

Chapter 1

Introduction

Referral of inquiry

1.1 On 28 October 2010 the Senate referred provisions of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 to the Senate Foreign Affairs, Defence and Trade Legislation Committee for inquiry and report by 24 March 2011.

Purpose of the bill

1.2 The purpose of the bill is to introduce legislative measures to ensure consistency between Australian law and the Convention on Cluster Munitions (the Convention). Its enactment coupled with other non-legislative measures will place Australia in a position to ratify the Convention.¹

1.3 The Convention bans the use, stockpiling, acquisition and transfer of cluster munitions by states parties. It aims to assist the victims of cluster munitions and includes provisions on the clearance of cluster munitions from areas of former conflict. Article 9 requires states parties to enact legislation to criminalise any activity prohibited under the Convention. In keeping with this undertaking, the Australian Government intends to amend the *Criminal Code Act 1995* (the Code) to create offences and penalties in relation to cluster munitions and explosive bomblets. The proposed legislation would also provide defences for certain circumstances and for certain authorisation to be made. These legislative measures will enable Australia to ratify the Convention.

1.4 The bill inserts a new Subdivision C in Division 72 of the Code. The heading of proposed Subdivision C is 'Cluster munitions and explosive bomblets'. The bill proposes to insert new offences and other provisions into Division 72 relating to the use, development, production, acquisition, stockpiling, retention or transfer of cluster munitions. The Subdivision will apply in relation to explosive bomblets in the same way that it does to cluster munitions.²

1.5 The bill contains two main features:

- offences relating to the use, development, production, acquisition, stockpiling, retention and transfer of cluster munitions;

1 As with any international treaty, legislation must be first enacted before Australia can ratify the treaty body. *Explanatory Memorandum*, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, p. 1.

2 *Explanatory Memorandum*, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, p. 6.

- defences to these offences that reflect a range of conduct that is permitted by the Convention to enable Australia to maintain and develop its skill and capabilities in detecting and destroying cluster munitions and to maintain cooperative military relationships with countries that are not party to the Convention.

Definitions

1.6 The bill uses the Convention's definition of 'cluster munition' which is:

...a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. It does not mean the following:

- (a) A munition or submunitions designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defence role;
- (b) A munition or submunitions designed to produce electrical or electronic effects;
- (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:
 - (i) Each munition contains fewer than ten explosive submunitions;
 - (ii) Each explosive submunitions weighs more than four kilograms;
 - (iii) Each explosive submunitions is designed to detect and engage a single target object;
 - (iv) Each explosive submunitions is equipped with an electronic self-destruction mechanism;
 - (v) Each explosive submunitions is equipped with an electronic self-deactivating feature.³

1.7 An 'explosive bomblet' is determined in the bill to have the same meaning as that articulated in Article 2(13) of the Convention.⁴ Similarly, an explosive submunitions for the purposes of the bill has the same meaning as that provided in Article 2(3) of the Convention.

1.8 The committee notes that the explanatory memorandum contains errors where it describes a 'cluster munition'. It gives reference to paragraph 2 of Article 21 of the Convention rather than Article 2 concerning definitions. This mistake is repeated twice on page 17 of the explanatory memorandum.

3 *Convention on Cluster Munitions*, Article 2(2).

4 That is 'a conventional munition, weighing less than 20 kilograms, which is not self-propelled and which, in order to perform its task, is dispersed or released by a dispenser, and is designed to function by detonating an explosive charge prior to, on or after impact' (*Convention on Cluster Munitions*, Article 2(13)).

Convention on Cluster Munitions and Australia's role

1.9 Concerns within the international community regarding the unintended impact of cluster munitions were raised in the 1970s primarily in the context of the conflicts of Southeast Asia. However, negotiations towards a treaty on cluster munitions only began officially in February 2007 when the Oslo Process was launched. Discussions, which had been on identifying technical solutions to improve submunitions reliability, shifted towards striving for a total ban on cluster munitions that cause unacceptable harm to civilians.⁵

1.10 The Convention on Cluster Munitions was adopted in Dublin on 30 May 2008 and entered into force on 1 August 2010. Norway was the first country to sign the Convention and both Lebanon and Laos, two countries which experienced the effects of cluster munitions, followed quickly.⁶ Australia signed the Convention at Oslo on 3 December 2008.⁷ The UN Secretary-General, Ban Ki-moon stated the following in relation to the treaty when it entered into force:

This new instrument is a major advance for the global disarmament and humanitarian agendas, and will help us to counter the widespread insecurity and suffering caused by these terrible weapons, particularly among civilians and children.⁸

1.11 The Convention seeks to prevent future civilian harm caused by cluster munitions by establishing absolute prohibitions on a number of activities involving cluster munitions. It serves as a legally binding instrument to prohibit the use, production, transfer and stockpiling of cluster munitions. It also establishes a framework for cooperation and assistance to ensure the adequate provision of care and rehabilitation of victims and, amongst other things, the destruction of cluster munition stockpiles. Indeed, according to the preamble, the Convention strives to 'put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use, when they fail to function as intended or when they are abandoned'.⁹ For their part, states parties to the Convention are required to interpret their obligations in a manner which is consistent with the object and purpose of the Convention.

