

Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

Dissenting Report

By Senator Scott Ludlam, the Australian Greens

The Criminal Code (Cluster Munitions Prohibition) Bill gives effect to Australia's implementation of the Convention on Cluster Munitions. The Convention on Cluster Munitions prohibits use, production, transfer and stockpiling of cluster munitions as well as assistance with any of these activities. Under the Convention's obligations, state parties are required to clear their territory of cluster munition remnants, assist victims and provide cooperation and assistance to other state parties.

Australia was an active participant in the negotiation of the Convention on Cluster Munitions and among its original signatories. The Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 was introduced in the House of Representatives on October 27, 2010 and in the Senate on November 22, 2010. The Selection of Bills Committee found the Bill to be 'inconsistent with recommendations made by the Joint Standing Committee on Treaties (JSCOT),' and on October 28, 2010 the Senate referred the Bill to the Senate Committee on Foreign Affairs, Defence and Trade for inquiry and report.

The Greens have concerns with a number of the majority committee's conclusions particularly with regards interoperability, investment, stockpiling and retention of munitions.

In terms of interoperability the Australian Greens are not convinced that the report's findings go anywhere near far enough. The majority committee report finds that the Bill, 'Cannot be considered in isolation from other positive measures that Australia has taken'. It remains satisfied that, 'Positive obligations are a matter of administrative rather than legislative action' and it comments that 'the article's positive obligations serve as a compelling incentive to ensure that states parties and their personnel engaged in joint military operations are a matter of administrative rather than legislative action.' The report goes on to say that it '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.'

The Greens share the concerns of the Cluster Munition Coalition (Australia) who point to the fact that the Convention on Cluster Munitions states parties should never 'under any circumstances' engage in prohibited activities related to cluster munitions. This bill does not include the phrase 'under any circumstances' and the Greens are concerned that as currently drafted, Australian personnel may be permitted to refuel planes carrying cluster munitions, participate in the planning of attacks involving cluster munitions or create rules of engagement that permit use of the weapon. The Greens believe that Section 72.41 should be revised to ensure that military operations with non-states parties do not become a loophole in the Bill's language.

The Greens agree with the views of Human Rights Watch who recommend that the Committee revise the Bill to reflect the continued application of the Convention's prohibitions - including the prohibition on assistance - during situations of interoperability. Implementing this interpretation will be consistent with the text of the convention and will uphold the Convention's object and purpose of eliminating cluster munitions and the humanitarian harm they cause.

The Greens echo the views of Human Rights Watch, who pointed out in their submission that, 'New Zealand's implementation legislation, enacted in 2009, allows for joint military operations while preserving the Convention's prohibitions. It would serve as a good model for Australia's legislation. The New Zealand law criminalizes all activities prohibited by the Convention's Article 1. It also creates an offence for expressly requesting the use of cluster munitions during joint operations "if the choice of munitions used is within the exclusive control of the Armed Forces." Without creating exceptions to its strong prohibitions, the New Zealand law clarifies that it does not preclude mere participation in joint military operations.'

In terms of stockpiling and retaining cluster munitions and allowing them to transit cluster munitions through Australian territory, the Greens are not convinced by the majority committee's position that, 'People's concerns about the operation of sections 72.41 and 72.42 could be allayed by the government 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.'

The Greens share the concerns of the Cluster Munition Coalition (Australia) who point out in their submission that, 'According to Article 9 of the Convention, "Each State Party shall take all appropriate legal, administrative and other measures to implement this Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or *on territory under its jurisdiction or control*". The CMC is concerned that the Bill exempts the military personnel of non-states parties from the Convention's prohibitions while they are on Australian territory. The CMC is also concerned that the Bill allows non-states parties in military cooperation with the Australian Defence Force to stockpile cluster munitions on bases, aircraft, and ships in Australia. Finally, the CMC is concerned that the Bill explicitly allows for the transit of cluster munitions by permitting transit by ship or plane through Australian territory by non-states parties in military cooperation with the ADF.

The Greens agree with the CMC that Section 72.42 (1) should be deleted as this section directly violates Articles 1 and 9 of the Convention. Allowing foreign forces to stockpile cluster munitions violates the prohibition on assistance because it facilitates stockpiling and can potentially aid in the use of cluster munitions.

