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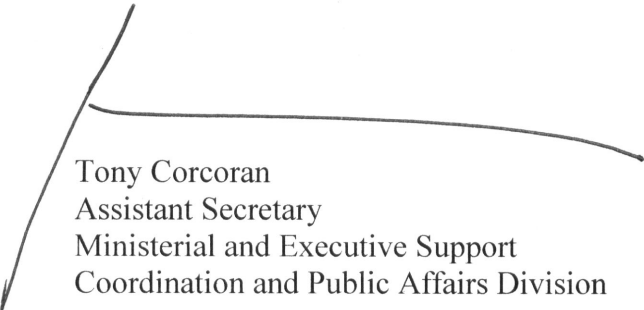
27 February 2007

Dr Kathleen Dermody
Secretary
Senate Standing Committee on Foreign Affairs,
Defence and Trade
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Dr Dermody

Please find attached the Defence submission to the Committee's inquiry into the Cluster Munitions (Prohibition) Bill 2006. The enclosed submission has been approved by the Minister for Defence.

Yours sincerely



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Enclosure:

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

**SENATE STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE
AND TRADE**

**DEFENCE SUBMISSION ON THE CLUSTER MUNITIONS (PROHIBITION)
BILL 2006**

Introduction

1. Defence, on behalf of the Australian Government, appreciates the opportunity to make a submission on the *Cluster Munitions (Prohibition) Bill* of 2006. Defence has consulted widely in developing this submission, and it includes input from the Attorney-General's Department and the Departments of Foreign Affairs and Trade. These Departments support the arguments in this submission.

Background

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

3. Some Non Government Organisations have been advocating a total ban on cluster munitions as a class of weapon. There is no substantial support for such a ban from States Parties 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* (Conventional Weapons Convention). Recent proposals from the International Committee of the Red Cross (ICRC) and the Government of Norway focus on ending 'the use of inaccurate and unreliable cluster munitions' (ICRC), or banning those types of cluster munitions which 'have unacceptable humanitarian consequences' (Norway).

4. While cluster munitions are not illegal, *per se*, under any arms control or International Humanitarian Law instrument – and are generally acknowledged as having legitimate military utility – some cluster munitions potentially pose humanitarian hazards. These hazards arise as a result of their *inappropriate use* in contravention of existing principles of International Humanitarian Law *and/or when cluster munitions fail to explode as intended*.

5. The Australian Government supports discussions in international forums on placing technical and targeting restrictions on cluster munitions which will address the humanitarian concerns about their use.

International Negotiations on Cluster Munitions

6. 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.

7. The ICRC presented a proposal to the November 2006 Review Conference on the Conventional Weapons Convention proposing restrictions on cluster munitions, and will hold a workshop in April 2007 to consider further discussions. The Conventional Weapons Convention Group of Government Experts will meet in June 2007, partly to consider restrictions on cluster munitions.

8. The Australian delegation to the November Review Conference strongly supported a renewed mandate for discussions on Explosive Remnants of War, which was adopted by consensus. This mandate makes provision for the Group of Government Experts to consider the application and implementation of International Humanitarian Law to weapons systems that can create Explosive Remnants of War. These meetings will have a 'particular focus on cluster munitions, including the factors affecting their reliability, and their technical and design characteristics, with a view to minimising the adverse humanitarian effect of these munitions'.

9. None of the current international initiatives on cluster munitions propose a total ban of the sort envisaged in the Bill. Restrictions being discussed include preventing cluster munitions from being used near concentrations of civilians, and restrictions based on reliability and the potential to create Explosive Remnants of War.

Protocol V and Explosive Remnants of War

10. Australia deposited its consent to be bound by Protocol V to the Conventional Weapons Convention on 4 January 2007, and this Protocol will enter into force for Australia on 4 July 2007. The aim of Protocol V is to minimise the risks and effects of Explosive Remnants of War, including unexploded cluster munitions, particularly on civilian populations and humanitarian missions. Australia was deeply involved in the negotiations on the provisions of Protocol V.

11. A Party to Protocol V is obliged to mark and clear, remove or destroy, explosive remnants of war present in its territory; record, retain and transmit information regarding use of explosive ordnance; and take precautions for the protection of civilians and humanitarian missions. If a Party does not control the territory where it has used munitions which have subsequently become Explosive Remnants of War, it is obliged to provide information to Parties who are in control of that area to facilitate post conflict clearance.

12. 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.

13. As more States Parties accede to and implement Protocol V, the threat of Explosive Remnants of War, including unexploded older cluster munitions, will be reduced.

