
Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

Senate Foreign Affairs, Defence and Trade Committee

27 January 2010

Table of Contents

Introduction.....3

**Participation in joint or international military operations with foreign countries
not party to the Convention.....4**

 Defence in Clause 72.414

 Article 21 of the Convention5

 Australia’s Approach to Interoperability in Article 216

 Criticisms of Australia’s Approach to Interoperability in Article 218

 Ensuring Compliance with the General Prohibition on Assistance11

Prohibition on Investment12

Attachment A: Profile of the Law Council of Australia15

Acknowledgement

The Law Council of Australia acknowledges the assistance of the Law Council’s Military Justice Working Group in the preparation of this submission.

Introduction

1. The Law Council of Australia is grateful for the opportunity to provide the following comments to the Senate Foreign Affairs, Defence and Trade Committee for consideration during its inquiry into the provisions of the *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010* ('the Cluster Munitions Bill').
2. The Law Council is the peak national representative body of the legal profession in Australia and through its constituent bodies represents around 56,000 lawyers.
3. The Law Council generally monitors compliance with the legal obligations Australia commits to at an international level and often advocates for these obligations to be implemented in domestic law. The Council considers this to be particularly important where the international law obligations Australia has assumed concern individual rights or liberties or involve a contribution to an international effort to combat the risk of violence or other harm.
4. For these reasons, the Law Council welcomes and supports the introduction of the Cluster Munitions Bill, which aims to implement into domestic law Australia's obligations under the Cluster Munitions Convention.¹
5. The introduction of the Cluster Munitions Bill follows a proud history of Australian support for and interest in promoting the Convention and eliminating the harm caused by cluster munitions around the world. Australia participated in the Berlin Conference on the Destruction of Cluster Munitions in June 2009, the Regional Conference on the Promotion and Universalization of the Convention on Cluster Munitions in Bali, Indonesia in November 2009, and the International Conference on the Convention on Cluster Munitions in Santiago, Chile in June 2010. Australia also plays an active role in the Lao Support Group, a voluntary group of countries tasked with advancing preparations for the First Meeting of States Parties to the Convention, and has contributed funds to the United Nations Development Programme's trust fund to help set up a new treaty support unit and support the First Meeting of States Parties.
6. In line with the key obligations under the Convention, the Law Council is pleased that the Cluster Munitions Bill introduces two new offences - doing acts with a cluster munition (clause 72.38(1)) and promoting acts with a cluster munition (clause 72.38(2)) - into the Commonwealth Criminal Code. These new offence provisions, which attract significant penalties, constitute an important step in implementing Australia's international obligations under the Convention into domestic law.
7. The Law Council is keen to ensure that the Bill is implemented in a way that gives full effect to all of Australia's obligations under the Convention and gives practical effect to the primary objects underlining the Convention.
8. In light of Australia's strong interest in promoting compliance with the Convention in our region, the Law Council encourages this Committee to recommend that the Government give careful consideration to how the Bill might be augmented to ensure that Australia does not become directly or indirectly complicit in the ongoing

¹ The Cluster Munitions Convention (the Convention) was signed by Australia in Oslo on 1 December 2008. Australia's ratification of the Convention was considered by the Parliamentary Joint Standing Committee on Treaties (JSCOT) in May 2009 which recommended ratification in its Report No 103 tabled in August 2009. The Convention bans cluster munitions that cause unacceptable harm to civilians, and establishes a framework for cooperation and assistance that ensures adequate provision of care and rehabilitation for victims, clearance of cluster munitions contaminated areas, risk education and the destruction of stockpiles.

use of cluster munitions as a result of the participation by Australian Defence Forces in joint or international military operations with foreign countries not party to the Convention.

9. The Law Council also encourages the Committee to consider whether the Bill should be amended to include a prohibition on investment by Australia 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. The inclusion of such a prohibition was recommended by Parliamentary Joint Standing Committee on Treaties (JSCOT) when it considered whether Australia should ratify the Convention in 2009.

Participation in joint or international military operations with foreign countries not party to the Convention.

