

Report 103

Treaties tabled on 12 March and 13 May 2009

Agreement between Australia and the Socialist Republic of Vietnam concerning the Transfer of Sentenced Persons (Canberra, 13 October 2008)

Convention on Cluster Munitions (Dublin, 30 May 2008)

Agreement on Employment of the Spouses and Dependants of Diplomatic and Consular Personnel between Australia and the Portuguese Republic (Lisbon, 6 February 2009)

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Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
 - (i) either House of the Parliament, or
 - (ii) a Minister; and

such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



List of abbreviations

ADF	Australian Defence Force
AG's	Attorney General's Department
ALHR	Australian Lawyers for Human Rights
AusAID	Australian Agency for International Development
DFAT	Department of Foreign Affairs and Trade
ITP Scheme	International Transfer of Prisoners Scheme
MOU	Memorandum of Understanding
NIA	National Interest Analysis
NSW	New South Wales
SMArt 155	Sensor Fused Munition for the Artillery, caliber 155mm
US	United States of America



List of recommendations

2 Agreement between Australia and the Socialist Republic of Vietnam concerning Transfer of Sentenced Persons

Recommendation 1

The Committee supports the *Agreement between Australia and the Socialist Republic of Vietnam concerning Transfer of Sentenced Persons* and recommends that binding treaty action be taken.

3 Convention on Cluster Munitions

Recommendation 2

The Committee recommends that the Australian Government and the Australian Defence Force (ADF) have regard to the following issues when drafting the legislation required to implement the *Convention on Cluster Munitions*, and when developing policies under which the personnel of the ADF operate:

- the definition of the terms ‘use’, ‘retain’, ‘assist’, ‘encourage’ and ‘induce’ as they apply in Articles 1, 2 and 21 of the *Convention on Cluster Munitions*;
- preventing inadvertent participation in the use, or assistance in the use, of cluster munitions by Australia; and
- 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.

Recommendation 3

The Committee supports the *Convention on Cluster Munitions* and recommends that binding treaty action be taken.

4 Agreement on Employment of the Spouses and Dependants of Diplomatic and Consular Personnel between the Government of Australia and the Portuguese Republic

Recommendation 4

The Committee supports the *Agreement on Employment of the Spouses and Dependants of Diplomatic and Consular Personnel between the Government of Australia and the Portuguese Republic* and recommends that binding treaty action be taken.

Introduction

Purpose of the Report

- 1.1 This report contains advice to Parliament on the review by the Joint Standing Committee on Treaties of three treaty actions tabled in Parliament on 12 March and 13 May 2009. These treaty actions are:
- the *Agreement on Employment of the Spouses and Dependants of Diplomatic and Consular Personnel between Australia and the Portuguese Republic (Lisbon, 6 February 2009)*;¹
 - the *Agreement between Australia and the Socialist Republic of Vietnam concerning the Transfer of Sentenced Persons (Canberra, 13 October 2008)*;² and
 - the *Convention on Cluster Munitions (Dublin, 30 May 2008)*.³
- 1.2 The report refers frequently to the National Interest Analysis (NIA) prepared for each proposed treaty action. These documents were prepared by the Government agencies responsible for the administration of Australia's responsibilities under each treaty. Copies of each treaty text and its associated NIA may be obtained from the Committee Secretariat or accessed through the Committee's website at:

1 Australia, House of Representatives 2008-09, *Votes and Proceedings*, No. 89, p. 1011; Australia, Senate 2008-09, *Journal*, No. 68, p. 1925.

2 Australia, House of Representatives 2008-09, *Votes and Proceedings*, No. 89, p. 1011; Australia, Senate 2008-09, *Journal*, No. 68, p. 1925.

3 Australia, House of Representatives 2008-09, *Votes and Proceedings*, No. 83, p. 931; Australia, Senate 2008-09, *Journal*, No. 64, p. 1731.

www.aph.gov.au/house/committee/jsct/13may2009/tor.htm

www.aph.gov.au/house/committee/jsct/12march2009/tor.htm

- 1.3 Copies of each treaty action and the NIAs may also be obtained from the Australian Treaties Library maintained on the internet by the Department of Foreign Affairs and Trade. The Australian Treaties Library is accessible through the Committee's website or directly at:
www.austlii.edu.au/au/other/dfat/

