries have undertaken unilateral measures:

- Could the bill be amended to conform to Australia's international position?
- Is the Australian Government's position in international fora firmly established or is it still evolving?

2. Paragraphs 16-18 delineate the ADF's ambitions to acquire an advanced submunition weapon system, noting:

> The ADF does not presently use or produce cluster munitions. Defence is, however, in the process of acquiring an advanced sub-munition capability for use against mobile armoured vehicles. Such advanced sub-munitions, when properly used, have a lower risk of adverse humanitarian effects than older generation cluster munitions, but would potentially be captured by the terms of the proposed Cluster Munitions (Prohibition) Bill. The Bill defines 'cluster munition' very broadly in Section 6(1) to include all munitions which deploy 'one or more sub-munitions'. The passage of this Bill would, therefore, prevent the ADF from obtaining an advanced sub-munition capability.
>
> Older generation cluster munitions technologies are unreliable, lack autonomous target detection, and usually include a large number of small, low yield, "dumb" bomblets. Such cluster munitions, by virtue of their unreliability, also have the potential to become Explosive Remnants of War.
>
> In contrast, modern, advanced sub-munitions, are more discriminating because they are designed to be effective against specific targets, such as armoured vehicles, while minimising anti-personnel effects. They also have

> small numbers of sub-munitions – usually less than ten, and sometimes as few as two. In addition, each sub-munition possesses a capacity for autonomous target detection and will self-destruct or self-neutralise (not detonate) if a target is not found. Advanced smart sub-munitions are more reliable than older cluster munitions and are an efficient method 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. Their self-destructing and self-neutralising capability also means that they pose less of a threat to civilians as an explosive remnant of war.

These paragraphs note that Defence is in the process of acquiring an 'advanced sub-munition capability' and then proceed to describe the generic attributes of these kinds of weapons.

- 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?
- If so, which attributes?
- What such criteria is used in the acquisition of submunition based weapon systems, noting that Defence may also pursue new, similar emergent technologies?

3. Paragraphs 23 and 24 denote Australia's requirement to comply with international humanitarian law and the elements of the bill that would prohibit engagement with foreign forces in the planning for use of cluster munitions. These indicate:

> All ADF personnel are required to adhere to Australia's international obligations and domestic law including the principles of International Humanitarian Law, with particular regard to special consideration of the principle of proportionality. ADF personnel would also have to comply with Australia's obligations as a State Party to Protocol V of the Conventional Weapons Convention relating to minimising the risks and effects posed by explosive remnants of war.
>
> Sections 11 and 12 of the Bill prohibit a member of the ADF intentionally engaging 'in military preparations to assist a member of the defence force of another country to use cluster munitions, container units or sub-munitions'. This would create excessive operational difficulties.

- 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?

4. Paragraphs 26 and 27 note the potential impact of exclusion of the ADF from command situations due to this constraint on involvement with cluster munitions. These sections state:

> When ADF commanders and personnel are integrated into coalition task forces, they would be likely to be employed in planning and conducting operations, including offensive support. In these instances, the ADF officers may need to call on coalition support in circumstances in which the coalition unit that responds determines the types of weapons to be used. This may include cluster munitions, as defined by the proposed Bill. If the Bill were to be adopted, ADF personnel would be either unable to call in appropriate support or exposed to prosecution under the Bill.
>
> The Bill would compromise the ADF's ability to contribute personnel to Coalition Headquarters where the use of cluster munitions and advanced sub-munitions may be incidentally planned. Should this Bill become law it would add significantly to the scope of restrictions and inhibitions on Australian personnel and reduce the effectiveness of their contribution to coalition headquarters.

- 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?
- Have or are Australians routinely involved in military preparations for cluster munition use with allied partners?
- If Australian personnel were in command situations and unable to call in cluster munition support, what would be the effect on the troops in these situations and would they be at greater risk?

5. Paragraph 31 notes that the ADF needs to develop countermeasures to adversaries' use of various weapon systems including cluster munitions. It indicates:

> Were Australia to be involved in a conflict with another State that had cluster munitions in its inventory, the ADF would need countermeasures against those munitions. In fact, Defence currently holds some inert cluster bombs and inert cluster munitions for the purposes of training explosive ordnance specialists in the identification and disposal of such ordnance. While section 14 of the Bill allows work to be done for rendering cluster munitions safe, it does not permit the acquisition of cluster munitions for research or training purposes, and section 17 of the Bill requires all cluster munitions held by Defence to be destroyed. The Bill makes no exception for using, producing or stockpiling cluster munitions purely for the purpose of developing such countermeasures. Part 3 does not address this concern.

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

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.