



Medical Association for Prevention of War (Australia)

ABN 15 779 883 661

21 January 2011

The Secretary
Senate Foreign Affairs, Defence and Trade Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Thank you for inviting the Medical Association for Prevention of War (Australia) to make a submission to the Committee's inquiry into the Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010. Following is our submission.

Dr Sue Wareham OAM (our Immediate Past President and ACT Coordinator) would be pleased to appear before the committee if requested to do so.

MAPW (Australia) welcomes the introduction of this bill. Our submission covers areas of the bill that we believe are noteworthy and should be retained, as well as areas of the bill that cause great concern and should be amended. Our guiding principle in preparing this submission has been to ensure the bill provides a strong interpretation of the humanitarian intention of the Convention on Cluster Munitions.

We urge the Committee to interpret Australia's obligations under the Convention in a robust manner aimed at protecting and enhancing the health and wellbeing of innocent civilians. We particularly urge the Committee to amend those sections of the bill, as noted in our submission, that currently undermine the whole purpose of the Convention.

We fully support the Convention and look forward to the Australian Government ratifying it as soon as possible following the amendment and passing of this bill.

Yours faithfully

Dr Bill Williams MBBS
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Submission to Senate Committee on Foreign Affairs, Defence and Trade on its inquiry into Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

Who we are

The Medical Association for Prevention of War (Australia) ('MAPW') is a professional not-for-profit organisation working for the elimination of all weapons of mass destruction and the prevention of armed conflict. We promote peace through research, advocacy, education and partnerships. In 1986, we were awarded the prestigious Australian Peace Award by Prime Minister Bob Hawke during the International Year of Peace.

Since our foundation in 1981, MAPW has also worked to reduce the physical and psychological impacts of war on humanity, while advocating that public resources be used to promote human and environmental wellbeing rather than to acquire armaments.

We have branches in every state and territory of Australia. Our active membership of around 600 people comprises health care professionals and like-minded associates from a wide range of backgrounds. We are independent of all political parties. Our core funding comes from our members, who also determine our policies.

MAPW is a member of the Cluster Munition Coalition – Australia.

Background to our submission

MAPW has been a strong and consistent advocate of the need to ban cluster munitions.

In December 2006, Dr Sue Wareham and two other MAPW members formed an Australian delegation that visited areas of south Lebanon most heavily affected by the July-August 2006 invasion by Israel – a war in which large numbers of cluster munitions were used. The delegation's 2007 report, [Cluster Bombs: The Case of Lebanon](#), is on MAPW's website. At the time of our visit, over one million unexploded cluster munitions remained in the area.

Practically all the cluster bomb victims in Lebanon were civilians, and about a third of them were children. The weapons were found in houses, on roads, in gardens, and in the rubble of destroyed buildings. Olive groves and other cultivated lands were affected.

Although cluster bombs are designed to detonate on initial impact, the failure rate (ie. failure to explode on initial impact) in Lebanon was up to 40 per cent, according to the UN Mine Action Coordination Centre in South Lebanon. Large numbers remained live either on or just below the surface of the ground (where they can become exposed later when the soil moves, such as during heavy rain). Injuries inflicted by these indiscriminate devices included both physical maiming and extreme psychological trauma. In addition the people have to suffer the economic and social impact of the loss of productive land and income. Lebanon is, of course, only one of very many countries that have been contaminated by cluster munitions.

Recently, in November 2010, MAPW member Mr Robert Rands attended the First Meeting of States Parties to the Convention on Cluster Munitions (the Convention) in Vientiane, Laos.

The purpose of a worldwide ban on cluster munitions is to stigmatise these weapons and set a new norm of civilised behaviour, so that their possession and use carries a political cost. No nation wants to be seen as a pariah state using inhumane weapons that most of the world has abandoned. Now that the Convention is in force pressure can be applied to all nations to take part. The 1997 Mine Ban Treaty outlawing landmines has already greatly reduced the civilian impact of these terrible weapons. The potential exists for the Convention to achieve the same.

As with any legal instrument, some of the provisions of the Convention are open to interpretation. MAPW believes Australia's goal with this bill must be to interpret our obligations under the Convention in as wide and strong a manner as possible, thus providing unequivocal support for the humanitarian intentions of the Convention.

Noteworthy positive aspects of the bill

The following are positive aspects of the bill that MAPW endorses. We believe these aspects of the bill should be retained.

Including explosive bomblets

The bill applies to explosive bomblets as well as cluster munitions. MAPW is pleased the government has interpreted the Convention to include explosive bomblets.

