



The Secretary
Senate Committee on Foreign Affairs, Defense and Trade
Department of the Senate
PO Box 6100, Parliament House
Canberra, ACT, 2600
Australia

Submission to the Senate Committee on Foreign Affairs, Defence and Trade on the Inquiry into the Criminal Code Amendment (Cluster Munitions Prohibitions) Bill 2010

The Afghan Landmine Survivors' Organization (ALSO) consists of 48 numbers of members, many of whom are cluster bomb survivors and Landmine Survivors. It has been part of the International Cluster Munitions Coalition since 2007. ALSO is a very active member of the Afghan CMC, and this submission is also written on behalf of the Afghan CMC. The effects of cluster bombs have been and still are devastating to our country and to us as individuals.

We have worked together with the International Campaign to Ban Landmines since 2007 to rid the world of landmines. At the moment more than 150 countries have signed the landmine treaty, and landmines have not been used since 1997.

We were crucial in getting Afghanistan to sign onto the Convention on Cluster Munitions during the signing conference in December 2008 in Oslo. We have campaigned and lobbied face to face a number of key governments, including Australia, to ban cluster bombs during all the international conferences in the Oslo Process.

Living in a country where cluster bombs have been used extensively and where a war is still going on, we really appreciate Australia joining the convention, Australia's effort to ban cluster bombs and the extensive funding by Australia in mine action and Victim Assistance. We met with the delegations, including Australia, to discuss how to improve the treaty, and in the end at the Dublin Conference achieving the strongest text with

regards to victim assistance in a disarmament treaty ever. We witnessed how Australia fought hard to have strong and good text in the treaty with regards to victim assistance. Unfortunately as we will outline below, this language and these obligations for victim assistance are not reflected in Australia's proposed legislation.

Australia participated in all International meetings leading up to the Oslo Conference except for the first meeting in Oslo in 2007. On December 3rd Australia signed the convention in Oslo. The Afghan Landmine Survivors' Organization and Afghan CMC were also present. March 12 2009 the **National Interest Analysis** was tabled with following hearings in June. 18 August JSCOT issued the **Report 103** supporting ratification. 27 October 2010 the **Criminal Code Amendment Bill** was introduced in the House of Representatives, and 22 November the Bill was introduced in the Senate. The 21 of January is the deadline for submissions and we are thankful for this opportunity to comment on the proposed legislation.

Looking through the draft legislation we have concerns about a variety of issues that are highly relevant to us in Afghanistan: Retention, Transit/Stockpile, Interoperability, and Clearance/Victim assistance.

The following areas of main concern to us in Afghanistan are:

1. We are concerned about **Retention** because we have seen that Australia has kept thousands of landmines for "training purpose" despite only using a few hundred in a decade. We fear the number of cluster munitions can reach tens of thousands as each bomb retained can contain more than 600 sub munitions. No deminer, nor soldiers, trains on live cluster bombs. Section 72.39 permits Australia Defense Forces or police to acquire or retain cluster munitions for purposes of destruction, counter-measure development, or development of detection, clearance or destruction techniques with the authorization of the Defense Minister. No limit is specified and no annual reporting requirements are mentioned. There is no need to retain live cluster bombs for training or research development, if Australia decides to retain cluster bombs we request that Australia report in a transparent manner on the number and type of sub-munitions retained, as well as where they are obtained from and how they have been used to make sure they are used as intended. Otherwise we believe they should be destroyed. We hope there would be no retention and that the text allowing retention will be removed from Australia's final legislation.
2. We are concerned about **Transit/Foreign Stockpile** because it may facilitate use of cluster bombs in Afghanistan. The proposed legislation Section 72.42(1) of the Bill explicitly allows for the transit of cluster munitions by permitting transit by ship or plane through Australian territory by non-states parties in military cooperation with the Australia Defence Forces. Section 72.42(1) allows non-state parties in military cooperation with the Australian Defense Forces to stockpile cluster munitions on bases, aircraft, and ships in Australia. Transit and stockpile of foreign stockpiles should be banned across Australia soil and all areas controlled by Australian law. Transit clause in your proposed legislation will only encourage continued use. We therefore hope that transit across Australian soil and territories will not be allowed in the Australian legislation.

