

The Senate

Foreign Affairs, Defence and Trade
Legislation Committee

Criminal Code Amendment (Cluster Munitions
Prohibition) Bill 2010 [Provisions]

March 2011

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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.armsnet africa.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

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.

to the use of cluster munitions with a view to introducing similar legislation that would be relevant to Australia's circumstances'.²⁰

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

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

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.

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 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).

Chapter 2

The use and legacy of cluster munitions worldwide

2.1 This chapter provides background information on the use and legacy of cluster munitions worldwide.

Use of cluster munitions in warfare

2.2 Cluster munitions are large weapons which are deployed from the air or the ground and release small submunitions or 'bomblets'. These bomblets have a wide dispersal pattern that results in a wide area of impact. Since World War II, at least 15 countries have used cluster munitions in more than 24 countries.¹ According to the United Nations (UN), some 85 countries have stockpiles of cluster munitions containing billions of explosive devices.² The Convention on Cluster Munitions (the Convention) requires that states parties destroy them.

2.3 In terms of their contemporary use, cluster munitions were most recently used by Russia and Georgia in their 2008 conflict.³ The United States (US) and the United Kingdom (UK) are believed to have used nearly 13,000 cluster munitions containing an estimated 1.8 to 2 million submunitions in three weeks of major combat in Iraq between 2003 and 2006.⁴ In Afghanistan between 2001 and 2002, the US dropped 1,228 cluster bombs containing 248,056 bomblets. Cluster munitions were also reportedly used by the US, UK and Netherlands in the context of the 1999 Yugoslavia conflict.⁵

2.4 Since the Convention was opened for signature in December 2008, reports suggest that there has only been one serious allegation of cluster munitions use.

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- 1 UN Backs Vientiane Declaration on Cluster Munitions, UN Electronic Mine Information Network, Press Release, 12 November 2010, <http://www.mineaction.org/doc.asp?d=1532> (accessed 29 November 2010). However, according to the Cluster Munition Coalition, cluster munitions have been used during armed conflict in 39 countries and disputed territories since the end of WWII and at least 18 government armed forces have used cluster munitions. (Cluster Munition Coalition, *Cluster Munition Monitor 2010*, Major Findings, http://www.the-monitor.org/index.php/publications/display?url=cmm/2010/CMM_Major_Findings_2010.html, (accessed 15 December 2010).
 - 2 UN Backs Vientiane Declaration on Cluster Munitions, UN Electronic Mine Information Network, Press Release, 12 November 2010, <http://www.mineaction.org/doc.asp?d=1532> (accessed 29 November 2010).
 - 3 Cluster Munition Coalition, *A History of Harm*, undated, <http://www.stopclustermunitions.org/the-problem/history-harm/> (accessed 15 December 2010).
 - 4 Cluster Munition Coalition, *A timeline of cluster bomb use*, undated, <http://www.stopclustermunitions.org/the-problem/history-harm/> (accessed 29 November 2010).
 - 5 Cluster Munition Coalition, *A timeline of cluster bomb use*, undated, <http://www.stopclustermunitions.org/the-problem/history-harm/> (accessed 29 November 2010).

Amnesty International reported that the US 'appeared to have used at least one cruise missile with submunitions' to attack an alleged al-Qaeda training camp in Yemen in December 2009.⁶

Legacy of cluster munitions

2.5 In 2006, Handicap International (HI) published the first comprehensive publicly available study on the impact of cluster munitions on civilian populations through casualty data. In its review across 23 contaminated countries and areas, HI compiled evidence of at least 11,044 recorded and confirmed casualties. The organisation found that 98 per cent of recorded cluster submunitions casualties are civilians.

2.6 In terms of the impact and legacy of cluster munitions, the HI report found that:

- In the post-strike and post-conflict period, unexploded submunitions cause a lasting threat as failed submunitions dominate amongst new incidents in post-conflict situations.⁷
- Not only are civilians most at risk but the vast majority of civilian casualties occur whilst people carry out daily activities in their usual and accustomed places.
- Males represent 84 per cent of casualties with 40 per cent of them under the age of 18 years. In all contexts, boys constitute the vast majority of child casualties averaging between 85 and 90 per cent.
- The majority of child casualties occur whilst carrying out livelihood activities, mostly tending animals.
- The number of casualties that occur while carrying out livelihood activities demonstrates the direct economic impact on cluster munitions-contaminated communities. In many countries, men are the traditional breadwinners and given that adult males and boys represent the majority of casualties, the

6 Amnesty International cited in Cluster Munition Coalition and International Campaign to Ban Landmines, *Cluster Munition Monitor 2010*, Major Findings, p. 1, http://www.the-monitor.org/index.php/publications/display?url=cmm/2010/CMM_Major_Findings_2010.html (accessed 29 November 2010).

7 In parts of Southeast Asia, cluster munitions continue to cause nearly half of the recorded casualties more than three decades after their use. Handicap International, *Fatal Footprint: The Global Human Impact of Cluster Munitions*, Preliminary Report, November 2006, p. 42, http://www.mineaction.org/downloads/1/Fatal_Footprint_HI_report_on_CM_casualties.1.pdf (accessed 22 December 2010).

'socio-economic loss for both the immediate term and distant future cannot be underestimated'.⁸

2.7 According to the Cluster Munition Monitor 2010, there were 16,816 cluster munition casualties confirmed globally at the end of 2009. It noted, however, that many casualties have gone unrecorded and estimated that the actual number may be between 58,000 and 85,000 casualties. As previously noted, whilst most cluster munitions are intended to explode on impact, many do not and these explosive remnants continue to maim civilians and impede agricultural development often years after conflicts end. In terms of contamination, at least 23 states and three other areas are believed to be contaminated with cluster munition remnants whilst at least thirteen additional states still may have a small level of contamination from past use of the weapon. The most heavily affected countries include Lao PDR, Vietnam, Iraq and Cambodia. Southeast Asia has the greatest amount of cluster munition contamination of all regions.⁹

Cluster munition stockpiles worldwide

2.8 According to the Cluster Munition Monitor, in 2010, there were 74 countries with cluster munition stockpiles of which, 27 had signed or ratified the Convention. Of the 27, 17 states have provided information on the size of their stockpile. Collectively, this stockpile amounts to at least 1.1 million cluster munitions with at least 146 million submunitions.¹⁰

2.9 According to Human Rights Watch, of the known quantities of submunitions stockpiled by signatory states, Germany has 50 million submunitions in its stockpiles whilst the United Kingdom has 39 million, the Netherlands 26 million, France 15 million and Belgium 10 million.¹¹ However, the Cluster Munition Monitor reported that two of the biggest stockpilers, Germany and the UK, have destroyed significant portions of stocks whilst at least eight other countries are in the process of destroying stocks. Four state parties (Belgium, Moldova, Norway and Spain) and two signatories (Colombia and Portugal) are reported to have destroyed all of their stockpiles,

8 Handicap International, *Fatal Footprint: The Global Human Impact of Cluster Munitions*, Preliminary Report, November 2006, p. 43, http://www.mineaction.org/downloads/1/Fatal_Footprint_HI_report_on_CM_casualties.1.pdf (accessed 22 December 2010).

9 Cluster Munition Coalition and International Campaign to Ban Landmines, *Cluster Munition Monitor 2010*, Major Findings, p. 1, http://www.the-monitor.org/index.php/publications/display?url=cmm/2010/CMM_Major_Findings_2010.html (accessed 29 November 2010).