Conduct of the Committee's Review

- 1.4 The reviews contained in this report were advertised in the national press and on the Committee's website.⁴ Invitations to lodge submissions were also sent to all State Premiers, Chief Ministers, Presiding Officers of parliaments and to individuals who have expressed an interest in being kept informed of proposed treaty actions. Submissions received and their authors are listed at Appendix A.
- 1.5 The Committee also received evidence at public hearings held on 15 and 22 June 2009 in Canberra. A list of witnesses who appeared at the public hearings is at Appendix B. Transcripts of evidence from public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website at:
www.aph.gov.au/house/committee/jsct/12march2009/hearings.htm
www.aph.gov.au/house/committee/jsct/13may2009/hearings.htm

4 The Committee's reviews of the proposed treaty actions were advertised in *The Australian* on 18 March and 27 May 2009. Members of the public were advised on how to obtain relevant information both in the advertisement and via the Committee's website, and invited to submit their views to the Committee.

Agreement between Australia and the Socialist Republic of Vietnam concerning Transfer of Sentenced Persons

Background

- 2.1 It is proposed that Australia ratify the *Agreement between Australia and the Socialist Republic of Vietnam concerning Transfer of Sentenced Persons* (the Agreement).
- 2.2 The Agreement permits Australians imprisoned in Vietnam, and Vietnamese nationals imprisoned in Australia, to apply to serve the remainder of their sentences in their home country.¹
- 2.3 The Agreement is part of the Government's International Transfer of Prisoners (ITP) Scheme which has been in place since 2002. A representative from the Attorney General's (AG's) Department informed the Committee of the purpose of the scheme:

The purpose of the scheme is to reintegrate prisoners into society by allowing them to apply to serve their sentences in their home country, without the language and cultural barriers which can reduce their prospects of rehabilitation. Once transferred, prisoners continue to be punished, as far as possible, in accordance with their original sentence.²

1 National Interest Analysis (NIA), para 4.

2 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 1.

- 2.4 The Agreement would be implemented through regulations made under the *International Transfer of Prisoners Act 1997*.³

Obligations

- 2.5 The Agreement creates obligations relating to the eligibility of prisoners to transfer, the origin of the request for transfer, the consent to transfer, financial costs and the jurisdiction over convictions.
- 2.6 Article 4 outlines a range of criteria that determine the eligibility of prisoners to be transferred under the Agreement:
- the prisoner must be either a Vietnamese or Australian national, or otherwise have community ties with Australia and be permitted to reside in Australia indefinitely;
 - the prisoner must have a final conviction that is not subject to appeal; and
 - the prisoner must have at least one year of their sentence remaining.⁴
- 2.7 Prisoners are also required to have been imprisoned for an act which is classified as a criminal offence in both countries, although this requirement may be waived by agreement between the two Parties if permitted by their domestic laws.⁵
- 2.8 Article 5 provides that requests for transfer can be initiated by the prisoner, the Australian Government or the Vietnamese Government.⁶
- 2.9 Article 4(f) requires that the Australian Government, Vietnamese Government and the prisoner must all consent to the transfer taking place. Where a prisoner is sentenced under the laws of, or would be transferred to a correctional facility run by, an Australian State or Territory, the State or Territory must also provide consent.⁷
- 2.10 Article 7 states that the transferring Party⁸ retains jurisdiction for the review, modification or cancellation of the prisoner's sentence.⁹
- 2.11 Article 8 provides that the receiving Party¹⁰ shall enforce the sentence as originally imposed, or as modified, by the transferring Party.
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3 NIA, para 23; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

4 NIA, paras 16 and 17; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

5 NIA, para 17.

6 NIA, para 16.

7 NIA, paras 18 and 20; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

8 'transferring Party' refers to the Party from whose jurisdiction the prisoner is transferred

9 NIA, paras 22; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 3.

Where a sentence is by its nature or duration incompatible with the law of the receiving Party, the receiving Party may adapt the sentence in accordance with a sentence prescribed by its own law for a similar offence. However, the adapted sentence is not permitted to be harsher than the original sentence imposed.¹¹

2.12 The AG's Department told the Committee that the Agreement permits the receiving Party to grant conditional release to prisoners at the end of their non-parole period.¹²

2.13 Article 12 states that the transferring Party will bear the expense of the domestic travel within their country. The receiving Party will bear the expense of the international travel, the domestic travel within their country and the continued enforcement of the sentence after transfer. The receiving Party may request reimbursement of the costs of travel from the prisoner.¹³