14. Paragraph 19 of the *Cluster Munitions (Prohibition) Bill* appears to introduce elements of Protocol V into the legislation. This is unnecessary as Australia will have already implemented the Protocol domestically upon its entry into force. The Attorney-General's

Department has formally advised with regard to Protocol V that implementing legislation was not necessary to give it effect.

International Humanitarian Law

15. Cluster munitions and advanced sub-munitions are not illegal per se under any arms control or International Humanitarian Law instrument. However their use, 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. ADF personnel are trained in the laws of armed conflict, which form an integral part of ADF targeting decisions.

Capability Considerations

16. 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.

17. 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.

18. 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.

19. The proposed Bill would potentially prevent the ADF from acquiring any advanced new generation sub-munition capability. As Australia’s defence planning requires that the ADF possesses a clear margin of capability superiority, the placing of unnecessary and overly strict limits on the ADF’s acquisition of new technology, as proposed in the Bill, would put it at a disadvantage against future potential adversaries.

20. As an example, Army is in the process of upgrading its warfighting capabilities and would encounter difficulty in doing so without access to a high-technology sub-set of the

types of weapons that would be banned if this Bill is enacted. Should these prohibitions be introduced, Army 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. The adoption of the *Cluster Munitions (Prohibition) Bill* would therefore have a contrary effect to its intention.

21. Another issue of concern is that the Bill would exclude Australia's potential to exploit new emergent technologies that would be *more capable, discriminating and reliable* than existing munitions. The broad and ambiguous definitions proposed in the Bill could have the unintended consequence of precluding acquisition of such systems as weapon-carrying Unmanned Aerial Vehicles, Surface Unmanned Vessels, and Underwater Unmanned Vehicles.

22. Most current precision guided weapons are short range and rely on aircraft or other delivery systems to carry them to a release point which may be within defended territory. An emerging trend in capability development is 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. This effectively increases safety for the personnel in the 'manned assets' whilst achieving precision effects with minimal associated damage. These systems may be covered by the Bill's definition of cluster munition, depending on the meaning given to other terms such as 'device', 'fired' and even 'harm', none of which is defined in the Bill. As it stands, this Bill would prevent Australia from benefiting from these emerging technologies that could confer an advantage on the ADF, even though the ADF would continue to remain consistent with Australia's respect for the Law of Armed Conflict and concern to avoid unnecessary humanitarian effects on civilians.

Operational Issues

23. 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.

24. 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.

25. Australia places a premium on interoperability between our forces and those of our allies and other countries with whom we operate in coalition. This is an important capability issue which, as identified in the Defence 2000 White Paper, helps us to achieve an advantage over adversaries in a conflict. The Bill's very broad definitions of those capabilities that are to be banned and its strict prohibitions on ADF members engaging with other defence forces who may have these capabilities would place imprudent limits on the ADF's ability to operate with coalition partners.

26. 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.

27. 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.

28. The offence provisions of the Bill would also prevent logistics personnel from being embedded within coalition forces that use cluster munitions, due to the risk that their duties could indirectly result in the transfer of the prohibited munitions to another person. This would erode ADF experience in the planning and execution of modern logistic support operations and inhibit the ability of the ADF to contribute to coalition operations in this important area. Another example involves the employment of ADF specialist personnel in Terminal Air Control duties. These duties require personnel to manage tactical air space and as such personnel are not able to discriminate as to which weapons are being used on individual platforms, the proposed Bill would prohibit their involvement with aircraft carrying cluster munitions.

29. Due to the broad prohibitions in this Bill on operating with coalition forces where they may be using cluster munitions (Section 12), the ADF would be further limited in its ability to participate in coalitions, and reducing opportunities for its members to gain experience in coalition planning and execution of modern combat operations. This would result in a decline in the operational experience of members of the ADF, including expertise in the planning and execution of logistic support operations. These handicaps would increase as more coalition partners take advantage of developments in sub-munition technologies, and increasingly incorporate them into their armed forces.

30. Notwithstanding these issues, at all times ADF personnel are bound by rules of engagement to absent themselves from activities of coalition partners not in accordance with national policy direction and Australia's international and domestic law obligations.

Countermeasures

31. 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.

Conclusion

32. The Australian Government opposes this Bill because of 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 within 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 international position in current negotiations on cluster munitions. If enacted it will put Australia at a serious military disadvantage in future conflicts, which would be detrimental to our national interest.

33. Nevertheless, the Government recognises the concerns over the potential harm that some cluster munitions can cause to civilians, and supports discussions in international forums to address humanitarian concerns regarding their effects. These issues are being addressed in current international discussions, especially within the Conventional Weapons Convention.

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