10 Cluster Munition Coalition and International Campaign to Ban Landmines *Cluster Munition Monitor 2010*, Major Findings, p. 1, http://www.the-monitor.org/index.php/publications/display?url=cmm/2010/CMM_Major_Findings_2010.html (accessed 29 November 2010).

11 Human Rights Watch, *Cluster Munition Stockpiles of Signatories to the Convention on Cluster Munitions*, Fact Sheet, February 2010, p. 1.

accounting for an estimated 176,000 cluster munitions with more than 13.8 million submunitions. Austria and Montenegro expect to finish stockpile destruction in 2010.¹²

Australia and cluster munitions

2.10 From the 1970s to the 1990s, Australia manufactured and maintained limited quantities of cluster munitions for testing purposes.¹³

2.11 Whilst Australia had stockpiles in the past,¹⁴ the explanatory memorandum noted that there are no operational stockpiles of cluster munitions now.¹⁵

2.12 In evidence to the committee, the Department of Defence (Defence) confirmed that it does not have operational stocks of cluster munitions and that live sub-munitions are not part of Defence's operational weapons inventory.¹⁶ DFAT has also noted in the past that such munitions 'are not part of Defence's operational weapons inventory, and are not – in either numbers or configuration – suitable for operational use by the ADF'.¹⁷

2.13 In terms of conformity with the treaty, DFAT has argued that Australia already fulfils many of its obligations under the Convention as it does not possess any cluster munitions other than those stocks permitted for training and counter-measure purposes. It further noted that Australia provides a range of assistance to victims through Australian Agency for International Development Mine Action program.¹⁸

12 Cluster Muniton Coalition and International Campaign to Ban Landmines *Cluster Muniton Monitor 2010*, Major Findings, p. 1, http://www.the-monitor.org/index.php/publications/display?url=cmm/2010/CMM_Major_Findings_2010.html (accessed 29 November 2010).

13 Senate Foreign Affairs, Defence and Trade Committee, *Cluster Munitions (Prohibition) Bill 2006*, p. 4.

14 Human Rights Watch, *Cluster Muniton Stockpiles of Signatories to the Convention on Cluster Munitions*, Fact Sheet, February 2010, p. 1.

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

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

17 Letter from Peter Hooten, Department of Foreign Affairs and Trade, 27 April 2010 cited in Cluster Muniton Monitor, Country Profiles – Australia, 20 October 2010, p. 3. http://www.the-monitor.org/custom/index.php/region_profiles/print_profile/10 (accessed 3 December 2010).

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

Chapter 3

Penalties and the retention of cluster munitions

3.1 This chapter provides a short overview of the evidence in relation to the bill before considering its penalties and the section 72.39 defence to provide for the acquisition and retention of cluster munitions for training and related purposes.

Views on the bill

3.2 The bill seeks to create offences relating to cluster munitions and explosive bomblets and give effect to the Convention on Cluster Munitions (the Convention).

3.3 All witnesses to the inquiry strongly supported Australia's ratification of the Convention. While they welcomed the bill's objective of enhancing legislative measures to enable Australia to ratify the Convention, they expressed some concerns about particular provisions.

3.4 Most concern amongst submitters was directed to the issue of interoperability or joint military operations with states not party to the Convention reflected in sections 72.41 and 72.42 of the bill. These provisions are the focus of Chapter 4 and Chapter 5 respectively. Other major concerns were raised in relation to section 72.39 regarding the retention of cluster munitions in Australia which is considered in this chapter. Positive obligations in relation to Article 21 specifically and towards achieving the objectives of the Convention more broadly are considered in Chapter 4 whilst the prohibition on investment in cluster munitions production is the subject of Chapter 6.

New offences

3.5 Item 1 of Schedule 1 of the bill inserts a new Subdivision C titled 'Cluster munitions and explosive bomblets' into Division 72 of the *Criminal Code Act 1995* (the Code).¹ The purpose of this Subdivision is to create offences relating to cluster munitions and explosive bomblets and to give effect to the Convention on Cluster Munitions.²

3.6 The bill creates two new offences under section 72.38:

- (1) A person commits an offence if the person does any of the following with a cluster munition:
 - (a) uses it;
 - (b) develops, produces or otherwise acquires it;

1 Division 72 of the Criminal Code deals with explosives and lethal devices.

2 Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, s. 72.37.

(c) stockpiles or retains it;

(d) transfers it to anyone.

(2) A person (the *first person*) commits an offence if:

(a) the first person assists, encourages, or induces another person to do any of the following acts with a cluster munition:

(i) uses it;

(ii) develop, produce or otherwise acquire it;

(iii) stockpile or retain it;

(iv) transfer it to anyone; and

(b) the other person does the act; and

(c) the first person intends that the act be done.

3.7 The explanatory memorandum highlights that the proposed subsections do not specify a fault element for the prohibited acts. Section 5.6 of the Criminal Code provides that where a fault element is not specified in relation to the physical element, the fault element is intention.³ The explanatory memorandum notes that the elements in 72.38(2)(a) and (b) ensure that accidental or innocent assistance, encouragement or inducement is not an offence against subsection 72.38(2).⁴

3.8 The government recognises the establishment of offences as meeting the requirements of Article 9 of the Convention on states parties to impose:

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.

3.9 The establishment of such offences gives meaning to Article 1 of the Convention which requires that states parties undertake never under any circumstances to use, develop, produce, acquire, stockpile, retain or transfer 'directly or indirectly, cluster munitions of explosive bomblets or assist, encourage, or induce anyone to engage in any activity prohibited to a State Party under the Convention'.

3.10 Submitters such as Act for Peace supported the establishment of criminal offence provisions in relation to the use of cluster munitions and held that the penalties reflect the seriousness of the crimes.⁵

3 *Explanatory Memorandum, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, p. 7.

4 *Explanatory Memorandum, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, p. 7.

5 Act for Peace, *Submission 17*, p. [1].

3.11 The explanatory memorandum notes that terms including 'use', 'develop', 'produce', 'acquire', 'stockpile' and 'retain' are used in their plain English sense. The term 'transfer' is defined in section 72.45 as having the same meaning as that in the Convention. Article 2(8) of the Convention states that 'transfer' involves:

...in addition to the physical movement of cluster munitions into or from national territory, the transfer of title to and control over cluster munitions, but does not involve the transfer of territory containing cluster munition remnants.

Geographical jurisdiction

3.12 The explanatory memorandum emphasises that Category B jurisdiction captures the conduct of persons who are Australian citizens or residents at the time of the alleged offence and provides explanation that:

The application of category B jurisdiction would mean that, regardless of where the conduct constituting the offence occurs, if the person engaging in that conduct is an Australian citizen or body corporate, that person would be able to be prosecuted in Australia. The extension of jurisdiction in this way gives effect to the obligation on States Parties under Article 9 to enact penal sanctions to prevent and suppress prohibited conduct undertaken by persons or on territory under its jurisdiction or control.⁶

3.13 Human Rights Watch and Harvard Law School's International Human Rights Clinic (IHRC) supported the establishment of extraterritorial jurisdiction in subsection 72.38(3) which would prevent Australian citizens from escaping liability for violating the Convention's norms.⁷ This provision was also supported by the Medical Association for Prevention of War (Australia) (MAPW) which also welcomed the government's inclusion of explosive bomblets as well as cluster munitions in the bill.⁸

Language – 'never under any circumstances'

3.14 The primary concern of many witnesses in relation to section 72.38 was that the phrase 'never under any circumstances' specified in Article 1(1) of the Convention was not included. They recommended that the phrase preface all offences in section 72.38 in line with the Convention in which states parties undertake 'never under any

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

7 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 15.

