

Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

Attorney-General's Department - Additional information

Penalties and criminal liability – section 72.38

1. Submissions note that the bill does not include the Convention phrase 'never under any circumstances' in relation to the prohibited activities in section 72.38. Please explain why the phrase was not included and whether any negative consequences would flow from having the phrase included.

In setting out the prohibitions which apply to States Parties, the chapeau of Article 1 of the *Convention on Cluster Munitions* (the Convention) states that 'each State Party undertakes never under any circumstances' to use, develop, produce, otherwise acquire, stockpile, retain or transfer cluster munitions, or assist, encourage or induce anyone to engage in such activities.

In translating this treaty prohibition into a domestic criminal offence, it is not necessary to include the words 'never under any circumstances'. This is because the 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. Inserting words such as 'never under any circumstances' would depart from the standard drafting practice in the *Criminal Code Act 1995* (the Code) and may give rise to questions of interpretation regarding differences in how offences are framed within the Code.

2. The Attorney-General made reference to the penalty for bodies corporate (\$330,000) in his second reading speech but it is not codified in section 72.38 of the bill. Please explain why the penalty is not codified in the bill and of any reason as to why the penalty could not be explicitly stated in the bill.

Penalties that apply to bodies corporate are determined by applying the standard formula set out in the *Crimes Act 1914* (the Crimes Act). The Bill provides that the maximum penalty for the offences in proposed section 72.38 is 10 years imprisonment. When the maximum penalty of 10 years imprisonment is converted to penalty units in accordance with the standard formula, the sentence is converted to 3000 penalty units for bodies corporate, which is equivalent to \$330 000.

All offences in the Code must be read together with other provisions in the Code as well as the Crimes Act. This approach ensures stability and consistency in how penalty provisions are read across all Commonwealth legislation. As a matter of form, and in order to maintain simplicity, the Bill sets out only the penalty of

imprisonment, which must be read together with the Crimes Act in order to determine the applicable number of penalty units. Including the penalty units in the Bill would unnecessarily lengthen the Bill. The Office of Parliamentary Counsel (OPC) is currently working with government agencies to reduce the complexity and length of legislation, and this is one measure that can be taken to address this issue.

3. The bill requires a standard of intent for criminal liability. Was a recklessness standard considered when the bill was drafted? Why was a standard of intent deemed more suitable?

The offences in the Bill are to be read in light of the standard fault elements set out in the Code. Under the Code, intention is the standard fault element for any component of an offence that relates to conduct. A person has intention with respect to conduct if he or she means to engage in that conduct. This approach is the most appropriate way to implement in Australia the obligations set out in the Convention. The Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers states that the standard fault elements in the Code should apply unless there is a reason to depart from these. In this regard, the Government has been guided by the prohibition in the Convention. The Convention itself does not refer to standards of fault, because it proscribes State – rather than individual – conduct. However, we consider that a reasonable interpretation of the Convention is that a fault element of intention should be imported into the meaning of Article 1.

Care has been taken to ensure that the offences in the Bill reflect the language of Article 1 of the Convention as closely as possible, in order to ensure that all conduct that is prohibited by the Convention is the subject of a criminal offence under Australian law.

4. JSCOT's recommendation was that the terms "use, retain, assist, encourage and induce" be defined in the bill. Submissions noted that such definitions would assist in interpreting the statute. Please explain why this recommendation was not realised in the bill.

The Joint Standing Committee on Treaties (JSCOT) recommended that when drafting the legislation required to implement the Convention, the Government should have regard to the definition of the terms 'use', 'retain', 'assist', 'encourage' and 'induce' as they apply in Article 1, 2 and 21 of the Convention. The Government tabled its response to the JSCOT report on 13 May 2010, noting all recommendations. In developing the Bill, the Government carefully considered this recommendation, and concluded that it was not necessary to define these terms in the Bill.

Section 72.38 of the Bill uses these terms, which are taken from Article 1 of the Convention. This is intended to ensure that all conduct that is prohibited by the Convention is the subject to a criminal offence under Australian law. These terms are used in the Convention in accordance with their ordinary meaning, and no further clarification is necessary. These terms should also be read in accordance with their ordinary meaning when they are used in the Bill. Consequently, it was not necessary to define these terms in the Bill. The Explanatory Memorandum for the Bill states that these terms are used in their plain English sense.