5 Gugu Dube, *Negotiating The Convention on Cluster Munitions*, ISS Paper 187, July 2009, <http://www.armsnetfrica.org/content/iss-paper-187-negotiating-convention-cluster-munitions-gugu-dube-july-2009> (accessed 15 December 2010).

6 Laos is recognised by the UN to be the most heavily bombed country in history on a per capita basis. UN Backs Vientiane Declaration on Cluster Munitions, Media Release, 12 November 2010, <http://www.mineaction.org/doc.asp?d=1532> (accessed 29 November 2010).

7 United Nations Treaty Collection, Convention on Cluster Munitions, Status as at 07-03-2011, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-6&chapter=26&lang=en (accessed 8 March 2011).

8 Statement by UN Secretary-General Ban Ki-moon on the entry-into-force of the Convention on Cluster Munitions, 30 July 2010, Electronic Mine Information Network, <http://www.mineaction.org/overview.asp?o=3722> (accessed 29 November 2010).

9 Convention on Cluster Munitions, preamble, paragraph 2.

1.12 Australia played an active role in negotiating the Convention throughout the Oslo Process. The joint government submission highlighted that Australia 'has worked closely with international partners to achieve the strongest possible ban on these weapons'.¹⁰ Australia also played a lead role in the preparations for the First Meeting of States Parties to the Convention held in Vientiane, Laos, in November 2010. The National Interest Analysis noted the following in relation to Australia's role in the Oslo Process:

Australia advocated the need to strike a balance between addressing the impact of cluster munitions that cause unacceptable humanitarian harm and legitimate military needs, supported a pragmatic approach to clearance responsibilities and helped to ensure that there were comprehensive and meaningful victim assistance and rehabilitation provisions.¹¹

1.13 Australia has a long history of involvement in mine action activities. According to AusAID, Australia has contributed over \$175 million since 1997 towards global efforts to reduce the threat and impact of landmines and other explosive ordnance including cluster munitions. Through its aid program, Australia is recognised as a 'leading contributor to international mine clearance efforts, victim assistance, mine risk education and integrated mine action programs'.¹² This contribution was recognised by witnesses to this inquiry.¹³ Under the new *Mine Action Strategy for the Australian aid program 2010–2014*, Australia has pledged \$100 million to work towards a 'world free from landmines, cluster munitions and other explosive remnants of war over the next five years'.¹⁴ In the second reading speech, the Attorney-General, the Hon Robert McClelland MP, recognised that this contribution will 'help reduce the deaths and injuries from these devices and improve the quality of life for victims, their adversely affected families and, indeed, entire communities'.¹⁵

10 Attorney-General, Minister for Foreign Affairs, Minister for Defence, *Submission 24*, p. 1.

11 National Interest Analysis, para 5. The National Interest Analysis which sets out the benefits for Australia in ratifying the Convention, and Australia's responsibility under the Convention, was tabled in Parliament on 12 March 2009.

12 AusAID, Australia's aid program, Mine action, <http://www.aisaid.gov.au/human/landmines.cfm> (accessed 11 February 2011).

13 See for example, International Committee of the Red Cross, *Submission 9*, p. 1.

14 AusAID, Australia's aid program, Mine action, <http://www.aisaid.gov.au/human/landmines.cfm> (accessed 11 February 2011).

15 The Hon Robert McClelland MP, Attorney-General, Second Reading Speech, *House Hansard*, 27 October 2010, p. 10.

1.14 The First Meeting of states parties took place in November 2010 in Lao PDR, the most heavily bombed country per capita in the world.¹⁶

1.15 To date, 52 states have ratified the Convention including France, Germany, Ireland, Lebanon, New Zealand, Spain, and the UK whilst there are 108 signatories.¹⁷

1.16 Countries that have not agreed to the treaty include the United States (US), China, Russia, Israel, Brazil, India and Pakistan. They are recognised as amongst the major producers of cluster munitions and their components worldwide.¹⁸

Previous parliamentary inquiries

Senate Standing Committee on Foreign Affairs, Defence and Trade

1.17 On 31 May 2007, the Senate Standing Committee on Foreign Affairs, Defence and Trade completed an inquiry into a private senator's bill—the Cluster Munitions (Prohibition) Bill 2006. The effect of the bill was to ban Australia's involvement in cluster munitions. The bill was specifically intended to prevent members of the Australian Defence Force (ADF), whether serving in Australia or elsewhere, and whether serving with the ADF or any other defence force, from being involved in the deployment of cluster munitions.¹⁹

