



20 January 2011

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

To Whom It May Concern:

Please find enclosed a submission by the Aotearoa New Zealand Cluster Munition Coalition (ANZCMC) in support of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010. The ANZCMC Coordinator Mary Wareham has drafted this submission on behalf of the coalition and is willing to appear before the committee if required.

The ANZCMC is grateful to the Senate Committee on Foreign Affairs, Defence and Trade for this opportunity to provide its views on the Bill. We have identified several recommendations to strengthen and clarify key sections of the Bill. The ANZCMC also endorses the detailed recommendations made in the submission by Human Rights Watch and Harvard Law School's International Human Rights Clinic.

Once this Bill is revised and enacted, we urge Australia to ratify the Convention on Cluster Munitions without delay. We hope that Australia is in a position to participate as a state party in the Convention's Second Meeting of States Parties in Lebanon this September.

Sincerely,

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Submission to the Senate Committee on Foreign Affairs, Defence and Trade on the Inquiry into the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

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I. Background

1. The Aotearoa New Zealand Cluster Munition Coalition (“ANZCMC”) is a network of 24 New Zealand non-governmental organization established in March 2007 to campaign against cluster munitions.¹ The ANZCMC strongly supported New Zealand’s leadership engagement in the “Oslo Process,” the fast-track diplomatic initiative that resulted in the adoption of the 2008 Convention on Cluster Munitions (the “Convention”). This landmark legal instrument prohibits the use, production, transfer, and stockpiling of cluster munitions and establishes a robust framework for humanitarian assistance to those affected by the weapon, including clearance of contaminated areas and assistance to victims. As of 11 January 2011, a total of 108 states had signed the Convention, of which 50 had ratified.

2. During 2009, the ANZCMC worked to ensure New Zealand’s swift ratification of the Convention as well as the enactment of legislation to enforce the Convention domestically. New Zealand’s Cluster Munitions Prohibition Act was signed into law on 17 December 2009 and New Zealand became the 25th signatory to ratify the Convention on 22 December 2009.

3. Since its inception, the ANZCMC has also encouraged other states to ban cluster munitions, particularly Australia and Pacific nations. As of 1 January 2011, Fiji and Samoa had ratified the Convention, while Australia, Cook Islands, Nauru, and Palau had signed, but not yet ratified. Five other Pacific states participated in the Oslo Process, but have not yet joined the Convention on Cluster Munitions: Marshall Islands, Niue, Papua New Guinea, Tonga and Vanuatu.²

¹ The ANZCMC member NGOs are: African Pacific Voices NZ, Amnesty International Aotearoa NZ, Aotearoa Lawyers for Peace, Auckland University Students' Association, Campaign Against Landmines, Caritas Aotearoa NZ, Christian World Service, Development Resource Centre, Disarmament and Security Centre, Engineers for Social Responsibility NZ, International Physicians for the Prevention of Nuclear War NZ, National Council of Women NZ, National Consultative Committee on Disarmament, Oxfam NZ, Parliamentarians for Nuclear Nonproliferation and Disarmament NZ, Pax Christi Aotearoa-NZ, Peace Foundation NZ, Peace Movement Aotearoa, Soroptimist International NZ, Umma Trust, UN Association NZ, UN Youth Association NZ, UNICEF NZ, Women’s International League for Peace and Freedom, Aotearoa. See www.banclusterbombs.org.nz for more information.

² The other Pacific states that have not joined the Convention on Cluster Munitions are Kiribati, Federated

II. Comments and Recommendations on the Bill

4. The ANZCMC supports Australia's swift ratification of the Convention as recommended by the August 2009 report of the parliamentary Joint Standing Committee on Treaties ("JSCOT report").³ The ANZCMC supports the intent of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 (the "Bill") to give effect to Australia's implementation of the Convention on Cluster Munitions. We understand that implementation of any international treaty involves a combination of legislation, policy, and practice. Yet good policy implementation must be based on binding, specific rules that clarify Australia's treaty obligations and ensure that its commitment to the Convention on Cluster Munitions is upheld. Therefore, the ANZCMC has identified several recommendations below, where we believe further revision or clarification of the Bill is needed.

Offences—Section 72.38

5. Under Article 1(1) of the Convention, states parties undertake 'never under any circumstances' to engage in prohibited activities related to cluster munitions. This phrase emphasizes that the Convention's prohibitions are comprehensive and apply during both international and non-international armed conflicts, as well as situations that do not rise to the level of armed conflict. The Bill however does not include the phrase "under any circumstances."

Recommendation:

- 72.38 - preface all offences with the phrase "under any circumstances" e.g. "A person commits an offence if *under any circumstances* the person does any of the following with a cluster munition" (emphasis added)

Interoperability and the Prohibition on Assist—Section 72.41

6. The ANZCMC is concerned that, as currently drafted, section 72.41 of the Bill may be interpreted to allow Australians to assist with prohibited activities in the context of joint military operations. For example, under the Bill's formulation, 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. Section 72.41 should be revised to ensure that military operations with non-states parties do not become a loophole in the Bill's otherwise strong language.

