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March 15, 2007

Dr Kathleen Dermody
Secretary
Senate Standing Committee on Foreign Affairs, Defence and Trade
Parliament House
Canberra.
Fax 02 6277 5818

Dear Dr Dermody,

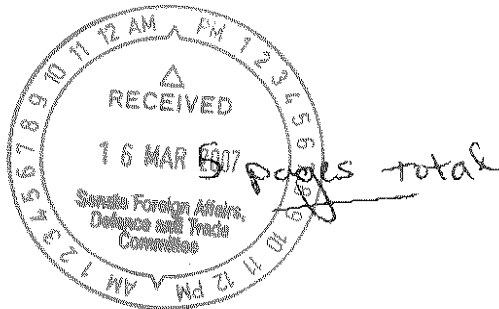
Thank you for inviting MAPW (Australia) to respond to the submission made by the Department of Defence to the Committee's inquiry into the Cluster Munitions (Prohibition) Bill 2006. We offer the enclosed comments.

Yours sincerely



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Immediate Past President
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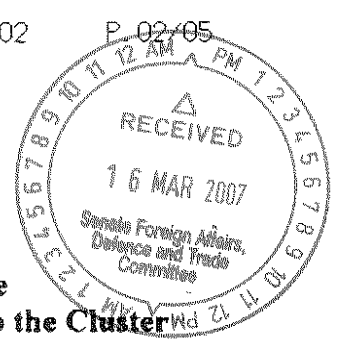
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Medical Association for Prevention of War (Australia)

Comments on the submission of the Department of Defence to the Senate Standing Committee on Foreign Affairs, Defence and Trade inquiry into the Cluster Munitions (Prohibition) Bill 2006

(Defence Department comments italicised)

Background

"The Australian Government shares domestic and international concerns about the humanitarian hazards associated with the use of some cluster munitions, and, as this submission indicates, is working actively to ameliorate these effects.."

It is important at the outset in considering the issue of cluster munitions to understand the reason for grave concern at their use. The above statement does not in any sense convey that concern. It is estimated by Handicap International that 98% of the victims of cluster munitions are civilians. (This figure was derived from a study in 24 countries contaminated by cluster bombs, published in 2006¹.) At least 27 % of them are children. In many countries the percentage of victims who are children is much higher, sometimes 50-70%. This is not a problem that we can attribute just to "some" cluster munitions. The humanitarian problem reflects the nature of cluster munitions as a non-discriminatory class of weapon.

"At the same time, we need to ensure that Australia's security interests, and our ability to work with security partners, are not compromised."

While the security of Australians is a matter of great importance to all of us, many Australians would regard our security as depending more on factors of far broader implications than on access to a particular class of weapon, especially a weapon whose victims are overwhelmingly civilians. Indeed, many would believe that the greatest risk to Australians now derives not from any technical deficiency in our weaponry but from our cooperation with the illegal and profoundly destabilising actions of our security partners. MAPW would argue strongly that if our security partners choose to use weapons that violate the International Humanitarian Law (IHL) obligation to avoid civilian harm, then it is Australia's obligation, both legally and morally, to refuse to cooperate in the use of such weapons.

"While cluster munitions are not illegal per se under any arms control or International Humanitarian Law instrument.....some cluster munitions potentially pose humanitarian hazards."

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-discriminating. They contaminate wide areas. The Department in paragraph 9 refers to the possibility of "preventing cluster munitions from being used near concentrations of civilians". On this overcrowded planet, it is difficult to imagine a location that is both of military significance and also absolutely devoid of adjacent civilian populations or any agricultural or other purpose.

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. Thomas Nash, of

¹ Cluster bomb victims are 98% civilian, 24-state study finds. *The Guardian Weekly*, 10-16 Nov 2006

the Cluster Munition Coalition, writes of Handicap International's stance in favour of a total ban on cluster munitions, and states that the organisation's view "stems not from IHL but from the experience of its staff working in areas affected by cluster munitions"². In other words, the organization is working not to fulfil the letter of the law but to protect civilians from inhumane weapons.

The protection of civilians must surely be the goal of the Australian parliament as it considers this important issue. Nash cites also the call for a moratorium on the use of cluster munitions made in 2003 by several UN agencies (the UN Children's Fund, the UN Mine Action Service, the UN Development Program and the Office for the Coordination of Humanitarian Affairs). Again, the primary concern of these agencies is the practice rather than the theory of protecting civilians. They see the end results of what actually happens, not what we would like to happen.

International Negotiations on Cluster Munitions

"Australia is presently involved in negotiations internationally on cluster munitions, including within the CCW.....If domestic legislation is enacted, our negotiating position in international forums may be prematurely restricted and/or compromised."