Provision for extraterritorial jurisdiction

The bill provides for extraterritorial jurisdiction for acts performed by Australians or acts resulting in an offence in Australia. MAPW commends the government for extending jurisdiction to extraterritorial offences. We believe this lends further support to the achievement of the intention of the Convention.

Definition of transfer

In the explanatory memorandum, 'transfer' is defined to occur "either where there is a physical movement of cluster munitions into or from national territory or where there is a transfer of title and control over cluster munitions." MAPW believes this interpretation is a good one because it covers a wide range of activities.

Concerns with the bill and recommendations for amendment

MAPW has six important concerns with the bill:

1. section 72.38 of the bill does not include the words “under any circumstances”
2. the bill requires a standard of intent for criminal liability
3. the provisions for interoperability, transit, and the hosting of foreign stockpiles undermine the intention of the Convention
4. the bill does not explicitly ban investment (direct and indirect, public and private) in the production of cluster munitions
5. the provision for retention of cluster munitions in Australia is unnecessary
6. the bill does not mention the positive obligations of the Convention.

1. Section 72.38 of the bill does not include the words “under any circumstances”

Under article 1(1) of the Convention, states parties undertake “never under any circumstances” to engage in prohibited activities related to cluster munitions. MAPW notes that in section 72.38 of the bill, when giving effect to this article of the Convention, the words “under any circumstances” have been omitted. We believe these words are necessary as they emphasise that the Convention’s prohibitions are comprehensive and unequivocal, and apply at all times regardless of the circumstances.

Recommendation

In section 72.38 preface offences with the phrase “under any circumstances.” Example: “A person commits an offence if under any circumstances the person does any of the following with a cluster munition...” (emphasis added to highlight necessary wording).

2. The bill requires a standard of intent for criminal liability

MAPW believes the bill sets too high a threshold for criminal liability by requiring a person to intend that an act be done in order to be liable for an offence under the bill.

We agree with the point made by Human Rights Watch and Harvard Law School’s International Human Rights Clinic in their submission that using an intention standard in the bill makes it difficult to hold individuals liable for use, production, transfer, and stockpiling of cluster munitions or assistance with these prohibited acts even if they knew, or should have known, their conduct could lead to one of these activities. The same difficulties would apply in holding entities liable for assisting the production of cluster munitions by investing in companies that produce these weapons.

By nominating intent as the standard for criminal liability the bill runs directly counter to the Joint Standing Committee on Treaties’ (JSCOT) recommendation that the legislation should be drafted to “prevent inadvertent participation in the use, or assistance in the use, of cluster munitions by Australia”¹ (emphasis added).

Recommendation

MAPW endorses the recommendation made by Human Rights Watch and Harvard Law School’s International Human Rights Clinic that the bill should use a recklessness standard for fault for offences instead of an intention standard.

¹ Convention on Cluster Munitions, JSCOT, *Report 103: Treaties Tabled on 12 March and 13 May 2009*, p27

3. The provisions for interoperability, transit, and hosting of foreign stockpiles undermine the intention of the Convention

MAPW believes the protection of civilians from harm must be the principal factor guiding us when considering the contentious issue of interoperability. Any possible military advantage obtained for Australia by cooperating with the use of these weapons is outweighed by our humanitarian responsibility to do everything possible to prevent their use.

MAPW is deeply concerned by sections 72.41 and 72.42 of the bill. These sections do not convey Australia's commitment to the intention of the Convention. On the contrary, it appears these sections have been drafted to facilitate the continued use of cluster munitions by Australia's military allies, with our full cooperation. Australia's obligations cannot be evaded to make room for military policies that subvert the whole purpose of the Convention. MAPW strongly objects to these sections.

Specifically, section 72.42 exempts the military personnel of non-states parties from the Convention's prohibitions while they are in Australia. Section 72.41(1) explicitly allows for the transit of cluster munitions within Australia by a non-state party. Section 72.41(1) also allows a non-state party to stockpile cluster munitions in Australia. These provisions violate article 9 of the Convention and are completely unacceptable in a bill which purports to be giving effect to that Convention. These sections must be removed or reworded to ensure that each of these activities is expressly prohibited.

Further, section 72.41(c) could be interpreted to mean that any act or conversation that falls just short of "expressly requesting" a cluster munition strike is permissible. It could be argued that the Australian Defence Force (ADF) "suggesting" to an ally that the use of cluster munitions "be considered" in a given situation is acceptable under this section. The bill must make it absolutely clear that Australians can never under any circumstances request, suggest or support the use of cluster munitions.

