



6 February 2007

Senate Standing Committee on Foreign Affairs, Defence and Trade

Dr Kathleen Dermody
Committee Secretary
Senate Foreign Affairs, Defence and Trade Committee
Department of the Senate
Parliament House
Canberra ACT 2600

Dear Dr Dermody,

Please find herein Austcare's submission to the Committee's inquiry into the Cluster Munitions (Prohibition) Bill 2006.

I am grateful for the opportunity to be able to present this submission to the Senate on a matter of such concern to Austcare. As a global humanitarian aid organisation with an active Mine Action Program, Austcare has a real interest in all efforts that aim to place restrictions or prohibitions on weapons of war that indiscriminately endanger the life and well-being of civilians in conflict zones. As such, we are in support of this Bill.

We look forward to the outcome of the Committee's inquiry.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Michael G. Smith".

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**SUBMISSION
TO THE SENATE STANDING COMMITTEE ON FOREIGN
AFFAIRS, DEFENCE AND TRADE**

TO THE CLUSTER MUNITIONS (PROHIBITION) BILL 2006

6 February 2007

Support for a Bill for an Act to prohibit the use, possession and manufacture of cluster munitions, and for related purposes,

otherwise known as the *Cluster Munitions (Prohibition) Bill 2006*

Thank you for the opportunity to make this submission. Austcare supports all efforts by Parliament to develop or reinforce legal mechanisms to restrict or prohibit the indiscriminate use of conventional weapons and thus minimise the humanitarian impact on civilian populations. Austcare believes that the *Cluster Munitions (Prohibition) Bill 2006* addresses many of the regulatory problems that relate to cluster munitions¹. To pass this Bill would be a significant step towards the ultimate goal of the universal prohibition of the production, stockpiling and use of cluster munitions.

In this submission Austcare addresses the need for legislation dealing with cluster munitions. In doing so, Austcare draws on its experience in international humanitarian Mine Action and on relevant data regarding conventional weapons that produce explosive remnants of war (ERW)².

Key points:

- From the Vietnam War to the recent conflict in Lebanon, the use of cluster munitions has resulted in immediate and longer-term civilian death and suffering and constrained development, particularly poverty reduction efforts;
- The use of cluster munitions has consistently contradicted the principles of International Humanitarian Law (IHL);
- The production, use, and stockpiling of cluster munitions continues globally at an alarming rate;
- Austcare recognises that Australia is not a producer, stockpiler, or user of cluster munitions, and supports Australia's ongoing efforts to address the problems posed by landmines and other ERW which have failed to explode or which have been abandoned;
- The Convention on Certain Conventional Weapons (CCW) is inadequate in preventing the unnecessary harm to civilians that results from the use of cluster munitions. Specific legislation relating to cluster munitions is required to address this problem;
- Austcare supports the purpose of the Bill as stipulated in Part 1, Section 3(1), *'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'*;

¹ Cluster munitions are large conventional weapons of war that open in mid-air and release dozens or hundreds of submunitions, or bomblets, over wide areas. They can be deployed from the air by fighters, bombers, helicopters, and others, and from the ground they can be shot out of artillery, rockets, and missile systems.

² Austcare defines explosive remnants of war as unexploded ordnance (UXO), abandoned explosive ordnance (AEO), and landmines.

- There is a need to prevent any Australian Defence Force member or members from assisting or supporting any other force in the use of cluster munitions. Austcare supports Pt.1, S 3(2) of the Bill: *'In particular, this Act prevents members of the Australian Defence Force, whether serving in Australia or outside Australia, and whether serving with the Australian Defence Force or any other defence force, from deploying cluster munitions'*. This could however be strengthened by prohibiting the 'production, transfer, stockpiling and use of the weapon', rather than prohibiting only the 'use'.
- The Bill is an important but minimalist step. Adequate legislation relating to cluster munitions must address clearing unexploded submunitions, education in relation to cluster munitions, and decommissioning. As stipulated in Pt.3, this Bill does not.

