



January 2011

The Secretary
Senate Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra, ACT, 2600

Submission on the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

The Synod of Victoria and Tasmania, Uniting Church in Australia, welcomes this opportunity to make a submission on the *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010* which would legislatively put into effect in Australia the *Convention on Cluster Munitions* adopted in Dublin on 30 May 2008. The Synod supports the Australian Government ratifying the Convention as soon as possible. While the Convention is not perfect from our perspective, it bans the commonly used cluster munitions that have inherent flaws rendering them open to misuse. Moreover, even when not misused the cluster munitions banned by the Convention result in a deadly legacy with humanitarian impacts far outweighing any military utility the weapon system provides.

1. Recommendations

The Synod of Victoria and Tasmania recommends:

- The Senate passes the *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, preferably with the amendments outlined below.
- The *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010* should fully implement the JSCOT recommendation “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.” This should be extended to companies involved in the production of components to be exclusively and/or primarily used in cluster munitions.
- Retain subsection 72.38(3) in its current form to define the extended geographical jurisdiction set out in section 15.2 of the Code (category B) as applying to the offences set out in the proposed section 72.38.
- Amend Section 72.38 (2)(c) so that it states:
 - (c) the first person knew, or reasonably should have known, that the act would be done.
- Increase the maximum penalty for companies that develop, manufacture and trade in cluster munitions under Section 72.38 to at least \$1.1 million, or three times the revenue value of the weapons produced or traded, whichever is higher.
- Amend Section 72.39 to match the requirements of Article 3(8) of the Convention, so that any acquisition, retention or transfer of cluster munitions should be required to be reported. As specified in Article 3(8) of the Convention, this should require a report “on the planned and actual use of these cluster munitions and explosive submunitions and their type, quantity and lot numbers.”

2. Introduction

The *Convention on Cluster Munitions* improves on the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction* in the provisions dealing with victim assistance and clearance of areas contaminated with unexploded cluster submunitions.

By the end of December 2010, 108 countries had signed the treaty (including Australia) and 49 had ratified.

It is the view of the Synod that the Convention has already started to establish a global norm in which it has become more and more unacceptable to continue to manufacture, possess or use cluster munitions that are banned by the Convention. For example, on 11 March 2009, President Obama signed into law a permanent ban on the export of nearly all types of cluster munitions from the US. The legislation states that cluster munitions can only be exported if they leave behind less than 1% of their submunitions as duds and that the country receiving the cluster munitions must agree that the cluster munitions “will not be used where civilians are known to be present.” Only a very tiny fraction of the cluster munitions in the US arsenal meet the 1% dud standard. The US is not a signatory to the *Convention on Cluster Munitions* at this time.

Currently the US arsenal contains 5.5 million cluster bombs, containing 728 million submunitions.

3. Humanitarian problems with cluster munitions

Cluster bomblets pose a particular danger to civilians compared to other weapon systems because of:

1. the broad area of effect they have;
2. the lack of accuracy;
3. the number of explosive duds left behind; and
4. the size and shape of many unexploded cluster submunitions makes them attractive to children.

Many of the submunitions do not explode on impact and then can lie around until touched, when they explode if armed, killing and maiming people for years after a conflict ends. The Geneva International Centre for Humanitarian Demining (GICHD) has assessed the threat from unexploded submunitions is higher than almost all other explosive remnants of war, with their small and attractive shapes leading to misunderstandings of their lethality.¹

The high failure rates of cluster munitions, combined with the large volume of submunitions able to be delivered over a short period of time, leads to particularly severe contamination of a wide area, with contamination both on the surface and underground. The National Demining Office in Lebanon estimated following the 2006 conflict throughout South Lebanon over one million unexploded cluster munitions contaminate a total of 34 million m².²

4. Provisions to prohibit financing of cluster munition manufacturers

In its 19 August 2009 report recommending the Australian Government take binding treaty action with regards to the *Convention on Cluster Munitions* the Joint Standing Committee on Treaties (JSCOT) made the following recommendation:

The Committee recommends that the Australian Government and the Australian Defence Force (ADF) have regard to the following issues when drafting the legislation required to implement the Convention on Cluster Munitions, and when developing

¹ GICHD, ‘Explosive Remnants of War (ERW) – A Threat Analysis’, Geneva, 2002, pp. 8-9.