The latter is an extraordinary and alarmist statement. It is not supported by any 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.

Protocol V and Explosive Remnants of War (ERW)

The apparent faith placed in Protocol V to protect civilians from the effects of cluster munitions indicates further failure to fully understand the nature of the cluster munition problem. 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.

This problem was illustrated to the delegation of members of MAPW and Australians for Lebanon during their visit to Lebanon in December 2006. Although the cluster bomb clearance program there was proceeding much faster than it has in many other situations, still villagers (many of them children) and farmers were being mutilated or killed by these weapons at an average rate of 2-3 per week (in a small country with a population of under 4 million). If the farmers do not tend their olive and other crops they have no income.

Further, the example of Lebanon's contamination with cluster munitions illustrates starkly the difficulty of relying on adversaries to transmit information on the location of ERW to facilitate post-conflict clearance. Mr Chris Clark, of the UN Mine Action Service in Tyre, Lebanon, emphasised to us that information provided by the Israeli Defence Force (IDF) on

² Nash T. Stopping cluster munitions. *UN Institute for Disarmament Research (UNIDIR) paper.*
http://www.unidir.org/bdd/fiche-article.php?ref_article=2532

its use of cluster munitions in Lebanon in 2006 was grossly inadequate. While maps had been provided, they lacked sufficient detail to expedite the cluster bomb clearance. The IDF has consistently refused to supply the requested "strike data" that are needed to most efficiently clear the weapons. Thus while the provision of data to clear ERW is the ideal, what actually happens in practice can be very different.

Capability Considerations

The Defence Department's advocacy of more modern cluster munitions is reminiscent of the "technological fix" so often sought in order to reduce the human cost of warfare. However as weapons are supposedly rendered more accurate, unfortunately we do not see a commensurate reduction in the civilian cost of warfare. Technological advances, while possibly offering some benefit in terms of civilian protection in some situations, cannot necessarily be relied on to deliver this result, for a number of reasons.

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 also. For example, 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.) MAPW understands that the UN Mine Action Coordination Centre in South Lebanon is collecting data on the failure rate of such self-destruct mechanisms, which will be of interest when it is completed. 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. It should be noted that these pose a risk not only to civilians but possibly also to friendly troops.

It is important to remember also that technologically advanced weapons are almost invariably more expensive than older weapons and this limits their use greatly. For example, China and Russia have indicated that they would not replace all their sub-munitions with more expensive weapons. The US also permits use of older, less "reliable" stock. In a chilling example, again from the Israeli use of cluster munitions in Lebanon in 2006, 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.³

One could argue that nations such as these would be unlikely to abandon their stocks of cluster bombs in any event, even if a global ban were instituted. While there may be *some* truth in that argument, its validity is limited. The purpose of a global ban is to stigmatise these weapons and to set a new norm of civilised behaviour, so that even their possession, let alone their use, carries a political cost. No nation wants to be seen as a pariah state that uses inhumane weapons that most of the world has abandoned. Once a ban has been negotiated, pressure can thus be applied to all nations to take part.

³ Rapoport M. Israel opted for cheaper, unsafe cluster bombs in Lebanon war. *Haaretz*, 14 Nov 2006

As with all movements for a much-needed change of direction, be it the reduction of greenhouse gases or the abolition of landmines as but two of many examples, those in the most powerful positions or with a vested interest initially resist change. As pressure mounts, change is harder to resist. Already the Mine Ban Treaty that outlawed landmines has greatly reduced the civilian impact of these terrible weapons.

In relation to cluster munitions that are said to contain only two sub-munitions, 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 interpretations.

Summary

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 moulded 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. As Nash has pointed out, regulations can readily be overlooked in the heat of combat, and compliance difficult to verify, whereas violations of a ban would be much more clear-cut and recognisable.

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 must 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?

And the important question for Australian parliamentarians is this: How can Australia best promote an end to the civilian devastation currently wrought by cluster munitions? MAPW believes that this is not through further technologies that may or may not deliver the promised protection for civilians, but through a ban on this class of weapon. (As noted above, a possible exception for weapons that deliver a "cluster" of only two sub-munitions could be considered, but this possible exception should not be used to put an end to the Cluster Munitions (Prohibition) Bill. The bill is too important to be abandoned on the basis of a sub-type of this weapon that forms a very small, if not negligible, fraction of current global stockpiles.)

MAPW believes that any possible military advantage obtained for Australia by using, or cooperating in the use of, weapons that cause untold human suffering is outweighed by our responsibility to do all that is possible to end the scourge of cluster munitions. The Cluster Munitions (Prohibition) Bill is a good step towards that goal.