8 Medical Association for Prevention of War (Australia), *Submission 15*, p. 3.

circumstances' to engage in prohibited activities related to cluster munitions.⁹ Human Rights Watch and IHRC argued that the phrase is significant because it:

emphasizes that the convention's prohibitions are comprehensive and apply during both international and non-international armed conflicts, as well as in situations that do not arise to the level of armed conflict. The phrase underlines the importance of foreclosing exemptions to these restrictions.¹⁰

3.15 The Australian Network to Ban Landmines and Cluster Munitions (ANBLC) argued that by omitting the phrase, the section fails to abide by the spirit of the treaty and 'violates the integrity of the Convention and the integrity of the Australian government'. The ANBLC noted that omission 'has significant ramifications, and impacts upon a number of sections, including 72.41 and 72.42 which are both major concerns'.¹¹ The ANBLC highlighted, moreover, that whilst the explanatory memorandum acknowledges the wording of the Convention, the draft legislation omits this 'vital' phrase.¹²

3.16 The Attorney-General's Department (AGD) responded to concerns about omitting the Convention phrase 'never under any circumstances'. It informed the committee that it was not necessary to include the phrase because the proposed offences in the section 'will apply in all circumstances, unless otherwise specified'. Furthermore, the department argued that:

Inserting words such as 'never under any circumstances' would depart from the standard drafting practice in the *Criminal Code Act 1995* (the Code) and may give rise to questions of interpretation regarding differences in how offences are framed within the Code.¹³

3.17 Mr Greg Manning, First Assistant Secretary, AGD further highlighted that the reading of the offences 'shows that it achieves the same as the words 'never under any circumstances' in that, in clause 72.38(1), there is a blanket prohibition'. He continued:

So the government's position is that it has prohibited everything that is prohibited under the convention. The issue of the amendment to the

9 Australian Network to Ban Landmines and Cluster Munitions, *Submission 3*, p. [3]; Aotearoa New Zealand Cluster Munitions Coalition, *Submission 6*, p. [2]; CBM Australia, *Submission 11*, p. 2; Australian Lawyers for Human Rights, *Submission 19*, p. [2]; Oxfam Australia, *Submission 14*, p. 2; Medical Association for Prevention of War (Australia), *Submission 15*, p. 4; Act for Peace, *Submission 17*, p. [2]; Human Rights Watch and IHRC, *Submission 7*, p. 5.

10 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 5. See also, Aotearoa New Zealand Cluster Munitions Coalition, *Submission 6*, p. [2].

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

12 Australian Network to Ban Landmines and Cluster Munitions, *Submission 3*, p. [3]. See *Explanatory Memorandum*, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, p. [1].

13 Attorney-General's Department, *Additional information*, received 28 February 2011, pp. 1–2.

Criminal Code versus a standalone act would not have changed the nature of the offences as drafted.¹⁴

Adequacy of the penalties

3.18 Penalties of up to 10 years imprisonment for individuals or \$330,000 for bodies corporate apply in relation to section 72.38 offences. Human Rights Watch and IHRC were concerned that the penalties needed to be codified in the bill. They also argued that penalties for bodies corporate which were noted by the Attorney-General in his second reading speech but not included in the bill need to be added to the text of section 72.38 to clarify that the legislation applies to corporations as well as people.¹⁵

3.19 Some submitters raised concerns about the fine set for bodies corporate engaged in the development, manufacture and trade in cluster munitions. The Uniting Church of Australia–Synod of Victoria and Tasmania argued that the proposed fine of \$330,000 should be increased to a maximum penalty of at least 1.1 million or three times the revenue value of the weapons produced or traded, whichever is higher.¹⁶

3.20 In relation to concerns regarding the penalties both in terms of adequacy and the fact that they are not codified in the bill, the AGD responded that:

Penalties that apply to bodies corporate are determined by applying the standard formula set out in the *Crimes Act 1914* (the Crimes Act)...When the maximum penalty of 10 years imprisonment is converted to penalty units in accordance with the standard formula, the sentence is converted to 3000 penalty units for bodies corporate, which is equivalent to \$330 000.¹⁷

3.21 AGD also asserted that all the offences in the Code must be read together with the Code's other provisions as well as the *Crimes Act 1914* and that such an approach 'ensures stability and consistency in how penalty provisions are read across all Commonwealth legislation'. The department further noted that:

As a matter of form, and in order to maintain simplicity, the Bill sets out only the penalty of imprisonment, which must be read together with the Crimes Act in order to determine the applicable number of penalty units. Including the penalty units in the Bill would unnecessarily lengthen the Bill.¹⁸

14 Greg Manning, Attorney-General's Department, *Committee Hansard*, 3 March 2011, p. 18.

15 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 13.

16 Uniting Church of Australia–Synod of Victoria and Tasmania, *Submission 8*, p. 1.

17 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 1.

18 Attorney-General's Department, *Additional information*, received 28 February 2011, pp. 1–2.

Intent requirement

3.22 For some witnesses, the requirement for a person to intend an act be done in order to be liable for one of the section 72.38 offences sets the threshold for criminal liability too high. Human Rights Watch and IHRC argued, for example that:

Under this standard, individuals would not be liable for conduct if, for example, they were aware their conduct would result in cluster munition use (knowledge) or in a substantial, unjustifiable risk of use (recklessness).¹⁹

3.23 JSCOT was concerned about preventing 'inadvertent participation in the use, or assistance in the use, of cluster munitions by Australia'.²⁰ According to Human Rights Watch and IHRC, the use of an intention standard in section 72.38 of the bill 'makes it difficult to hold individuals liable for use, production, transfer, and stockpiling of cluster munitions or assistance with these prohibited acts even if they know or should have known that their conduct could lead to one of these activities'.²¹

3.24 Submitters including the Australian Lawyers for Human Rights (ALHR) and MAPW as well as Human Rights Watch and IHRC argued that the section should be amended to support a recklessness standard of intent.²² Invoking JSCOT's recommendation, ALHR held that the bill as it stands might 'relieve of liability a person *who knew or should have known* that their actions could result in the use of cluster munitions or were recklessly indifferent to their potential use'.²³ ALHR argued that the reckless standard be explicitly retained as applicable to the interoperability clause.²⁴ Similarly, CBM Australia supported the removal of subsection 72.38(2) and replacement with the standard of recklessness which it argued more accurately reflected the Convention's purpose.²⁵

3.25 The Uniting Church in Australia–Synod of Victoria and Tasmania argued that the section should be modified to state that '(c) the first person knew, or reasonably should have known, that the act would be done' on the basis that this avoids liability for a person who could not have reasonably known that they were assisting,

19 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 12.

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

21 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 12.

22 Australian Lawyers for Human Rights, *Submission 19*, p. [2]; Medical Association for Prevention of War (Australia), *Submission 15*, p. 4; Human Rights Watch and IHRC, *Submission 7*, p. 12.

