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Senator Mark Bishop
Chair
Senate Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6100
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Dear Senator Bishop

We refer to your letter dated 5 November 2010, inviting us to make submissions to the Senate Standing Committee on Foreign Affairs, Defence and Trade (the FADT Committee) on the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 (the Bill).

The Bill includes the legislative measures necessary to give effect to the *Convention on Cluster Munitions* (the Convention) and will strengthen Australia's legal framework regarding weapons that cause significant and indiscriminate harm to civilians. In order to ensure that all conduct that is prohibited by the Convention is the subject of a criminal offence under Australian law (as required by Article 9 of the Convention), the Bill has used the same language as the Convention wherever possible.

The Government is a strong supporter of the Convention, which addresses the impact of cluster munitions that cause unacceptable humanitarian harm. Australia has worked closely with international partners to achieve the strongest possible ban on these weapons. Once all measures to give effect to the Convention are in place, the Government will move as quickly as possible towards lodging Australia's instrument of ratification for the Convention.

We note that in referring the Bill to the FADT Committee, the Senate Selection of Bills Committee stated that the Bill is inconsistent with the recommendations made by the Joint Standing Committee on Treaties (JSCOT) when it reviewed the *Convention on Cluster Munitions* (the Convention). We consider that the Bill is consistent with JSCOT's recommendations. In this regard, we would like to take this opportunity to provide some additional information to the FADT Committee which may clarify some of the issues raised by the Selection of Bills Committee.

In its report of 18 August 2009 (Report 103), JSCOT recommended that binding treaty action be taken in relation to the Convention. JSCOT also recommended 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, and when developing 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
- 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 provision of funds to companies that may develop or produce cluster munitions.

The Government tabled its response to the JSCOT report on 13 May 2010, noting all recommendations. In developing the Bill, the Government carefully considered JSCOT’s recommendations. The Government’s views on these issues are summarised below.

Definition of terms

The terms ‘use’, ‘retain’, ‘assist’, ‘encourage’ and ‘induce’ are used in Article 1 of the Convention. The same terms are used in the Bill. This is intended to ensure that all conduct that is prohibited by the Convention is the subject of a criminal offence under Australian law.

These terms are not defined in the Convention. In accordance with principles of treaty interpretation, these terms must be read in accordance with their ordinary meaning. These terms should also be read in accordance with their ordinary meaning when they are used in the Bill. Consequently, it was not necessary to define these terms in the Bill. The Explanatory Memorandum for the Bill states that these terms are used in their plain English sense.

Preventing inadvertent participation in the use, and assistance in the use, of cluster munitions

As the Government’s response to the JSCOT report noted, the Convention does not prohibit inadvertent participation in the use, or assistance in the use, of cluster munitions. Rather, Article 1 of the Convention prohibits States Parties from using cluster munitions, and also prohibits assistance in the use of cluster munitions. This prohibition is subject to the exceptions contained in Article 21 of the Convention.

Paragraph 3 of Article 21 of the Convention states that, notwithstanding the provisions of Article 1 of the Convention, States Parties, their military personnel and nationals may engage in military cooperation and operations with States not party to the Convention that may use cluster munitions. Paragraph 4 of Article 21 states that States Parties are nonetheless prohibited from themselves using, developing, producing, otherwise acquiring, stockpiling or transferring cluster munitions, or expressly requesting the use of cluster munitions in cases where the choice of munitions used is within their exclusive control.

Interoperability with States not party to the Convention

Article 21 of the Convention expressly recognises the importance of continued military cooperation between States Parties and non-States Parties. Such military cooperation and operations are central to the protection of international security, as well as Australia's national security. 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.

The practical effect of Article 21 is 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 also be deployed to operate with non-States Parties, or to provide logistical support to non-State Party forces. Consistent with Article 21(4), when undertaking these roles, ADF personnel will be prohibited from using, transferring, stockpiling, developing, producing or acquiring cluster munitions, or expressly requesting the use of cluster munitions where the choice of munitions used is within the ADF member's exclusive control.

To the best of our knowledge, while cluster munitions are not currently being used by others in any conflicts where ADF troops are deployed, the United States is likely to continue to retain cluster munitions in their military inventory and may use them in future conflicts. Cluster munitions would most likely be used in a major conflict against conventional forces, particularly against armoured forces. Notwithstanding this, the United States has adopted a cluster munitions policy which aims to minimise the potential unintended harm to civilians and civilian infrastructure.

The interoperability defence

In this context, the Bill does not include an offence of inadvertently participating in the use, or assistance in the use, of cluster munitions. The Bill uses the same language as the Convention, to ensure that the Bill accurately reflects the provisions of the Convention.

Proposed sections 72.38 and 72.41 of the Bill give effect to Article 1 and paragraphs 3 and 4 of Article 21 of the Convention. Section 72.38 contains offences that cover the range of conduct prohibited in Article 1 of the Convention, including use, and assistance in the use, of cluster munitions. The physical elements of the offences in section 72.38(1) must be done intentionally. Section 72.41 provides that a person who is an Australian citizen, 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, or expressly requesting the use of cluster munitions where the choice of munitions used is within Australia's exclusive control. The limitations contained in the interoperability defence in the Bill will ensure that Australia 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.

Preventing investment in companies that develop or produce cluster munitions

As the Government's response to the JSCOT report noted, the offences in the Bill will reflect the obligations contained in Article 1 of the Convention. Article 1 of the Convention prohibits States Parties from directly or indirectly developing or producing cluster munitions, or assisting, encouraging or inducing anyone to develop or produce cluster munitions.

The Bill includes criminal offences which reflect the range of conduct prohibited by the Convention. Proposed subsection 72.38(1) of the Bill makes it an offence for a person to use, develop, produce, otherwise acquire, stockpile, retain or transfer a cluster munition. Proposed subsection 72.38(2) makes it an offence for a person to assist, encourage or induce another person to use, develop, produce, otherwise acquire, stockpile, retain or transfer a cluster munition. As stated above, the Government has sought to use the language of the Convention wherever possible in order to ensure that any conduct that is prohibited by the Convention is the subject of a criminal offence under Australian law.

Any acts of investment that fall within the prohibition in Article 1 of the Convention will fall within the offences in section 72.38 of the Bill. For example, the intentional provision of financial assistance to an entity so that the entity can develop or produce cluster munitions would amount to an offence under the proposed provisions in the Bill. However, consistent with the Convention, accidental or innocent acts of assistance, encouragement or inducement will not fall within the offences in the Bill. For example, a person who contributes to a superannuation fund which includes investment in companies that may develop or produce cluster munitions is unlikely to satisfy the required mental elements for the offence contained in the Bill. The offences contained in the Bill will apply to bodies corporate in the same way as they apply to individuals.

Implementation by the ADF

The Department of Defence was closely involved in drafting the Bill. In addition to the proposed Bill, members of the ADF are required to act in accordance with ADF doctrine, procedures, rules and directives. The Department of Defence is working to ensure that such documentation is consistent with Australia's obligations under the Convention. Any changes to ADF doctrine, procedures, rules and directives will be completed before Australia takes binding treaty action in relation to the Convention.

Thank you for the opportunity to make a submission to the inquiry on this Bill.

Yours sincerely

Robert McClelland

Kevin Rudd

Stephen Smith