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The Committee Secretary
Senate Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Sir,

Thank you for the opportunity to provide a submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade inquiry on the [Cluster Munitions \(Prohibition\) Bill 2006](#).

A written submission is attached and Australian Red Cross is available and willing to attend the inquiry and speak to this submission if requested.

Yours sincerely

Robert Tickner
Chief Executive Officer

Australian Red Cross would like to thank the Senate Standing Committee on Foreign Affairs, Defence and Trade for the opportunity to make a written submission on the Cluster Munitions (Prohibition) Bill 2006. The issue is of particular importance to the Australian Red Cross given the Red Cross Red Crescent Movement's role in providing humanitarian assistance in times of conflict as unexploded ordnance, in particular cluster submunitions, have a significant adverse impact on the civilian population and on our ability to provide essential services and aid.

1. Summary of Bill

In summary, the Bill proposes a prohibition on the development, production, acquisition, retention, transfer, or use of Cluster Munitions. The prohibition applies to all persons and specifically extends to deployed Australian Defence Force (ADF) personnel as well as ADF personnel seconded to another defence force. The prohibition does not apply to conduct relating to the clearance or decommissioning of, or education about, Cluster Munitions.

2. Characteristics of Cluster Munitions

Air-delivered cluster bombs are composed of a large dispenser; fuses and electronic devices to control, spin, and stabilise the weapon during fall; and submunitions or bomblets. Once released, the munition falls for a specified amount of time or distance before dispensing submunitions. The submunitions are activated by an internal fuse, and can detonate above ground, at impact, or in a delayed mode. Because the submunitions are dispensed at altitude, they disperse to cover a wide-area target, and the number of submunitions increases the density of explosives in a given target area, (often designed to strike every few feet). In saturating an area with explosives, the munition neutralises the target or denies access to the target area. This is particularly useful against troop concentrations, airfields and air defence units.¹

3. The humanitarian impact of Cluster Munitions

There are significant problems with the design, reliability, targeting and deployment characteristics of Cluster Munitions. These include the following:

- the lack of targeting capability (i.e., they are essentially unguided);
- their use in areas where military and civilian sites are co-located;
- the high failure rate of submunitions (estimated at between 7 - 30 %², and on occasions as high as 40%³); and
- lack of self destruct/deactivation mechanisms and/or reliability of such mechanisms in more recent Cluster Munitions;
- difficulties in effectively mapping, marking and subsequently deactivating/removing unexploded submunitions.

Each of these problems raises concerns regarding the direct and indirect effect of Cluster Munitions on the civilian population, both during and after conflict.

¹ Human Rights Watch – backgrounder. October 2001, *Cluster Bombs in Afghanistan*, <http://www.hrw.org/backgrounder/arms/cluster-bck1031.htm>

² International Review of the Red Cross No. 841, p. 195-205 by *Peter Herby and Anna R. Nuiten* Explosive remnants of war : Protecting civilians through an additional protocol to the 1980 Convention on Certain Conventional Weapons. 31-03-2001.

³ UN Mine Action Centre commentary. Red Cross Red Crescent Meeting to discuss global humanitarian concerns related to the use of cluster munitions. February 2007.

As indicated above, Cluster Munitions have an immediate destructive impact on deployment, and use of such weapons in civilian areas, or in areas where military and civilian sites are co-located, invariably leads to significant civilian deaths and casualties.

However, it is not only the civilian death and high casualty toll that is of concern. Due to their relatively high failure rate and difficulties associated with de-mining, the presence of unexploded submunitions also creates long term social and economic impacts for the country attempting to rebuild and create a lasting peace. In Vietnam, Laos, Cambodia, Sudan, Ethiopia, Iraq, Kuwait, Russia/Chechnya, and Yugoslavia/Kosovo, many fields, villages and cities are no longer accessible because of the existence of unexploded submunitions and landmines. In Vietnam, the annual death toll is estimated at 300 p.a., while in Kosovo, more civilians die from unexploded submunitions than from landmines.

Afghanistan is one of the countries most severely affected by landmines and unexploded ordnance (UXO). Prior to October 7, 2001, the known contaminated area was estimated at 724 million square meters, including 344 million square meters classified as high priority land for clearance⁴.

