

# Chapter 4

## Interoperability

4.1 This chapter considers one of the most contentious of all the Convention's interpretive issues—interoperability or military cooperation between states parties and states that are not a party to the Convention.<sup>1</sup> It outlines the international negotiations on interoperability including Australia's position which is reflected in the bill. The chapter details the evidence before the committee in relation to section 72.41 of the bill which gives effect to the Convention's interoperability clause and considers the respective obligations on states parties to, amongst other requirements, promote the norms established by the Convention.

### Section 72.41

4.2 Section 72.41 of the bill, which gives effect to Article 21(3) and (4) of the Convention, provides that certain acts carried out by Australians in military cooperation and operations with countries that are not party to the Convention are not offences against section 72.38. The section reflects Australia's position on interoperability.

4.3 Article 21(3) and (4) of the Convention state:

3. Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.
4. Nothing in paragraph 3 of this Article shall authorise a State Party:
  - (a) To develop, produce or otherwise acquire cluster munitions;
  - (b) To itself stockpile or transfer cluster munitions;
  - (c) To itself use cluster munitions; or
  - (d) To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

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1 DFAT defines interoperability as the 'ability of militaries from different countries to effectively engage in military cooperation and operations' (Department of Foreign Affairs and Trade, *Additional information*, received 1 March 2011). The committee uses the term more narrowly in recognition of the contention surrounding military engagement between states parties and non-states parties to the Convention which is the subject of Article 21 generally and Article 21(3) specifically.

4.4 Section 72.41 states that a person who is an Australian citizen, member of the Australian Defence Force (ADF) or is performing services under a Commonwealth contract<sup>2</sup> does not commit an offence against section 72.38 by doing an act if:

- (a) the act is done in the course of military cooperation or operations with a foreign country that is not a party to the Convention;<sup>3</sup> and
- (b) the act is not connected with the Commonwealth:
  - (i) using a cluster munition; or
  - (ii) developing, producing or otherwise acquiring a cluster munition; or
  - (iii) stockpiling or retaining a cluster munition; or
  - (iv) transferring a cluster munition; and
- (c) the act does not consist of expressly requesting the use of a cluster munition in a case where the choice of munitions used is within the Commonwealth's exclusive control.

4.5 In order to understand the government's position on Article 21, the following section will consider the Oslo Process of international negotiations on the Convention with focus on the interoperability provision in the article.

## Negotiating Article 21

4.6 During the Oslo Process to establish a treaty on cluster munitions, Australia alongside countries including Canada and the UK raised concerns that the draft Convention text was problematic and could pose as a 'legal barrier to maintaining interoperability'.<sup>4</sup>

4.7 At the Wellington Conference in February 2008, Australia in association with a number of other countries issued a discussion paper on the matter.<sup>5</sup> The group of 12 states had concerns about the draft Convention Article 1(1)(c) prohibition that states parties never under any circumstances assist, encourage or induce anyone to engage in

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2 The meaning of the term 'Commonwealth contract' is that given by the Dictionary in the Code, that is, a contract, to which a Commonwealth entity is a party, under which services are to be, or were to be, provided to a Commonwealth entity (*Explanatory Memorandum*, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, p. 12).

3 This may include peacekeeping operations mandated by the United Nations which involve both States Parties and non-States Parties to the Convention. The language of subsection 72.41(a) reflects the language of Article 21(4)(a) and (c) of the Convention.

4 Department of Foreign Affairs & Trade, *Additional information*, received 1 March 2011, p. 1.

5 Canada described the need for a provision on interoperability as 'most critical' and a 'red-line issue' of whether it could join the Convention. International Campaign to Ban Landmines and Cluster Munition Coalition, *Cluster Munition Monitor 2010*, Canada – Cluster Munition Ban Policy, 22 October 2010, [http://www.the-monitor.org/index.php/cp/display/region\\_profiles/theme/119](http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/119) (accessed 15 December 2010). The signatories to the discussion paper include Australia, Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, Netherlands, Sweden, Switzerland and the United Kingdom.

any activity prohibited to a state party. They noted that this prohibition created 'significant obstacles to the maintenance of alliance relationships and to participation in future multi-national operations with non-State parties'.<sup>6</sup> The group emphasised that whilst states should be 'advocates for an effective convention and seek to promote its ultimate universalisation', if 'concerns about inter-operability prevent States from committing to the Convention, the goal of universalisation is undermined'.<sup>7</sup> The discussion paper noted that the draft treaty text could 'inhibit a range of military activities essential to the effectiveness of international operations (that involve non-State parties who may use cluster munitions)' and warned that this would render participation by states parties in such operations 'unworkable'.<sup>8</sup>

4.8 At the Dublin Diplomatic Conference on Cluster Munitions in May 2008, Argentina, Mexico, Venezuela, Honduras and Guatemala raised concerns about the proposed inclusion of the concept of interoperability in the Convention, arguing that it may create a window for the use of cluster munitions by military coalitions.<sup>9</sup> Venezuela argued that the inclusion of an interoperability concept would risk creating two orders of states parties – those complying immediately with the Convention and those who will continue to effectively have recourse to cluster munitions. The UK responded by stating that Article 21(4) of the then draft text should ensure that states parties cannot use the interoperability provision as an exception to their obligations under Article 1.<sup>10</sup>

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6 Australia, Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, Netherlands, Sweden, Switzerland, United Kingdom, 'Discussion paper Cluster Munitions and Inter-Operability: The Oslo-Process Discussion Text and Implications for International Operations', Wellington Conference on Cluster Munitions, February 18–22, 2008, p. [1], [http://www.delegfrance-cd-geneve.org/declarations/ssdos\\_decl\\_sous\\_munitions/discussion-paper-like-minded-conf-wellington.pdf](http://www.delegfrance-cd-geneve.org/declarations/ssdos_decl_sous_munitions/discussion-paper-like-minded-conf-wellington.pdf) (accessed 14 December 2010).