Defence in Clause 72.41

10. As noted above, clause 72.38 contains two offences relating to cluster munitions:
- it is an offence to use, develop, produce or otherwise acquire cluster munitions, or stockpile or retain cluster munitions or transfer cluster munitions to anyone (72.38(1)).
 - it is an offence to assist, encourage or induce another person to do an act prohibited in subclause 72.38(1) (72.38(2)).
11. Both offences attract a maximum penalty of 10 years imprisonment. These offences are based on Articles 1 and 9 of the Convention on Cluster Munitions.
12. The Bill also contains a number of defences, including the defence contained in clause 72.41 relating to acts by Australian Defence Force personnel in military cooperation with 8 countries not party to Convention. Clause 72.41 provides:

A person who is an Australian citizen, is a member of the Australian Defence Force or is performing services under a Commonwealth contract does not commit an offence against section 72.38 by doing an act if:

(a) the act is done in the course of military cooperation or operations with a foreign country that is not a party to the Convention on Cluster Munitions; and

(b) the act is not connected with the Commonwealth:

(i) using a cluster munition; or

(ii) developing, producing or otherwise acquiring a cluster munition; or

(iii) stockpiling or retaining a cluster munition; or

(iv) transferring a cluster munition; and

(c) the act does not consist of expressly requesting the use of a cluster munition in a case where the choice of munitions used is within the Commonwealth's exclusive control.

13. This clause is based on the Australian Government's interpretation of Article 21 of the Convention, in particular paragraphs (3) and (4).

Article 21 of the Convention

14. The primary object of the Convention is to end the significant humanitarian harm cluster munitions pose to civilians by prohibiting the use, production, stockpiling, and transfer of cluster munitions, as well as assistance with any of these activities. In line with this object, Article 21 of the Convention requires state parties to use their best efforts to encourage non-state parties to accept the Convention norms. For example, paragraph 21(1) provides:

Each State Party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention.

Paragraph 21(2) provides:

Each State Party shall notify the governments of all States not party to this Convention, referred to in paragraph 3 of this Article, of its obligations under this Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions.

15. Paragraphs (3) and (4) of Article 21 expand on relations with non-state parties in the specific context of military cooperation and operations and permit joint military operations between State Parties and non-State Parties to the Convention. Article 21(3), known as the 'interoperability provision', states:

Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.

Paragraph (4) provides:

Nothing in paragraph 3 of this Article shall authorise a State Party:

- a. To develop, produce or otherwise acquire cluster munitions;*
- b. To itself stockpile or transfer cluster munitions;*
- c. To itself use cluster munitions; or*
- d. To expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.*

16. During the negotiations surrounding the Convention, certain States expressed differing interpretations concerning the relationship between the absolute prohibitions contained in Article 1 and the interoperability provision in Article 21.

17. Some States have taken the view that paragraph 21(3) permits participation in joint military operations by State Parties with non-State Parties, even if cluster munitions

are used, provided that the State Party and/or its military personnel do not engage in any of the activities listed in paragraph 21(4). In other words, they consider paragraph 21(3) to be an exception to the prohibitions in Article 1, and consider paragraph 21(4) to be an exclusive list of activities that remain prohibited.

Australia's Approach to Interoperability in Article 21

18. This appears to be the view that has been adopted by the Australian Government and has influenced the drafting of clause 72.41 of the Bill, which provides a defence for Australian Defence Force members engaged in joint military operations with foreign countries not party to the Convention who engage in conduct that might otherwise constitute an offence.
19. The Australian Government's interpretation of Article 21(3) is evident in the Explanatory Memorandum to the Bill which provides that:

Proposed section 72.41 provides that certain acts done by Australians in military cooperation and operations with countries that are not party to the Convention are not offences against proposed section 72.38. This section gives effect to paragraphs 3 and 4 of Article 21 of the Convention.

Paragraph 3 of Article 21 of the Convention qualifies the key prohibitions specified in Article 1 of the Convention. The effect of paragraph 3 is that certain acts are permitted in the context of military cooperation and operations with States not party to the Convention, even though such acts could ultimately assist the non-State Party to engage in conduct that is prohibited by Article 1 of the Convention. Paragraph 4 of Article 21 restricts the scope of paragraph 3 by re-introducing some legal restrictions, namely that even in military cooperation and operations with non-States Parties, States Parties are not permitted to develop, produce, acquire, stockpile, transfer or use cluster munitions, or expressly request the use of cluster munitions in cases where the choice of munitions used is within the State Party's exclusive control.²

...

