

16 March 2007

Dr Kathleen Dermody
The Secretary
Senate Standing Committee on Foreign Affairs, Defence and Trade
Parliament House
Canberra, ACT, 2600

Submission to Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the Cluster Munitions (Prohibition) Bill 2006

The Australian Network to Ban Landmines (ANBL) and the Synod of Victoria and Tasmania, Uniting Church in Australia, welcome this opportunity to make a subsequent submission on the *Cluster Munitions (Prohibition) Bill 2006* in response to the submission by the Department of Defence dated 27 February 2007.

We acknowledge that within the Department of Defence submission is a shared concern with regard to the humanitarian impact of some cluster munitions.

1. The Legality of Cluster Munitions

The Department is correct in its assertion that cluster munitions are not illegal, *per se*, under any arms control or International Humanitarian Law (IHL) instrument. This had also been the situation with regard to anti-personnel landmines prior to the development of the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*. Similar arguments were advanced prior to the development of the Convention, that anti-personnel landmines were not illegal, *per se*, and that it was only as a result of inappropriate use that they may have subsequently breached the provisions 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.

It remains the view of the ANBL and the Synod of Victoria and Tasmania that most current cluster munitions, by their design, will almost always violate the requirements of *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977*. It is our view that the Articles violated are 51 and 57.

Attempts to survey governments with regard to their understanding of IHL has found that they have a variety of understanding as to how the above Articles would apply to the use of cluster munitions. Thus, as stated in the original submission, there are significant grounds for concern about the adequacy of the existing rules and principles of IHL as basis for substantially reducing civilian casualties and suffering inflicted by cluster munitions.¹

¹ Brian Rappert and Richard Moyes, 'Failure to Protect: A case for the prohibition of cluster munitions', Landmine Action, London, August 2006, pp. 19-20.

2. International Negotiations

Subsequent to our original submission, a meeting of 49 governments has taken place in Oslo on 22 – 23 February. The meeting resulted in 46 of the countries present signing up to a declaration that states that they commit themselves 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.*

The countries that signed up to the declaration were:

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|---------------------------|-------------------|--------------------|
| 1. Afghanistan | 16. France | 32. Mexico |
| 2. Angola | 17. Germany | 33. Mozambique |
| 3. Argentina | 18. Guatemala | 34. Netherlands |
| 4. Austria | 19. Holy See | 35. New Zealand |
| 5. Belgium | 20. Hungary | 36. Norway |
| 6. Bosnia and Herzegovina | 21. Iceland | 37. Peru |
| 7. Canada | 22. Indonesia | 38. Portugal |
| 8. Chile | 23. Ireland | 39. Serbia |
| 9. Columbia | 24. Italy | 40. Slovakia |
| 10. Costa Rica | 25. Jordan | 41. Slovenia |
| 11. Croatia | 26. Latvia | 42. South Africa |
| 12. Czech Republic | 27. Lebanon | 43. Spain |
| 13. Denmark | 28. Liechtenstein | 44. Sweden |
| 14. Egypt | 29. Lithuania | 45. Switzerland |
| 15. Finland | 30. Luxembourg | 46. United Kingdom |
| | 31. Malta | |

Of these countries 27 stockpile cluster munitions (representing 36% of all states stockpiling cluster munitions), 17 produced cluster munitions (representing 50% of all producing countries), six once used cluster munitions, six are countries affected by cluster munitions and seven are not party to the *UN 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* (CCW).

Those that are countries that have produced cluster munitions are:

- | | | |
|-------------------------|-----------------|--------------------|
| 1. Argentina | 7. France | 13. South Africa |
| 2. Belgium | 8. Germany | 14. Spain |
| 3. Bosnia and Herzovina | 9. Italy | 15. Sweden |
| 4. Canada | 10. Netherlands | 16. Switzerland |
| 5. Chile | 11. Serbia | 17. United Kingdom |
| 6. Egypt | 12. Slovakia | |

Subsequent to the meeting in February, Cambodia has declared that it will also join the process towards a ban on cluster munitions that cause unacceptable harm to civilians.

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.

Thus in response to the Department of Defence argument that domestic legislation would prematurely restrict and/or compromise Australia's negotiating position, it would appear to us that Australia is missing significant international opportunities to be involved in negotiations around addressing the humanitarian impacts of cluster munitions.

Given that the vast majority of states that are committed to the declaration from the Oslo meeting are members of the CCW, they appear to hold the view that their stated commitment to a ban on cluster munitions that cause unacceptable harm to civilians is not detrimental to their negotiating position in the CCW on cluster munitions.

Further, within the CCW, it would be our view that the failure of states to have firmly committed positions on Mines Other Than Anti-Personnel Mines (MOTAPM), in order to leave their position open to negotiation, has resulted in no meaningful development of a new Protocol on the humanitarian impacts of MOTAPM despite more than three years of negotiations. In fact a number of states are concerned that negotiations on a new Protocol to deal with MOTAPM could lead to an instrument weaker than the existing Amended Protocol II (*Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 may 1996*).

3. Advanced Cluster Munitions

The Department of defence submission states that the Department is in the process of acquiring an advanced submunition capability for use against mobile armoured vehicles.

As noted in our original submission there is a new generation of cluster munitions that have emerged that are primarily designed to sense and destroy armoured vehicles without creating antipersonnel effects. Advanced sensors, autonomous guidance packages, and the ability to loiter above a target area are the new features of these advanced submunitions. Instead of several hundred submunitions these systems often carry less than ten (sometimes only two) advanced submunitions. If the submunition is unable to identify, characterise and engage a target, it is typically equipped with a self-destruct or self-neutralising capability.² We are not aware of any evidence that these advanced submunitions have been used in situations where they have generated humanitarian problems. Cost of the submunitions probably restrains their widespread use, in preference to cluster munitions that disperse hundreds of cheap submunitions.

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.

² Human Rights Watch, 'A Global Overview of Explosive Submunitions', May 2002, 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. 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.

4. Operational Issues

It is the view of the ANBL and the Synod of Victoria and Tasmania that the operational issues related to ADF interoperability with forces of allied countries that arise from the *Cluster Munitions (Prohibition) Bill 2006* in the Department of Defence submission are overstated.

We note that Australia is a strongly committed part to the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*. Article 1 (c) of the Convention states that:

Each State Party undertakes never under any circumstances to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

We note that ADF personnel appear to be able to operate within the provisions of the Convention without significant interoperability issues arising with forces of allied countries who are not parties to the Convention themselves.

5. Countermeasures

The ANBL and the Synod of Victoria and Tasmania are not opposed to amendments to the *Cluster Munitions (Prohibition) Bill 2006* that would allow the ADF to acquire, use and maintain a very small stockpile cluster munitions purely for the purposes of developing countermeasures against such munitions and for training in rendering cluster munitions safe. We see no reason allow for the ADF to produce cluster munitions.

6. Recommendations

The Australian Network to Ban Landmines and the Synod of Victoria and Tasmania recommend that the Australian Parliament adopt the *Cluster Munitions (Prohibition) Bill 2006* into law with the amendments outlined above.

The organisations also believe that the Australian Government should seek to play a constructive role in the process that has been initiated by the Government of Norway to develop a new international treaty that would ban cluster munitions that cause unacceptable harm to civilians.

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