The Need for the Legislation

There is currently no body of international law that specifically regulates or prohibits the use of cluster munitions. However, it is Austcare's view that IHL principles of military necessity, distinction, discrimination, proportionality, precautions taken before and during attack, and superfluous injury and unnecessary suffering, are relevant to the use of cluster munitions³. These principles must be considered in the use of cluster munitions. Given the proven impact of cluster munitions on civilians, as summarised in this submission, it is Austcare's view that the articles of IHL derived from these principles have not been effectively applied. Given the consistent failure to apply IHL there are compelling reasons for considering that the principles of IHL do not effectively protect civilians from the use of cluster munitions.

IHL and the Use of Cluster Munitions

Austcare is aware that the Australian Government accepts certain principles of IHL in relation to cluster munitions, as has been reiterated by the Department of Defence: "...the targeting of cluster munitions, as with all munitions, is governed by the international humanitarian law principles of proportionality, distinction and military necessity which we accept"⁴.

• Military Necessity

At the core of customary IHL is the principle of military necessity, which provides part of the legal justification for the use of force necessary to achieve the military objective⁵, and implies the surrender of an enemy at the earliest possible time with the least possible outflow of resources and personnel. This principle should be considered in conjunction with other principles of IHL, and ensure other principles are not violated.

Austcare contends that the only acceptable justification for an attack, including an attack in which cluster munitions are used, is if it is necessary to achieve the military objective, provided their use is not inconsistent with other principles of

³ A major part of IHL is contained in the four Geneva Conventions of 1949 and its two Additional Protocols of 1977.

⁴ Speech delivered by the Parliamentary Secretary to the Minister for Defence, Fran Bailey, on behalf of Senator Hill, National Conference of the Defence Legal Service, RAAF Williams, Victoria, 28 January 2004.

⁵ A widely-accepted definition of *military objective* can be found in Chapter 3, Article 52(2) of Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977: *'Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage'*.

IHL. Specifically, the humanitarian implications of a cluster bomb attack should be in proportion to the actual anticipated military advantage.

Distinction

Also at the core of IHL is the principle of distinction⁶. This principle prohibits directing an attack, including with cluster munitions, against civilian populations or individual civilians. The Treaty of the Hague IV, Article 25 extends this principle, stipulating *'the attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited.'*

• Discrimination

The principle of discrimination is particularly relevant in regards to the use of cluster munitions. As specified in Additional Protocol I, Art. 51 (4) and (5) of the Geneva Conventions, indiscriminate attacks are prohibited. Art. 51 para 5(a) must be considered:

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.

This principle calls into question the legality of use of cluster munitions. The large number and wide dispersal of bomblets contained within cluster munitions deems its effects near impossible to contain.

• Proportionality

Although interpreted differently by various armed forces, the principle of proportionality is generally agreed upon to signify that the gained military advantage of an attack must be greater than the foreseeable civilian damage at the time of the attack. In other words, the proportionality between the military necessity of an attack, and the humanitarian consequences. Austcare regards this principle to be of particular relevance to the use of cluster munitions, given their high failure rate, their wide dispersal of often large numbers of submunitions, and the humanitarian impact resultant from unexploded ordnance.

Humanitarian Effects of Cluster Munitions

The use of cluster munitions in recent conflicts has demonstrated that these fundamental principles of IHL have been undermined. The threat posed by cluster munitions to civilians has been two-fold. First, submunitions, or "bomblets", dispersed by the munition often stray from the military target(s) and cause death and injury to civilians. Used in military operations, cluster munitions have resulted in the immediate and indiscriminate death and harm of civilians when used near populated areas; their effects have proved impossible to contain. Second, the longstanding effects of ERW produced by cluster munitions when they fail to function and remain unexploded⁷ have threatened the lives and livelihoods of civilian communities for decades, or until such time as they have

⁶ The principle of distinction can also be found in Additional Protocol I, Art.48, 51(2), 52(2) to the Geneva Conventions; it is prohibited that individual civilians and civilian populations be made the object of attack.

⁷ "The failure of a large number of submunitions to function as designed is an inherent and wholly predictable aspect of use of cluster munitions. Militaries have routinely reported that various types of submunitions have failure rates of 5 to 15 percent under test conditions, and have acknowledged that the failure rates can be exacerbated by foreseeable environmental factors", Steve Goose, Director of the Human Rights Watch Arms Division, Presentation to the Meeting of Military and Technical Experts at the 15th Session of the CCW GGE, August 2006.

been removed and destroyed. This situation has, and continues to be, experienced by civilians in post-conflict situations, including in the Asia-Pacific region which is of particular concern to the Australian Government.

