

**PROVISIONS OF THE *CRIMINAL CODE AMENDMENT (CLUSTER MUNITIONS PROHIBITION) BILL 2010***

**AUSTRALIAN LAWYERS FOR HUMAN RIGHTS**

**SUPPLEMENTARY SUBMISSION**

**MARCH 2011**

**Introduction**

1. This document is a supplementary submission to the Australian Lawyers for Human Rights' submission (ALHR Submission) to the Senate Standing Committee on Foreign Affairs, Defence and Trade (Committee) dated January 2011 regarding the *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010* (Bill).
2. This document specifically addresses the joint submission of the Hon Robert McClelland MP, the Hon Kevin Rudd MP and the Hon Stephen Smith MP,<sup>1</sup> additional information received from the Attorney-General's Department,<sup>2</sup> Department of Defence<sup>3</sup> and Department of Foreign Affairs and Trade,<sup>4</sup> and evidence of the Government at the hearing before the Committee chaired by Senator Mark Bishop on 3 March 2011 (Hearing).

**Applying 'recklessness' as the standard for criminal liability**

3. To meet the objectives of the *Convention on Cluster Munitions* (Convention), the standard for criminal liability in relation to offences under the Bill should be that of recklessness rather than intent: 'a recklessness standard ... holds accountable individuals who knew *or should have known* they were committing a prohibited act. This approach protects unwitting actors while requiring increased care by those with reason to know they may be assisting with prohibited acts.'<sup>5</sup> Applying a recklessness standard does not extend punishment to those who inadvertently contravene the Bill's prohibitions.

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<sup>1</sup> The Hon Robert McClelland MP, the Hon Kevin Rudd MP and the Hon Stephen Smith MP, Submission No 24 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Provisions of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, February 2011.

<sup>2</sup> Attorney-General's Department, Additional Information No 1 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Provisions of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, March 2011.

<sup>3</sup> Department of Defence, Additional Information No 2 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Provisions of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, March 2011.

<sup>4</sup> Department of Foreign Affairs and Trade, Additional Information No 3 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Provisions of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, March 2011.

<sup>5</sup> Evidence to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Canberra, 3 March 2011, (Bonnie Docherty, Human Rights Watch and Harvard Law School International Human Rights Clinic).

4. The Government's starting point is that the Code's default standard is intent unless a good reason exists to depart from it. However, the correct starting point for implementing a treaty should be the treaty obligation itself, read against the object and purpose of the treaty. Although the Convention is silent as to intent, it can be inferred from the purpose of the Convention and the breadth of the prohibitions in Article 1 that a strict intent standard is inappropriate to achieving its aims. An interpretation of the Convention that does not catch reckless indifference to the consequences of one's actions when undertaken in the knowledge that they may lead to the use of cluster munitions would significantly weaken the impact of the Convention and make successful prosecutions more unlikely.
5. The recklessness standard also accords with customary international law in many areas concerning international criminal liability. Specifically, it is consistent with the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) with respect to the mental element for war crimes. In several decisions, these Tribunals have concluded that the necessary *mens rea* encompasses reckless acts which can be inferred from the circumstances of each case.<sup>6</sup>
6. In the United Kingdom's legislation to implement its obligations under the Convention, the standard for criminal liability applied is that of recklessness rather than intention.<sup>7</sup>
7. It is submitted that a good faith interpretation of the Convention in light of its object and purpose, and adherence to both international best practice and analogous standards of liability at international law, represent good reasons to depart from the Code's default standard.

### **Interoperability with States not party to the Convention**

8. Proposed section 72.41 would allow Australian Defence Forces to assist non-States Parties in their use of cluster munitions during joint military activities contrary to the purpose of the Convention.<sup>8</sup> Proposed 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.
9. As outlined in the submission of the International Committee of the Red Cross (ICRC), 'the defence provided by section 72.41 of the Australian Bill ... could lead to permitting the forces of a State Party to be directly and actively involved in activities such as training for and planning the use of cluster munitions, which

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<sup>6</sup> See, for instance, *Celebici* ICTY T, Ch II 16.11.1998 para. 439; *Akayesu* ICTR T. Ch. I 2.9.1998 para 589; *Kordic* ICTY T.Ch. 26.2.2001 para.236; ICTY, Prosecutor's Pre-Trial Brief, *The Prosecutor v Milan Simic and Others* IT-95-9-PT, p.35; *Prosecutor v Blaskic* Case No. IT-95-14-A, para 592. It is recognised that these cases concern different crimes and the interpretation of different statutes. A further submission on these points can be made if required.