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

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

25 CBM Australia, *Submission 11*, p. 2.

encouraging or inducing a prohibited act. Such an amendment 'allows for prosecution of those that knew or who were reckless in their actions'.²⁶

3.26 AGD responded to suggestions that a reckless standard be applied by emphasising that the offences in the bill are to be read in light of the standard fault elements set out in the Code:

Under the Code, intention is the standard fault element for any component of an offence that relates to conduct. A person has intention with respect to conduct if he or she means to engage in that conduct. This approach is the most appropriate way to implement in Australia the obligations set out in the Convention. The Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers states that the standard fault elements in the Code should apply unless there is a reason to depart from these.²⁷

3.27 AGD further emphasised that the government had been guided by the prohibition in the Convention. The department noted that whilst the Convention itself does not refer to standards of fault given that it proscribes state rather than individual behaviour, the government considered 'that a reasonable interpretation of the Convention is that a fault element of intention should be imported into the meaning of Article 1'.²⁸ AGD stressed that care has been taken to ensure that the bill's offences reflect the language of Article 1 as closely as possible, 'in order to ensure that all conduct that is prohibited by the Convention is the subject of a criminal offence under Australian law'.²⁹

Section 72.39

3.28 Defences to the offences set out in section 72.38 are listed in sections 72.39 to 72.42 of the bill. Subsection 72.39(2) provides that the Defence Minister may authorise specified members of the ADF or other specified Commonwealth public officials to acquire or retain specified cluster munitions for one or more of the following purposes:

- (a) the development of, and training in, cluster munition and explosive submunitions detection, clearance or destruction techniques;³⁰
- (b) the development of cluster munition counter-measures;³¹
- (c) the destruction of munitions.³²

26 Uniting Church in Australia–Synod of Victoria and Tasmania, *Submission* 8, p. 6.

27 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 2.

28 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 2.

29 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 2.

30 Criminal Code Amendment (Cluster Munition Prohibition) Bill 2010, ss. 72.39(2)(a).

31 Criminal Code Amendment (Cluster Munition Prohibition) Bill 2010, ss. 72.39(2)(b).

32 Criminal Code Amendment (Cluster Munition Prohibition) Bill 2010, ss. 72.39(2)(c).

3.29 This authorisation to acquire or retain a limited number of cluster munitions for destruction or certain purposes creates with it a defence under subsection 72.39(1) for a person who acts in accordance with such an authorisation. In other words, section 72.38 offences are not applicable in relation to the acquisition or retention of a cluster munition authorised under proposed section 72.39(2).³³ A defendant bears an evidential burden in relation to subsection 72.39(1) as set out in subsection 13.3(3) of the Code. This subsection of the Code states that a defendant who wishes to deny criminal responsibility by relying on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to the matter.³⁴

3.30 Section 72.39 gives effect to paragraphs 6 and 7 of Article 3 of the Convention. Article 3(6) permits states parties to retain or acquire a limited number of cluster munitions and explosive submunitions for the development of, and training in, cluster munition and explosive submunitions detection, clearance or destruction techniques, or for the development of cluster munition counter-measures. The article qualifies, however, that the amount of explosive submunitions retained or acquired 'shall not exceed the minimum number absolutely necessary for these purposes'. In accordance with this provision, the explanatory memorandum states that the bill empowers the Minister for Defence to authorise the retention or acquisition of a 'limited number' of cluster munitions for this purpose.³⁵ Article 3(7) permits the transfer of cluster munitions to another state party for the purpose of destruction.

Evidence

3.31 Many witnesses raised concerns about section 72.39 regarding the domestic retention of cluster munitions. Notwithstanding the fact that Article 3(6) of the Convention allows for limited numbers of cluster munitions to be retained for various measures, submitters raised questions about the need to retain any live cluster bombs in Australia. ANBLC for example stated:

Australia does not presently possess cluster bombs and thus would need to acquire them. This is an unnecessary and undesirable step to take. A number of countries have formally recognized that live cluster bombs are not necessary for training purposes and have decided in favour of no retention.

Available, sophisticated technology also allows for research and development tests to be carried out without the use of live cluster munitions. These tests provide an accurate and predictable study enabling

33 The Minister (currently the Minister for Defence) may delegate this authorisation power to the Secretary of Defence or a Senior Executive Service employee in that department. Criminal Code Amendment (Cluster Munition Prohibition) Bill 2010, ss. 72.39(5).

34 *Explanatory Memorandum*, Criminal Code Amendment (Cluster Munition Prohibition) Bill 2010, pp. 8–9.

35 *Explanatory Memorandum*, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, p. 1.

analysis of the correct angle of contact, the distance to object and other necessary data. Live cluster bombs are not necessary and should not be retained.³⁶

3.32 Human Rights Watch and IHRC as well as Union Aid Abroad–APHEDA questioned the necessity of retaining live submunitions and noted that no UN-accredited clearance organisation is known to use live submunitions for training purposes.³⁷ ALHR took a similar view recommending a prohibition on the retention of all live cluster munitions whilst the Cluster Munition Coalition argued that the section should be deleted because retention of cluster munitions for training 'is unnecessary'.³⁸ Citing the position of a number of countries who have chosen not to retain cluster munitions including Afghanistan, Angola, Austria, Colombia, Honduras, Moldova, Montenegro, Norway, Portugal, and Slovenia, Human Rights Watch and IHRC argued that implementation legislation should not include a clause explicitly allowing retention.³⁹

3.33 ANBLC raised concern that the inclusion of this provision would set a precedent for similar provisions by other countries and that it 'could open the way to abuse which again flies in the face of the spirit and intent of the treaty'.⁴⁰ The organisation noted that abuses of the retention clause took place under the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Land Mine Treaty) with countries retaining operational quantities of mines.

3.34 As an alternative, other submitters including Act for Peace, suggested that the section should at least specify the number of munitions allowed to be retained in accordance with Convention Article 3(6) which emphasises that the amount 'shall not exceed the minimum number absolutely necessary'.⁴¹ Aotearoa New Zealand Cluster Munitions Coalition (ANZCMC) and ANBLC also raised concerns that there was no specific limit on the number of cluster munitions and submunitions to be retained or any reporting requirements established in accordance with Article 3(8) of the Convention.⁴² Human Rights Watch and IHRC argued that if Australia was not

36 Australian Network to Ban Landmines and Cluster Munitions, *Submission 3*, pp. [7–8]. See also, Aotearoa New Zealand Cluster Munitions Coalition, *Submission 6*, p. [3].

37 Human Rights Watch and IHRC, *Submission 7*, p. 11; Union Aid Abroad–APHEDA, *Submission 12*, p. [4].

38 Australian Lawyers for Human Rights, *Submission 19*, p. [3]; Cluster Munition Coalition, *Submission 22*.

39 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 11.

40 Australian Network to Ban Landmines and Cluster Munitions, *Submission 3*, p. [8].

41 Act for Peace, *Submission 17*, p. [2].

42 Aotearoa New Zealand Cluster Munitions Coalition, *Submission 6*, p. [3]; Australian Network to Ban Landmines and Cluster Munitions, *Submission 3*, p. [8].

willing to forgo the option of permitting retention of cluster munitions in legislation, at least such safeguards should be established in legislation.⁴³

3.35 A number of submitters, therefore, held the view that section 72.39 should be either deleted or that the number of live cluster munitions to be retained in Australia be specified in the bill with an assurance of annual reporting on their planned and actual use, the type and quality retained, and recipient state parties if the state transfers cluster munitions.⁴⁴

The government's position

3.36 In response to suggestions that live cluster munitions were not required for training purposes, Defence argued that such stocks need to be retained for a number of reasons:

The ADF requires the ability to access cluster munitions that they may find as explosive remnants of war in their current areas of operation as well as those that may potentially be used against the ADF in future conflicts. The ADF requires this access so that it may develop counter-measures and train its personnel in detection, clearance and destruction techniques, as permitted by Article 3(6) of the Convention. The ADF requires access to live cluster-munitions for the development of counter-measures of a technical nature. ADF explosive ordnance technicians need to be trained in neutralising bomblets. An explosive ordnance technician is unable to complete training with simulated bomblets.⁴⁵

3.37 Defence further noted that the ADF uses both simulated and live cluster submunitions in the development of counter-measures and training in cluster munitions and explosive submunitions detection, clearance and destruction techniques. These simulated cluster munitions are made specifically for practice purposes and do not contain an explosive fill. However, Defence emphasised that as some cluster submunitions are not available in simulated form, live cluster munitions are also used.⁴⁶ Defence concluded that:

Retention of cluster munitions samples enables the ADF to familiarise explosive ordnance disposal personnel with these munitions, to protect

43 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 12.