7 Australia, Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, Netherlands, Sweden, Switzerland, United Kingdom, 'Discussion paper Cluster Munitions and Inter-Operability: The Oslo-Process Discussion Text and Implications for International Operations', Wellington Conference on Cluster Munitions, February 18–22, 2008, p. [1], [http://www.delegfrance-cd-geneve.org/declarations/ssdos\\_decl\\_sous\\_munitions/discussion-paper-like-minded-conf-wellington.pdf](http://www.delegfrance-cd-geneve.org/declarations/ssdos_decl_sous_munitions/discussion-paper-like-minded-conf-wellington.pdf) (accessed 14 December 2010).

8 Australia, Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, Netherlands, Sweden, Switzerland, United Kingdom, 'Discussion paper Cluster Munitions and Inter-Operability: The Oslo-Process Discussion Text and Implications for International Operations', Wellington Conference on Cluster Munitions, February 18–22, 2008, p. [2], [http://www.delegfrance-cd-geneve.org/declarations/ssdos\\_decl\\_sous\\_munitions/discussion-paper-like-minded-conf-wellington.pdf](http://www.delegfrance-cd-geneve.org/declarations/ssdos_decl_sous_munitions/discussion-paper-like-minded-conf-wellington.pdf) (accessed 14 December 2010).

9 Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, *Summary Record of Tenth Session of the Committee of the Whole*, CCM/CW/SR/10, 18 June 2008, [http://www.clustermunitionsdublin.ie/pdf/CoW10May26am\\_002.pdf](http://www.clustermunitionsdublin.ie/pdf/CoW10May26am_002.pdf) (accessed 15 December 2010).

10 Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, *Summary Record of Tenth Session of the Committee of the Whole*, CCM/CW/SR/10, 18 June 2008, [http://www.clustermunitionsdublin.ie/pdf/CoW10May26am\\_002.pdf](http://www.clustermunitionsdublin.ie/pdf/CoW10May26am_002.pdf) (accessed 15 December 2010).

4.9 Throughout the process, those involved in the negotiations sought to establish a balance between humanitarian and security concerns as well as that between the interests of states and civil society.<sup>11</sup> Further to the discussion paper and in the final stage of negotiations, Article 21 was inserted into the text of the Convention at the Dublin Diplomatic Conference.

## Interpreting Article 21

4.10 There are two contrasting interpretations of the relationship between Article 1 and 21 of the Convention. Some states interpret Article 21(3) as an exemption to the Article 1(1)(c) prohibition on assistance in the context of joint military operations and cooperation with non-states parties. This is the position that the government has taken as stated by the explanatory memorandum on Article 21(3):

The effect of paragraph 3 is that certain acts are permitted in the context of military cooperation and operations with States not party to the Convention, even though such acts could ultimately assist the non-State Party to engage in conduct that is prohibited by Article 1 of the Convention.<sup>12</sup>

4.11 The government recognises that paragraph 4 of Article 21 restricts the scope of paragraph 3 by re-introducing some legal restrictions. The defence in section 72.41 of the bill applies, therefore, to persons who 'undertake prohibited conduct in the course of military operations with non-States Parties, as long as the act does not constitute any of the conduct mentioned in paragraph 4 of Article 21 of the Convention'.<sup>13</sup> Australia's interpretation of Article 21 as reflected in the bill is consistent with the approach of other states parties with whom Australia often works in military coalitions, including the UK and Canada.<sup>14</sup>

4.12 The alternative position held by governments including Ireland and New Zealand (and supported by the majority of submitters to the committee) is that Article 21(3) and (4) clarifies rather than suspends Article 1(1)(c). Their view is that joint military operations are authorised only to the extent that the ban on assistance with prohibited acts is maintained.<sup>15</sup> Supporters of this position argue that Article 21 should be considered in conjunction with the general obligations of the Convention

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11 Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, *Summary Record of the Sixteenth Session of the Committee of the Whole*, CCM/CW/SR/16, 18 June 2008, [http://www.clustermunitionsdublin.ie/pdf/CoW16May28pm\\_rev15July2009.pdf](http://www.clustermunitionsdublin.ie/pdf/CoW16May28pm_rev15July2009.pdf) (accessed 15 December 2010).

12 *Explanatory Memorandum*, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, p. 12.

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

14 Department of Defence, *Additional information*, received 2 March 2011, p. 2.

15 Human Rights Watch, *Promoting the Prohibitions, The Need for Strong Interpretations of the Convention on Cluster Munitions*, 6 November 2010, p. 4, <http://www.hrw.org/en/news/2010/11/06/promoting-prohibitions> (accessed 14 December 2010).

articulated in Article 1(1) of the Convention. They hold the view that as the purpose of the Convention is to eliminate cluster munitions 'for all times', it would be inconsistent with that purpose to interpret Article 21(3) as waiving the obligations of Article 1(1)(c), including its prohibition on assistance during periods of joint military operation. On the adoption of the text of the Convention, for example, Iceland noted that Article 21(3) 'should not be read as entitling States Parties to avoid their specific obligations under the Convention for this limited purpose', that is, for the purpose of joint military operations. It continued that the 'decision to reinforce this position by listing some examples in paragraph 4 cannot therefore be interpreted to allow departures in other respects'.<sup>16</sup>

4.13 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 with recommendations made by the Joint Standing Committee on Treaties (JSCOT) when it reviewed the United Nations Convention on Cluster Munitions in the 42nd Parliament'.<sup>17</sup> The following section considers, therefore, JSCOT's recommendations and Australia's response to them.