Read together, paragraphs (a) to (c) of proposed section 72.41 have the effect of creating a defence where an Australian citizen, ADF member of Commonwealth contractor does an act in the course of military cooperation or operations with a foreign country that is not a party to the Convention, except where the Act is connected with the Commonwealth using, developing, producing, acquiring, stockpiling, retaining or transferring a cluster munition, or where the act consists of expressly requesting the use of a cluster munition in a case where the choice of munitions used is within the Commonwealth's exclusive control.³

20. Australia's interpretation of Article 21 was considered by the Parliamentary Joint Standing Committee on Treaties (JSCOT) when it considered Australia's ratification of the Convention in 2009.⁴ During its inquiry, JSCOT questioned the Department of Foreign Affairs and Trade (DFAT) on the origins and motivations for the inclusion of Article 21 in the Convention. DFAT submitted that the Australian Government supported the inclusion of Article 21 "to ensure that Australia could continue to

² Explanatory Memorandum p. 12

³ Explanatory Memorandum p. 13

⁴ Joint Parliamentary Standing Committee on Treaties, Report 103: Treaties Tabled on 12 March and 13 May 2009, Chapter 3: Convention on Cluster Munitions, (August 2009) pp. 19-23.

cooperation militarily with its allies, particularly with the United States of America.”⁵ The Department of Defence (Defence) told JSCOT that the US is likely to continue to use cluster munitions in military conflicts, and DFAT stated that it is likely that Australia will participate in operations where allies may use cluster munitions. JSCOT queried how Article 21 would operate in practice, to which Defence explained:

... the simplest way to understand the interoperability provisions in the Convention is that ADF personnel should not be the first or the last in the chain of command when cluster munitions are used. That is, ADF personnel must not be engaged in actually deploying the cluster munitions – an example [is] that of a pilot actually dropping the cluster munition – nor should they be at the top of the chain of command with ultimate responsibility for exclusive control over the choice of using cluster munitions.

*However, ADF personnel can support the coalition in a wide variety of roles, even if cluster munitions are used by one of the coalition partners. They could still be employed in planning, intelligence, logistics and other support roles ... and carry out senior roles in coalition headquarters.*⁶

21. Defence told JSCOT that although it considers Article 21 of the Convention to permit Australian Defence Force personnel to carry out a range of functions that may be connected to the use of cluster munitions, it does not necessarily mean that such functions will be carried out. Air Vice Marshall Geoffrey Brown explained that it is common for Australian Defence Forces to place additional restrictions on personnel through directives and rules of engagement.⁷

22. JSCOT recommended that Australia ratify the Convention, which would continue to allow Australia to cooperate with its allies. However, it expressed concern that:

*... some of the terms in the Convention are not clearly defined and may provide an avenue by which Australia could participate in actions which may contravene the humanitarian aims of the Convention.*⁸

23. To address this concern, JSCOT suggested that the Australian Government and the Australian Defence Force address this issue when drafting domestic legislation required to implement the Convention, and when developing policies by which the personnel of the Australian Defence Force operation. The JSCOT recommended that particular regard be given to:

*... preventing inadvertent participation in the use, or assistance in the use, of cluster munitions by Australia.*⁹

⁵ Joint Parliamentary Standing Committee on Treaties, Report 103: Treaties Tabled on 12 March and 13 May 2009, Chapter 3: Convention on Cluster Munitions, (August 2009) pp. 19-20.

⁶ Air Vice Marshall Gregory Brown, *Transcript of Evidence*, 22 June 2009, pp.11-12 as quoted in Joint Parliamentary Standing Committee on Treaties, Report 103: Treaties Tabled on 12 March and 13 May 2009, Chapter 3: Convention on Cluster Munitions, (August 2009) pp. 20-21.

⁷ Air Vice Marshall Gregory Brown, *Transcript of Evidence*, 22 June 2009, pp.11 as quoted in Joint Parliamentary Standing Committee on Treaties, Report 103: Treaties Tabled on 12 March and 13 May 2009, Chapter 3: Convention on Cluster Munitions, (August 2009) pp. 22.

⁸ Joint Parliamentary Standing Committee on Treaties, Report 103: Treaties Tabled on 12 March and 13 May 2009, Chapter 3: Convention on Cluster Munitions, (August 2009) pp. 27.

⁹ Joint Parliamentary Standing Committee on Treaties, Report 103: Treaties Tabled on 12 March and 13 May 2009, Chapter 3: Convention on Cluster Munitions, (August 2009) pp. 27.

