



## **Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010**

### **Department of Defence**

#### ***Interoperability – section 72.41***

1. **Question from the Chair:** Most witnesses were concerned by Australia's interpretation of Article 21(3) of the Convention and argued that it could be interpreted to allow Australians to assist with prohibited acts in the context of joint military operations including: planning an attack using cluster munitions, creating rules of engagement that permit their use by non-parties, providing security for stores of such weapons, refuelling vehicles transporting cluster munitions, and identifying targets for attacks or calling in strikes that may involve cluster munitions (see for example Australian Lawyers for Human Rights, Submission 19, p. [6]). Can you explain the parameters of military engagement and assistance with Non-States Parties that may use cluster munitions?

#### **Defence response:**

- a) The Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010 (the Bill) uses the same language as the Convention on Cluster Munitions (the Convention), to ensure that the Bill accurately reflects the provisions of the Convention.
- b) The Convention provides a balance between humanitarian and security concerns. Defence is a strong supporter of the Convention on Cluster Munitions. The Convention addresses the impact of cluster munitions that cause unacceptable humanitarian harm, while permitting continued military cooperation and operations with Non-States Parties that may use cluster munitions.
- c) Article 21 of the Convention expressly recognises the importance of continued military cooperation and operations between States Parties and Non-States Parties. Such military cooperation and operations are central to the protection of international security, as well as Australia's national security. Article 21 will allow Australian Defence Force (ADF) personnel to continue to support coalition operations involving Non-States Parties, and will help to protect ADF lives during those combined operations. In particular, Article 21 will allow Non-States Parties (such as the United States) to defend the lives of ADF personnel through close air support, even when cluster munitions might be used.
- d) In an operational sense, the Bill will prohibit ADF personnel from physically firing, discharging or releasing cluster munitions. 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. Consistent with Article 21(4), when undertaking these roles, ADF personnel will be prohibited

from using, transferring, stockpiling, developing, producing or acquiring cluster munitions, or expressly requesting the use of cluster munitions where the choice of munitions used is within the ADF member's exclusive control.

- e) Cluster munitions are most likely to be used in conventional warfare against conventional forces. Our ally, the United States is likely to continue to retain cluster munitions in their military inventory and may use them in future major conflicts. Although the United States has not signed the Convention on Cluster Munitions, the United States has adopted a cluster munitions policy which aims to minimise the potential unintended harm to civilians and civilian infrastructure. This policy includes that by the end of 2018, the United States military 'will no longer use cluster munitions which, after arming, result in more than one per cent unexploded ordnance across the range of intended operational environments'.
  - f) The Australian Government policy in relation to Article 21 of the Convention is consistent with the approach of other State Parties with whom Australia often works in military coalitions, including the United Kingdom and Canada.
2. **Question from the Chair:** How will the ADF ensure that Australia complies with its obligations under the Convention in the context of military engagement with Non-States Parties?

**Defence Response:**

- a) In the course of military cooperation and operations with Non-States Parties, Defence personnel will comply with the provisions of the Bill, as well as ADF doctrine, procedures, rules and directives. These documents are being modified to ensure consistency with the Convention and the Bill. These changes to ADF doctrine, procedures, rules and directives will be completed before Australia ratifies the Convention and the implementing legislation commences.
  - b) The ADF is experienced at incorporating the requirements of weapons treaties into doctrine and procedure and complying with those requirements while working in coalition operations.
3. **Question from the Chair:** How will ADF balance its positive obligations to discourage the use of cluster munitions by Non-States Parties with the need to engage in joint military exercises with such parties?

**Defence Response:**

- a) Paragraphs 1 and 2 of Article 21 – which set out certain obligations relating to universality of the Convention – must be read alongside paragraphs 3 and 4 of Article 21. Paragraphs 3 and 4 of Article 21 were included in the Convention in order to allow continued military cooperation and operations between States Parties and Non-States Parties, which is essential to the protection of international security. These obligations can be undertaken concurrently. The obligation on Australia to exert influence where appropriate in discouraging the use of cluster munitions will

not preclude our continued ability to engage in military cooperation and operations with States not party to the Convention.

- b) The Department of Foreign Affairs and Trade will have primary carriage of realising the obligations in paragraphs 1 and 2 of Article 21 to encourage Non-States Parties to sign on to the Convention and discourage the use of cluster munitions. Once Australia ratifies the Convention, Australia will fulfil the obligations imposed by paragraphs 1 and 2 of Article 21 as appropriate opportunities arise. For example, this obligation may be discharged in bilateral or multilateral spheres through oral or written communications aimed at dissuading or advising States not party to the Convention against using cluster munitions.
- c) The limitations in the Bill will ensure that Australia and Australians will act consistently with the object and purpose of the Convention, even when undertaking military cooperation and operations with countries that are not obliged to comply with the Convention. Agencies are also working to ensure that ADF doctrine, procedures, rules and directives are consistent with the Convention.

#### ***Retention of cluster munitions – section 72.39***

4. **Question from the Chair:** Some witnesses argue that live sub munitions are not required for training purposes and have questioned the need for the provision. Human Rights Watch for example, notes that no UN-accredited clearance organisation is known to use live submunitions for training purposes (Submission 7, p. 11). Does the ADF require live cluster munitions for training purposes?