Cluster bombs continue to be widely used in recent armed conflicts. An estimated thirty million were expended during the first Gulf War⁵. More recently, during the conflict between Lebanon and Israel (2006), an estimated 4 million cluster submunitions were delivered⁶. Unexploded ordnance has caused more than 200 deaths and injuries since the cessation of armed hostilities in August 2006 and it is estimated that "more than 1 million bomblets litter the fields and orchards of southern Lebanon".⁷

4. International law applicable to Cluster Munitions

International Humanitarian Law (IHL) refers to the branch of international law that circumscribes appropriate conduct in times of conflict. The fundamental elements of IHL are primarily found in:

- the Geneva Conventions of 1949;
- the Protocols Additional to the Geneva Conventions of 1977 and 2006, and
- various weapons conventions,

International Humanitarian Law contains a number of provisions directly relevant to the Committees consideration of this Bill. It should be noted that Australia is a party to the various Conventions, Protocols and Treaties referred to below and thus is bound to implement their provisions in good faith⁸.

In summary, the following rules are relevant:

The rule of distinction⁹ - this rule requires attacks be directed against military objectives. The parties to a conflict must distinguish between civilians and combatants and between civilian objects and military objectives.

⁴ Human Rights Watch – backgrounder. October 2001, *Cluster Bombs in Afghanistan*, <http://www.hrw.org/backgrounder/arms/cluster-bck1031.htm>

⁵ Smith, N, 'A Plea for the Total Ban of Land Mines by International Treaty' (1995) 17 *Loyola of Los Angeles International & Comparative Law Journal* 507, 512

⁶ Handicap International, *Fatal Footprint: The Global Human Impact of Cluster Munitions, Preliminary Report*, Brussels, November 2006.

⁷ <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/stories-lebanon-310107?opendocument>

⁸ Article 26, Vienna Convention on the Law of Treaties. Every Treaty in force is binding upon the parties to it and must be performed by them in good faith.

⁹ Art 48 Additional Protocol I 1977. Note: this is also considered a rule of customary law. Ref rules 1 and 7, Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge University Press Rules, 2005.

The design characteristics and means of deployment are clearly relevant to a consideration of how and when Cluster Munitions can be deployed in accordance with this rule. A cluster munition is dropped at high altitude and is not guided. It subsequently releases submunitions in a manner designed to disperse them over a large area. The ability to 'hit' the target area is thus dependent on a range of variables including height and speed on release, wind and weather conditions, and submunition design, (e.g. use of parachutes/drogues).

Given the characteristics described above, compliance with the rule of distinction would require that such weapons not be used in situations where the military objective is co-located with, or in close proximity to civilians or civilian sites.

The rule against indiscriminate attacks¹⁰ - this rule prohibits indiscriminate attacks. An Indiscriminate attack is defined to include those which employ a method or means of combat that cannot be directed at a specific military objective. An indiscriminate attack would also include any bombardment 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.

By design, the wide area effects of Cluster Munitions, together with the means of delivery mentioned above, make it difficult, if not impossible to direct such weapons at a military objective were it is located in or near a populated target area.

The rule of proportionality¹¹ - this rule prohibits the initiation of an attack which may be expected to cause incidental loss of civilian life, injury to civilians, and/or damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.

The rule recognizes that civilian casualties and damage to civilian objects may occur during an attack against a military objective but requires that the military advantage anticipated outweigh the incidental impact on civilians. An attack that can be expected to cause excessive civilian casualties or damage in relation to the concrete and direct military advantage anticipated would be disproportionate and prohibited.

It is therefore necessary, during the planning and execution of an attack using Cluster Munitions, to evaluate the foreseeable incidental consequences for civilians both during and after attack.

The limitations on precise targeting, high failure rate of submunitions, lack of self destruct/deactivation mechanisms and difficulties in effectively mapping, marking and subsequently deactivating/removing unexploded submunitions, and the now well documented long term problems associated with unexploded submunitions, mean that such weapons should not be used in or near civilian populations or sites.

The rule on feasible precautions¹² – this rule requires that in the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All

¹⁰ Art 51 (4) and (5a) Additional Protocol 1 1977. Note: this is also considered a rule of customary law. Ref rules 11-13, Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge University Press Rules, 2005.

