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HUMAN RIGHTS WATCH

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March 8, 2011

Dr. Kathleen Dermody
Committee Secretary
Senate Standing Committee on Foreign Affairs, Defence and Trade
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Dr. Dermody,

Please find attached a submission to the Senate Committee on Foreign Affairs, Defence and Trade from Human Rights Watch and Harvard Law School's International Human Rights Clinic regarding the Committee's inquiry into the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010. This update to our initial submission provides precedents from other states of effective implementation legislation and policies. In so doing, it addresses certain questions that Committee members posed during the hearing where Bonnie Docherty testified on behalf of Human Rights Watch and IHRC. The attached update also responds to submissions filed after the hearing by the Department of Foreign Affairs and Trade and the Department of Defense.

Please let us know if you have any questions. We would be happy to discuss our submission with the Committee by teleconference if necessary.

Thank you for your consideration.

Sincerely,

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HUMAN RIGHTS WATCH

IHRC
INTERNATIONAL HUMAN RIGHTS CLINIC
HUMAN RIGHTS PROGRAM HARVARD LAW SCHOOL

Australia's Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

Update to the January 2011 Submission from Human Rights Watch and Harvard Law School's International Human Rights Clinic to Senate Committee on Foreign Affairs, Defence and Trade
March 2011

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INTRODUCTION

In January 2011, Human Rights Watch and Harvard Law School's International Human Rights Clinic (IHRC) submitted to the Senate Committee on Foreign Affairs, Defence and Trade an analysis of Australia's proposed legislation and recommendations for amendment. Part I of this update compares the Australian bill to the legislation and policies of other states in order to illuminate where the Australian bill falls short and to provide models for how to improve it. Part II responds to additional submissions that the Australian Department of Foreign Affairs and Trade (DFAT) and Department of Defense filed after the Senate Committee's March 3 hearing.

PART I: PRECEDENT FROM OTHER JURISDICTIONS

Australia's Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 is far weaker than most other countries' legislation to implement the Convention on Cluster Munitions. Parts of the bill also fail to live up to the object and purpose of the convention—to eliminate cluster munitions and the harm they cause—which should guide interpretation and implementation of the convention. The bill's provisions on interoperability, transit, foreign stockpiling, and retention are particularly worrisome as is its requirement that individuals must act intentionally, rather than recklessly, before they can be prosecuted for offences. While government submissions have focused on the positions of Canada and the United Kingdom, Human Rights Watch and IHRC urge the Senate Committee to look at the precedent set by a wider range of states.

Interoperability

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."[1]

[1] Cluster Munitions Prohibition Act 2009, Public Act 2009 no. 68, sec. 10(1) and (3) (New Zealand).

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).[2]

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.

While using different language, several states, including members of NATO, have supported New Zealand's interpretation of the convention's interoperability provision. In a commentary attached to its implementation legislation, Norway states, "The exemption for military cooperation does not authorise the States Parties to engage in activities prohibited by the convention…. [C]ontinued participation in international cooperation should be allowed, and … the negotiating result does not circumvent other provisions of the Convention, which if it had, could have undermined confidence in the Convention."[3] Other states that have issued similar interpretations include: Ecuador, Ghana, Iceland, Lebanon, Mexico, Madagascar, Malawi, and Slovenia.[4]

Australia should amend Section 72.41 of the bill either to mimic the language of New Zealand's law or to follow the recommendation outlined in the submission by Human Rights Watch and IHRC.

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[2] Ibid., sec. 11(6).

[3] Excerpt from Proposition No. 4 (2008-2009) to the Storting on Consent to Ratification of the Convention on Cluster Munitions, p. 23.

[4] International Campaign to Ban Landmines, *Cluster Munition Monitor 2010* (Ottawa: Mines Action Canada, 2010), pp. 20-21.

Transit

While the Australian bill explicitly allows transit of cluster munitions through the country's territory, most states have taken a different approach. Both Germany and Austria clearly ban transit in their legislation, providing a strong model for addressing this issue.[5] Other states, such as France, Luxembourg, and New Zealand, are silent on the matter in their legislation; while their legislation does not go as far as the Austrian and German laws, it is still stronger than Australia's because it does not explicitly allow transit. In fact, France has pledged to try to prevent transit on its territory. Many countries—including Bulgaria, Burkina Faso, Colombia, Ecuador, Ghana, Guatemala, Lebanon, FYR Macedonia, Malawi, Malta, Mexico, Slovenia, South Africa, and Zambia—have made statements explaining that they believe the convention bans transit.[6]

Australia should delete Section 72.42 and replace it with a ban on transit, similar to Austria's and Germany's. Alternatively, it should at least delete the section and supplement the legislation with a policy statement explaining it believes transit is prohibited.

