

Chapter 5

Transit, retention and stockpiling of cluster munitions on Australian territory by non-states parties

5.1 Section 72.42 of the bill provides defences for the stockpiling, retention and transit of cluster munitions by military personnel of non-states parties on Australia territory. In considering this provision within the context of joint military operations with states not party to the Convention, the chapter considers the manner in which the transit, retention and stockpiling of foreign cluster munitions has been interpreted internationally before considering the evidence before the committee and the government's position in relation to it.

Interpreting the Convention

5.2 For the purposes of the Convention, the transit, retention and foreign stockpiling of cluster munitions are interpretive issues. The definition of 'transfer' in Article 2 of the Convention does not make explicit that the transit of cluster munitions through the territory of a state party is either prohibited or permissible. For this reason, different interpretations of the prohibition on assistance in Article 1(1)(c) have been applied to the issue of cluster munitions transit. Similarly, Article 21(3) concerning interoperability leaves scope to interpret states parties' relations with non-states parties including that in relation to the transit and stockpiling of cluster munitions when engaged in joint operations.

5.3 Austria and Germany have banned the transit of foreign cluster munitions in their implementation legislation.¹ A number of other states including Bulgaria, Madagascar, Malta, and Mexico have indicated that they interpret the Convention to proscribe transit and stockpiling of foreign-owned cluster munitions on the territory of a states party.² Whilst a specific prohibition on the transit of cluster munitions into French law was rejected on the basis that transit would be difficult to control, the Secretary of State for Defence noted that France will endeavour to prevent any state transit of cluster munitions on its territory. It would make known its obligations and

1 Human Rights Watch, *Promoting the Prohibitions, The Need for Strong Interpretations of the Convention on Cluster Munitions*, November 2010, p. 8, <http://www.hrw.org/en/news/2010/11/06/promoting-prohibitions> (accessed 18 January 2011).

2 Human Rights Watch, *Promoting the Prohibitions, The Need for Strong Interpretations of the Convention on Cluster Munitions*, November 2010, pp. 8–9, <http://www.hrw.org/en/news/2010/11/06/promoting-prohibitions> (accessed 19 January 2011).

commitments through diplomatic channels, and encourage other countries to respect them.³

5.4 The Netherlands in contrast has taken the view that the transit (or physical movement) across Dutch territory of cluster munitions of non-states parties is not prohibited but that the transfer (of ownership) of such munitions is.⁴ In addition, whilst the Netherlands has stated that there is no foreign stockpiling on its territory, it does not consider such storage by non-states parties to be prohibited under the Convention provided that the munitions remain under the ownership of that non-state party.⁵ Similarly, Portugal has taken the view that the Convention does not unequivocally exclude the possibility of foreign stockpiling and transit with the qualification that transit is permissible only in circumstances where the cluster munitions in question remain under the control of the non-state party which requested their passage.⁶

Section 72.42

5.5 Section 72.42 provides a defence in relation to the transit, retention and stockpiling of cluster munitions by non-states parties where such acts carried out in the course of military cooperation or operations with the ADF. It provides that military personnel of non-states parties can raise the defence in relation to the stockpiling, retention or transfer of cluster munitions when they are on a base, aircraft or ship in Australian territory.⁷ The provision is consistent with the government's interpretation of the Convention that the continuation of military cooperation and operations with non-states parties is expressly permitted under Article 21(3). Moreover, the defence recognises the government's position that military personnel of a country not party to the Convention are not required to comply with it.⁸

3 International Campaign to Ban Landmines and Cluster Munition Coalition, *Cluster Munition Monitor 2010*, Country Profile – France, October 2010, http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/144#_ftnref26 (accessed 19 January 2011).

4 International Campaign to Ban Landmines and Cluster Munition Coalition, *Banning Cluster Munitions: Government Policy and Practice*, Global Overview of Government Policy and Practice, 2009, <http://www.the-monitor.org/index.php/publications/display?url=cm/2009> (accessed 18 January 2011).

5 International Campaign to Ban Landmines and Cluster Munition Coalition, *Banning Cluster Munitions: Government Policy and Practice*, Netherlands, 2009, http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/595 (accessed 18 January 2011).

6 International Campaign to Ban Landmines and Cluster Munition Coalition, *Cluster Munitions Monitor 2010*, Portugal, http://www.the-monitor.org/custom/index.php/region_profiles/print_theme/582 (accessed 18 January 2011).

7 Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, ss. 72.42(1)(b).

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

5.6 The explanatory memorandum clarifies that the definition of 'transfer' in the bill reflects the meaning given by Article 2(8) of the Convention and includes either physical movement into or from national territory or transfer of title and control.⁹ Rather than distinguish transfer from transit, Australia's interpretation is consistent with the common interpretation of the Mine Ban Treaty's definition.