Many countries share the tragic legacy of cluster munitions, including Afghanistan, Albania, Bosnia-Herzegovina, Cambodia, Chad, Croatia, Eritrea, Ethiopia, Iraq, Kuwait, Lao PDR, Lebanon, Pakistan, Russia, Saudi Arabia, Serbia-Montenegro, Sierra Leone, Sudan, Syria, Tajikistan, and Vietnam.

For example, as a result of aerial bombardments between 1964 and 1975, the US dropped an estimated one million cluster bombs on Lao PDR, equating to approximately 80 million submunitions. In a situation of guerrilla warfare, as was the nature of that conflict, the differentiation of military and civilian was impossible to comprehend by aerial bombardment. The use of cluster munitions destroyed entire civilian communities throughout Lao PDR. Moreover, the country and its people have suffered the long-term socio-economic impact of these munitions. Over 40 percent of the 11,928 casualties from ERW recorded between 1973 and 1997 have been attributed to cluster bomb submunitions.

Afghanistan continues to suffer from cluster munitions used during both the Soviet occupation over 1979-1991 and during US-led operations in 2001-2002. Between October 2001 and March 2002, approximately 1,228 cluster bombs, containing a total of 248,056 bomblets, were dropped in Afghanistan⁸. The International Committee of the Red Cross reported 127 civilian casualties from cluster bombs, including 29 deaths; as of November 2002, 87 of the victims were under the age of 18.⁹ However, "[t]he ICRC list does not claim to be complete. It comes from hospital data and does not include people who died on the spot or who were only injured slightly...Deaths are therefore underreported".¹⁰

During the three weeks from 20 March to 9 April 2003, approximately 13,000 cluster munitions were dropped in Iraq. This equated to an estimated 1.8 to 2 million bomblets.¹¹ Although the failure rate of cluster munitions varies, a conservative 5 percent 'dud' rate results in close to 90,000 unexploded bomblets. The post-strike situation in al-Hilla, central Iraq, demonstrates the dangers of unexploded bomblets; between 1-11 April 2003, the General Teaching Hospital recorded 221 civilian injuries, mostly from duds, and 31 injuries from unexploded bomblets between May and August.¹² "Explosive duds [from cluster munitions] have endangered al-Hilla's inhabitants since moments after the battle began on March 31 [2003]. Ambulances could not enter one neighbourhood to evacuate wounded civilians because their drivers feared running over a dud in the dark; the next morning hundreds of injured civilians were taken to the hospital".¹³

More recently, southern Lebanon suffered high-levels of cluster bomb contamination since fighting ceased in August 2006. According to the Mine Action Coordination Centre, South Lebanon (MACC SL), 839 cluster bomb strike locations were identified as at 7 January 2007, posing an immediate threat to civilian returnees and those involved in the reconstruction and redevelopment of the region.¹⁴ To date, over 78,738 cluster bomblets have been destroyed, yet hundreds of thousands remain.¹⁵ Between 14 August 2006 and 7 January 2007,

⁸ Human Rights Watch (HRW), *Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan*, Vol.14, No.7(G), December 2002.

⁹ *Ibid.*, 'VI. After-effects'.

¹⁰ *Ibid.*, 'VI. After-effects'.

¹¹ HRW, *Global Overview of Cluster Munitions Use, Production, Stockpiling, and Transfer*, March 2006.

¹² HRW, *Off Target: The Conduct of the War and Civilian Casualties in Iraq*, December 2003.

¹³ *Ibid.*, December 2003.

¹⁴ Mine Action Coordination Centre South Lebanon (MACC SL), 7 January 2007.

¹⁵ United Nations Mine Action Service (UNMAS), Lebanon update, 2 January 2006.

there had been 27 reported fatalities and 179 reported injuries from unexploded ordnance (UXO) in southern Lebanon, 19 of those killed and 160 of those injured were civilians¹⁶. All the deaths and all but five of the injuries were the result of cluster munitions¹⁷.