Foreign Stockpiling

The Australian bill establishes a defense for foreign military personnel who stockpile cluster munitions on Australian soil, while other states have avoided creating such a loophole in their legislation. For example, the laws of Austria, France, Germany, Ireland, Luxembourg, and New Zealand all remain silent on the issue, which means foreign stockpiling could be understood as falling under the prohibition on assistance. The UK legislation creates a defense for foreign stockpiling, but in a 2008 statement, the United Kingdom announced that, in keeping with the convention's spirit, it would seek the removal of US stockpiles of cluster munitions from UK territory within the eight-year deadline for stockpile destruction.[7] Several states that do not have foreign stockpiles—Bulgaria, Madagascar, Malta, and

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[5] Federal Law on the Prohibition on Cluster Munitions, *Austrian Federal Law Gazette*, no. 12/2008, as amended by *Austrian Federal Law Gazette* I, no. 41/2009, sec. 2; and Ausführungsgesetz zu Artikel 26 Abs. 2 des Deutschen Grundgesetzes (Gesetz über die Kontrolle von Kriegswaffen) ("Act Implementing Article 26(2) of the Basic Law (War Weapons Control Act)"), 1961, as amended 2009, sec. 18(a). An unofficial English translation of Austria's law specifically uses the word transit, while Germany bans transit by declaring it is prohibited to "transport [cluster munitions] through or otherwise bring them into or out of a federal territory."

[6] *Cluster Munition Monitor 2010*, pp. 22-23.

[7] Cluster Munitions (Prohibitions) Act 2010, sec. 8(1) (United Kingdom); Statement by Rt. Hon. Chris Bryant, House of Commons Debate, Hansard, March 17, 2010, Column 925, http://www.publications.parliament.uk/pa/cm200910/cmhansrd/cm100317/debtext/100317-0011.htm#10031743002726 (accessed September 19, 2010).

Mexico—said that they believe the Convention on Cluster Munitions prohibits states parties from allowing foreign stockpiles on their territory.[8]

Australia should delete Section 72.42 and replace it with a ban on foreign stockpiling. It should at least remove the section from its bill, following the approach of several other states, and issue a policy statement that foreign stockpiling is prohibited.

State of Mind

Precedent shows that the Australian bill need not require the high threshold of intent for an act to be considered an offense. The United Kingdom uses a recklessness standard. The defenses in its legislation apply only if the person charged with the offense "neither knew nor suspected, nor had reason to suspect, that the object in question was a prohibited munition."[9] Australia should follow the United Kingdom's lead on the standard for state of mind.

Retention

While the convention allows retention of small numbers of cluster munitions and submunitions for training and development purposes, retention of such live munitions is unnecessary. Indeed, most of the stockpilers that have so far joined the convention and expressed a view on this issue have chosen not to retain any. These states include Afghanistan, Angola, Austria, Colombia, Honduras, Moldova, Montenegro, Norway, Portugal, and Slovenia.[10]

If Australia feels a need to include a retention provision in its legislation, however, its law should impose the safeguards laid out in the convention. It should ensure, as Ireland explicitly does in its implementation legislation, that only the "minimum number absolutely necessary" are retained.[11] While the most appropriate number is open for debate, France's legislation caps the quantities it can retain at a specific number.[12] In addition, as Norway points out in the commentary attached to its legislation, the convention regulates retention

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[8] Human Rights Watch, *Promoting the Prohibitions: The Need for Strong Interpretations of the Convention on Cluster Munitions*, November 2010, http://www.hrw.org/en/news/2010/11/06/promoting-prohibitions, p. 9.

[9] Cluster Munitions (Prohibitions) Act 2010, sec. 7 (United Kingdom).

[10] *Cluster Munition Monitor 2010*, p. 19.