5.7 Whilst the defence applies to military personnel of countries that are not party to the Convention in relation to the stockpiling, retention and transfer of cluster munitions, it does not apply in relation to the use, development, production or acquisition of cluster munitions whilst such personnel are in Australian territory. As the explanatory memorandum highlights, such conduct 'remains prohibited to the military personnel of countries not party to the Convention while they are in Australian territory'.¹⁰

Evidence

5.8 Many submitters were concerned about the scope of the section 72.42 defence and the implications of providing explicitly for the stockpiling, retention and transit of cluster munitions by military personnel of non-states parties on Australian territory. The Australian Red Cross argued that this provision 'allows acts generally prohibited in the Convention to occur on the territory of a State party'.¹¹ Other submitters took the view that allowing foreign stockpiling and the transit of such weapons through Australian airspace and water would undermine Article 9 specifically and the objectives of the Convention more broadly whilst contributing to the continued use of the weapons.¹² The International Committee of the Red Cross (ICRC) held that it would be difficult to reconcile the broad exemptions under this provision with the obligations under paragraphs 1 and 2 of Article 21 to promote the norms of the Convention and discourage non-states parties from using the munitions.¹³ The ICRC continued that Article 21 was not meant to ensure that military cooperation and operations were unaffected by the Convention and that the provision permitted acts, prohibited by the treaty, to occur on territory under the jurisdiction and control of a state party.¹⁴ ALHR held the view that it was:

9 *Explanatory Memorandum, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, p. 18.

10 *Explanatory Memorandum, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, p. 15.

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

12 See for example, Australian Network to Ban Landmines and Cluster Munitions, *Submission 3*, p. [5]; Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 8; Australian Lawyers for Human Rights, *Submission 19*, p. [2]; Union Aid Abroad–APHEDA, *Submission 12*, p. [3]; Oxfam Australia, *Submission 14*, p. 3; Afghan Landmine Survivors' Organization, *Submission 13*, p. 2; Medical Association for Prevention of War (Australia), *Submission 15*, p. 5; Aotearoa New Zealand Cluster Munitions Coalition, *Submission 6*, p. [3].

13 International Committee of the Red Cross, *Submission 9*, p. 4.

14 International Committee of the Red Cross, *Submission 9*, p. 4.

...simply unconscionable that a state which has committed itself to the universal eradication of these weapons and the promotion of the treaty's humanitarian norms would allow for cluster munitions to be brought to, transferred and retained on its territory...The use of Australian infrastructure and territory amounts to clear assistance in breach of article 1, and facilitates the proliferation of cluster munitions, thereby defeating the object and purpose of the Convention, in addition to breaching articles 1 and 9.¹⁵

5.9 The ICRC as well as Human Rights Watch and IHRC noted that the bill goes further in this area than the legislation of other common law countries as Australia is believed to be the only state that will explicitly allow for foreign stockpiling in its implementation legislation.¹⁶ The ICRC argued that the legislation of New Zealand and Ireland respectively 'do not contain provisions excluding the application of their laws to foreign forces or vehicles on their territory'. The ICRC noted that the UK legislation creates 'defences for visiting forces of non-states parties for actions relating to the possession and transfer of a cluster munition as well as assisting, encouraging or inducing any other person to engage in any act that is prohibited'. Even so, according to the ICRC, the UK has 'indicated that it has requested the removal of foreign stockpiles of cluster munitions from UK territories within the 8 year period allowed for stockpile destruction in the Convention'.¹⁷

5.10 A number of witnesses suggested that the section 72.42 defence be deleted and replaced with specific wording prohibiting the transit, retention and stockpiling by military personnel of non-states parties on Australian territory.¹⁸ Whilst agreeing with this suggestion, Human Rights Watch and the IHRC proposed as an alternative, the removal of subsection 72.41(1) which specifically allows for transit and foreign stockpiling on Australian territory.¹⁹

The government's position

5.11 The government's position is that as military personnel of non-states parties are not required to comply with the Convention's obligations, they should not, therefore be subject to section 72.38 offences.²⁰ As Defence stated in evidence to the

15 Australian Lawyers for Human Rights, *Submission 19*, p. [12].

16 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 10.

17 International Committee of the Red Cross, *Submission 9*, p. 4.

18 Australian Network to Ban Landmines and Cluster Munitions Inc, *Submission 3*, pp. [6–7]; Oxfam Australia, *Submission 14*, p. 3; International Committee of the Red Cross, *Submission 9*, p. 5; Medical Association for Prevention of War (Australia), *Submission 15*, p. 5; Aotearoa New Zealand Cluster Munitions Coalition, *Submission 6*, p. [3]; Cluster Munition Coalition, *Submission 22*; Union Aid Abroad–APHEDA, *Submission 12*, p. [3]; Australian Red Cross, *Submission 21*, p. 3; Human Rights Watch and IHRC, *Submission 7*, p. 10; CBM Australia, *Submission 11*, p. 3.