<sup>7</sup> *Cluster Munitions (Prohibitions) Act 2010* (UK) c 11, s 7.

<sup>8</sup> 'The Bill does not prevent ADF personnel from working in coalition headquarters (conducting planning, providing intelligence and logistics support), in operations where cluster munitions may be used.' in Department of Defence, above n 3, 1.

would contravene the Convention and undermine its goals'.<sup>9</sup> Similarly, Human Rights Watch and the IHRC state that '[t]he government's submission lays out several scenarios it believes Article 21 and thus Section 72.41 allow, and each of them flouts the prohibition on assistance. According to the government, the ADF could help plan and provide logistical support for the use of cluster munitions. Such actions facilitate the use rather than the elimination of these weapons. 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.'<sup>10</sup>

10. Clarification that the prohibition on assistance applies during joint military operations must be included to ensure that Australia's legislation is in line with the objectives and text of Article 21 in the context of the whole of the Convention. Nothing in the Convention creates an exception to contravene the prohibition on assistance. This is the primary approach taken by signatories to the Convention including Ecuador, Ghana, Iceland, Lebanon, Mexico, Madagascar, Malawi, New Zealand, Norway and Slovenia.<sup>11</sup> Accordingly, Australia should ensure that its legislation does not allow Australia to provide unlawful assistance to non-States Parties.
11. To reiterate the key points with respect to treaty interpretation made in our submission, we note that:
  - The treaty's core purpose of **universal eradication** of cluster munitions would be undermined by reading Article 21 as waiving the prohibition on assistance in Article 1;
  - As an international humanitarian law treaty, the Convention is to be read consistent with the principles of humanity and dictates of public conscience (or the 'elementary considerations of humanity'). This requires a rejection of a restrictive interpretation of prohibitions and of *a contrario* arguments that conduct not mentioned in Article 21 is therefore not prohibited. An interpretation protective of human life is to be preferred, especially in cases of doubt; and
  - The omission of the positive duties in Article 21 removes vital context for interpreting the interoperability clause consistent with the continuation of the prohibition on assistance.
12. Maintaining a prohibition on assisting non-States Parties during joint military operations need not interfere with military readiness or effectiveness, or jeopardise Australia's strategic relationship with non-States Parties such as the United States of America. Other States Parties, including members of the North Atlantic Treaty Organisation (NATO), have stronger legislative and policy initiatives on the relationship with non-States Parties. In a commentary attached

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<sup>9</sup> International Committee of the Red Cross, Submission No 9 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Provisions of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, January 2011, 2.

<sup>10</sup> Bonnie Docherty, above n 5.

<sup>11</sup> Human Rights Watch and Harvard Law School International Human Rights Clinic, Additional Information to the Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Provisions of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010*, March 2011, 1-2.

to its implementing legislation, for example, Norway, a member of NATO, explains that Article 21 of the Convention does not authorise a State Party to engage in prohibited activities during joint military operations.<sup>12</sup>

13. While there is some room for different means of implementation between States, States Parties must nevertheless abide by their obligations and the object and purpose of the Convention. The submission of the ICRC points to the text of New Zealand's implementing legislation which more accurately gives effect to Article 21 within the context of Article 1 of the Convention and the Convention's overall objectives.<sup>13</sup> Australia should similarly interpret its obligations. Not to do so throws into doubt Australia's commitment to act as a good international citizen and may set a precedent for narrow and inconsistent interpretation of the Convention for other States yet to ratify the Convention.

### **Stockpiling and transfer of cluster munitions by non-States Parties**

14. As highlighted in the Attorney-General's Department's submission, the defence in proposed section 72.42 'applies to military personnel of countries that are not party of the Convention who stockpile, retain or transfer cluster munitions while on the foreign country's base, aircraft or ship that is in Australian territory.'<sup>14</sup> No other State provides expressly for a blanket exemption, regardless of circumstances and without any executive oversight or control, for the use of its territory by allies for the transit and stockpiling of cluster munitions.<sup>15</sup> Proposed section 72.42 is inconsistent with Australia's obligations under the Convention and undermines both Articles 1 and 9 and the Convention's broader objectives.<sup>16</sup>
15. Other States Parties have remained truer to the Convention's purpose when implementing their obligations related to stockpiling, retention and transfer of cluster munitions. Austrian and German laws expressly prohibit transit of cluster munitions.<sup>17</sup> In its policy statement, the United Kingdom specifies that foreign stockpiles of cluster munitions must be removed from their territory within an eight year period.<sup>18</sup>
16. At the Hearing, the Government stated that currently there are no stockpiles of cluster munitions on Australian territory. If Australia is genuinely committed to the eradication of cluster munitions, we should not make provision to legalise unconditional foreign stockpiling on our territory in future.