#### **Defence Response:**

- a) Yes. The ADF requires the ability to access cluster munitions that they may find as explosive remnants of war in their current areas of operation as well as those that may potentially be used against the ADF in future conflicts. The ADF requires this access so that it may develop counter-measures and train its personnel in detection, clearance and destruction techniques, as permitted by Article 3(6) of the Convention. The ADF requires access to live sub-munitions for the development of counter-measures of a technical nature. ADF explosive ordnance technicians need to be trained in neutralising bomblets. An explosive ordnance technician is unable to complete training with simulated bomblets.
- b) The ADF uses both simulated and live cluster sub-munitions in the development of counter-measures and training in cluster munition and explosive submunitions detection, clearance and destruction techniques. These simulated cluster munitions are made specifically for practice purposes, and do not contain an explosive fill. Some cluster sub-munitions are not available in simulated form, which is why live cluster munitions are also used.
- c) The live cluster sub-munitions are not part of Defence's operational weapons inventory, and are not, in either numbers or configuration, suitable for operational use by the ADF. The ADF does not have operational stocks of cluster munitions.

Training and counter-measure samples are not held with any of Defence's operational munitions.

- d) Retention of cluster munitions samples enables the ADF to familiarise explosive ordnance disposal personnel with these munitions, to protect ADF personnel against cluster munition attacks, and to conduct both battlefield and humanitarian clearance operations.

**5. Question from the Chair:** Witnesses have called on the government to qualify the section with wording which gives effect to Article 3(6) of the Convention that the amount of cluster munitions retained or acquired 'shall not exceed the minimum number absolutely necessary for these purposes'. Is there any reason why such a qualification and respecting reporting obligations should not be provided for in the bill?

**Defence Response:**

- a) Article 9 of the Convention requires States Parties to take all legal, administrative and other measures to implement the Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under the Convention. The purpose of the Bill is to create the necessary criminal offences under Australian law. The reporting obligations contained in Article 3(8) and Article 7 of the Convention do not require legislative implementation, and can be implemented through administrative means. This approach is consistent with Australia's implementation of other international agreements.
- b) It is worth recognising that Australia does not have any operational cluster munition stocks that it needs to destroy. As permitted by the Convention, Australia has samples of cluster munitions for the development of and training in cluster munition and explosive sub-munition detection, clearance and destruction techniques, and for the development of counter-measures. These training samples will be reported.
- c) The Bill includes Section 72.39 that permits the Minister to authorise persons to acquire or retain cluster munitions for training and counter-measures. Proposed section 72.39(3) of the Bill states that regulations may prescribe the requirements relating to an authorisation by the Minister, such as the requirement in paragraph 6 of Article 3 of the Convention that the amount of explosive submunitions retained or acquired by a State Party shall not exceed the minimum number absolutely necessary for the purposes permitted in the Convention.

***Stockpiling, retention and transfer of cluster munitions by Non-States Parties – section 72.42***

**6. Question from the Chair:** Many witnesses are concerned that Non-States Parties will be able to transit cluster munitions through Australian airspace and water and to stockpile or retain munitions on ADF or other bases on Australian territory. What were the motivations for the inclusion of this provision in the bill?

**Defence Response:**

- a) The Bill provides a defence for military personnel of States that are not party to the Convention who stockpile, retain or transfer cluster munitions while on a base, aircraft or ship that is in Australian territory. The defence in the Bill recognises that it is not appropriate to require these persons to comply with an international legal obligation to which their sending country has not consented. Notwithstanding this defence, visiting forces would not be excused from prosecution if they use, develop, produce or acquire cluster munitions in Australia.
  - b) This defence takes into account that Australia engages in military cooperation and operations with some States that are not party to the Convention – as permitted by the Convention. This military cooperation and operations may entail the use by foreign States of bases on Australian territory, or the entry of foreign ships or aircraft into Australian territory. The Convention expressly permits the continuation of such cooperation and operations between States Parties and Non-States Parties in paragraph 3 of Article 21.
  - c) It is essential that Australia be able to continue to cooperate with States that have not signed the Convention. The ability to maintain interoperability with Non-States Parties is central to the protection of international security, as well as Australia's national security.
7. **Question from the Chair:** How will foreign stockpiling and transit be administered and monitored and what sort of reporting regime has been envisaged?

**Defence Response:**

- a) The Bill creates the penal sanctions required by Article 9 of the Convention. Article 9 of the Convention requires States Parties to take all legal, administrative and other measures to implement the Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under the Convention.
- b) Consistent with other international agreements that Australia has ratified, Australia will implement the Convention's reporting obligations through administrative measures.
- c) All munitions owned by foreign armed forces that are stored on Australian soil are required to be managed as 'Commonwealth Explosives', in accordance with the *Explosives Act 1961*, and its subordinate regulations and codes. This requires specific approval for the storage and transportation of these munitions, and their inclusion in Defence information holdings. Additionally, they are stored in Defence facilities licensed to store explosive ordnance, and are managed on the Computer System for Armaments. Consequently, Defence both approves and has full visibility of all foreign armed forces munitions that are stored on Australian soil.
- d) No foreign armed force will be approved to fire cluster munitions on any Australian training range. All munitions fired on Australian training ranges by foreign armed forces are required to comply with the requirements and prohibitions specified under Defence Instructions and policies for the management of Defence training areas.