Reasons for Australia to take treaty action

2.14 The AG's Department submitted that the proposed Agreement would afford humanitarian and rehabilitative support to prisoners, while ensuring that the original custodial sentence of a transferred prisoner is enforced.¹⁴

2.15 The Committee was informed that some rehabilitation programs are not available to foreign prisoners due to language barriers or the risk that they might flee the country. The AG's Department considered that the proposed Agreement would enable prisoners to transfer to their home country in order to participate in such programs, which in turn would improve the prospects of prisoners being successfully reintegrated into society. The AG's Department submitted that the rehabilitative benefits for prisoners transferred to Australia may include family support, access to rehabilitation, education, training and employment programs, work release, parole supervision, and offender registration and supervision.¹⁵

10 'receiving Party' refers to the Party to whose jurisdiction the prisoner is transferred

11 NIA, para 22; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

12 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 3.

13 NIA, paras 27 and 29; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

14 NIA, para 9.

15 NIA, paras 5 and 9; NIA, para 9; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 3.

- 2.16 The AG's Department also told the Committee that the Agreement would benefit the relatives of Australians currently imprisoned in Vietnam:
- The agreement is expected to reduce the financial and emotional burden on Australians who have family members imprisoned in Vietnam. This is more so because letters and phone calls to and from Australians detained in Vietnam must be in Vietnamese. This is a significant hardship for those who only speak English. Transfers under this agreement will allow prisoners to retain direct family contact during their incarceration thereby reducing the costs of visiting and corresponding.¹⁶
- 2.17 Australia has concluded similar Agreements with Cambodia, China, Hong Kong and Thailand. It also has a multilateral agreement with 64 other countries under the *Council of Europe Convention on the Transfer of Sentenced Persons*. The AG's Department told the Committee that there is no substantive difference between these other Agreements and the proposed Agreement with Vietnam, and that the proposed Agreement is consistent with the requirements of the *International Transfer of Prisoners Act 1997*.¹⁷
- 2.18 The Committee was informed that ITP Agreements are forming an increasingly important part of international cooperation in the administration of criminal justice. The AG's Department submitted that without the entry into force of the proposed Agreement, Australia would have no mechanism with which to facilitate prisoner transfers with Vietnam.¹⁸
- 2.19 The Committee was informed that the proposed Agreement with Vietnam has been a priority for the Australian Government for a number of years. A number of recent high-profile overseas imprisonments have made the conclusion of ITP Agreements an important goal for the Government.¹⁹
- 2.20 The AG's Department considered that the Agreement may result in cost savings for Australia, both by reducing the burden on Australia's consular staff in Vietnam, and by potentially reducing the number of Vietnamese nationals serving prison sentences in Australia.²⁰
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16 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 3.

17 NIA, para 11; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, pp. 2, 7.

18 NIA, paras 10 and 14; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 3.

19 NIA, para 13; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

20 NIA, para 15; Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 3.

2.21 The AG's Department stated that, on a broader level, the proposed Agreement would strengthen Australia's bilateral relationship with Vietnam and would demonstrate Australia's commitment to law enforcement cooperation in the region.²¹

Costs

2.22 There would be costs to Australia associated with the transport of prisoners, and the maintenance of prisoners transferred to Australia. It has been agreed that the Commonwealth would meet the administrative costs of the transfer, while States and Territories would meet the costs of the transport and maintenance of prisoners. However, Governments are permitted to request reimbursement of the costs of travel from the prisoner.²²

2.23 A submission to the inquiry from the Foreign Prisoner Support Service argued that there is an emerging pattern at the State and Territory level whereby prisoners undergoing financial hardship are denied transfers due to an inability to reimburse governments for travel costs. The submission argued that this could occur under the proposed Agreement.²³

2.24 The AG's Department acknowledged that the cost of prisoner transfers is a significant issue for State and Territory Governments, especially in the case of New South Wales (NSW). The AG's Department informed the Committee that this issue had been raised at the Ministerial level, and that NSW had been asked to reconsider its position on recovering the costs of prisoner transfers.²⁴

2.25 Nonetheless, the AG's Department considered that the decision to recover costs for prisoner transfers is ultimately a concern for State and Territory Governments. The Committee was also told that a number of offenders imprisoned overseas do have substantial financial resources at their disposal and may in fact be in a position to reimburse the cost of their transfer.²⁵

21 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

22 NIA, paras 27 to 29.

23 Foreign Prisoner Support Service, *Submission No. 2*, pp. 1-2.

24 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 4.