Interoperability – section 72.41

5. A number of submissions maintain that section 72.41 does not adhere to JSCOT's Recommendation 2 that the 'inadvertent participation in the use, or assistance in the use, of cluster munitions by Australia' be prevented. How do you respond and how were JSCOT's recommendations taken into account in the drafting of this section?

As the Government's response to the JSCOT report noted, the Convention does not prohibit inadvertent participation in the use, or assistance in the use, of cluster munitions. Rather, Article 1 of the Convention prohibits States Parties from using cluster munitions, and also prohibits assistance in the use of cluster munitions. This prohibition is subject to the exceptions contained in Article 21 of the Convention.

Paragraph 3 of Article 21 of the Convention states that, notwithstanding the provisions of Article 1 of the Convention, States Parties, their military personnel and nationals may engage in military cooperation and operations with States not party to the Convention that may use cluster munitions. Paragraph 4 of Article 21 states that States Parties are nonetheless prohibited from themselves using, developing, producing, otherwise acquiring, stockpiling or transferring cluster munitions, or expressly requesting the use of cluster munitions in cases where the choice of munitions used is within their exclusive control.

The Bill uses the same language as the Convention, to ensure that the Bill accurately reflects the provisions of the Convention. Thus, rather than referring to 'inadvertent participation', the Bill picks up the particular language of paragraph 1(c) of Article 1 and paragraph 3 of Article 21.

Proposed sections 72.38 and 72.41 of the Bill give effect to Article 1 and paragraphs 3 and 4 of Article 21 of the Convention. Section 72.38 contains offences that cover the range of conduct prohibited in Article 1 of the Convention, including use, and assistance in the use, of cluster munitions. The physical elements of the offences in section 72.38(1) must be done intentionally. Section 72.41 provides that a person who is an Australian citizen, Australian Defence Force (ADF) member or Commonwealth contractor does not commit an offence under section 72.38 if the act is done in the course of military cooperation or operations with a foreign country that is not a party to the Convention, as long as the act is not connected with Australia using, developing, producing, otherwise acquiring, stockpiling, retaining or transferring a cluster munition, or expressly requesting the use of cluster munitions where the choice of munitions used is within Australia's exclusive control. The limitations contained in the interoperability defence in the Bill will ensure that Australia and Australians will continue to act consistently with the object and purpose of the Convention, even when undertaking cooperative activities with countries that are not obliged to comply with the Convention.

6. Human Rights Watch and IHRC argue that:

Article 21(3) clarifies that, in the particular context of joint military operations, military personnel may *participate* in such operations without violating the convention; it does not, however, give them licence to *violate* the prohibitions of the

convention. The proposed Section 72.41 takes the opposite approach and adopts language that seems to go further than Article 21(3). While Article 21(3) unambiguously states that only states parties "may engage" in joint military operations, the Bill creates a defence for many acts during such operations that on their face violate the convention (Submission 7, p. 6).

Please respond to this interpretation and explain the rationale for the defence.

As evident in the submissions of Human Rights Watch and Harvard Law School's International Human Rights Clinic, some organisations interpret Article 1 and Article 21 of the Convention as prohibiting all forms of assistance in prohibited conduct, in all circumstances. Australia, along with a number of other States, does not share this interpretation. Article 21 of the Convention expressly recognises the importance of continued military cooperation between States Parties and non-States Parties. Article 21 was specifically included in the Convention in order to allow States Parties to continue such military cooperation and operations with non-States Parties, subject to some restrictions.