-
24. In response to the JSCOT's report and recommendations, the Australian Government reiterated its understanding of the interaction between Article 1 and Article 21 of the Convention as follows:

Article 1 of the Convention prohibits State Parties from using cluster munitions and also prohibits assistance in the use of cluster munitions. However, this prohibition is subject to the exception contained in Article 21 that allows State Parties, their military personnel and nationals to engage in military cooperation and operations with States not party to the Convention that may use cluster munitions. This provision allows State Parties to continue to conduct operations with allies not party to the Convention who may be using prohibited cluster munitions, such as the United States. The Convention does not prohibit inadvertent participation in the use, or assistance in the use, of cluster munitions. During military cooperations and operations with States not party to the Convention, Australian personnel will nonetheless be prohibited from themselves using cluster munitions or expressly requesting the use of cluster munitions in cases where the choice of munitions used is within their exclusive control.¹⁰

Criticisms of Australia's Approach to Interoperability in Article 21

25. Australia's approach to the interoperability in Article 21 has been subject to criticism by national and international human rights organisations. The Law Council expresses no view about these criticisms, however, it considers the views of these organisations – and in particular their interpretation of Article 21 of the Convention - to be relevant to understanding the nature of Australia's obligations under the Convention.
26. Australia's interpretation of paragraphs (3) and (4) of Article 21 of the Convention, and the inclusion of defence provisions such as clause 72.41 of the Bill, has been strongly criticised by human rights organisations¹¹ on the grounds that it undermines the primary object of the Convention and relies on an interpretation of Article 21 that is internally inconsistent.
27. Under these organisations' interpretation of Article 21, paragraphs (3) and (4) do not create an exception to any obligations under the Convention, including Article 1(1)(c) which prohibits states parties from assisting anyone with any activity that is banned under the Convention, including use, production, stockpiling, and transfer of cluster munitions. Article 21(3) simply serves to clarify that participation in joint military operations *when it does not amount to assistance with acts prohibited by the Convention*, is not prohibited under the Convention. In other words, under this interpretation, defences such as those proposed in clause 72.41 of the Bill are based on misinterpretations of Article 21 and are inconsistent with the core obligations in the Convention.
28. This interpretation is said to be preferred as it correctly identifies the prominence given to Article 1 of the Convention, which constitutes a 'general obligation' under

¹⁰ 'Government Response to Joint Standing Committee on Treaties Report No 103 on the Convention on Cluster Munitions,' undated but released 13 May 2010 available at <http://www.apf.gov.au/house/committee/jsct/governmentresponses/103rd.pdf>.

¹¹ See for example, Human Rights Watch, 'Staying True to the Ban on Cluster Munitions: Understanding the Prohibition on Assistance in the Convention on Cluster Munitions,' June 2009, available at <http://www.hrw.org/node/83975>; Cluster Munitions Coalition, 'Policy Papers on the Convention on Cluster Munitions', March 2010, available at <http://www.stopclustermunitions.org/wp/wp-content/uploads/2010/06/3a-cmc-policy-papers.pdf>; Australian Red Cross Submission to JSCOT inquiry into Australia's ratification of the Convention on Cluster Munitions, May 2009; Australian Network to ban Land Mines, Submission to JSCOT inquiry into Australia's ratification of the Convention on Cluster Munitions, May 2009.

the Convention and extends to a general prohibition on assistance with any prohibited activity. The placement of the provision in Article 1 and its equation with other banned activities are said to demonstrate that the prohibition on assistance was intended as a foundation of the Convention from which no deviation should be permitted. It is also noted that the language of Article 1(1)(c) is expansive and unqualified. It specifies that the ban on assistance applies to "anyone" under "any circumstances".