Recommendations:

- 72.41 - make it clear that all of the Convention's prohibitions apply during joint military operations

States of Micronesia, Solomon Islands, and Tuvalu. All Pacific states participating in the Oslo Process except Tonga subscribed to the Wellington Declaration on 22 February 2008 affirming their support for the negotiation of an instrument prohibiting cluster munitions that cause unacceptable harm to civilians. Six Pacific states participated in the negotiations held in Dublin, Ireland, that resulted in the successful and unanimous adoption of the Convention on Cluster Munitions on 30 May 2008 (Cook Islands, Fiji, Palau, Papua New Guinea, Samoa, and Vanuatu).

³ Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, "Report 103: Treaties tabled on 12 March and 13 May 2009 - Convention on Cluster Munitions (Dublin, 30 May 2008)." <http://www.aph.gov.au/house/committee/jsct/13may2009/hearings.htm> [Accessed 19 Aug 09]

- 72.41(b) - clarify that this should be understood as an illustrative list and not an exhaustive list of activities prohibited during joint military operations
- 72.41(c) - prohibit military personnel from requesting cluster munitions strikes

Jurisdiction over foreign military personnel, stockpiles, and transit

7. 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*” (emphasis added). The ANZCMC 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 ANZCMC is also concerned that the Bill allows non-states parties in military cooperation with the Australian Defence Force (“ADF”) to stockpile cluster munitions on bases, aircraft, and ships in Australia. Finally, the ANZCMC 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.

Recommendations:

- 72.42 - Delete this section as it directly violates Article 9 of the Convention
- Add specific language prohibiting transit
- Add specific language prohibiting the hosting of foreign stockpiles

Retention of cluster munitions

8. The ANZCMC is concerned that the Bill permits the ADF or police to acquire or retain cluster munitions for purposes of destruction, counter-measure development, or development of detection, clearance or destruction techniques with the authorization of the Minister of Defense. No limit is specified and none of the annual reporting requirements are mentioned. Australia does not currently hold an operational stockpile of cluster munitions and the ANZCMC sees *no need* for Australia—or any other nation—to retain cluster munitions for clearance training or the development of clearance counter-measures.

Recommendation:

- 72.39 - Delete the section allowing for the retention of cluster munitions or, alternatively, specify the number of cluster munitions that Australia will retain and ensure annual reporting on both their plans and actual use of cluster munitions, the type and quantity retained, and recipient state parties if the state transfers cluster munitions.

Investment

9. The JSCOT report recommended “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.”⁴ Yet the Bill currently does not explicitly prohibit investment in the production of cluster munitions. New Zealand’s

⁴ Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, “Report 103: Treaties tabled on 12 March and 13 May 2009 - Convention on Cluster Munitions (Dublin, 30 May 2008),” p. 27. <http://www.aph.gov.au/house/committee/jsct/13may2009/hearings.htm> [Accessed 19 Aug 09]

proposed implementing legislation for the Convention on Cluster Munitions was revised to include an explicit prohibition on investment in the production of cluster munitions following a recommendation by the Foreign Affairs, Defence, and Trade Select Committee.

Recommendation:

- Include a provision specifically prohibiting 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.

Positive obligations

10. The Bill makes no mention of the Convention's positive obligations (Article 21) to promote universalisation of the Convention with states not party, "make best efforts" to discourage prohibited acts such as cluster munition use, and notify non-state party allies of its obligations under the Convention.

Recommendation:

- Include a provision requiring that the government encourage non-states parties to join the convention and promote the Convention's norms to all states. Designate a government agency that is responsible for coordinating these activities.

III. Summary of Recommendations

- 72.38 - preface all offences with the phrase "under any circumstances" e.g. "A person commits an offence if *under any circumstances* the person does any of the following with a cluster munition" (emphasis added)
- 72.41 - make it clear that all of the convention's prohibitions apply during joint military operations
- 72.41(b) - clarify that this should be understood as an illustrative list and not an exhaustive list of activities prohibited during joint military operations
- 72.41(c) - prohibit military personnel from requesting cluster munitions strikes
- 72.42 - Delete this section as it directly violates Article 9 of the Convention
- Add specific language prohibiting transit
- Add specific language prohibiting the hosting of foreign stockpiles
- 72.39 - Delete the section allowing for the retention of cluster munitions or, alternatively, specify the number of cluster munitions to be retained (the "minimum number absolutely necessary") and ensure annual reporting
- Include a provision specifically prohibiting 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.
- Include provision requiring that the government encourage non-states parties to join the convention and promote the convention's norms to all states