44 Australian Network to Ban Landmines and Cluster Munitions, *Submission 3*, p. [8]; Aotearoa New Zealand Cluster Munitions Coalition, *Submission 6*, p. [3]; Uniting Church in Australia–Synod of Victoria and Tasmania, *Submission 8*, p. 1; CBM Australia, *Submission 11*, p. 2; Afghan Landmine Survivors' Organization, *Submission 13*, p. 2; Medical Association for Prevention of War (Australia), *Submission 15*, p. 6; Union Aid Abroad–APHEDA, *Submission 12*, p. [4]; Oxfam Australia, *Submission 14*, p. 3; Act for Peace, *Submission 17*, pp. [5–6].

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

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

ADF personnel against cluster munitions attacks, and to conduct both battlefield and humanitarian clearance operations.⁴⁷

3.38 In terms of a current stock, Defence stated that it does not have operational stocks of cluster munitions and that live cluster sub-munitions are not part of Defence's operational weapons inventory and are not in either numbers or configuration, suitable for operational use by the ADF.⁴⁸ It also noted that training and counter-measure samples are not held with any of Defence's operational munitions.⁴⁹

3.39 Defence responded to concerns regarding domestic retention of cluster munitions by highlighting that section 72.39(3) of the bill states that regulations may prescribe the requirements relating to an authorisation by the Minister, such as the requirement in Article 3(6) that the amount retained or acquired 'shall not exceed the minimum number absolutely necessary for these purposes'.⁵⁰

3.40 In relation to a reporting regime, Defence noted that consistent with Australia's approach to other international agreements, the reporting obligations contained in Article 3(8) and Article 7 of the Convention 'do not require legislative implementation, and can be implemented through administrative means'.⁵¹ Defence assured the committee that the samples of cluster munitions that it retains for training and other purposes as permitted by the Convention will be subject to reporting.⁵²

Committee view

3.41 The committee accepts that Defence requires access to cluster munitions for training and other legitimate purposes as specified in section 72.39 of the bill and Article 3 of the Convention. Whilst it appreciates the concerns of submitters that Australia should retain only the minimum number absolutely necessary for such purposes, the committee recognises that the bill already states that regulations may prescribe the requirements relating to the Minister's authorisation such as the requirement in Article 3(6). Moreover, it accepts that reporting in relation to domestic acquisition and retention of cluster munition is to be implemented through administrative means and that this approach is consistent with that in relation to other international agreements.

47 Department of Defence, *Additional information*, received 2 March 2011, p. 4.

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

49 Department of Defence, *Additional information*, received 2 March 2011, p. 4.

50 Department of Defence, *Additional information*, received 2 March 2011, p. 4.

51 Department of Defence, *Additional information*, received 2 March 2011, p. 4.

52 Department of Defence, *Additional information*, received 2 March 2011, p. 4.

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.¹ 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.

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 contract² 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;³ 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'.⁴

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.⁵ The group of 12 states had concerns about the draft Convention Article 1(1)(c) prohibition that states

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 (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.

parties never under any circumstances assist, encourage or induce anyone to engage in 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'.⁶ 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'.⁷ 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'.⁸

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.⁹ 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

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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 (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 (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 (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 (accessed 15 December 2010).

parties cannot use the interoperability provision as an exception to their obligations under Article 1.¹⁰

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.¹¹ 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.¹²

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'.¹³ 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.¹⁴

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

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 (accessed 15 December 2010).

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 (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.

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.¹⁵ Supporters of this position argue that Article 21 should be considered in conjunction with the general obligations of the Convention 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'.¹⁶

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'.¹⁷ 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;

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).

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 (accessed 11 February 2011).

- 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.¹⁸

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 actions which may contravene the humanitarian aims of the Convention'.¹⁹ 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.²⁰

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'.²¹

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.²² 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.²³

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

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

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.

Article 1(1)(c) prohibitions.²⁴ 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 operations.²⁵ 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'.²⁶ 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'.²⁷ 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'.²⁸

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'²⁹, 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'.³⁰

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

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

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].

the gun, so long as they did not pull the trigger'.³¹ 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.³²

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'.³³ 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.³⁴

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'.³⁵ 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'.³⁶

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

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.

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.

states parties being required to carry out prohibited acts.³⁷ 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.³⁸

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.³⁹ 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).⁴⁰

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.⁴¹ 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'.⁴²

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.

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.

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.⁴³ 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'.⁴⁴ 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 entire section should be deleted on the basis that it violates Article 9 of the Convention.⁴⁵

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'.⁴⁶

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.⁴⁷

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'.⁴⁸ The Attorney-General noted that the ability to maintain military capability through interoperability is a 'fundamental pillar of international security and essential for

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.

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.

Australia's national security'.⁴⁹ Indeed, Australia's position is that without such a provision, participation by Australia in joint military operations would be rendered unworkable.⁵⁰ 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 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.⁵¹

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'.⁵² 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...⁵³

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

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 (accessed 14 December 2010).

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.

prohibited in Article 1 of the Convention'.⁵⁴ 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?

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.⁵⁵

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.⁵⁶ 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 72.41.⁵⁷

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'.⁵⁸

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.⁵⁹

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.

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.

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'.⁶⁰ 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'.⁶¹

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

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.⁶²

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'.⁶³ 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'.⁶⁴

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.⁶⁵ 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'.⁶⁶

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.

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.

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.⁶⁷ 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 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'.⁶⁸

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'.⁶⁹ 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'.⁷⁰

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

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 (accessed 14 December 2010).

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 (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.

that of positive obligations to actively discourage non-states parties from using cluster munitions and to adhere to the Convention.⁷¹

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.⁷²

4.44 Many other submitters argued that Australia's positive obligations under Article 21(1) and (2) need to be recognised in the bill.⁷³ 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'.⁷⁴ 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.⁷⁵

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.⁷⁶

4.46 ALHR argued in favour of incorporating an intention clause to assist in interpreting the statute⁷⁷ whilst others supported the inclusion of provisions which

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.

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].

encourage universalisation of the treaty.⁷⁸ 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.⁷⁹

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.⁸⁰ Similarly, AGD's Mr Manning 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 21.⁸¹

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'.⁸²

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'.⁸³

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

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.

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.

bill's provisions and that an additional 'objects' clause would simply add to the complexity of the legislation.⁸⁴ 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.⁸⁵

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 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'.⁸⁶ Indeed, the government has stated its commitment to a 'world free from cluster munitions'.⁸⁷

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.⁸⁸ 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.⁸⁹

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

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.