### **Retention**

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<sup>12</sup> Ibid 2.

<sup>13</sup> International Committee of the Red Cross, above n 9, 3.

<sup>14</sup> Attorney-General's Department, above n 2, 7.

<sup>15</sup> Human Rights Watch and Harvard Law School International Human Rights Clinic, *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 Rights Clinic to Senate Committee on Foreign Affairs, Defence and Trade*, March 2011, 3-4.

<sup>16</sup> Human Rights Watch and Harvard Law School International Human Rights Clinic, above n 11, 8-12.

<sup>17</sup> Ibid 3.

<sup>18</sup> Ibid 4.

17. The Government also clarified at the Hearing that inert cluster munitions only are used for training purposes in clearance of cluster munitions. Practically, there is no reason to allow for retention of live cluster munitions by any Party or in any circumstance in the future. If cluster munitions are to be retained, legislation 'should implement the convention's requirements that states parties retain only "the minimum number absolutely necessary". The legislation should also require detailed annual reports as mandated by Article 3(8) of the convention.'<sup>19</sup> This would allow for monitoring and transparency to ensure Australia moves towards the purpose of the Convention – the universal eradication of cluster munitions.

### **Indirect investment**

18. The Government's evidence at Hearing was that the Bill did not identify whether indirect investment in cluster munitions is an offence. The Government's argument was that, while some acts of investment will fall within the scope of the offences in the Bill, to clarify whether indirect investment is an offence would add to the length of the legislation and so could not be done. In creating this ambiguity, the Bill leaves interpretation to the courts which is a far more complex and resource intensive alternative. Furthermore, in the interest of fairness, it is important that clarity be provided so that investors can know with certainty whether they are acting unlawfully.

### **Positive obligations**

19. The positive obligations contained in Article 21(1) and (2) of the Convention should be implemented in legislation possibly outside of the *Criminal Code*. These obligations should be coordinated and monitored to ensure that they are carried out appropriately in line with the purpose and requirements of the Convention, and to promote transparency of Australia's actions and progress in this regard.
20. In order to ensure that Australia gives effect to all its obligations under the Convention, we consider that stand-alone legislation may be more appropriate rather than seeking to amend the *Criminal Code Act 1995*.

### **An objects clause**

21. In order to promote an interpretation of the terms 'use', 'retain', 'assist', 'encourage' and 'induce' that is consistent with the intent of the Convention, the Bill should include an objects clause as detailed in paragraphs 31 to 34 of the ALHR Submission.
22. Incorporating an objects clause in the Bill would help ensure that interpretation of the Bill is consistent with the Convention. It would add clarity and minimise complexity by reducing the need to look outside of the legislation itself to elucidate right interpretation.

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<sup>19</sup> Ibid 12.

23. Incorporation of the text of the Convention figures prominently in the Government's submissions. Given the relevance of objects clauses for interpreting statutes, an objects clause drafted consistently with the text of the preamble would be consistent with the Government's approach to mirror the language of the Convention.

### **'under any circumstances'**

24. As outlined in paragraphs 25 and 26 of the ALHR Submission, it is imperative that the text of the Bill accurately reflects that of the Convention. In this respect, in referring to the terms 'use', 'retain', 'assist', 'encourage' and 'induce', the words 'under any circumstances' must be included in proposed section 72.38. 'Under any circumstances' clarifies that offences apply 'during both international and non-international armed conflicts, as well as in situations that do not rise to the level of armed conflict.'<sup>20</sup>
25. The importance of including the statement 'under any circumstances' is revealed by the Attorney-General's Department's answer to this query from the Committee. According to the Attorney-General's Department, such words are unnecessary because: '[t]he proposed offences in section 72.38 of the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 (the Bill) will apply in all circumstances, unless otherwise specified'<sup>21</sup> (emphasis added).
26. With respect, the wording of the treaty is important because it highlights the fact that there are no exemptions to these absolute prohibitions. That it could be inconsistent with standard drafting practices does not justify a departure from the text of the Convention; our statutes are littered with different phrases which courts are adept at interpreting. This would seem to be a minor impediment.
27. Identical language appears in the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, and the *Convention on the Prohibition of the Development, Production And Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*.

### **Meeting Australia's obligations**

28. We further call on the Government to engage, in a collaborative way, with civil society and the expertise it is able to offer in drafting legislation to implement Australia's obligations under the Convention.

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<sup>20</sup> Ibid 5.

<sup>21</sup> Attorney-General's Department, above n 2, 1.