² Electronic Information Mine Network, <http://www.mineaction.org/overview.asp?o=540>. Accessed 7/2/2007.

policies under which the personnel of the ADF operate:

- *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.*

New Zealand, Ireland, Luxembourg and Belgium have all introduced legislation to ban providing financing towards and investment in cluster munitions to varying extents.

The Belgian law forbids banks and investment funds operating on the Belgian market from offering credit to producers of cluster munitions. The purchase of shares and bonds issued by these companies is also prohibited. Investments made via index funds, and the financing of projects by companies that manufacture cluster munitions that are clearly unrelated to cluster munitions are allowed. The law required the Belgian Government to draw up a list of cluster munition producers caught under the law.

The Belgian law published in the Belgian State Monitor on 27 April 2007 forbids: “the financing of companies under Belgian law or foreign law that produce, use, repair, distribute, import, export, store or transport anti-personnel mines and/or sub-munitions in the meaning of this law, and with regard to the spreading thereof”. “Financing” is defined as “Financing of one of the companies included in the list also includes all forms of financial support, namely credits, bank guarantees and the acquisition of financial instruments issued by that company.”

The law required the publishing of a list:

- of the companies that are shown to carry out an activity in contravention of the previous sentence;*
- of the companies that own a majority share in the companies covered by part i) and;*
- the institutions for collective investment that hold financial instruments of companies covered by parts i) and ii)*

The 2008 Irish *Cluster Munitions and Anti-Personnel Mines Act* explicitly prohibits investment of public money in cluster munition producers.³ Part 4 of the Act states:

PART 4: Investment of Public Moneys

11 – In this Part –

“Components” means components specifically designed for use in prohibited munitions;

“investor” means a person or body responsible for the investment of public moneys owned by a Minister of the Government;

“munitions company” means a company involved in the manufacture of prohibited munitions or components;

“prohibited munition” means a cluster munitions, explosive bomblet or anti-personnel mine;

“public moneys” means moneys provided by the Oireachtas out of the Central Fund, or the growing produce thereof.

12. – (1) Nothing in any enactment that authorises the investment of public moneys shall be taken to authorise any investment, direct or indirect, in a munitions company.

³ Roos Boer and Esther Vandenbroucke, ‘Worldwide investments in Cluster Munitions a shared responsibility. April 2010 Update’, IKV Pax Christi and Netwerk Vlaanderen, April 2010, p. 101.

(2) Notwithstanding any other enactment, an investor, in the performance of any function conferred on it by or under any enactment, shall endeavour to avoid the investment of public moneys in a munitions company.

(3) In pursuing the objective set out in subsection (2) an investor shall have regard to the matters set out in this Part.

13. – (1) An investor shall endeavour to avoid the direct investment of public moneys in equity or debt securities issued by a munitions company.

(2) Where public moneys are directly invested in a company which is or becomes a munitions company, the investor shall-

(a) establish to its satisfaction that the company intends to cease its involvement in the manufacture of prohibited munitions or components, or

(b) divest itself of its investment in that company in an orderly manner.

14- (1) An investor shall avoid investing public moneys in collective investment undertakings or investment products unless, having exercised due diligence, the investor is satisfied that there is not a significant probability that the public moneys will be invested in a munitions company.