As Human Rights Watch point out in their submission, ' No other state has explicitly allowed for foreign stockpiling in its implementation legislation, and several nations have said they view the convention to ban the hosting of foreign stockpiles. Austria stated that the "foreign stockpiling of cluster munitions on the national territory of States Parties is prohibited by the Convention.... Should a State Party to the Convention allow a foreign state to stockpile cluster munitions on its territory, this action would be in violation with the provision

entailed in Article 1 paragraph C that prohibits assistance.” Colombia noted that it “absolutely rejects any manner of ... storage of foreign cluster bombs in Colombian territory.” Guatemala wrote that it “considers that the stockpiling of cluster munitions of other countries in the territory of a State Party to the Convention ... is prohibited according to Article 1 of the Convention.” Slovenia stated “in our view, the Convention also contains the prohibition of ... stockpiling of cluster munitions by third countries on the territory of each State Party. Therefore, such activities are illegal and not allowed on the territory of the Republic of Slovenia.”

The Greens also want to specify the number of cluster munitions Australia will retain with an annual report that indicates the numbers and types of cluster munitions retained in this country.

In terms of investment in companies that develop or produce cluster munitions, the Greens are not persuaded by the government's view that it is not appropriate to explicitly prohibit such investment because the Convention does not contain such a provision. The lack of a prohibition on investment is directly counter to JSCOT Recommendation 2, which states that the 'legislation should prevent investment.' The Australian attorney general, in a speech to the House on November 18, 2010 said that the convention's prohibition on assistance extends to investment in companies that produce cluster munitions when the investor 'intends to assist, encourage or induce the development or production of cluster munitions....'

The Greens agree with Human Rights Watch who state that the Bill, 'Should explicitly ban investment because it assists with a prohibited act, that is, the production of cluster munitions. Production cannot be curtailed and cluster munitions eliminated if a state party allows direct or indirect financial support to manufacturers of the weapons. Because private investors often provide important financial support to such companies, the ban should extend to private funds.'

Finally, as the Australian Council of Super Investors (ACSI) points out in its submission, there is no known direct investment in cluster munitions occurring anywhere in the world, yet direct investment is the only type of investment that would be captured under the current legislative wording. ACSI observe that, 'For the avoidance of doubt, the current drafting will have no practical effect on the financing of cluster bomb production.'

Recommendations:

Recommendation 1

The Bill should be revised to better reflect the continued application of the Convention's prohibitions - including the prohibition on assistance - during situations of interoperability.

The Greens would recommend the example of New Zealand's implementation legislation, enacted in 2009, which allows for joint military operations while preserving the convention's prohibitions. It would serve as a good model for Australia's legislation. The New Zealand law criminalizes all activities prohibited by the convention's Article 1. It also creates an offence for expressly requesting the use of cluster munitions during joint operations 'if the choice of munitions used is within the exclusive control of the Armed Forces.'

Without creating exceptions to its strong prohibitions, the New Zealand law clarifies that it does not preclude mere participation in joint military operations. Its Section 11(6) states: A member of the Armed Forces does not commit an offence against section 10(1) [which lays out the prohibitions] 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). New Zealand's approach explicitly permits joint military operations, something Australia wants to do. At the same time, it does not create a blanket defense that excuses prohibited activities, notably assistance, when they are committed during such operations. In so doing, New Zealand remains true to object and purpose of the convention and is able to balance its obligations under the convention with its obligations to its allies that have not yet joined the convention.

Recommendation 2

The Greens believe that Section 72.41 be deleted and the following wording (see below) should be added in its place and that sections 72.42 (1) and (2) be deleted as it directly violates Articles 1 and 9 of the Convention. Allowing foreign forces to stockpile cluster munitions violates the prohibition on assistance because it facilitates stockpiling and can potentially aid in the use of cluster munitions.

Wording for Section 72.41 to be added:

'A person who is an Australian citizen, is a member of the Australian Defence Force or is performing services under a Commonwealth contract does not commit an offence against section 72.38 by merely participating in military cooperation or operations with a country not party to the Convention on Cluster Munitions.'

Recommendation 3

The legislation must explicitly specify the minimum number of cluster munitions to be retained for training purposes. In addition the Minister or his or her delegate should submit a detailed annual report to the Secretary-General of the United Nations for each year during which cluster munitions are retained, acquired or transferred no later than 30 April of the following year. The report should include information on the planned and actual use, type, quantity and lot numbers of cluster munitions acquired or retained under subsection (2).

Recommendation 4

All investment - direct and indirect, public and private - should be prohibited by the Act (in line with JSCOT recommendations). A public authority or an entity regulated by the Australian Securities and Investments Commission (ASIC) or the Australian Prudential Regulation Authority (APRA) should be deemed to have committed an offence if it directly or indirectly provides funds to or invests funds in a corporation involved in the development or production of cluster munitions or explosive submunitions.

Senator Scott Ludlam