### **Joint Standing Committee on Treaties and Government response**

4.14 In its report on the Convention, JSCOT raised three issues in relation to Article 21:

- the motivations for the inclusion of Article 21(3) in the Convention;
- the ability of Australian personnel to inadvertently participate in the use, or assist in the use, of cluster munitions in light of the interoperability permitted under Article 21;
- the risk of Australian personnel being relied upon to carry out an action which would be in breach of the Convention during a joint military operation with a State not party to the Convention.<sup>18</sup>

4.15 JSCOT acknowledged concerns regarding the potential for Australian military personnel to inadvertently participate in the use or assist in the use of cluster munitions. It raised its own concerns that some of the terms in the Convention are 'not clearly defined and may provide an avenue by which Australia could participate in

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16 Statement of Ireland, 'Statement by the Government of Ireland upon the Adoption of the Convention on Cluster Munitions', Dublin Diplomatic Conference on Cluster Munitions, CCM/CRP/2, 30 May 2008, <http://www.clustermunitionsdublin.ie/pdf/IcelandStatementGE.pdf> (accessed 14 December 2010).

17 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](http://www.aph.gov.au/Senate/committee/selectionbills_ctte/reports/2010/rep1310.pdf) (accessed 11 February 2011).

18 Joint Standing Committee on Treaties, *Report No 103*, Treaties tabled on 12 March and 13 May 2009, 18 August 2009, p. 19.

actions which may contravene the humanitarian aims of the Convention'.<sup>19</sup> It recommended that the government and ADF have regard to the definition of the terms 'use', 'retain', 'assist', 'encourage' and 'induce' as they apply in Articles 1, 2 and 21 of the Convention when drafting the legislation to implement the treaty.<sup>20</sup>

4.16 JSCOT further recommended that when drafting the legislation required to implement the Convention together with policies under which ADF personnel are to operate, the government and ADF have regard to preventing 'inadvertent participation in the use, or assistance in the use, of cluster munitions by Australia'.<sup>21</sup>

4.17 In evidence to JSCOT, DFAT emphasised the importance of Article 21 in terms of Australia being able to engage in coalition and UN peacekeeping operations and to maintain defence cooperation with countries which are not or will not be states parties to the Convention for some time.<sup>22</sup> In its response to JSCOT's recommendations, DFAT clarified Australia's position that its military personnel would be permitted to participate in coalition operations in which an ally may use cluster munitions. It explained that such personnel would not, however, be permitted to physically use, transfer or expressly request the use of cluster munitions.<sup>23</sup>

## Evidence

4.18 Australia's interpretation of Article 21 received the greatest attention in evidence to the committee. The majority of submitters argued that unlike the interpretation articulated in the bill which recognises Article 21(3) as an exception to Article 1(1)(c) prohibitions, Article 21(3) should be interpreted as a clarification of Article 1(1)(c) prohibitions.<sup>24</sup> This position stands in direct contrast to that of the government. Thus, concerns raised by the majority of submitters both in terms of the bill's provisions as well as in relation to Convention obligations outside of the imposition of penal sanctions stem largely from their divergent interpretation of Article 21.

4.19 The primary concern of submitters was that section 72.41 may be interpreted to allow Australians to assist with prohibited acts in the context of joint military

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

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

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

22 Joint Standing Committee on Treaties, *Report No 103*, Treaties tabled on 12 March and 13 May 2009, 18 August 2009, p. 19.

23 Joint Standing Committee on Treaties, *Report No 103*, Treaties tabled on 12 March and 13 May 2009, 18 August 2009, p. 16.

24 See for example, Lorel Thomas, Cluster Munition Coalition, *Committee Hansard*, 3 March 2011, p. 4.

operations.<sup>25</sup> Mrs Lorel Thomas of the Cluster Munition Coalition voiced this concern by stating 'we do not believe that deliberate and willing cooperation by Australian personnel in prohibited acts is acceptable'.<sup>26</sup> The Australian Network to Ban Landmines and Cluster Munitions (ANBLC) argued that Article 21 was designed to allow state parties to work with non-state parties and was 'never meant to allow military personnel of the State Party to engage in prohibited acts and should not be interpreted in this fashion'.<sup>27</sup> The Law Council of Australia noted that the interpretation of such submitters is that Article 21(3) serves to 'clarify that participation in joint military operations *when it does not amount to assistance with acts prohibited by the Convention*, is not prohibited under the Convention'.<sup>28</sup>

4.20 Referring to JSCOT's observation that Article 21(4) 'reaffirms the obligation that States Parties cannot assist, encourage or induce the use of cluster munitions by another State'<sup>29</sup>, ANBLC held that the legislation:

...allows for Australian soldiers to engage in actions such as participating in planning a cluster munitions strike, agreeing to rules of engagement where cluster munitions would be used, training others in the use of cluster munitions and even calling for a cluster munitions strike provided that the choice of munitions used was not exclusively under Australian control'.<sup>30</sup>

4.21 Human Rights Watch and the IHRC argued that if adopted, such an interpretation would 'essentially allow Australian military personnel to load and aim the gun, so long as they did not pull the trigger'.<sup>31</sup> They noted that whilst Article 21(3) serves to clarify that, in the context of joint military operations, military personnel 'may *participate* in such operations without violating the convention; it does not, however, give them licence to violate' the Convention's prohibitions and that:

The proposed Section 72.41 takes the opposite approach and adopts language that seems to go further than Article 21(3). While Article 21(3) unambiguously states only that states parties "may engage" in joint military operations, the Bill creates a defence for many acts during such operations that on their face violate the convention.<sup>32</sup>

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25 Australian Red Cross, *Submission 21*, p. 3; Australian Network to Ban Landmines and Cluster Munitions, *Submission 3*, p. [4]; Aotearoa New Zealand Cluster Munitions Coalition, *Submission 6*, p. [2]; Act for Peace, *Submission 17*, pp. [6–7]; Afghan Landmine Survivors' Organization, *Submission 13*, p. 3; Human Rights Watch and IHRC, *Submission 7*, p. 5.