3. We are concerned about **Interoperability** because section 72.41 in the proposed legislation may allow Australian forces in Afghanistan to assist with prohibited activities leading to increased cluster bombs contamination in Afghanistan. Section 72.41 c should prohibit military personnel to request cluster munitions strikes, rather than allowing them to do so, also where the choice of munitions is not with the Australia's exclusive control as it is explained in the Explanatory Memorandum (p13:4). The spirit of article 21 in the Convention on Cluster Munitions was to protect troops of signatory countries from prosecution for actions by other nations not party to the conventions. It was never intended to allow either limited or unlimited collaboration with non-signatory parties. The proposed Australian text takes a very liberal view of article 21 and may allow Australia to actively to participate in many levels of planning for cluster strikes. JSCOT expressed similar concerns about the Bill, stating that 'some of the terms contained 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' (JSCOT Report 103:3.77). We hope that this view will be reflected in the final Australian legislation and that we will never find ourselves in a situation where we have to name Australia for assisting or facilitate use of cluster bombs in Afghanistan.

4. We are concerned about **Clearance and Victim Assistance**, because there is no mention of this treaty obligation in the proposed Australian legislation. In fact the Explanatory Memorandum (p 3:2) to the 2010 Cluster Munitions Prohibition Bill says that the Convention *does not impose any financial obligations on Australia* regarding international cluster munition clearance efforts or the provision of assistance to victims of cluster munitions outside of Australia. The spirit of the treaty was to assist all victims of cluster bombs, not just victims located in Australia. Although there is no specific prescribed guide for providing financial contributions under the Convention, Australia as a state party "in a position" to provide assistance clearly will have an obligation to contribute according to Article 6 of the Convention. The Anti-Personnel Mines Convention Act of 1998 doesn't contain similar positive obligations, so this is an opportunity for Australia to pronounce and define positive obligations to victim assistance in addition to the proposed criminal legislation.

Keeping in mind that Article 9 obliges State Party shall take "all appropriate legal, administrative and other measures" to implement the Convention on Cluster Munitions below are a few suggestions for addressing positive obligations. We recommend including provisions for cooperation and assistance as well as for universalisation of the treaty.

These provisions could contain specific reference to victim assistance (Article 6.7 obligations and a commitment to respond to Article 5 needs) bearing in mind the spirit of the *Convention and drawing from the Convention's preamble to do its* "utmost in providing assistance to cluster munitions victims" *and to* "ensure the full realization of the rights of all cluster munitions victims" This should be coherently linked to Australia's obligations to Convention on the Rights of Persons with Disabilities and the disability inclusive strategy.

We hope that Australia will designate a government agency that is responsible for

coordinating activities to fulfill positive obligations, and that this is done in a more concrete and lasting manner than in a 5-year strategy. Unfortunately, the cluster bomb problem in Afghanistan will last longer than 5 years. Furthermore, in the spirit of the convention we hope Australia will include references to its commitment to respond to the needs expressed by states with responsibility for cluster munitions victims in their areas of jurisdiction

We fully endorse the recommendations made by Human Right Watch in their submission.

We are willing to appear before the Committee through our CMC colleague John Rodsted who is based in Australia. John Rodsted has worked as photo journalist in places of conflict and post conflict for more than 25 years and as a field researcher for ICBL and CMC and many associated NGOs and governments. He has worked in Afghanistan, Kosovo, Bosnia, Laos, Lebanon, Eritrea, Sudan, West Sahara, Vietnam, Sri Lanka, Cambodia, Georgia to name but a few. He has a great depth of understanding of the field realities of cluster munitions and their impact on civil society.

Sincerely



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On behalf of all Afghan CMC

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