19 Human Rights Watch and International Human Rights Clinic, *Submission 7*, pp. 9–10.

20 *Explanatory Memorandum, Criminal Code Amendment, (Cluster Munitions Prohibition) Bill 2010*, p. 14.

committee, it is not appropriate to require military personnel of non-states parties to comply with an international legal obligation to which their own country has not consented.²¹ Furthermore, the defence is consistent with the government's interpretation of the Convention that military cooperation and operations with non-states parties are expressly permitted by Article 21 and that such cooperation may entail the use by foreign states of bases on Australian territory or the entry of foreign ships or aircraft into Australian territory.²² As Defence emphasised, the ability to maintain interoperability with non-states parties is 'central to the protection of international security, as well as Australia's national security'.²³ However, in accordance with Article 21(4), non-states parties would not be excluded from prosecution 'if they use, develop, produce or acquire cluster munitions in Australia'.²⁴

5.12 Contrary to the views of many submitters, the government argued that section 72.42 is consistent with Article 9 of the Convention as the offences created in the bill 'apply to all persons on Australian territory and, under certain circumstances, to persons outside of Australia'.²⁵ Furthermore, AGD emphasises that Article 9 must be read alongside Article 21 and that the defence in the bill:

...recognises that it is not appropriate to require military personnel of non-States Parties to comply with an international legal obligation to which their sending country has not consented. Nonetheless, such visiting forces would not be excused from prosecution for the offences contained in the Bill if they use, develop, produce or acquire cluster munitions in Australia.²⁶

5.13 In response to concerns raised in submissions regarding foreign stockpiling and how such a defence could be reconciled with the fact that Australia does not itself currently have an operational stockpile of cluster munitions, DFAT stated:

The issue of domestic and foreign stockpiles of cluster munitions are separate. Australia does not have any operational stockpiles of cluster munitions and is committed to a world free from cluster munitions. However, Australia recognises that some non-States Parties to the Convention—including Australia's allies—may continue to use cluster munitions.²⁷

21 Department of Defence, *Additional information*, received 2 March 2011, p. 5.

22 Department of Defence, *Additional information*, received 2 March 2011, p. 5. See also, Attorney-General's Department, *Additional information*, received 28 February 2011, p. 7.

23 Department of Defence, *Additional information*, received 2 March 2011, p. 5.

24 *Explanatory Memorandum*, Criminal Code Amendment, (Cluster Munitions Prohibition) Bill 2010, p. 14; Department of Foreign Affairs & Trade, *Additional information*, received 1 March 2011, p. 7.

25 Attorney-General's Department, *Additional information*, received 28 February 2011, pp. 6–7.

26 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 7.

27 Department of Foreign Affairs & Trade, *Additional information*, received 1 March 2011, pp. 8–9.

5.14 When questioned about the practical application of the defence, Lieutenant General David Hurley, Vice Chief of the Defence Force (VCDF) stated that Australia is 'not stockpiling cluster munitions on behalf of anybody' and when asked whether US cluster munitions get transhipped through Australian territory, VCDF explained that if 'US forces are transiting Australian airspace or sea passage there is a possibility they will have them on board'.²⁸

5.15 Again, it is important to read this provision on the stockpiling and retention of cluster munitions in light of Australia's obligation to 'exert influence where appropriate in discouraging the use of cluster munitions'.²⁹ According to Defence, this obligation may be discharged, for example, in 'bilateral or multilateral spheres through oral or written communications aimed at dissuading or advising States not party to the Convention against cluster munitions'.³⁰ AGD and DFAT also stated that Australia would comply with its obligations under Article 21(1) and (2) as appropriate opportunities arise and consistently with its implementation of similar obligations in other international disarmament instruments. They stated further that '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'. DFAT added:

Australia will also make our obligations under the Convention clear to non-State Parties. When engaged in military cooperation, 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.³¹

5.16 In this regard, it is important to note that according to Defence and DFAT:

All munitions owned by foreign armed forces that are stored on Australian soil are required to be managed as 'Commonwealth Explosives', in accordance with the *Explosives Act 1961*, and its subordinate regulations and codes. This requires specific approval for the storage and transportation of these munitions, and their inclusion in Defence information holdings. Additionally, they are stored in Defence facilities licensed to store explosive ordnance, and are managed on the Computer System for Armaments. Consequently, Defence both approves and has full visibility of all foreign armed forces munitions that are stored on Australian soil.

No foreign armed force will be approved to fire cluster munitions on any Australian training range. All munitions fired on Australian training ranges

28 Lieutenant General David Hurley, Department of Defence, *Committee Hansard*, 3 March 2011, p. 22.

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

30 Department of Defence, *Additional information*, received 2 March 2011, p. 3.

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

by foreign armed forces are required to comply with the requirements specified and prohibitions for each range by the Director of Operations and Training Area Management.³²

Committee view

5.17 The committee appreciates that section 72.42 is consistent with the government's position on interoperability. The committee also notes the statements by AGD, Defence and DFAT providing assurances that Australia 'would comply with its obligations under Article 21(1) and (2) as appropriate opportunities arise'. Australia is not exempt from these obligations when it comes to non-states parties stockpiling or retaining cluster munitions on Australian territory or allowing them to transit cluster munitions through Australian airspace and water.

5.18 The Australia Government might help to allay people's concerns about the operation of sections 72.41 and 72.42 by better publicising the work that it is doing to encourage non-party states to adhere to, or endorse, the Convention and the way it uses its best efforts to discourage others from using cluster munitions.

32 Department of Defence, *Additional information*, received 2 March 2011, p. 5; Department of Foreign Affairs & Trade, *Additional information*, received 1 March 2011, p. 9.