26 Lorel Thomas, Cluster Munitions Coalition, *Committee Hansard*, 3 March 2011, p. 4.

27 Australian Network to Ban Landmines and Cluster Munitions, *Submission 3*, p. [5].

28 Law Council of Australia, *Submission 20*, p. 8. The Law Council of Australia expresses no views about such criticisms of Australia's approach to interoperability in Article 21.

29 Joint Standing Committee on Treaties, *Report No 103*, Treaties tabled on 12 March and 13 May 2009, 18 August 2009, p. 14.

30 Australian Network to Ban Landmines and Cluster Munitions, *Submission 3*, p. [4].

31 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 6.

32 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 6.

4.22 The Australian Red Cross held a similar view, arguing that rather than protecting personnel from liability from inadvertent or indirect participation in activities involving the use of cluster munitions, the 'defence as currently drafted could in fact allow the intentional violation of the Convention'.<sup>33</sup> The International Committee of the Red Cross (ICRC) took the position that the section 72.41 defence:

...could lead to permitting the forces of a State Party to be directly and actively involved in activities such as training for and planning the use of cluster munitions, which would contravene the Convention and undermines its goals and that such acts would perpetuate rather than eliminate the future use of these weapons.<sup>34</sup>

4.23 Similarly, Australian Lawyers for Human Rights (ALHR) argued that under the bill's provisions, Australia could 'potentially participate' in acts of assistance that run directly counter to the Convention's purpose'.<sup>35</sup> Drawing on the Vienna Convention on the Law of Treaties (VCLT) which governs the interpretation of the Convention, ALHR drew the committee's attention to Article 31(1) of the VCLT. It states that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objective and purpose'. ALHR held that the 'object and purpose' of the Convention on Cluster Munitions can be ascertained, in part, by consideration of the preamble which affirms that the fundamental humanitarian and disarmament purpose of the Convention is to 'put an end for all time to the suffering and casualties caused by cluster munitions'.<sup>36</sup>

4.24 Referring to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Land Mine Treaty), ANBLC emphasised that joint operations can be conducted without states parties being required to carry out prohibited acts.<sup>37</sup> Indeed, when similar concerns were raised during negotiations about joint military operations in relation to the Land Mine Treaty, the Law Council of Australia argued that states addressed the issue by clarifying their position in national statement and national laws, rather than by adopting a separate article, such as Article 21 of the Convention.<sup>38</sup>

4.25 Other witnesses cited the legislation of New Zealand and Ireland respectively as key examples of a more narrow approach to Article 21 for Australia to follow.<sup>39</sup>

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33 Australian Red Cross, *Submission 21*, p. 3.

34 International Committee of the Red Cross, *Submission 9*, p. 2.

35 Australian Lawyers for Human Rights, *Submission 19*, p. [11].

36 Australian Lawyers for Human Rights, *Submission 19*, p. [4]. See further, paragraph 2 of the Convention preamble.

37 Australian Network to Ban Landmines and Cluster Munitions, *Submission 3*, p. [5].

38 Law Council of Australia, *Submission 20*, p. 10.

39 See for example, International Committee of the Red Cross, *Submission 9*, p. 3. See also the discussion on the New Zealand legislation at the committee hearing, *Committee Hansard*, 3 March 2011, pp. 5–6.



The New Zealand legislation stipulates that a member of the armed forces does not commit an offence:

...merely by engaging, in the course of his or her duties, in operations, exercises, or other military activities with the armed forces of a State that is not a party to the Convention and that has the capability to engage in conduct prohibited by section 10(1).<sup>40</sup>

### *Suggested amendments*

4.26 A substantial number of submitters argued that section 72.41 should be revised to state explicitly in the bill that all the Convention's prohibitions apply during joint military operations to ensure that such operations with non-states parties do not become what the ANZCMC termed a 'loophole' in the bill's prohibitions.<sup>41</sup> Many such submitters suggested that the bill heed JSCOT's recommendation and apply a more narrow definition to that of:

- 'mere participation' in military cooperation or operations with non-states parties, and
- acts that are 'unintended or inadvertent or that only have a remote or indirect relationship with the prohibited conduct'.<sup>42</sup>

4.27 A number of submitters were also concerned that subsection 72.41(c) should be amended to state explicitly that military personnel are prohibited from requesting cluster munitions strikes.<sup>43</sup> Human Rights Watch and the IHRC, for example, took the view that section 72.41(c) should be amended to prohibit expressly such requests on the basis that such requests come 'dangerously close to use'.<sup>44</sup> MAPW was concerned that the provision could be interpreted to mean that any act or conversation that falls just short of 'expressly requesting' a cluster munition strike is permissible and that the

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40 *Cluster Munitions Prohibition Act 2009*, Section 11(6), <http://www.legislation.govt.nz/act/public/2009/0068/latest/DLM2171672.html> (accessed 28 January 2011).

41 Human Rights Watch and IHRC, *Submission 7*, pp. 6–7; Australian Network to Ban Landmines and Cluster Munitions, *Submission 3*, p. [5]; Union Aid Abroad–APHEDA, *Submission 12*, p. [3]; CBM Australia, *Submission 11*, p. 3; Australian Lawyers for Human Rights, *Submission 19*, p. [2]; Oxfam Australia, *Submission 14*, p. 2; Cluster Munition Coalition, *Submission 22*; Aotearoa New Zealand Cluster Munitions Coalition, *Submission 6*, p. [2].