(2) Where public moneys are invested in a collective investment undertaking or investment product which invests these moneys in a company which is or becomes a munitions company, the investor shall –

(a) establish to its satisfaction that –

(i) the company intends to cease its involvement in the manufacture of prohibited munitions or components, or

(ii) the collective investment undertaking or investment product intends to divest itself of its investments in the company, and that there is not a significant probability that the collective investment undertaking or investment product will again invest public moneys in a munitions company, or

(b) so far as possible, taking into account any contractual obligation it has assumed, divest itself of its investment in that collective investment undertaking or investment product in an orderly manner.

15, - Nothing in this Part shall prevent an investor from contracting derivative financial instruments based on a financial index.

The Irish law does not cover finance from counties and municipalities or private funds.

The Luxembourg law states “It is prohibited for all persons, or businesses or corporal entities, to knowingly/intentionally finance cluster munitions or explosive submunitions.”⁴ The penalty for breaching this provision is between 5 to 10 years imprisonment and a fine ranging from €25,000 and €1 million.⁵

The New Zealand *Cluster Munitions (Prohibitions) Act 2009* states:⁶

A person commits an offence 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.

The law defines funds as:

Funds means assets of every kind, whether tangible or intangible, moveable or immoveable, however acquired; and includes legal documents or instruments (for example bank credits, travellers’ cheques, bank cheques, money orders, shares, securities, bonds, drafts, and letters of credit) in any form (for example, in electronic or digital form) evidencing title to, or an interest in, assets of any kind.

⁴ Loi du 4 juin 2009 portant approbation de la Convention sur les armes à sous-munitions, ouverte à la signature à Oslo le 3 décembre 2008.

⁵ Roos Boer and Esther Vandenbroucke, ‘Worldwide investments in Cluster Munitions a shared responsibility. April 2010 Update’, IKV Pax Christi and Netwerk Vlaanderen, April 2010, p. 103.

⁶ Roos Boer and Esther Vandenbroucke, ‘Worldwide investments in Cluster Munitions a shared responsibility. April 2010 Update’, IKV Pax Christi and Netwerk Vlaanderen, April 2010, p. 104.

The number of companies that would seek finance from financial institutions and continue to manufacture cluster munitions is small and growing smaller. Research commissioned by IKV Pax Christi and Netwerk Vlaanderen identified only the following companies as still being involved in the manufacture of cluster munitions:⁷

1. Alliant Techsystems (USA)
2. Hanwha Corporation (South Korea)
3. L-3 Communications (USA)
4. Lockheed Martin (USA)
5. Poongsan (South Korea)
6. Singapore Technologies Engineering (Singapore) and
7. Textron (USA)

However, even amongst this small group of companies, Lockheed Martin has declared they will no longer be involved in the manufacture of cluster munitions prohibited by the *Convention on Cluster Munitions* when existing contracts to produce such weapons expire in 2013.⁸ The Unit also has reason to believe, from its communication with the ANZ Bank, L-3 Communications has also moved to cease any involvement in the manufacture of cluster munitions, but we are awaiting confirmation of that.

Also, the ANZ Bank, which is the key Australian financial institution that has been identified as providing finance and business services to companies manufacturing cluster munitions, has recently changed its policy to seek not to do business with companies involved in the manufacture of cluster munitions and anti-personnel landmines. It has stated:⁹

As you know, ANZs policy settings on this issue have at all times been clear, in that they explicitly prohibit the Bank from providing direct funding for the production of cluster munitions by defence industry clients. However, as you have highlighted, our policy and practices have been less proscriptive with regard to our historic and corporate banking relationships with those companies that may produce component parts for such weapons in other areas of their business.

In this regard, ANZ recently considered a formal review of our Military Equipment policy. A number of specific changes to our policy and practices have now been approved that we believe go to addressing this issue. Specifically, our policy now proscribes that:

- *ANZ will not be involved with direct financing or contract bonding related to the sale or manufacturing of controversial weapons (specifically cluster munitions and anti-personnel land mines).*
- *ANZ does not wish to be involved more broadly with customers that are involved in the production of components designed for specific use in these weapons.*

To satisfy the intent of our new policy, ANZ has now commenced two practical processes to drive implementation. Firstly, we are engaging proactively with existing defence industry clients that have been identified publicly as producing components for cluster munitions to inform them of this revised policy. Secondly, and we believe

⁷ Roos Boer and Esther Vandenbroucke, 'Worldwide investments in Cluster Munitions a shared responsibility. April 2010 Update', IKV Pax Christi and Netwerk Vlaanderen, April 2010, pp. 28-32.