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.

adherence to the Convention.⁹⁰ 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.⁹¹

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 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'.⁹² 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.⁹³

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

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.

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.

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.

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 Muniton Coalition, *Cluster Muniton 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 Muniton 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 Muniton 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 Muniton 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.

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.

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

Chapter 6

Investment in cluster munitions production

6.1 This chapter explores the issue of investment in the production of cluster munitions with focus on the bill's provisions. It considers the legislation of other states parties to the Convention, Australia's position and the evidence on investment in cluster munitions production.

Provisions of the bill

6.2 According to subsection 72.38(2) of the bill, a person (the *first person*) commits an offence if:

- (a) the first person assists, encourages, or induces another person to do any of the following acts with a cluster munition:
 - (i) uses it;
 - (ii) develop, produce or otherwise acquire it;
 - (iii) stockpile or retain it;
 - (iv) transfer it to anyone; and
- (b) the other person does the act; and
- (c) the first person intends that the act be done.

6.3 In the second reading speech in relation to the bill the Attorney-General provided an example of conduct that would fall within this offence:

...where a person provides financial assistance to, or invests in, a company that develops or produces cluster munitions, but only where that person intends to assist, encourage or induce the development or production of cluster munitions by that company.¹

6.4 For the offence to have been committed there must be intent on the part of the individual to provide financial assistance to an entity so that the entity can develop or produce cluster munitions. However, as the joint government submission highlighted, 'accidental or innocent acts of assistance, encouragement or inducement will not fall within the offences' of the bill.²

Interpreting the Convention

6.5 A number of countries have interpreted the Convention's prohibitions to include investment in companies that manufacture cluster munitions or components on

1 Attorney-General, Second Reading Speech, *House Hansard*, 27 October 2010, p. 8.

2 Attorney-General, Minister for Foreign Affairs, Minister for Defence, *Submission 24*, p. 4.

the basis that such investment amounts to a form of assistance with production otherwise prohibited under Article 1. Many have prohibited investment in cluster munitions production in their implementation legislation including Belgium which adopted a law in 2007 prohibiting financial institutions, whether public or private, from investing in companies that produce cluster munitions. France's legislation bans both direct and indirect financing of cluster munitions production.³ Luxembourg and New Zealand have criminalised investment by public or private entities in companies that produce cluster munitions whilst Ireland banned investment of public money in cluster munitions producers.⁴

6.6 Clause 10(2) of New Zealand's *Cluster Munitions Prohibition Act 2009* states that a person ' who provides or invests funds with the intention that the funds be used, or knowing that they are to be used, in the development or production of cluster munitions' commits an offence. The Act provides an extensive definition of what a fund is and includes clear sanctions.⁵ However, New Zealand is yet to detail how it will ensure compliance with these provisions as the Act does not require the government to identify and maintain a list of cluster munition producers.

6.7 In contrast, whilst the *UK Cluster Munitions (Prohibition) Act 2010* prohibits the direct financing of cluster munitions production, it does not prohibit indirect financing of cluster munitions.⁶ The view of the UK Government reflected in the Act is that the Convention only bans the provision of funds which directly contribute to the manufacture of cluster munitions.⁷ The passage of the bill through the House of

3 Human Rights Watch, *Promoting the Prohibitions, The Need for Strong Interpretations of the Convention on Cluster Munitions*, November 2010, p. 10, <http://www.hrw.org/en/news/2010/11/06/promoting-prohibitions> (accessed 14 December 2010).

4 Human Rights Watch, *Promoting the Prohibitions, The Need for Strong Interpretations of the Convention on Cluster Munitions*, November 2010, p. 10, <http://www.hrw.org/en/news/2010/11/06/promoting-prohibitions> (accessed 14 December 2010).

5 Cluster Munition Coalition and International Campaign to Ban Landmines, *Cluster Munition Monitor 2010*, Cluster Munition Ban Policy – New Zealand, http://www.the-monitor.org/index.php/cp/display/region_profiles/theme/564 (accessed 9 December 2010).

6 Foreign and Commonwealth Office, *The Financing of Cluster Munitions Production*, Written Ministerial Statement, 7 December 2009, <http://www.stopexplosiveinvestments.org/uploads/pdf/UK%20Ministerial%20statement.pdf> (accessed 9 December 2010).

7 Jon Lunn, *Cluster Munitions (Prohibitions) Bill [HL]*, Research paper 10/11, House of Commons Library, 11 February 2010, p. 7, <http://www.parliament.uk/briefingpapers/commons/lib/research/rp2010/RP10-011.pdf> (accessed 12 January 2011).

Lords, however, generated widespread concern about the issue of indirect financing.⁸ On 7 December 2009, the UK Government announced to Parliament that it would work with the financial sector, non-government organisations and other interested parties to promote a voluntary code of conduct to prevent indirect financing of cluster munitions.⁹ Whilst 'it would not become illegal to provide funds generally to companies that manufacture a range of goods, including cluster munitions', the UK Government recognised a need to establish measures to end indirect financing of cluster munitions. It took the view that a thorough consultation was needed in the first instance given the complex nature of indirect financing.¹⁰

Joint Standing Committee on Treaties and Government response

6.8 In its inquiry on the Convention, JSCOT queried whether investment by Australian entities in companies that develop or produce cluster munitions would be viewed as assisting the production of cluster munitions, and if so, whether such investment would be criminalised.¹¹ DFAT responded that the Convention does not explicitly prohibit investment in companies that develop or produce cluster munitions, nor does it define the term 'assist'. It noted, however, that Australia had interpreted 'assist' to mean direct physical participation in any activity prohibited under the Convention.¹²

6.9 In light of its concern that terms contained in the Convention were not clearly defined and noting that the interpretation of terms such as 'assist' will need to be considered in the development of legislation, JSCOT recommended that the Australian Government have regard to:

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.¹³

8 Jon Lunn, Cluster Munitions (Prohibitions) Bill [HL], Research paper 10/11, House of Commons Library, 11 February 2010, p. 24, <http://www.parliament.uk/briefingpapers/commons/lib/research/rp2010/RP10-011.pdf> (accessed 12 January 2011).

9 Foreign and Commonwealth Office, 'Cluster bombs ban moves a step closer', Press Release, 17 March 2010, <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=21900970> (accessed 9 December 2010).

10 Foreign and Commonwealth Office, 'The Financing of Cluster Munitions Production', Written Ministerial Statement, 7 December 2009, <http://www.stopexplosiveinvestments.org/uploads/pdf/UK%20Ministerial%20statement.pdf> (accessed 9 December 2010).