42 Australian Red Cross, *Submission 21*, p. 3. See also, Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 5.

43 Aotearoa New Zealand Cluster Munitions Coalition, *Submission 6*, pp. [2–3]; Union Aid Abroad–APHEDA, *Submission 12*, p. [3]; CBM Australia, *Submission 11*, p. 3; Australian Lawyers for Human Rights, *Submission 19*, p. [2]; Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 7; Afghan Landmine Survivors' Organization, *Submission 13*, p. 3.

44 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 8.

entire section should be deleted on the basis that it violates Article 9 of the Convention.<sup>45</sup>

4.28 Human Rights Watch and the IHRC emphasised that revising section 72.41 to reflect the continued application of the Convention's prohibitions during situations of interoperability would not interfere with Australia's military partnerships or restrict Australia's ability to participate in joint military operations with non-states parties. They argued that it would also protect individual soldiers from liability for acts during such operations and that experience with the Land Mine Treaty 'shows that states are fully capable of abiding by a prohibition on assistance while cooperating with the armed forces of states not party'.<sup>46</sup>

4.29 The Law Council of Australia took a different approach, suggesting that rather than focus on section 72.41 defence provisions, a mechanism of regular reporting be established whereby the government and ADF regularly report to the committee on how they have acted to ensure compliance with the Convention whether by way of published government policy or rules of engagement.<sup>47</sup>

## **The government's position**

### ***The importance of interoperability***

4.30 The position of the Australian Government is that interoperability is 'central to the protection of international security, as well as Australia's national security'.<sup>48</sup> The Attorney-General noted that the ability to maintain military capability through interoperability is a 'fundamental pillar of international security and essential for Australia's national security'.<sup>49</sup> Indeed, Australia's position is that without such a provision, participation by Australia in joint military operations would be rendered unworkable.<sup>50</sup> As Lieutenant General David Hurley, Vice Chief of the Defence Force emphasised to the committee in response to the question of whether a total ban on cluster munitions in relation to the ADF could be considered:

...I think at times calls for total exclusion do not recognise the deeply integrated nature of interoperability. For example, our people are deeply

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45 Medical Association for Prevention of War (Australia), *Submission 15*, p. 5.

46 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 7.

47 Law Council of Australia, *Submission 20*, p. 12.

48 Department of Foreign Affairs and Trade, *Additional information*, received 1 March 2011.

49 The Hon Robert McClelland MP, Attorney-General, Second Reading Speech, *House Hansard*, 27 October 2010, p. 9.

50 Australia, Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, Netherlands, Sweden, Switzerland, United Kingdom, 'Discussion paper Cluster Munitions and Inter-Operability: The Oslo-Process Discussion Text and Implications for International Operations', Wellington Conference on Cluster Munitions, February 18–22, 2008, p. [2], [http://www.delegfrance-cd-geneve.org/declarations/ssdos\\_decl\\_sous\\_munitions/discussion-paper-like-minded-conf-wellington.pdf](http://www.delegfrance-cd-geneve.org/declarations/ssdos_decl_sous_munitions/discussion-paper-like-minded-conf-wellington.pdf) (accessed 14 December 2010).

embedded with US forces or coalition forces on operations today. Total exclusion would negate interoperability, which is one of the balancing parts of the convention. If we want to be interoperable, to be able to conduct military cooperation and military operations with a non-state party, total exclusion would prevent us from doing that.<sup>51</sup>

### ***Interoperability, the Convention and the bill***

4.31 The government's position is that the bill gives effect to the Convention in Australian law and is both guided and limited by the contents of the Convention. In this regard, AGD highlighted that the interoperability defence in section 72.41 'reflects the conduct that is permitted by paragraph 3 of Article 21 while ensuring that the conduct that is prohibited by paragraph 4 of Article 21 remains prohibited'.<sup>52</sup> Therefore:

Section 72.41 provides that a person who is an Australian citizen, Australian Defence Force (ADF) member or Commonwealth contractor does not commit an offence under section 72.38 if the act is done in the course of military cooperation or operations with a foreign country that is not a party to the Convention, as long as the act is not connected with Australia using, developing, producing, otherwise acquiring, stockpiling, retaining or transferring a cluster munition...<sup>53</sup>

4.32 The government considers that Article 21(3) permits certain acts in the context of military cooperation and operations with non-states parties even though such acts could 'ultimately assist the non-State Party to engage in conduct that is prohibited in Article 1 of the Convention'.<sup>54</sup> In other words, acts defined in Article 1(1)(c) including that of assistance are, for the purposes of the bill, considered permissible conduct in the course of joint military cooperation and operations. While giving evidence to the committee, Mr Greg Manning, First Assistant Secretary, AGD clarified this point:

CHAIR—Does the interpretation by the Australian government of the convention as reflected in section 72.41 mean that in joint military operations its military personnel may assist military personnel of non-state parties to use, develop, produce, acquire, stockpile, retain or transfer cluster munitions?

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51 Lieutenant General David Hurley, Department of Defence, *Committee Hansard*, 3 March 2011, p. 20.

52 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 5.

53 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 3.

54 *Explanatory Memorandum*, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, p. 12. See also Attorney-General's Department, *Additional information*, received 28 February 2011, p. 4.