29. It is further argued that accepted rules of treaty interpretation call for a broad reading of the prohibition on providing assistance. For example, under Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in context-which includes the text and preamble-and in light of its object and purpose. In this case, the Convention aims, as articulated in its preamble, to eradicate for all time the harm caused by cluster munitions. It is argued that a general, extensive prohibition on assistance with activities associated with the use of cluster munitions is the only interpretation of Article 1(1)(c) that is consistent with this aim. Alternative interpretations, such as those relied upon by the Australian Government in the formulation of clause 72.41, are considered to undermine the purpose of the Convention.
30. In line with this position, the activities listed in Article 21(4) as prohibited during a joint military operation constitute an *illustrative* list of activities prohibited during joint military operations with non State Parties , rather than an exhaustive catalogue of acts that continue to be prohibited despite Article 21(3). Under this interpretation, activities that are not listed in Article 21(4) are still subject to the prohibition under Article 1(1)(c) if they constitute assisting, encouraging, or inducing another to use, transfer, retain or stockpile a cluster munitions.
31. It is argued that interpreting Article 21(4) as an exhaustive list of prohibited activities would allow states parties to participate in a range of activities that are otherwise banned by the Convention, such as:
 - identifying targets for cluster munitions attacks;
 - securing, storing, or transporting cluster munitions that belong to a state that is not a party to the convention;
 - agreeing to rules of engagement that allow cluster munition use by a state that is not a party to the convention;
 - participating in planning for use of cluster munitions by a state that is not a party to the convention; and
 - training others to use cluster munitions.
32. In addition to undermining the purpose of the Convention, viewing Article 21(4) as an exhaustive list is said to conflict with the positive obligation placed on parties under Article 21(2) to discourage cluster munition use by non State Parties. It is contended that Article 21 would be internally incoherent if it both allowed states parties to assist with cluster munition use by their military partners and required them to discourage such use.

-
33. To further support this interpretation of Article 21, Human Rights Watch point to the precedent of the 1997 Mine Ban Treaty.¹² The Cluster Munitions Convention borrows much of its language from this Treaty and the prohibitions on assistance are nearly identical. When negotiating and implementing the Mine Ban Treaty, States expressed similar concerns about joint military operations and the prohibitions on assistance as have been raised in the context of the Cluster Munitions Convention. In the context of the Mine Ban Treaty, States addressed the issue by clarifying their position in national statements and national laws, rather than adopting a separate article, such as Article 21 of the Cluster Munitions Convention.
34. After more than a decade of the Mine Ban Treaty being in force, most State Parties have agreed that the Treaty allows participation in joint operations, but have maintained an expansive understanding of the prohibition on assistance. For example, most State Parties, including Australia, have agreed that State Parties may *not* participate in the planning of use of antipersonnel mines, agree to rules of engagement that permit the use of such weapons, or knowingly derive military benefit from the use of such weapons by others. In 2003 Australia stated that it “will not participate in planning or implementation of activities related to anti-personnel mine use in joint operations.”¹³ Given the overlapping support for the Mine Ban Treaty and the Convention on Cluster Munitions, it is argued that these examples of broad understanding of assistance in the context of the Mine Ban Treaty should apply equally in the context of the Convention.
35. There are to date few national laws implementing the Convention. However, national statements provide some guidance on how to articulate an interpretation of Article 21 which emphasises the primacy of the complete prohibition on the use of and assistance in the use of cluster munitions.
36. In 2008, Ireland, a leader in the process that created the Convention, enacted the *Cluster Munitions and Anti-Personnel Mines Act 2008*. Subsection 6(2) of the Act included a strong prohibition on assistance, borrowing language directly from Article 1(1)(c), and making it an offence to “assist, encourage or induce” a person to commit one of the list of activities prohibited by the Convention.¹⁴ The Irish legislation also contains subsection 7(4), which provided that subsection 6(2) did not apply to any act done or omission made by any person during joint military operations involving forces from states not party to the Convention.
37. When first proposed, subsection 7(4) was strongly criticised in parliamentary debates and by human rights organisations for the reasons described above. It was said that this subsection’s “permissiveness makes it a poor model for states that seek to uphold the absolute prohibition laid out in Article 1(1)(c) of the Convention”.¹⁵ In 2009, in response to these criticisms and concerns, the Irish Government

12 Human Rights Watch, ‘Staying True to the Ban on Cluster Munitions: Understanding the Prohibition on Assistance in the Convention on Cluster Munitions,’ June 2009, pp. 6-8, available at <http://www.hrw.org/node/83975>

13 “Land Mine Use by Non-States Parties in Joint Operations.” Undated policy statement provided by Peter Baxter, Deputy Chief of Mission, and Susan Deets, Chief Council, Embassy of Australia to the US, in Washington DC, to the US Campaign to Ban Landmines coordinator, Gina Coplon-Newfield, 8 April 2003. See also Landmine and Cluster Munition Monitor, Country Profile on Australia, available at <http://www.the-monitor.org/index.php/publications/display?url=lm/2004/australia.html>.