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

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

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

Evidence

6.10 The majority of submitters argued in favour of an explicit prohibition on both direct and indirect investment in the production of cluster munitions with many supporting the realisation of JSCOT's recommendation 2 in the bill.¹⁴ For example, ALHR held that an explicit prohibition on investment in statutory form would:

provide clarity to the definition of the term 'assist' and give guidance to the prosecution, defence and judiciary in any future proceedings. At present, these matters rely entirely upon prosecutorial policy and eventual judicial interpretation, thereby creating an unnecessary level of uncertainty.¹⁵

6.11 Act for Peace argued for a more comprehensive legal framework beyond that of the suite of criminal offences of the bill and held that the government should consult with investor stakeholders in order to establish such a framework including a ban on investment and framework for divestment.¹⁶

6.12 Human Rights Watch and IHRC agreed that the bill should explicitly ban investment because it assists with a prohibited act. In their view, production cannot be curtailed and cluster munitions eliminated if a state party allows direct or indirect financial support to manufactures of cluster munitions. They further noted that as private investors often provide important financial support to such companies, the ban should extend to private funds.¹⁷ Mr Robert Rands argued that a prohibition on Australian investment in off-shore manufacturers of cluster munitions would in the long run, decrease the 'amount of foreign aid we so generously expend on removing explosive remnants of war, and on aiding survivors and their communities in affected areas'.¹⁸

6.13 The Australian Council of Super Investors (ACSI) raised a number of issues in its evidence which were pursued by the committee. The ACSI noted that the bill would make it illegal for a person or bank to provide financial assistance to, or invest in a company that develops or produces cluster munitions but 'only where that person or bank intends to assist, encourage or induce the development or production of

14 Sally McGushin, *Submission 1*; Willy Bach, *Submission 2*; Australian Council of Superannuation Investors, *Submission 4*; Robert Rands, *Submission 5*; Aotearoa New Zealand Cluster Munitions Coalition, *Submission 6*, pp. [3–4]; Uniting Church in Australia–Synod of Victoria and Tasmania, *Submission 8*, p. 1; Quaker Peace and Justice Committee, *Submission 10*; CBM Australia, *Submission 11*, p. 3; Union Aid Abroad–APHEDA, *Submission 12*, p. [1]; Australian Lawyers for Human Rights, *Submission 19*, p. [2]; Law Council of Australia, *Submission 20*, p. 12; Oxfam Australia, *Submission 14*, p. 3, Adrian von der Borch, *Submission 25*.

15 Australian Lawyers for Human Rights, *Submission 19*, p. [13].

16 Act for Peace, *Submission 18*, p. 4.

17 Human Rights Watch and International Human Rights Clinic, *Submission 7*, p. 13.

18 Robert Rands, *Submission 5*, p. [2].

cluster munitions by that company'.¹⁹ The concern of ACSI is that the bill's drafting implies that financial assistance is illegal only if it is provided 'solely for the purpose of cluster bomb production and with recourse only to that activity' and yet it was not aware that direct financing of cluster munitions actually exists.²⁰ Mr Azhar Abidi from ACSI clarified the term 'direct investment':

If there is a company out there that is producing only cluster bombs—that is its sole line of business—and you want to invest in that company because you want to buy shares and you want to get a return on investment from the production and sale of cluster bombs, then that is a direct investment.²¹

6.14 To support their argument, ACSI drew on the findings of a report by IKV Pax Christi and Netwerk Vlaanderen which identified only seven companies worldwide that produce cluster munitions. Moreover, as they are diversified conglomerates and do not source direct finance solely for the production of cluster munitions, the production of cluster munitions is only one component of their overall operations.²²

6.15 The ACSI further argued that it was not practical to restrict weapons producers from using corporate lending facilities for the purpose of producing cluster munitions. It noted, however, that it was 'highly likely that weapons producers will increasingly shift to indirect financing of controversial munitions to avoid reputational damage'. This presents what ACIS called a 'major loophole' in the bill as most financing is indirect.²³ Citing evidence from the IKV Pax Christi and Netwerk Vlaanderen report which established that 146 identified financial institutions have provided over US \$43 billion of investments and financial services to the seven cluster bomb producers, ACIS argued that:

Companies source financing through corporate loans, syndicated loans, rights issues, new equity and raising through other securities and unless there is a mechanism to restrict weapons producers from using such financing towards the production of cluster munitions, the legislation will not be effective in complying with the spirit of the CCM.²⁴

19 Australian Council of Superannuation Investors, *Submission 4*, p. [1].

20 Australian Council of Superannuation Investors, *Submission 4*, p. [1].

21 Azhar Abidi, Australian Council of Superannuation Investors, *Committee Hansard*, 3 March 2011, p. 15.

22 Australian Council of Superannuation Investors, *Submission 4A*, [1]. See also IKV Pax Christi and Netwerk Vlaanderen, *Worldwide Investments in Cluster Munitions: A Shared Responsibility*, April 2010, p. 8, <http://www.ikvpaxchristi.nl/files/Documenten/wap%20cluster%20munitie/Clustermunitie/Stoep%20Explosive%20Investments/2010%20Worldwide%20Investments%20in%20Cluster%20Munitions%20-%20April%202010%20update%20full%20report%20DEF.pdf> (accessed 15 December 2010).

23 Australian Council of Superannuation Investors, *Submission 4*, p. [1].

24 Australian Council of Superannuation Investors, *Submission 4*, pp. [1–2].

6.16 The ACSI held that unless a mechanism is introduced into the bill to restrict weapons producers from using such financing towards the production of cluster munitions, the legislation will not be effective. It argued that unless the loophole is closed, it is likely that 'capital from Australian investors or Australian companies in unit trusts, superannuation funds and other forms will continue to be used indirectly in the production of cluster bombs around the world'.²⁵

6.17 In relation to the question of clear intent, the ACSI held the view that individual investors in a trust fund cannot be held accountable for the operations of the companies in a unit trust. It recognised that it would not be likely for such individuals to be informed of the companies' operations in great detail and that individual investors would rarely have the voting power to influence the corporate behaviour of the companies they invest in. However:

On the other hand, the brokers, fund managers and investment banks who sell such unit trusts in Australia can ensure that they do not provide exposure to companies that breach the Bill. Similarly, the super funds can ensure that they do not expose their members to companies that breach the Criminal Code Amendment by excluding companies that are involved in cluster bomb production from their investment portfolios. Only by making such a restriction a legislative requirement can the Commonwealth ensure that Australian companies—banks, fund managers, brokers and other financial institutions—do not provide advertent or inadvertent assistance to cluster bomb producers.²⁶

6.18 ACSI argued that the bill should not be restricted to persons or companies who intended to assist, encourage or induce the development or production of cluster munitions. It noted that companies would rarely, if ever, solicit direct funding for the development or production of controversial weaponry and would rarely provide such funding in light of the controversy surrounding cluster munitions. However, it argued that as it is 'extremely likely' that companies will continue to use general corporate loans and equity towards producing cluster munitions that would not attract direct funding. Therefore, ACSI argued that the bill must restrict the ability of cluster bomb producers to secure any capital from Australian investors by 'making it illegal for Australian investors to provide financing to such companies'.²⁷ ACSI held that the restriction should apply to all Australian institutions regulated by ASIC or APRA and that under its proposal:

...these institutions will be prohibited in trading in securities or investing monies (their own or on behalf of their clients) in companies that produce cluster bombs. Finally, under our proposal, the Bill will contain a Schedule

25 Australian Council of Superannuation Investors, *Submission 4*, p. [3].

26 Australian Council of Superannuation Investors, *Submission 4*, p. [3].

27 Australian Council of Superannuation Investors, *Submission 4*, p. [3].

with a list of such companies that will be updated by the Commonwealth as required.²⁸

The government's position

6.19 The government takes the view that an explicit prohibition on investment in companies that develop or produce cluster munitions is not appropriate because the Convention does not contain such a provision.²⁹ In this regard, AGD highlighted that the bill gives effect to the Convention in Australian law and that it is both guided and limited by the Convention's contents.³⁰

6.20 Proposed subsection 72.38(1) of the bill creates the offence of developing or producing cluster munitions and according to the AGD, the operation of the Code's ancillary offence means that:

...a person who aids, abets, counsels or procures the commission of this offence commits an offence. In addition, proposed subsection 72.38(2) creates the offence of assisting, encouraging or inducing the development or production of cluster munitions.³¹

6.21 Rather than expressly prohibiting investment, Article 1 prohibits the direct or indirect development or production of cluster munitions and the provision of assistance, encouragement or inducement to anyone engaged in such activities. The bill uses therefore the language of the Convention in order to ensure that any conduct prohibited by the Convention is the subject of a criminal offence under Australian law, as required by Article 9.³² In terms of acts of investment that will fall within the proposed offence, AGD provided an example:

The intentional provision of financial assistance to an entity so that the entity can develop or produce cluster munitions will amount to an offence.³³

6.22 In relation to offences that will probably fall outside the proposed offence, these include accidental or innocent acts of assistance, encouragement or inducement including as the joint submission noted:

For example, a person who contributes to a superannuation fund which includes investment in companies that may develop or produce cluster

28 Australian Council of Superannuation Investors, *Submission 4*, p. [3].

29 Department of Foreign Affairs & Trade, *Additional information*, 1 March 2011, pp. 11–12.

30 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 9.