Mr Manning—The effect of 72.41 is that the Australian government itself cannot use, develop, produce or otherwise acquire but that the ancillary provisions are open to Australia. So yes—it can.<sup>55</sup>

4.33 It will be an offence, however, for Australian personnel to expressly request the use of cluster munitions in cases where the choice of munitions used is within their exclusive control.<sup>56</sup> This provision realises Article 21(4) of the Convention and contains two concepts: an 'express request' and a case of 'exclusive control':

If a person's act consists of an express request in a situation of exclusive control, the defence in proposed section 72.41 will not be made out. Both concepts must be present in order for the application of the defence to be excluded. For example, if a person expressly requests the use of cluster munitions in a case where the choice of munitions used is not within the exclusive control of the Commonwealth, they may still raise the defence in proposed section 72.41.<sup>57</sup>

4.34 Thus, the limitations contained in the interoperability defence in the bill will ensure that 'Australian and Australians will continue to act consistently with the object and purpose of the Convention, even when undertaking cooperative activities with countries that are not obliged to comply with the Convention'.<sup>58</sup>

4.35 In response to suggestions that the defence apply to inadvertent participation in the use of cluster munitions, AGD affirmed that the Convention does not prohibit inadvertent participation in the use, or assistance in the use, of cluster munitions.<sup>59</sup>

### ***Practical application of the interoperability defence***

4.36 According to the government, the ability to maintain interoperability means that 'ADF personnel can continue to support coalition operations involving non-States Parties, and will help to protect ADF lives during those combined operations'.<sup>60</sup> Defence highlighted that the effect of the provision is that ADF personnel could be defended by non-states-parties through 'close air support, even when cluster munitions might be used'.<sup>61</sup>

4.37 In terms of the scope of section 72.41 or practical effect of Article 21, the joint government submission stated that:

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55 *Committee Hansard*, 3 March 2011, p. 19.

56 Government Response to Joint Standing Committee on Treaties Report No 103 on the Convention on Cluster Munitions, 13 May 2010, pp. 1–2.

57 *Explanatory Memorandum*, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, p. 13.

58 Attorney-General, Minister for Foreign Affairs, Minister for Defence, *Submission 24*, p. 3.

59 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 3.

60 Attorney General, Minister for Foreign Affairs, Minister for Defence, *Submission 24*, p. 3.

61 Department of Defence, *Additional information*, received 2 March 2011, p. 1.

ADF personnel will be able to participate in a variety of roles when involved in combined operations with non-States Parties who may use cluster munitions, including by holding senior positions (without exercising exclusive control over the choice of munitions used in operations). For example, the ADF will be able to participate in combined headquarters, mission or other planning with non-State Party forces. ADF personnel may be deployed to operate with non-States Parties, or to provide logistical support to non-State Party forces.<sup>62</sup>

4.38 Further, Defence informed the committee that in an operational sense, ADF personnel will be prohibited from 'physically firing, discharging or releasing cluster munitions'.<sup>63</sup> In evidence to JSCOT, Defence had noted that in practice, 'ADF personnel should not be the first or the last in the chain of command when cluster munitions are used'.<sup>64</sup>

4.39 Defence highlighted that ADF doctrine, procedures, rules and directives are 'being modified to ensure consistency with the Convention and the Bill' and that the necessary changes will be made before Australia ratifies the Convention and the implementing legislation commences.<sup>65</sup> Defence also assured the committee that the ADF is experienced at 'incorporating the requirements of weapons treaties into doctrine and procedures and complying with those requirements while working in coalition operations'.<sup>66</sup>

### ***Comparison with Land Mine Treaty***

4.40 The government's response to the suggestion that its approach to cluster munitions should mirror that in relation to the Land Mine Treaty is reflected in the joint discussion paper issued during the Oslo Process.<sup>67</sup> At that time, the government took the view that the strategies employed in relation to anti-personnel mines which allow for the feasible removal of officers from the decision-making process, are unlikely to work for cluster munitions. It noted that anti-personnel mines are 'less likely to be used in modern coalition warfare' given that they have reduced military utility 'where conventional battles are fast-moving or operations are non-conventional

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62 Attorney-General, Minister for Foreign Affairs, Minister for Defence, *Submission 24*, p. 3.

63 Department of Defence, *Additional information*, received 2 March 2011, p. 1.

64 Department of Defence, *Additional information*, received 2 March 2011, p. 1. See also, Joint Standing Committee on Treaties, *Report No 103*, Treaties tabled on 12 March and 13 May 2009, 18 August 2009, p. 21.

65 Department of Defence, *Additional information*, received 2 March 2011, p. 2.

66 Department of Defence, *Additional information*, received 2 March 2011, p. 2.

67 Australia, Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, Netherlands, Sweden, Switzerland, United Kingdom, 'Discussion paper Cluster Munitions and Inter-Operability: The Oslo-Process Discussion Text and Implications for International Operations', Wellington Conference on Cluster Munitions, February 18–22, 2008, p. [2], [http://www.delegfrance-cd-geneve.org/declarations/ssdos\\_decl\\_sous\\_munitions/discussion-paper-like-minded-conf-wellington.pdf](http://www.delegfrance-cd-geneve.org/declarations/ssdos_decl_sous_munitions/discussion-paper-like-minded-conf-wellington.pdf) (accessed 14 December 2010).

or insurgent in nature'. Moreover, states parties to the Convention are more likely to be 'inadvertently captured by the prohibition because of the wide variety of planned and unplanned in scenarios in which cluster munitions may be used and the short planning lead time involved'.<sup>68</sup>

4.41 DFAT emphasised that as the legal obligations enshrined in the respective treaties are different, the government has taken a different legislative approach to landmines and cluster munitions 'in so far as the Government must ensure that Australia implements its legal obligations under each Convention'.<sup>69</sup> AGD also noted that the Convention was negotiated in light of the experience with the Land Mine Treaty. It informed the committee that in any case, Australia's position in relation to both treaties is that military cooperation and operations between states including non-states parties is 'central to the protection of international security, as well as Australia's national security'.<sup>70</sup>

## **Article 21 positive obligations**

4.42 Whilst Article 21(3) permits military cooperation between states parties and states not party to the Convention, the first two paragraphs of the article also oblige states parties to promote the Convention's norms. In this sense, the article seeks to balance the provision for continued military cooperation with non-states parties with that of positive obligations to actively discourage non-states parties from using cluster munitions and to adhere to the Convention.<sup>71</sup>

4.43 A number of submitters highlighted the importance of Article 21(1) and (2) of the Convention particularly in light of the interoperability clause. The Australian Red Cross emphasised the importance of ensuring that paragraphs 3 and 4 of the article do not conflict with paragraphs 1 and 2, noting that in its opinion, the bill does not achieve this balance.<sup>72</sup>

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68 Australia, Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, Netherlands, Sweden, Switzerland, United Kingdom, 'Discussion paper Cluster Munitions and Inter-Operability: The Oslo-Process Discussion Text and Implications for International Operations', Wellington Conference on Cluster Munitions, February 18–22, 2008, p. [2], [http://www.delegfrance-cd-geneve.org/declarations/ssdos\\_decl\\_sous\\_munitions/discussion-paper-like-minded-conf-wellington.pdf](http://www.delegfrance-cd-geneve.org/declarations/ssdos_decl_sous_munitions/discussion-paper-like-minded-conf-wellington.pdf) (accessed 14 December 2010).