[11] Cluster Munitions and Anti-Personnel Mines Act 2008, no. 20-2008, sec. 7(3) (Ireland)

[12] Loi no. 2010-819 du 20 juillet 2010 tendant à l'élimination des armes à sous-munitions, *Journal Officiel de la Republique Française*, texte 1 sur 137, July 21, 2010, art. 1, sec. 2.

not only by mandating a minimum number but also by establishing rigorous reporting requirements when cluster munitions are retained.[13] While its bill leaves open the option of imposing more detailed administrative regulations at a later date,[14] Australia should legislate at a minimum such precautions against abuse.

PART II: RESPONSE TO NEW GOVERNMENT SUBMISSIONS

After the Senate Committee's March 3, 2011 hearing, the Australian Department of Foreign Affairs and Trade and Department of Defense provided additional information in writing on their positions. Part II of this Human Rights Watch and IHRC submission responds to some of their arguments not already discussed above. The analysis that follows focuses on the problems of the bill's Sections 72.41 and 72.42. The original submission by Human Rights Watch and IHRC outlines the organizations' concerns about the bill's provisions on other matters, including retention and investment.

Human Rights Watch and IHRC agree with the government departments on certain key issues. First, the Convention on Cluster Munitions permits participation in joint military operations. Although the negotiations surrounding Article 21 were more contentious than DFAT's description suggests,[15] states and civil society agreed that mere participation was acceptable. Second, as a signatory, 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."[16] The preamble clearly lays out the convention's humanitarian intent when it declares that states parties are determined "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."

Despite these points of concurrence, Human Rights Watch and IHRC strongly disagree with the government departments that Australia's proposed legislation is consistent with the "spirit and intent" (or object and purpose) of the convention.

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[13] Excerpt from Proposition No. 7 (2008-2009) to the Odelsting on a Bill Relating to the Implementation of the Convention on Cluster Munitions in Norwegian Law, pp. 5-6.

[14] Department of Defence, "Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010," March 2011, p. 4 [hereinafter Department of Defence submission].

[15] Department of Foreign Affairs and Trade, "Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010: Additional Information," March 2011, p. 1 [hereinafter DFAT submission].

[16] Ibid., p. 10.

Interoperability (Section 72.41)

As written, Section 72.41 of the bill contravenes the convention's goal to eliminate cluster munitions and the harm they cause. The Department of Defence openly enumerates several activities that the section would allow. For example, during joint military operations, ADF personnel could plan, provide intelligence for, and/or contribute logistical support to a cluster munition attack. They could also benefit from the use of cluster munitions, particularly in close air support.[17] In each case, Australians would be assisting with banned activities and thus flout the convention's prohibition on assistance. Allowing such actions, even during joint operations, violates the object and purpose of the convention because it facilitates use rather than elimination of cluster munitions.

Despite the government departments' arguments, Section 72.41 is also inconsistent with Article 21(2), which obliges states parties to promote the convention's norms. Article 21(2) does not preclude Australia's participation in joint military operations, but as the Department of Defense notes, it must be "read alongside" of the rest of the article.[18] Article 21 cannot logically be understood to require a state to discourage use and at the same time allow it to assist with use. Therefore, the article should be understood to allow participation in joint operations as long as it does not violate the prohibitions of Article 1. Section 72.41 should implement that understanding.

As noted in the first part of this submission, Section 72.41 should be amended to clarify that joint military operations are permitted but the absolute prohibition on assistance applies even during such operations.

Exemptions for Foreign Military Personnel (Section 72.42)

Section 72.42 violates Article 9 of the convention, which requires penal sanctions for unlawful actions committed "by persons or on territory under its jurisdiction or control." DFAT argues that Article 9 "must be read alongside Article 21,"[19] but neither article refers to the other. Instead, Article 9 is an overarching provision that requires implementation of the whole convention, not the convention as qualified by Article 21. The loophole created by Section 72.42 allows foreign military personnel to commit acts on Australian soil that the convention requires be criminalized.

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[17] Department of Defence submission, p. 1.

[18] Ibid., p. 2.

[19] DFAT submission, p. 6.

DFAT notes that Section 72.42 excuses foreign military personnel from stockpiling and transiting cluster munitions but not from use, development, production, or acquisition.[20] In doing so, it underlines how inconsistent the section is with the convention. The convention does not distinguish among these activities. Instead it establishes the same absolute prohibitions and requires penal sanctions for all of those activities.

Section 72.42 should be deleted, and as discussed in Part I of this submission, be replaced with bans on transit and foreign stockpiling.

[20] Ibid., p. 7.