¹¹ Art 51 (5)(b), Additional Protocol 1 1977. Note: this is also considered a rule of customary law. Ref rule 14, Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge University Press Rules, 2005.

feasible precautions must be taken to avoid, and in any event to minimise incidental loss of civilian life, injury to civilians and damage to civilian objects.

The limitations on precise targeting, high failure rate of submunitions, lack of self destruct/deactivation mechanisms and difficulties in effectively mapping, marking and subsequently deactivating/removing unexploded submunitions would suggest that in taking all feasible precautions, Cluster Munitions should not be used in or near civilian populations or sites and alternative weapons should be considered.

The rule on environmental protection¹³ – this rule prohibits the use of methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment.

As has been outlined in section 3 above, the indiscriminate use of Cluster Munitions in recent conflicts has not only had led to the death and injury of large numbers of civilians, but has also rendered large tracts of arable land inaccessible. In so doing, it imposes an ongoing burden on the civilian population who are unable to sustain themselves, and thus re-establish civil society and create a lasting peace.

6. Enforcement of International Humanitarian Law - the International Criminal Court Statute

The Committee may care to note that Article 8(2)(b) of the International Criminal Court statute, to which Australia is a party, defines a "war crimes" to include:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) 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 (emphasis added).

7. Concluding Comments

Australian Red Cross would like to acknowledge and congratulate the Australian Government on its decision not to maintain a stockpile of Cluster Munitions originally held between 1970 and 1990,¹⁴ nor to utilise such weapons in the previous conflicts, including most recently in Iraq¹⁵.

Additionally Australian Red Cross acknowledges the Government's significant involvement in international efforts to place appropriate controls on a range of weapons systems, including those

¹² Art 57, Additional Protocol 1 1977. Note: this is also considered a rule of customary law. Ref rule 45, Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge University Press Rules, 2005

¹³ Art 35, Additional Protocol 1 1977. Note: this is also considered a rule of customary law. Ref rule 45, Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge University Press Rules, 2005.

¹⁴ Government and Defence statement in response to Parliamentary Question o Notice No. 2616, 7 November 2006.

¹⁵ Australian Department of Defence, Operation Falconer – Frequent Questions, 11.01.07, <http://www.defence.gov.au/opfalconer/faq.htm>

that contribute significantly to the problems associated with explosive remnants of war, such as Cluster Munitions¹⁶.

However, given the:

- problems associated with targeting and delivery of Cluster Munitions;
 - high failure rate and instability of submunitions;
 - the instability of unexploded submunitions;
 - lack of self destruct/deactivation mechanisms and/or reliability of such mechanisms;
 - difficulties in effectively mapping, marking and subsequently deactivating/removing unexploded submunitions;
 - immediate and long terms effects of Cluster Munitions on the civilian population (which has been well documented);
 - capacity for unexploded remnants of war to disrupt the provision of humanitarian relief; and
 - capacity for unexploded remnants of war to disrupt and delay the rebuilding of civil society;
- Australian Red Cross would support a prohibition on the use of Cluster Munitions.

If however the Committee feels that a blanket prohibition cannot be supported on the evidence before it, Australian Red Cross would strongly urge the Committee to support restrictions on the use of Cluster Munitions such that they can only be used in a manner consistent with the legal principles outlined above. This 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.

Australian Red Cross is available and willing to attend the inquiry and speak to this submission, and to provide any additional evidence that may assist the Committee.

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¹⁶ Government and Defence statement in response to Parliamentary Question o Notice No. 2616, 7 November 2006.

ATTACHMENT A - RELEVANT ARTICLES, PROTOCOL 1 ADDITIONAL TO THE GENEVA CONVENTIONS 1977

Article 48, Additional Protocol 1 1977 – Basic Rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Article 51 (4) and (5a), Additional Protocol 1 1977 - Protection of the civilian population

4. 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;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

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;

Article 51 (5b), Additional Protocol 1 1977 - Protection of the civilian population

- (b) an 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.

Article 57, Additional Protocol 1 1977 - Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
 - (a) those who plan or decide upon an attack shall:
 - (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
 - (ii) 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;
 - (iii) 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;

- (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack 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;
 - (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
 4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.
 5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Article 35, Additional Protocol 1 1977 – Basic Rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
 2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.
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