69 Department of Foreign Affairs and Trade, *Additional information*, received 1 March 2011, p. 4.

70 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 6.

71 Article 21(1) requires states parties to encourage non-states parties to 'ratify, accept, approve or accede' to the Convention with the 'goal of attracting the adherence of all States to this Convention'. Article 21(2) requires that states parties notify non-states parties of their obligations under the Convention, to promote the Convention's norms and to make 'its best efforts to discourage States not party to this Convention from using cluster munitions'.

72 Australian Red Cross, *Submission 21*, p. 2; Medical Association for Prevention of War (Australia), *Submission 15*, pp. 6–7.

4.44 Many other submitters argued that Australia's positive obligations under Article 21(1) and (2) need to be recognised in the bill.<sup>73</sup> Union Aid Abroad–APHEDA, for example, argued that Article 9 mandates states parties to implement all obligations of the Convention and that implementing the Convention's positive elements through legislation is the 'best way to set clear binding rules and ensure that Australia is fulfilling all of its treaty obligations'.<sup>74</sup> Submitters in support of this course of action recommended that a designated government agency be charged with coordinating implementation of Australia's positive obligations under the Convention, namely to encourage non-states parties to join and promote the Convention's norms with all states.<sup>75</sup>

4.45 Other submitters highlighted the need for recognition in the bill of other positive obligations under the Convention including that of stockpile destruction, clearance procedures and victim assistance.<sup>76</sup>

4.46 ALHR argued in favour of incorporating an intention clause to assist in interpreting the statute<sup>77</sup> whilst others supported the inclusion of provisions which encourage universalisation of the treaty.<sup>78</sup> To this end, Mrs Lorel Thomas, Cluster Munition Coalition argued that a stand-alone piece of legislation would more easily allow for the inclusion of both positive obligations and an objects clause as opposed to an amendment to the Code.<sup>79</sup>

### **The government's position on positive obligations**

4.47 In response to criticism that the bill does not reconcile or balance the respective obligations in Article 21 with the interoperability provision, Defence emphasised that the obligation on Australia to exert influence in discouraging the use of cluster munitions will 'not preclude our continued ability to engage in military cooperation and operations' with non-states parties.<sup>80</sup> Similarly, AGD's Mr Manning

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73 See for example, International Committee of the Red Cross, *Submission 9*, p. 2.

74 Union Aid Abroad–APHEDA, *Submission 12*, p. [3].

75 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 14; Oxfam Australia, *Submission 14*, p. 3; Medical Association for Prevention of War (Australia), *Submission 15*, p. 7; CBM Australia, *Submission 11*, p. 4; Aotearoa New Zealand Cluster Munitions Coalition, *Submission 6*, p. [4].

76 Submitter 16 for example highlighted the obligations of states parties in relation to victim assistance under the Convention and commitment to respond (*Submission 16*, p. [2]). See also Act for Peace in relation to stockpile destruction, clearance and risk reduction education (*Submission 17*, p. [4]). Afghan Landmine Survivors' Organization also supported recognition of victim assistance as well as provisions for cooperation and universalisation of the treaty in the bill (*Submission 13*, p. 3).

77 Australian Lawyers for Human Rights, *Submission 19*, p. [2].

78 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 1; Australian Network to Ban Landmines and Cluster Munitions, *Submission 3*, p. [10].

79 Lorel Thomas, Cluster Munition Coalition, *Committee Hansard*, 3 March 2011, p. 7.

80 Department of Defence, *Additional information*, received 2 March 2011, pp. 2–3.

argued that there was no inconsistency between the authority to assist non-states parties who may use cluster munitions with that of obligations to discourage the use of cluster munitions:

Obviously Australia's obligations under the convention are of equal weight. However, there is no prohibition on Australia in relation to the type of conduct that we are talking about. It may choose to implement its obligations under article 21(2) in a number of ways, but the convention itself reflects a balance here and acknowledges that whilst states are doing that they are not prohibited from engaging in the type of conduct accepted in the later clauses in article 21.<sup>81</sup>

4.48 AGD also warned that the inclusion of a reference to paragraphs 1 and 2 of Article 21 in the bill would 'risk curtailing the considerable discretion available to States Parties as to the means of discharging these obligations'.<sup>82</sup>

4.49 The government emphasised that the purpose of the bill is to amend the *Criminal Code Act 1995* (the Code) to ensure consistency between Australian law and the Convention by creating offences and penalties in relation to cluster munitions. AGD emphasised that the bill should, therefore, only contain those provisions necessary to give effect to the Convention. In this regard, positive obligations 'do not require legislative implementation, and can be implemented through administrative and other means'.<sup>83</sup>

4.50 Furthermore, an objects clause was not considered necessary by the government because the bill already contains a clause that sets out the purpose of the bill's provisions and that an additional 'objects' clause would simply add to the complexity of the legislation.<sup>84</sup> In addition, Mr Greg Manning, First Assistant Secretary of AGD, clarified that there was no legal effect in proceeding with a stand-alone piece of legislation as opposed to an amendment to the Code:

The government thinks that an amendment to the Criminal Code is the most appropriate and efficient way to give effect to those parts of the convention that require legislative implementation. Importantly, there is no legal effect in proceeding with this course as compared to having a stand-alone piece of legislation. The impact is the same in that it prohibits that conduct that Australia has an obligation to prohibit under the convention.<sup>85</sup>

### ***Realising Australia's positive obligations***

4.51 DFAT highlighted that the clearest demonstration of Australia's intent to fulfil the Convention's positive obligations under Article 21 was the signing of the

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81 Greg Manning, Attorney-General's Department, *Committee Hansard*, 3 March 2011, p. 19.