⁸ E-mail from Jeffery Adams, Director - News & Information, Lockheed Martin Corporation, 17 April 2010.

⁹ E-mail from Shane Lucas, Head of Sustainable Development, Group Corporate Affairs, ANZ, 27 October 2010.

most significantly, we are seeking assurances that these companies are either not engaged in the production of these weapons or their component parts, or are in the process of winding down these production lines within a reasonable timeframe (eg such as subsequent to fulfilment of existing contractual obligations, if relevant).

To date, our discussions with defence industry clients have been positive in this respect. As you know, we have previously received assurances from Lockheed Martin that it will cease production of related components at the expiry of its existing contracts in 2011 and 2013 respectively. We have also received written assurances from L-3 Communications that it no longer manufactures the relevant component (ie fuses) cited publicly and that it does not manufacture, sell or trade in the manufacture of these weapons. Discussions with other relevant defence companies across our book are ongoing.

Importantly, please note that ANZs revised Military Equipment policy also contains a commitment that facilities for new defence industry clients or annual reviews of existing defence industry clients will be considered by the relevant senior executive committee of the Bank.

The *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010* should fully implement the JSCOT recommendation “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.” This should be extended to companies involved in the production of components to be exclusively and/or primarily used in cluster munitions.

5. Jurisdiction

The Synod strongly supports subsection 72.38(3) to define the extended geographical jurisdiction set out in section 15.2 of the Code (category B) as applying to the offences set out in the proposed section 72.38. Category B jurisdiction will capture the conduct of all persons who are Australian citizens or residents at the time of the alleged offence. This definition of jurisdiction will give effect to the obligation of States Parties under Article 9 of the Convention.

6. Intent

Currently Section 72.38 (2)(c) requires that a person assisting, encouraging or inducing another to commit an act outlined in Section 72.38 (2)(a) must have intended for the act to be committed. This is setting a very high bar on being able to prosecute for such assistance, encouragement or inducement. Intent requires establishing the mental state of the accused. The Synod believes this should be modified so that it states:

(c) the first person knew, or reasonably should have known, that the act would be done.

This avoids liability for a person who could have not reasonably known that they were assisting, encouraging or inducing a prohibited act, but allows for prosecution for those that knew or who were reckless in their actions.

7. Penalty for Bodies Corporate

Currently under Section 72.38 of the Bill the maximum penalty for companies that develop, manufacture and trade in cluster munitions is \$330,000. This would appear to be an inadequate deterrent for such activities and we suggest that the maximum penalty be at least \$1.1 million, or three times the revenue value of the weapons produced or traded, whichever is higher. The Synod notes that a similar approach suggested by the Synod was adopted in relation to penalties to deter companies from paying bribes to foreign officials. The *Crimes*

Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2009 passed on 4 February 2010 increased the fines for bribing a foreign government official to a maximum of \$1.1 million for individuals and up to the greatest of the following for a body corporate:

- \$11 million;
- Up to three times the value of the benefit of the bribe where the value of the benefit obtained has been determined by a court; or
- Up to 10% of the annual turnover of the company.

8. Acquisition or Retention authorised by the Defence Minister

The Bill should be amended to match the requirements of Article 3(8) of the Convention, so that any acquisition, retention or transfer of cluster munitions under Section 72.39 of the Bill should be required to be reported. As specified in Article 3(8) of the Convention, this should require a report *“on the planned and actual use of these cluster munitions and explosive submunitions and their type, quantity and lot numbers.”*

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