The Threat of Proliferation

There is an urgent need to ban the production and stockpiling of cluster munitions as a means of lowering usage rates. 34 countries are known to have produced over 200 types of cluster munitions, and 73 countries are known to currently stockpile cluster munitions¹⁸. Prohibiting production and stockpiling of cluster munitions is a vital step in the overall goal of minimising the humanitarian impact of this deadly weapon.

Australian Government Efforts

Austcare recognises that Australia is not a producer, stockpiler, or user of cluster munitions. Austcare also supports the ongoing efforts of the Australian Government to address the problems posed by landmines and other ERW which have failed to explode or which have been abandoned. These efforts have recently been exemplified by the Australian Government's ratification of Protocol V on ERW to the CCW on 29 December 2006, as well as by Australia's longstanding commitment to universalisation of the 1997 Anti-Personnel Mine-Ban Convention. Yet given the ongoing use of cluster munitions by coalition forces, and the clear evidence in support of the devastating impact of such munitions on the civilian population, there is a need for specific regulations on cluster munitions in both domestic and international law.

Austcare contends that the adoption of the *Cluster Munitions (Prohibition) Bill 2006* is an essential step in addressing and preventing the problem of cluster munitions. Australia has the opportunity to continue to take a leading international role in such efforts and to ensure that Australian forces do not participate in the production, transfer, stockpiling or use of cluster munitions. Austcare proposes that a clause that bans the production, transfer, stockpiling or use of cluster munitions is included in the Bill in Pt.2 Art.11 to strengthen the Bill.

It is Austcare's position that:

First, the core justification for the Bill is not based on assumption. There is clear evidence in support of the devastating humanitarian effects of cluster munitions on civilian communities, both during and after conflict. As such, Austcare supports the purpose of the Bill as stipulated in Pt.1, S 3(1), *'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'*.

Second, there is a need to prevent any Australian Defence Force member or members from assisting or supporting, in any way whatsoever, any other force, be it a State or Non-State Actor, in the use of cluster munitions. Austcare, therefore, is in favour of Pt.1, S 3(2) of the Bill:

'In particular, this Act prevents members of the Australian Defence Force, whether serving in Australia or outside Australia, and whether serving with the Australian Defence Force or any other defence force, from deploying cluster munitions.'

¹⁶ MACC SL, 7 January 2007.

¹⁷ UNMAS, Lebanon update, 2 January 2006.

¹⁸ HRW, 'Global Overview of Cluster Munitions Use, Production, Stockpiling, and Transfer, March 2006.

Austcare also finds the corresponding Pt.2, S 10(d), 11-13 as essential to the Bill. These sections could however be strengthened by prohibiting the “production, transfer, stockpiling and use” of the weapon, rather than prohibiting the “use” of the weapon.

Third, Austcare notes that the offences set out in the Bill do not apply in relation to the clearing of unexploded submunitions, education in relation to cluster munitions, or decommissioning, as stipulated in Pt.3, 14-16 of the Bill. These components are essential to minimising the humanitarian impact of cluster munitions and other ERW on civilians in conflict zones, as commonly understood to be contained within the five pillars of Mine Action (humanitarian demining, mine risk education, victim assistance, advocacy, and stockpile destruction). Austcare understands that for the purpose of the Bill for an Act to prohibit the use, possession and manufacture of cluster munitions, and for related purposes, the Offences as set out in Pt.2, S 10 are contextually sufficient. However, adequate legislation relating to cluster munitions must address these issues.

In sum, the devastating immediate and longer-term humanitarian impacts of cluster munitions on civilians is irrefutable, and lays sufficient ground for the formulation of legislation to prohibit the use, production, and stockpiling of cluster munitions. The adoption of the *Cluster Munitions (Prohibition) Bill 2006* is an essential step in minimising the humanitarian impact of cluster munitions on civilians in conflict zones. Austcare urges Australian Government Parliamentarians to take an immediate stance against the problem of cluster munitions, and pass the *Cluster Munitions (Prohibition) Bill 2006*.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Michael G. Smith". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Michael G. Smith AO
Chief Executive Officer
Major General (Rtd)