31 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 9.

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

33 Attorney-General's Department, *Additional information*, received 28 February 2011, p. 9.

munitions is unlikely to satisfy the required mental elements for the offence contained in the Bill.³⁴

6.23 In response to concerns that there was no explicit prohibition on direct investment in the bill, Mr Greg Manning of AGD assured the committee that the government's approach was consistent with usual practice:

Therefore the norm when framing criminal offences is to focus on the conduct you are trying to prohibit and then leave it to be decided on the facts of a particular case whether or not that conduct falls within that prohibition. That is the approach that the government has taken in the bill. It repeats the words of the prohibition in the convention, and whether or not a particular act of investment falls within that is left to be determined on the facts.³⁵

6.24 Mr Manning then repeated the point made in the government's submission about the Code's ancillary offence. In his view, the offence in subsection 72.38(1):

picks up by normal operation of the Criminal Code the ancillary provisions of the Criminal Code. I am talking about aiding, abetting, counselling and procuring or acting through agents. That type of conduct that is also prohibited. When you are determining whether or not a particular act related to investment—and that could be a very broad range of action—is covered, you would look at the full range of conduct that is prohibited by the offences and as extended by those ancillary codes in relation to 72.38(1).³⁶

6.25 Mr Manning argued that the alternative 'pick and choose' approach carries great risk if all possible contexts are not foreseen and that conduct that you intend to prohibit will not be prohibited.³⁷ He emphasised that the real test will be to establish whether the person intended to invest in cluster munitions and that for the purpose of the act, intention to assist is the central element.³⁸

Committee view

6.26 The committee accepts the government's position that the manner in which a prohibition on investment has been framed is consistent with the normal approach to the framing of criminal offences. The committee believes, however, that the explanatory memorandum should have provided information on investment and explanation of the government's legislative approach in this regard, especially in light of JSCOT's recommendations.

34 Attorney-General, Minister for Foreign Affairs, Minister for Defence, *Submission 24*, p. 4.

35 Greg Manning, Attorney-General's Department, *Committee Hansard*, 3 March 2011, pp. 24–25.

36 Greg Manning, Attorney-General's Department, *Committee Hansard*, 3 March 2011, p. 25.

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

38 Greg Manning, Attorney-General's Department, *Committee Hansard*, 3 March 2011, p. 26.

Committee conclusion

6.27 The committee understands that the intention of the government is to 'move as quickly as possible towards lodging Australia's instrument of ratification for the Convention' once all measures to give effect to the Convention are in place.³⁹ To this end, the committee recognises that the bill gives effect to the Convention requirement to impose penal sanctions.

6.28 The committee recommends therefore that the bill be passed.

Recommendation 1

6.29 The committee recommends that the Senate pass the bill.

SENATOR MARK BISHOP
CHAIR

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

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

Appendix 1

Public submissions, form letter and additional information

- 1 Ms Sally McGushin
- 2 Mr Willy Bach
- 3 Australian Network to Ban Landmines and Cluster Munitions
- 3A Australian Network to Ban Landmines and Cluster Munitions
- 4 Australian Council of Super Investors
- 4A Australian Council of Super Investors
- 5 Mr Robert Rands
- 6 Aotearoa New Zealand Cluster Munitions Coalition
- 7 Human Rights Watch & International Human Rights Clinic, Harvard Law School
- 7A Human Rights Watch & International Human Rights Clinic, Harvard Law School
- 8 Uniting Church of Australia - Synod of Victoria and Tasmania
- 9 International Committee of the Red Cross
- 10 Quaker Peace and Justice Committee
- 11 CBM Australia
- 12 Union Aid Abroad-APHEDA
- 13 Afghan Landmine Survivors' Organization
- 14 Oxfam Australia
- 15 Medical Association for Prevention of War (Australia)
- 16 Name Withheld
- 17 Act for Peace
- 18 Australian Pugwash Group Inc.
- 19 Australian Lawyers for Human Rights
- 19A Australian Lawyers for Human Rights
- 20 Law Council of Australia
- 21 Australian Red Cross
- 22 Cluster Munition Coalition

- 23 Ms Marilyn Bertram
- 24 Ministers for Foreign Affairs and Defence and the Attorney-General
- 25 Adrian von der Borch
- 26 Dr Jeff Baker
- 27 Mrs Helen Stanger
- 28 Mr Mike Sprange and others
- 29 Just Peace Queensland Inc.

Form Letter

Eight signatures

Additional Information

- 1 Attorney-General's Department
- 2 Department of Defence
- 3 Department of Foreign Affairs and Trade
- 4 Cluster Munition Coalition, Capturing the legacy. The journey to ban cluster munitions through the eyes of six photographers
- 5 Mr N.A.J. Taylor
- 6 Cluster Munition Coalition, Global Ban on Cluster Munitions, Inside footage from behind the lines, A short film by John Rodsted

Appendix 2

Public hearing and witnesses

Thursday, 3 March 2011—Canberra

ABIDI, Mr Azhar, Director, Sustainability and Responsible Investment, Industry Funds Management

BINSKIN, Air Marshal Mark Donald, Chief of Air Force, Royal Australian Air Force

DOCHERTY, Ms Bonnie, Senior Researcher, Human Rights Watch; and Lecturer on Law, International Human Rights Clinic, Harvard Law School, Harvard University

DURHAM, Dr Helen, Strategic Adviser, International Law, Australian Red Cross

GOUSSAC, Ms Netta, Acting Principal Legal Officer, Office of International Law, Attorney-General's Department

HURLEY, Lieutenant General David, Vice Chief of Defence Force, Department of Defence

MANNING, Mr Greg, First Assistant Secretary, Office of International Law, Attorney-General's Department

McKINNON, Mr Allan, First Assistant Secretary, International Security Division, Department of Foreign Affairs and Trade

OKOTEL, Mrs Karina, Member, Australian Lawyers for Human Rights

PULESTON, Ms Gaia, Counter Proliferation Section, Department of Foreign Affairs and Trade

ROSE, Mr Andrew, Director, International Law Section, Department of Foreign Affairs and Trade

SKINNER, Ms Rebecca, First Assistant Secretary, Strategic Policy, Department of Defence

SPATHIS, Mr Phillip Arthur, Manager, Strategy and Engagement, Australian Council of Superannuation Investors

THOMAS, Mrs Lorel Margaret, Representative, Cluster Munition Coalition