1.18 The committee was of the view that the bill in its then current form and without substantial redrafting was not the most appropriate means to address the problems created by the use of cluster munitions. Whilst recommending that the bill not be passed, the committee encouraged the government to consider foreign legislation 'that has been enacted or is currently before foreign parliaments that relates to the use of cluster munitions with a view to introducing similar legislation that would be relevant to Australia's circumstances'.²⁰

16 From 1964 to 1973, over two million tons of ordnance, including 270 million cluster submunitions was dropped on Laos with a failure rate of up to 30 per cent, leaving approximately 25 per cent of villages across the country contaminated with unexploded ordnance. National Regulatory Authority for UXO/Mine Action in the Lao PDR, *The Unexploded Ordnance (UXO) Problem and Operational Progress in the Lao PDR, Official Figures*, 2 June 2010, <http://www.clusterconvention.org/1msp/wp-content/uploads/2010/08/The-UXO-Problem-in-the-Lao-PDR-Official-Statistics-final.pdf> (accessed 15 December 2010).

17 United Nations Treaty Collection, Convention on Cluster Munitions, Status as at 07-03-2011, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-6&chapter=26&lang=en (accessed 8 March 2011).

18 Human Rights Watch, *Meeting the Challenge, Protecting Civilians through the Convention on Cluster Munitions*, Section III – Production, Transfer, and Stockpiling, 22 November 2010, <http://www.hrw.org/en/node/94330/section/7> (accessed 8 December 2010).

19 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Cluster Munitions (Prohibition) Bill 2006*, May 2007, p. xi.

20 Senate Foreign Affairs, Defence and Trade Legislation Committee, *Cluster Munitions (Prohibition) Bill 2006*, May 2007, pp. ix–x.

Joint Standing Committee on Treaties

1.19 In March 2009, Australia tabled a National Interest Analysis in Parliament which provided an overview of the potential benefits and obligations arising out of ratification of the Convention. In June the same year, the Joint Standing Committee on Treaties (JSCOT) conducted an inquiry into the Convention with a view to Australia becoming a party to it. JSCOT took the view that ratification of the Convention would 'reaffirm Australia's commitment to limiting the impact of armed conflict on civilian populations'. It noted further that ratification 'will significantly improve the lives of people affected by cluster munitions' whilst enabling Australia to continue to cooperate militarily with its allies.²¹ However, JSCOT was particularly concerned that Article 21 of the Convention 'may permit Australian personnel to assist or participate in the use of cluster munitions'.²² It noted that Australia could 'inadvertently participate in the use or assist in the use of cluster munitions'. Furthermore, that the lack of clarity in relation to some Convention terms 'may provide an avenue by which Australia could participate in actions which may contravene the humanitarian aims of the Convention'.²³

1.20 Whilst recommending ratification of the Convention, JSCOT also recommended that the Australian Government and ADF have regard to a number of issues when developing policies under which ADF personnel would operate, namely:

- the definition of the terms 'use', 'retain', 'assist', 'encourage' and 'induce' as they apply in Articles 1, 2 and 21 of the Convention on Cluster Munitions;
- preventing inadvertent participation in the use, or assistance in the use, of cluster munitions by Australia; and
- preventing investment by Australian entities in the development or production of cluster munitions, either directly, or through the provision of funds to companies that may develop or produce cluster munitions.²⁴

Selection of Bills Committee

1.21 The proposal made to the Senate Standing Committee for the Selection of Bills to refer the bill for inquiry and report suggested that the bill was 'inconsistent

21 Joint Standing Committee on Treaties, *Report No 103*, Treaties tabled on 12 March and 13 May 2009, 18 August 2009, p. 26.

22 Joint Standing Committee on Treaties, *Report No 103*, Treaties tabled on 12 March and 13 May 2009, 18 August 2009, p. 20.

23 Joint Standing Committee on Treaties, *Report No 103*, Treaties tabled on 12 March and 13 May 2009, 18 August 2009, p. 27.

24 Joint Standing Committee on Treaties, *Report No 103*, Treaties tabled on 12 March and 13 May 2009, 18 August 2009, p. 27.

with recommendations' made by JSCOT when it reviewed the Convention on Cluster Munitions in the 42nd Parliament.²⁵

Submissions

1.22 The committee advertised the inquiry on its website and in *The Australian* on 10 and 24 November 2010 and 8 December 2010. The committee wrote to the Minister for Defence, Minister for Foreign Affairs and the Attorney-General respectively. The committee also wrote to respective state and territory governments, inviting them or their departments or related agencies to make a submission. A number of other organisations, commentators, and academics were also contacted and invited to make submissions to the inquiry. The committee received 29 submissions, which are listed at Appendix 1.

Acknowledgements

1.23 The committee thanks those who assisted with the inquiry.

25 Senate Standing Committee for the Selection of Bills, *Report No. 13 of 2010*, Appendix 1, http://www.aph.gov.au/Senate/committee/selectionbills_ctte/reports/2010/rep1310.pdf (accessed 14 February 2011).