Australians should not cooperate with the use of cluster munitions by non-states parties. Rather, our clear obligation under the Convention is to do whatever we can to encourage these states to abandon their use of these weapons.

Recommendations

Section 72.41: Delete this section as it directly violates Article 9 of the Convention.

Section 72.42(1): Delete this provision and add specific language prohibiting the transit of cluster munitions and prohibiting the hosting of foreign stockpiles of cluster munitions.

4. The bill does not explicitly ban investment (direct and indirect, public and private) in the production of cluster munitions

Without doubt, investment is a powerful source of assistance in the production of cluster munitions. Because of this, and regardless of the fact that investment is not explicitly mentioned in the Convention, MAPW recommends that Australia join other nations that have shown leadership on this issue (eg Belgium, Ireland, Luxembourg, New Zealand and France) by prohibiting investment in the manufacturers of cluster munitions.

Specifically, wording should be added to the bill to explicitly prohibit both direct and indirect investment of public and private funds in the production of cluster munitions. The ban should extend to private entities because private investors provide significant levels of financial support to such companies.

An explicit ban would clarify the meaning of the term ‘assist’ in relation to financial support – ‘assist’ being one of the terms noted in JSCOT’s 2009 report as needing clarification. The JSCOT report recommended “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”² (emphasis added).

Recommendation:

Include a provision specifically prohibiting direct and indirect investment by public and private entities in companies which manufacture cluster munitions or their components (as recommended in JSCOT’s 2009 report, page 27).

5. The provision for retention of cluster munitions in Australia is unnecessary

MAPW is concerned that the bill permits the ADF or other specified Commonwealth officials to acquire or retain cluster munitions for purposes of destruction, counter-measure development, or development of detection, clearance or destruction techniques with the authorisation of the Minister of Defence. No limit on the number of cluster munitions is specified and no annual reporting requirements are mentioned.

As Australia does not currently hold an operational stockpile of cluster munitions, MAPW sees no need for Australia to acquire them.

Recommendation

Delete section 72.39. Failing that, the bill must at least specify the actual number of cluster munitions that Australia will retain and ensure annual reporting on planned and actual use of cluster munitions, the type and quantity retained, and the recipient state parties if Australia transfers any of the cluster munitions.

6. The bill does not mention the positive obligations of the Convention

The bill does not mention that Australia must implement all the positive obligations of the Convention in order to fully comply with it. Positive obligations under the Convention include stockpile destruction, clearance procedures and victim assistance.

The bill also neglects to mention the Convention’s positive obligation to promote the Convention to states not party to it (article 21). Nor does it mention that Australia is required to “make best efforts” to discourage prohibited acts such as cluster munition use, and that we must also notify all of our non-state party allies of our obligations under the Convention.

These provisions are important to include in the bill, particularly given Australia’s alliance with the United States which is not yet a party to the Convention. As noted

² Convention on Cluster Munitions, JSCOT, *Report 103: Treaties Tabled on 12 March and 13 May 2009*, p27

above in our third item of concern, currently the bill appears to positively allow Australians to participate with our allies in the use of cluster munitions, rather than actively discourage our allies from using them.

Recommendation

Include provisions requiring the Australian government to fulfil all positive obligations of the Convention. In particular, include provisions requiring Australia to encourage non-states parties to join the Convention and to promote the Convention's norms to all states. MAPW suggests the creation of a government agency to take responsibility for these activities.

Summary of recommendations

- In section 72.38 preface offences with the phrase “under any circumstances.”
- MAPW endorses the recommendation made by Human Rights Watch and Harvard Law School's International Human Rights Clinic that the bill should use a recklessness standard for fault for offences instead of an intention standard.
- Delete section 72.41 as it directly violates Article 9 of the Convention. Delete section 72.42(1) and add specific language prohibiting the transit of cluster munitions and prohibiting the hosting of foreign stockpiles of cluster munitions.
- Include a provision specifically prohibiting direct and indirect investment by public and private entities in companies which manufacture cluster munitions or their components (as recommended in JSCOT's 2009 report, page 27).
- Delete section 72.39. Failing that, the bill must at least specify the actual number of cluster munitions that Australia will retain and ensure annual reporting on planned and actual use of cluster munitions, the type and quantity retained, and the recipient state parties if Australia transfers any of the cluster munitions.
- Include provisions requiring the Australian government to fulfil all positive obligations of the Convention. In particular, include provisions requiring Australia to encourage non-states parties to join the Convention and to promote the Convention's norms to all states. MAPW suggests the creation of a government agency to take responsibility for these activities.