14 Cluster Munitions and Anti-Personnel Mines Act 2008 s6(2).

15 Human Rights Watch, ‘Staying True to the Ban on Cluster Munitions: Understanding the Prohibition on Assistance in the Convention on Cluster Munitions,’ June 2009, pp. 6-8, available at <http://www.hrw.org/node/83975>

provided a statement clarifying the intended meaning and operation of subsection 7(4) to the Cluster Munitions Coalition.¹⁶ It explained that:

The purpose of section 7(4) of the Act is not to enable assistance with prohibited acts ... Rather, this provision is intended to ensure that no person may be prosecuted for an act or omission that might otherwise constitute assistance but is unintended or inadvertent, or has only a remote or indirect relationship to the commission of a prohibited act by a state not party to the Convention.

...

It is Ireland's view that any deliberate assistance in the commission of an act prohibited by the Convention in the context of military cooperation with a state not party will be inconsistent with [the obligations in Articles 21(1) and (2)] to make its best efforts to discourage the use of cluster munitions by the latter and that Article (3) must be interpreted accordingly.¹⁷

38. The statement also provided that the activities listed in Article 21(4) were not the only acts prohibited during joint military operations with non-State parties.
39. Norway also provided accompanying explanatory commentaries for its legislation implementing the Convention. The Norwegian law criminalises assistance, but does not specifically address how these provisions apply in the context of joint military operations with non-State parties. The commentaries do, however, provide that Article 21 cannot be interpreted as meaning that co-responsibility for assistance is generally excluded in international operations. The commentaries also note that Article 21 does not circumvent other provisions in the Convention, which if it had, could have undermined confidence in the Convention.¹⁸

Ensuring Compliance with the General Prohibition on Assistance

40. Australia's primary obligation under the Convention is to ensure that Australia is not in any way complicit in the use, storage, transfer and retention of cluster munitions.
41. As Australia is not a country which itself uses cluster munitions, the practical ramifications of this obligation are likely to be most significant in circumstances where Australia engages in military cooperation with a non-party state.
42. The challenge for Australia is to create a regulatory framework which allows Australia to continue to train with and undertake military operations with non-party states but only to the extent that this does not result in the provision of assistance to those states to use, store, transfer or retain cluster munitions. Much of the debate around this Bill has focused on the defence in clause 72.41 on the assumption that the scope of that defence alone will define the terms of Australia's lawful engagement with non-party states.

16 The Cluster Muniton Coalition is an international civil society campaign working to eradicate cluster munitions, prevent further casualties from these weapons and put an end for all time to the suffering they cause. Further information can be found at <http://www.stopclustermunitions.org/the-coalition/>.

17 Department of Foreign Affairs of Ireland, "Note on the Measures Taken by Ireland to Implement Article 21 of the Convention on Cluster Munitions", 11 March 2009, p.1 attached to letter from Daithi O'Ceallaigh, ambassador, Permanent Mission of Ireland to United Nations in Geneva, to Thomas Nash, coordinator, Cluster Munitions Coalition, 16 March 2009.

18 See Proposition no 7(2008-2009) to the Odelsting, in Norwegian Legislation and Commentary, p11. See also Human Rights Watch, 'Staying True to the Ban on Cluster Munitions: Understanding the Prohibition on Assistance in the Convention on Cluster Munitions,' June 2009, p. 17

-
43. The terms of the defence provision in clause 72.41 are significant in that they demarcate what activities a person may or may not face criminal sanction for in the context of joint military operations with non-party states. The provision is focused on the individual liability of personnel who probably have limited control over who Australia cooperates with and on what terms.
 44. Rather than focusing primarily on this defence provision, the Law Council suggests that the Committee consider what other mechanisms could be employed to ensure that the Australian Government complies with the spirit of the Convention when engaged in joint military operations with non party States. The Law Council suggests that the Committee recommend that the Government regularly report to the Committee on how it and the ADF have acted to ensure compliance with the Convention whether this is by way of published government policy, or Rules of Engagement.
 45. For example, the Law Council suggests that the Australian Government could report to the Committee on instances where it refused to agree to any proposed rules of engagement with respect to joint military operations that contemplate or authorise the use of cluster munitions by foreign countries not party to the Convention. The Australian Government could also report on the development and implementation of government policies that give effect to its obligations to use its best efforts to dissuade States not party to the Convention to adopt its norms and prohibit the use of cluster munitions, or any efforts to ensure that Australian Defence Forces are not directly or indirectly complicit in the ongoing use of cluster munitions.