Paragraph 3 of Article 21 states that, notwithstanding Article 1 of the Convention, and in accordance with international law, States Parties, their military personnel and nationals may engage in military cooperation and operations with States not party to the Convention who might engage in activities prohibited to a State Party. Paragraph 3 qualifies the key prohibitions specified in Article 1 of the Convention. The effect of paragraph 3 is that certain activities in the context of military cooperation and operations with non-States Parties are permitted, even though they could ultimately assist the non-State Party to engage in conduct prohibited under the Convention. Paragraph 4 of Article 21 restricts the scope of paragraph 3 by re-introducing some legal restrictions. Paragraph 4 states that, notwithstanding paragraph 3, States Parties in military cooperation and operations with non-States Parties are not permitted to develop, produce, otherwise acquire, stockpile transfer or use cluster munitions. Paragraph 4 also states that States Parties must not expressly request the use of cluster munitions in a situation where the choice of munitions used is within the State Party's exclusive control.

The Bill includes a defence which reflects the conduct that is permitted by paragraph 3 of Article 21, while ensuring that the conduct that is listed in paragraph 4 of Article 21 remains prohibited. Proposed section 72.41 provides that a person who is an Australian citizen, ADF member or Commonwealth contractor does not commit an offence under section 72.38 if the act is done in the course of military cooperation or operations with a foreign country that is not a party to the Convention, and as long as the act is not connected with Australia using, developing, producing or otherwise acquiring stockpiling, retaining or transferring a cluster munition, or expressly requesting the use of cluster munitions where the choice of munitions used is within Australia's exclusive control. The limitations on the defence ensure that Australia and Australians will continue to act consistently with the object and purpose of the Convention, even when undertaking cooperative activities with countries that are not obliged to comply with the Convention.

7. How do you respond to the concerns of the Australian Red Cross that the bill relating to Article 21 is too broad and would permit 'the use of cluster

munitions in a manner that weakens the aims and objectives of the Convention' (Submission 21, p. 2)?

The Bill gives effect to the Convention in Australian law, and is guided and limited by the contents of the Convention. As stated above, the interoperability defence in section 72.41 reflects the conduct that is permitted by paragraph 3 of Article 21 while ensuring that the conduct that is prohibited by paragraph 4 of Article 21 remains prohibited. The limitations on the defence ensure that Australia and Australians will continue to act consistently with the object and purpose of the Convention, even when undertaking cooperative activities with countries that are not obliged to comply with the Convention. Importantly, it remains prohibited for Australian citizens, ADF members and Commonwealth contractors to use cluster munitions, even in the course of military cooperation and operations with non-States Parties.

8. Witnesses held that Article 21(3) provisions need to be balanced by Article 21(1) and (2) obligations and that explicit recognition of the latter in the bill could assist in this regard. How does Australia view the relationship between Article 21(3) and the positive obligations in Article 21(1) and (2) and has explicit recognition in legislation been considered? If so, what was the rationale for their exclusion from the bill? What sort of wording was considered for inclusion? If not, what are the possible ramifications of the inclusion of Article 21(1) and (2) obligations in the bill?

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 obligations contained in paragraphs 1 and 2 of Article 21 of the Convention do not require legislative implementation. As set out above, OPC is currently working with government agencies to reduce the complexity and length of legislation. One way to achieve this aim is to ensure that the Bill contains only those provisions necessary to give effect to the Convention. The universality obligations contained in the Convention do not require legislative implementation, and can be implemented through administrative and other means. Consequently, they have not been referred to in the Bill.

Including a reference to paragraphs 1 and 2 of Article 21 in the Bill would also risk curtailing the considerable discretion available to States Parties as to the means of discharging these obligations. Australia will comply with its obligations under paragraphs 1 and 2 of Article 21 as appropriate opportunities arise, and consistently with its implementation of similar obligations in other international disarmament instruments. In formal and informal diplomatic and other contacts, Australia will urge States not party to the Convention not to use cluster munitions and encourage them to accede to the Convention. Australia will also continue to work with non-government organisations, which make a significant contribution to universalisation. Australia will also make clear to non-States Parties our obligations under the Convention,

including when engaged in military cooperation and operations with non-States Parties.

9. Witnesses took the example of the Land Mine Treaty to demonstrate in their view that states are 'fully capable of abiding by a prohibition on assistance while cooperating with the armed forces of states not party' (Human Rights Watch and IHRC, Submission 7, p. 7). They questioned why the cluster munition treaty was different. Does Australia's position in relation to the cluster munitions treaty differ to that in relation to the land mine treaty and if so, how and why?