82 Attorney-General's Department, *Additional information*, received 28 February 2011, pp. 5–6.

83 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 8.

84 Greg Manning, Attorney-General's Department, *Committee Hansard*, 3 March 2011, p. 24.

85 Greg Manning, Attorney-General's Department, *Committee Hansard*, 3 March 2011, p. 17.



Convention on 3 December 2008 which implies that Australia is 'bound to comply with the spirit and intent of the Convention and is obliged not to act in a manner inconsistent with the Convention'.<sup>86</sup> Indeed, the government has stated its commitment to a 'world free from cluster munitions'.<sup>87</sup>

4.52 In regard to realising all the Convention's positive obligations, DFAT assured the committee that the obligations will be adhered to in the same manner as with other disarmament treaties including the Land Mine Treaty.<sup>88</sup> In terms of how Australia will fulfil its obligations in practice, AGD asserted that:

Australia will comply with its obligations under paragraphs 1 and 2 of Article 21 as appropriate opportunities arise, and consistently with its implementation of similar obligations in other international disarmament instruments. In formal and informal diplomatic and other contacts, Australia will urge States not party to the Convention not to use cluster munitions and encourage them to accede to the Convention. Australia will also continue to work with non-government organisations, which make a significant contribution to universalisation. Australia will also make clear to non-States Parties our obligations under the Convention, including when engaged in military cooperation and operations with non-States Parties.<sup>89</sup>

4.53 DFAT also noted that whilst it will have primary carriage of realising these obligations, it will work with other agencies, including Defence, to ensure that they take advantage of all relevant and appropriate opportunities to promote universal adherence to the Convention.<sup>90</sup> In terms of military engagement with non-states parties, DFAT clarified that:

...the limitations contained in the Bill will be reflected in ADF doctrine, procedures, rules and directives. This will ensure that Australia and Australians will act consistently with the object and purpose of the Convention (including paragraphs 1 and 2 of Article 21), including when undertaking cooperative activities with countries that are not obliged to comply with the Convention.<sup>91</sup>

4.54 As noted earlier in this chapter, the ADF is experienced at incorporating the requirements of weapons treaties into doctrine and procedures and at complying with such requirements during coalition operations.

4.55 AGD also emphasised that whilst the Convention gives considerable discretion as to the means of discharging the positive obligations, Australia will implement its obligations in a manner appropriate to each obligation. It noted further

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86 Department of Foreign Affairs & Trade, *Additional information*, received 1 March 2011, p. 11.

87 Department of Foreign Affairs & Trade, *Additional information*, received 1 March 2011, p. 5.

88 Department of Foreign Affairs & Trade, *Additional information*, received 1 March 2011, p. 3.

89 Attorney-General's Department, *Additional information*, received 28 February 2011, pp. 5–6.

90 Department of Foreign Affairs & Trade, *Additional information*, received 1 March 2011, p. 5.

91 Department of Foreign Affairs & Trade, *Additional information*, received 1 March 2011, p. 5.

that Australia already implements obligations under Article 6 to provide 'technical, material and financial assistance to States Parties affected by cluster munitions through the Mine Action Strategy for the Australian aid program'.<sup>92</sup> Moreover, Australia is already playing a constructive role in relation to Article 5 concerning victim assistance including through Australia's Mine Action Strategy for which Australia has pledged \$100 million to work towards a world free of landmines, cluster munitions and other explosive remnants of war.<sup>93</sup>

### **Committee view**

4.56 The committee recognises the complexities surrounding military relations with non-states parties and appreciates the need for a balance between security and humanitarian concerns. It acknowledges that without interoperability, the ability of Australia to engage with military allies in bilateral and multinational operations would be severely undermined if not impossible. It also appreciates that provision for military cooperation and operations with non-states parties is essential to the protection of international security, national security and the lives of ADF personnel.

4.57 The committee recognises that in seeking to amend the *Criminal Code Act 1995*, the bill gives effect to Convention obligations on states parties under Article 9 to impose penal sanctions to prevent and suppress prohibited activities whilst establishing respective defences.

4.58 Notwithstanding this, the committee acknowledges the strong concerns of submitters regarding the need to balance the explicit defences in relation to engagement with non-states parties to the Convention with Australia's positive obligations as a state party to actively pursue universal elimination of cluster munitions. Moreover, this bill cannot be considered in isolation from other positive measures that Australia has taken, and has pledged to undertake, to rid the world of cluster munitions. In this context, the committee acknowledges Australia's international standing in demining and victim assistance in particular. The committee is satisfied, moreover, that positive obligations are a matter of administrative rather than legislative action.

4.59 Given the extent of the concerns raised in evidence on the need to balance the four respective provisions of Article 21, the committee recognises that the article's positive obligations serve as a compelling incentive to ensure that states parties and their personnel engaged in joint military operations abide by the spirit of the Convention. When taken in this broader context, the committee is satisfied that the concerns about a lack of balance or silence on positive obligations in the bill are resolved.

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92 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 8.

93 Department of Foreign Affairs & Trade, *Additional information*, received 1 March 2011, p. 10.