Prohibition on Investment

46. The Law Council also encourages the Committee to consider whether the Bill should be amended to include an express prohibition on investment by Australia 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.
47. The inclusion of such a prohibition was recommended by JSCOT when it considered whether Australia should ratify the Convention in 2009.
48. In its response to this recommendation, the Australian Government did not commit to including such a prohibition in domestic legislation implementing the Convention. Rather it observed that:

Article 9 of the Convention requires Australia to enact criminal offences to prevent and suppress any activity prohibited to a State Party under the Convention undertaken by persons or on territory under its jurisdiction or control. Article 1 of the Convention prohibits State Parties from directly or indirectly developing or producing cluster munitions, or assisting, encouraging or inducing anyone to develop or produce cluster munitions. While the terms of the legislation required to implement the Convention are still under consideration, the offences included in the legislation will reflect the obligations in Article 1 of the Convention.

49. Although there is no specific article in the Convention that obliges State Parties to prohibit investment in the development or production of cluster munitions by private actors a number of State Parties have interpreted the broad prohibition on assistance in Article 1(1)(c) of the Convention to extend to include a ban on investments in companies that manufacture cluster munitions.

-
50. For example, Belgium, Ireland, and Luxembourg currently prohibit investments in cluster munitions producers.
51. In 2007 the Belgium Parliament expanded an existing law, which prohibits direct or indirect financing in the production of anti-personnel landmines, to ban investment in companies that produce cluster munitions.¹⁹ The law covers banks and funds operating in Belgium.
52. Ireland, Luxembourg and New Zealand have banned investments in cluster munitions production through national laws designed to implement their ratification of the Convention. For example, subsection 10(2) of the New Zealand *Cluster Munitions Prohibition Act 2009* provides:
- 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.*
53. The European Parliament indicated its support for banning investment in cluster munitions in October 2007 when it passed a resolution calling for a moratorium on using, investing in, stockpiling, producing, transferring, or exporting cluster munitions.²⁰
54. Several other States, including Bulgaria, Lebanon, and Mexico, had voiced support for a broad interpretation of the prohibition on assistance to include investment although they have not enacted laws to prohibit investment in cluster munitions production.²¹
55. A report prepared by the international NGO Cluster Munitions Coalition in 2009 and updated in 2010 shows a clear trend toward action by governments and financial institutions to limit or end involvement in financing cluster munitions production since the beginning of the negotiation of the Convention.²² The report shows that there are now 30 financial institutions, nearly all in Europe, with policies on excluding funding for investment in cluster munitions or other weapons.²³
56. However, the report also concludes that State Parties must continue to exert pressure on financial institutions that currently fund the production and development of cluster munitions. The Report lists 146 financial institutions from 15 different countries that continue to provide this funding.

¹⁹ Cluster Munitions Coalition 'Investment in Civilian Suffering To Be Halted by future Cluster Munitions Convention Policy paper' (2009) available at <http://www.stopclustermunitions.org/wp/wp-content/uploads/2009/09/disinvestment-policy-paper.pdf>.

²⁰ In October 2007 the European Parliament resolution 'Towards A Global Ban To Ban All Cluster Munitions' was adopted available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0484+0+DOC+XML+V0//EN>

²¹ Cluster Munitions Coalition Report 'Worldwide Investments in Cluster Munitions: A Shared Responsibility' (April 2010) published by coalition members IKV PAX Christi of the Netherlands and Netwerk Vlaanderen of Belgium. available at <http://www.stopexplosiveinvestments.org/uploads/pdf/Worldwide%20Investments%20in%20Cluster%20Munitions%20-%20April%202010%20update%20full%20report%20DEF.pdf>

²² That process was led in part by Norway and named for the site of the effort's first global conference on cluster munitions, which took place in February 2007. The process brought together NGOs, UN organizations, and interested governments in a series of major conferences to draft a ban on cluster munitions.

²³ That process was led in part by Norway and named for the site of the effort's first global conference on cluster munitions, which took place in February 2007. The process brought together NGOs, UN organizations, and interested governments in a series of major conferences to draft a ban on cluster munitions.

-
57. In light of the reported positive impact prohibiting or discouraging investment in the production of cluster munitions can have on eliminating their use and reducing the harm caused to civilians, the Law Council urges this Committee to consider recommending that the Bill be amended to include an express prohibition on investment by Australia 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.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.