While the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction* (the Land Mine Treaty) does not include an interoperability provision, the issue of interoperability was dealt with in the negotiation of this Treaty. At the time of ratifying the Land Mine Treaty, Australia – as well as Canada, the United Kingdom and others – deposited a declaration which confirmed its understanding that the prohibition on anti-personnel mines shall not imply liability for conduct undertaken in the context of operations, exercises or other military activity authorised by the United Nations or otherwise conducted in accordance with international law between Australians and the armed forces of a State not party to the Land Mine Treaty.

The interoperability provision in the Convention was negotiated in light of the experience of the Land Mine Treaty. Australia's position in relation to both the Land Mine Treaty and the Convention is that military cooperation and operations between States, including non-States Parties to both of these instruments, is central to the protection of international security, as well as Australia's national security. When undertaking military cooperation or operations, ADF personnel are required to act in accordance with doctrine, procedures, rules and directives. These documents are already consistent with Australia's obligations under the Land Mine Treaty and agencies are working to ensure that these documents are also consistent with the Convention. This process will be completed before Australia ratifies the Convention and this legislation commences.

Stockpiling, retention and transfer of cluster munitions by non-states parties – section 72.42

10. A substantial number of witnesses argued that section 72.42 would violate Article 9 of the Convention whilst undermining the Convention's objectives and contribute to the continued use of cluster munitions. What was the rationale for the provision and how does the government respond to these concerns?

The defence in proposed section 72.42 of the Bill is consistent with Article 9 of the Convention. Article 9 of the Convention requires States Parties to take all appropriate measures to implement the Convention. These measures include, *inter alia*, imposing penal sanctions to prevent and suppress any activity prohibited to a State Party under the Convention when undertaken by persons or on territory under its jurisdiction or control. In accordance with this provision, the offences created in the Bill apply to all

persons on Australian territory and, under certain circumstances, to persons outside of Australia.

The defence in section 72.42 applies to military personnel of countries that are not party to the Convention who stockpile, retain or transfer cluster munitions while on the foreign country's base, aircraft or ship that is in Australian territory. This defence takes into account that Australia engages in military cooperation and operations with some countries that are not party to the Convention, as permitted by Article 21. This military cooperation and operations may extend to hosting foreign bases, aircraft or ships. Article 9 must be read alongside Article 21. The defence in the Bill recognises that it is not appropriate to require military personnel of non-States Parties to comply with an international legal obligation to which their sending country has not consented. Nonetheless, such visiting forces would not be excused from prosecution for the offences contained in the Bill if they use, develop, produce or acquire cluster munitions in Australia.

11. What is the government's response to the position of the Australian Red Cross that the effect of section 72.42 is to allow non-states parties to the Convention to 'use Australian territory, including airspace and water to stockpile or retain cluster munitions on Australian territory' and therefore 'allows acts generally prohibited in the Convention to occur on the territory of a State party' (Submission 21, p. 3).

The defence in proposed section 72.42 takes into account that Australia engages in military cooperation and operations with some countries that are not party to the Convention. This military cooperation and operations may entail the use by foreign countries of bases on Australian territory, or the entry of foreign ships or aircraft into Australian territory. The defence in the Bill recognises that it is not appropriate to require persons on these bases, ships and aircraft to comply with an international legal obligation to which their sending country has not consented.

The defence in the Bill applies to the military personnel of non-States Parties in relation to the offences of stockpiling, retaining or transferring a cluster munition. It will remain an offence under section 72.38 for such persons to use, develop, produce or acquire a cluster munitions in Australia.

Positive obligations

12. Did the government consider a statement of intent, objects clause or provision in the bill which recognises Australia's positive obligations as a state party including that to promote the norms of the Convention which would assist in interpreting the statute? If so, please explain why such a statement was not included. If not, could such a provision be included? Could you provide examples of such a statement?

