

The Secretary
Senate Committee on Foreign Affairs, Defence and Trade
Department of the Senate
PO Box 6100
CANBERRA ACT 2600

20 January 2011

Dear Sir/Madam

**Re: Submission to the Senate Inquiry
Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010**

We thank you for the opportunity to provide comment in relation to the *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010* ("the Bill"). We urge the Australian government to enact appropriate legislation to give effect to all our obligations under the Convention on Cluster Munitions ("the Convention").

CBM is the largest organisation worldwide working in the area of disability and development. We partner with more than 800 projects in over 70 countries. Our vision is for an inclusive world in which all persons with disabilities enjoy their human rights and achieve their full potential.

Cluster munitions and other explosive remnants of war are a large cause of disability in developing countries. Long after conflict has ceased, unexploded bomblets continue to cause death and disability for civil populations. Cluster munitions cause both physical and psychosocial disabilities due to associated psychological trauma.¹ 98% of cluster munition victims are civilians.² As of 2009, at least 16,816 cluster munition casualties were confirmed globally,³ 40% of whom were children.⁴ Statistics indicate that for every child killed in conflict, 3 more are left with a permanent disability.⁵

We commend the government for actions already taken to meet our obligations under the Convention. We recognise that the *Mine Action Strategy for the Australian Aid Program 2010-2014* takes significant steps. We also welcome the government's commitment to implement the strategy by way of pledging \$100 million in assistance to developing countries affected by landmines, cluster munitions and other

¹ 'Banning Cluster Munitions' (2009) 87(1) *Bulletin of the World Health Organization* 8-9.

² Handicap International, *Circle of Impact: The fatal footprint of cluster munitions on people and communities* (2007) 9.

³ Landmine and Cluster Munition Monitor, *Casualties and Victim Assistance* (2009) <http://www.the-monitor.org/index.php/publications/display?url=cmm/2010/CMM_Casualties_Victim_Assistance_2010.html>.

⁴ UN News Centre, *UN Hails Entry Into Force of Global Pact Banning Cluster Munitions* (30 July 2010) <<http://www.un.org/apps/news/story.asp?NewsID=35479>>.

⁵ UN Enable, *Factsheet on Persons with Disabilities* <<http://www.un.org/disabilities/default.asp?id=18>>.

explosive remnants of war over the next 5 years, with a significant portion of these funds going to victim assistance programs.

As a good and responsible global citizen, we must now make genuine efforts to prohibit cluster munitions and to show leadership in encouraging other countries to do likewise.

CBM Australia endorses the submission of Human Rights Watch and the Harvard Law School's International Human Rights Clinic.

CBM Australia recommends 8 areas for amendment or inclusion in the Bill which are detailed below:

1. Proposed section 72.38 Offences relating to cluster munitions

In order to ensure that offences are interpreted broadly regardless of location or whether a situation has escalated to the level of armed conflict, it is necessary that the words of the Convention are accurately reflected in proposed section 72.38 of the Bill.

As recognised in the Explanatory Memorandum to the Bill:

Under Article 1 of the Convention, States Parties undertake never under any circumstances to:

- use cluster munitions or explosive bomblets.
- develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions or explosive bomblets, or
- assist, encourage or induce anyone to engage in any activity prohibited to a State Party under the Convention.⁶

The current wording in proposed section 72.38 of the Bill omits the words of the Convention: 'never under any circumstances'. These words should be included all offences described in section 72.38.

For example, proposed subsection 72.38(1) should more appropriately read: 'A person commits an offence if under any circumstances the person does any of the following with a cluster munition...'

Proposed subsection 72.38(2)(c) adds the need to establish 'intent' that a prohibited act be done contrary to Article 1 of the Convention. A person's mental state will be extremely difficult to determine in relation to the acts outlined in proposed subsection 72.38(2)(a), going against the objects of the Convention. Therefore, proposed subsection 72.38(2) should be removed and replaced instead with the standard of 'recklessness' which more accurately reflects the Convention's purpose.

2. Proposed section 72.39 Defence – acquisition or retention authorised by Defence Minister

Currently, Australia does not have an operational stockpile of cluster munitions. We believe that there is no need for Australia to acquire or retain live cluster munitions in the future. Cluster munitions used for the purposes set out in proposed subsection 72.39(2) should not be live. Therefore, proposed section 72.39 is irrelevant and should be removed. In the alternative, if this proposed section remains, the maximum number of cluster munitions permitted to be retained should be specified as well as requirements for annual reporting made compulsory under Article 3(8) of the Convention.

⁶ The Parliament of the Commonwealth of Australia, *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 Explanatory Memorandum*, House of Representatives (2010) 1.

3. Proposed section 72.41 Defence – acts by Australians in military cooperation with Countries not party to Convention on Cluster Munitions

Proposed section 72.41 could, arguably, be interpreted as permitting the Australian Defence Force or persons performing services under a Commonwealth contract to participate in training others in cluster munition use, initiating an attack involving cluster munitions not solely under Australia's control, planning cluster munition strikes, entering into rules of engagement where cluster munitions will be used and other actions which go against the stated purpose of the Convention.

In order to prevent such interpretation, proposed section 72.41 must use clear language to specify that the offences listed in proposed section 72.38 apply in joint military operations. Acts described in proposed subsection 72.41(b) should be recognised as not forming a comprehensive list but as illustrative of some prohibited acts amongst others not stated. Also, proposed subsection 72.41(c) should explicitly prohibit members of the Australian Defence Force or others performing services under a Commonwealth contract from initiating or requesting attacks involving cluster munitions.

4. Proposed section 72.42 Defence – acts by military personnel of countries not party to Convention on Cluster Munitions

Article 9 of the Convention states that:

Each State Party shall take all appropriate legal, administrative and other measures to implement this Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

Article 9 requires that offences apply to non-Australian citizens involved in prohibited activity on Australian territory. Proposed section 72.42 contravenes Article 9 as it would allow non-Australian citizens to commit offences within Australian territory including the transit and stockpiling of cluster munitions.

Accordingly, proposed section 72.42 should be removed from the Bill. Clear offences prohibiting the transit through or stockpiling of cluster munitions within Australian territory should be included in the Bill.

5. Investment

There are no specific provisions in the Bill which prohibit investment in corporations or other entities that directly or indirectly manufacture cluster munitions or components exclusively used in cluster munitions. In line with the report of the Joint Standing Committee on Treaties, the law must be active in 'preventing investment by Australian 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.'⁷

Offences for direct and indirect, and public and private investment in the manufacture of cluster munitions or components exclusively used in cluster munitions should be included in the Bill.

⁷ Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, *Convention on Cluster Munitions* (30 May 2008).

6. Positive obligations

Article 21(1) and (2) of the Convention states:

1. 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.
2. Each State Party shall notify the governments of all States not party to this Convention ... 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.

The Bill should include the positive obligations contained in Article 21 and provide mechanisms to effect and monitor these obligations.

Conclusion

On 18 August 2009, the Joint Standing Committee on Treaties declared its support for the Convention and recommended that 'binding treaty action be taken'.⁸ It is essential that the government makes no further delay in ratifying the Convention. We commend the Bill with amendments outlined above to you as the next step towards ratification.

Should you have any queries or require clarification regarding this submission, please contact Karina Okotel of CBM Australia on 03 8843 4447.

Yours faithfully

Karina Okotel
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⁸ Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, *Convention on Cluster Munitions* (18 August 2009).