

24 January 2010

The Secretary  
Senate Foreign Affairs and Trade Committee  
Parliament House  
Canberra, ACT, 2600

Australian Red Cross submission to the Senate Foreign Affairs and Trade Committee  
relating to the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

## 1. Introduction

Australian Red Cross thanks the Senate Foreign Affairs and Trade Committee for the opportunity to make a written submission in relation to the proposed Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010.

The issue of cluster munitions is of particular importance to Australian Red Cross given the role of the International Red Cross Red and Crescent Movement in promoting new norms in international humanitarian law (IHL) and providing humanitarian assistance in times of armed conflict. Unexploded ordnance, in particular cluster sub-munitions, have a significant adverse impact on civilian populations and deplete the capacity of humanitarian workers such as Red Cross and Red Crescent personnel to provide essential services and aid pursuant to our legal mandate under IHL.

The Convention on Cluster Munitions ('the Convention') came about as a response to human suffering caused by cluster munitions, which have killed and injured high numbers of civilians in countries where they have been used. As a result of the so-called "Oslo Process" of negotiations, 107 States concluded an international treaty prohibiting these weapons in May 2008. The Convention was opened for signature on 3 December 2008, at which time Australia signed, along with 93 other countries. The treaty entered into force on 1 August 2010 and as at the time of writing, 49 countries have ratified the Convention.

Australia participated actively in the negotiations of the Convention and Australian Red Cross congratulates the Government on the commitment demonstrated to the issue by the early signature of the Cluster Munitions Convention. Australian Red Cross strongly supports ratification of the Convention and was pleased to participate in the Dublin Conference as a civil society observer on the Australian Government Delegation.

Australian Red Cross endorses entirely the recommendations of the International Committee of Red Cross (ICRC) in relation to the Bill and thanks the ICRC for their actions to assist Australia to strengthen the implementation of the Convention in domestic law.

## 2. The Criminal Code Amendment (Cluster Munitions Prohibition) Bill

Australian has drafted the Criminal Code Amendment (Cluster Munitions Prohibition) Bill ('the Bill') in order to incorporate important aspects of the Convention into Australian law. The Bill incorporates many areas of the Convention and in particular creates offences for acts prohibited under the Convention and allows exemptions foreseen also by the Convention. The Bill then goes on to create defences to the offences, including for actions relating to military cooperation and operations with States not party to the convention.

In many respects, the Bill is consistent with the goals of the Convention, however it is with regard to sections 72.41 and section 72.42 pertaining to military cooperation with countries not party to the Convention that Australian Red Cross has significant concerns.

Both provisions are drafted based on Article 21 of the Convention which relates to "Relations with States not Party to the Convention." The article was drafted to address concerns of States who were concerned with the need for protection from potential criminal liability for the State itself and its personnel for the crime of assisting with the use of cluster munitions because of activities performed in joint military operations by a State not party to the Convention.

Paragraphs 3 & 4 of Article 21 outline the manner in which States Party may engage in military cooperation with States not Party to the Convention and paragraphs 1 & 2 of Article 21 impose positive obligations on States Party to amongst other things "make its best efforts to discourage States not party to this Convention from using cluster munitions." It is important then to read the two parts of the Article together and ensure that the implementation of paragraphs 3 & 4 do not conflict with paragraphs 1 & 2. Unfortunately the current draft does not, in the opinion of Australian Red Cross, achieve this balance.

Whilst Australian Red Cross appreciates the concerns that have given rise to States addressing this issue in the Convention itself, Australian Red Cross is concerned that the provisions in Australian law relating to Article 21 should be drafted as narrowly as possible to meet the aims and objectives of the Convention as a whole and Article 21 in particular. The Bill as currently drafted is too broad in this regard and would permit the use of cluster munitions in a manner that weakens the aims and objectives of the Convention 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" (Preamble to the Convention)

## Section 72.41 Defence – acts by Australians in military cooperation with countries not party to Convention on Cluster Munitions

Australian Red Cross is concerned about the breadth of the defence of s.72.41 in the current draft. As currently drafted it could allow Australians (both defence force personnel and contractors) to participate directly in the course of joint military operations in acts otherwise prohibited by the Convention. For example, Australian personnel could be involved in the refueling of planes carrying cluster munitions or involved in the planning of activities or creation of rules of engagement where the actual use of cluster munitions is not by a State Party to the Convention.

Australian Red Cross supports the ICRC's concern in their submission to this Committee that the language used could permit Australians to be directly and actively involved in activities. Rather than protecting personnel from liability resulting 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.

### Recommendation:

- Delete this section, or
- Construe this section more narrowly, for example by having it apply only to "mere participation" and acts that are unintended or inadvertent or that only have a remote or indirect relationship with the prohibited conduct.

## Section 72.42 Defence – acts by military personnel of countries not party to Convention on Cluster Munitions

This provision provides that certain acts by military personnel of countries not party to the Convention on Australian territory are defences to the offences in the Bill. This provision as currently drafted would allow the stockpiling or transiting of cluster munitions on Australian territory. The legislation specifically permits the use of cluster munitions on a military base, an aircraft or ship in Australian territory.

The effect of this provision is to allow countries not party to the Convention to use Australian territory, including airspace and water to stockpile or retain cluster munitions on Australian territory. This provision allows acts generally prohibited in the Convention to occur on the territory of a State party.

It is a concern to Australian Red Cross that the Australian Legislation is said to go further in this area than legislation adopted by other common law countries.

### Recommendation:

Delete this section, and

- expressly prohibit the transit of cluster munitions in section 72.38

### 3. Conclusion

Australian Red Cross strongly supports ratification of the Cluster Munitions Convention by Australia and incorporation of its provisions into domestic legislation in such a way that upholds the aims and objectives of the Convention. Whilst there is much in the Bill which faithfully implements the Convention into Australian law, as currently drafted, sections 72.41 and 72.42 are so broad as to potentially undermine aspects of the Convention.

Australian Red Cross, as part of an international movement mandated to disseminate IHL and domestically assisting States to ensure IHL is respected, is also willing and able to provide the Australian Government with any assistance or support required in the process of the implementation required for ratification of this important treaty.

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