Section 72.37 sets out the purpose of the new Subdivision, which is to create offences relating to cluster munitions and explosive bomblets, and give effect to the Convention. As set out above, OPC is currently working with government agencies to reduce the complexity and length of legislation. One way to achieve this aim is to

ensure that the Bill contains only those provisions necessary to give effect to the Convention. The positive obligations contained in the Convention do not require legislative implementation, and can be implemented through administrative and other means. Consequently, they have not been referred to in the Bill.

The Convention gives States considerable discretion as to the means of discharging their positive obligations. Article 9 of the Convention requires States Parties to take the appropriate legal, administrative and other measures to implement the Convention. Australia will implement its obligations under the Convention in the manner appropriate to each obligation. For example, Australia already implements its obligation under Article 6 to provide technical, material and financial assistance to States Parties affected by cluster munitions through the Mine Action Strategy for the Australian aid program.

13. What are the concerns (if any) where such a statement of intent or objects clause introduced?

The primary purpose of the Bill is to create criminal offences under Australian law for conduct that is prohibited by the Convention. All provisions in the Bill are related to this purpose. It is not necessary to include in the Code statements of intent regarding provisions in the Convention that do not require legislative implementation. Such provisions would unnecessarily increase the complexity and length of the Bill. As stated above, OPC is currently working with government agencies to reduce the complexity and length of legislation.

The Attorney-General, Minister for Foreign Affairs and Minister for Defence have stated publicly Australia's commitment to implementing the Convention's obligations. Similar statements have also been made by Australian officials, including at the First Meeting of States Parties to the Convention, held in Laos from 9 to 12 November 2010.

Investment in cluster munitions production

14. In the second reading speech, the Attorney-General used investments in cluster munitions production as an example of an activity to which the bill's offences would apply. However, witnesses noted that there was no explicit prohibition in relation to investment in cluster munitions in the bill. Please explain Australia's position on investment and rationale for not providing an explicit prohibition in the bill.

The Bill gives effect to the Convention in Australian law and is guided and limited by the contents of the Convention. The Convention reflects international agreement on the range of conduct to be prohibited. The Convention does not include a prohibition on investment in companies that develop or produce cluster munitions. However, as stated in the Attorney-General's second reading speech, some acts of investment will fall within the scope of the offences in the Bill.

The conduct prohibited in Article 1 of the Convention is reflected in the offences in section 72.38 of the Bill. Specifically, the Convention prohibits the provision of assistance, encouragement or inducement in the development or production of cluster

munitions. Proposed section 72.38 creates offences that reflect the Convention obligations. Proposed subsection 72.38(1) creates the offence of developing or producing cluster munitions. The operation of the Code's ancillary offences means that a person who aids, abets, counsels or procures the commission of this offence commits an offence. In addition, proposed subsection 72.38(2) creates the offence of assisting, encouraging or inducing the development or production of cluster munitions.

Some acts of investment will fall within the proposed offences. For example, the intentional provision of financial assistance to an entity so that the entity can develop or produce cluster munitions will amount to an offence. However, accidental or innocent acts of assistance, encouragement or inducement will not fall within the offences in the Bill. For example, a person who contributes to a superannuation fund which includes investments in companies that may develop or produce cluster munitions is unlikely to fulfil the elements of the offences in the Bill.

15. Many witnesses argued in favour of an explicit prohibition on investment through the provision of funds to companies that develop/produce cluster munitions in light of JSCOT's Recommendation 2. The Australian Council of Superannuation Investors argued that it was 'highly likely that weapons producers will increasingly shift to indirect financing to controversial munitions to avoid reputational damage' (Submission 4, p. [1]). What is the Australian Government's response to this statement? Please explain Australia's position on indirect investment and in relation to JSCOT's recommendation.

In its report on the Convention, JSCOT recommended that the Government have regard to 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. As stated above, the Government has carefully considered the Committee's recommendations. The Bill gives effect to the Convention in Australian law, and is guided and limited by the contents of the Convention. As the Convention does not include a prohibition on investment in companies that develop or produce cluster munitions, the Bill similarly does not include an investment offence. However, some acts of investment will fall within the scope of the offences in the Bill, as described above. Importantly, the intentional provision of financial assistance to an entity so that the entity can develop or produce cluster munitions will amount to an offence.