25 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, pp. 3-4.

Criminality and adaptation of sentences

- 2.26 The Committee queried if there are likely to be any issues arising from the transfer of prisoners where their offence is not classified as criminal by the receiving Party.
- 2.27 The AG's Department told the Committee that this is unlikely to occur in prisoner transfers between Australia and Vietnam, as the majority of current prisoners to which the Agreement would apply are serving sentences for offences which are classified as criminal in both countries.²⁶
- 2.28 However, the AG's Department considered that if such a case did arise, the requirement could be waived by agreement between the Australian and Vietnamese Governments, and an adapted sentence could be negotiated between the two Governments. Following agreement on the adapted sentence by the two Governments, the prisoner could then consider whether to give their consent to the transfer and the adapted sentence.²⁷

Number of prisoners to be affected

- 2.29 The AG's Department informed the Committee that there are currently 28 Australians known to be imprisoned in Vietnam, five of whom are still waiting trial. The Committee was told that the majority of these prisoners are serving long sentences of 20 years to life imprisonment for drug related offences.²⁸
- 2.30 The AG's Department stated that there are currently 684 prisoners in Australia who claim to have been born in Vietnam, and thus may be eligible to transfer to Vietnam under the Agreement.²⁹
- 2.31 The AG's Department informed the Committee that nine prisoners have transferred to Australia under Australia's other ITP Agreements, and that no prisoners have transferred from Australia under these other Agreements. Thus a small number of prisoners are likely to be directly affected by the proposed Agreement with Vietnam.³⁰

26 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, pp. 4-5.

27 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, pp. 4-6.

28 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

29 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 2.

30 Ms Maggie Jackson, *Transcript of Evidence*, 22 June 2009, p. 8.

Implementation

- 2.32 Australia would need to make regulations under the *International Transfer of Prisoners Act 1997* in order to give effect to the Agreement.³¹
- 2.33 The operation of the Agreement would be supported by complementary legislation and administrative arrangements with all States and Territories.³²

Future treaty action

- 2.34 The Agreement can be amended by consensus between the two Parties. Parties may terminate the Agreement after six months notice, however the provisions of the Agreement would still apply to already-transferred prisoners.³³

Consultation

- 2.35 Relevant Commonwealth Ministers and agencies, and State and Territory Governments, were notified of Australia's proposed ratification of the Convention. Responses supported ratification of the Agreement.³⁴

Conclusions and recommendation

- 2.36 The Committee is of the view that the Agreement will provide humanitarian and rehabilitative support to Australian and Vietnamese prisoners, while ensuring that convicted persons serve their original custodial sentence. The Committee considers that the Agreement will strengthen Australia's bilateral relationship with Vietnam and will demonstrate Australia's commitment to law enforcement cooperation in the region.

31 NIA, para 23.

32 NIA, paras 24 to 26.

33 NIA, paras 31 and 32.

34 NIA, Attachment on Consultation, paras 33 to 36.

Recommendation 1

The Committee supports the *Agreement between Australia and the Socialist Republic of Vietnam concerning Transfer of Sentenced Persons* and recommends that binding treaty action be taken.

Convention on Cluster Munitions

Introduction

- 3.1 It is proposed that Australia become a Party to the *Convention on Cluster Munitions* (the Convention).
- 3.2 Cluster munitions are gravity bombs, artillery shells and rockets that fragment into small bomblets known as submunitions. One cluster munition can spread up to hundreds of submunitions over a large area. These weapons are designed for use against massed formations of troops and armour, or broad targets such as airfields.¹
- 3.3 The Convention bans the use, stockpiling, acquisition and transfer of cluster munitions (as defined in the Convention) by States Parties. The Convention also aims to assist the victims of cluster munitions and includes provisions on the clearance of cluster munitions from areas of former conflict.²
- 3.4 The Convention was signed in December 2008 and will come into force six months after it has been ratified by 30 States. As of July 2009, 98 countries had signed the Convention and 14 countries had ratified.³

1 Arms Control Association, *Cluster Munitions at a Glance*, February 2008, viewed 30 April 2009, <<http://www.armscontrol.org>>

2 National Interest Analysis (NIA), para 3.

3 NIA, para 2; Australian Network to Ban Landmines and Uniting Church in Australia Synod of Victoria and Tasmania, *Submission No. 3*, p. 1.

Impact of cluster munitions on civilians

- 3.5 Submissions to the inquiry stated that cluster munitions often have a broad area of effect and that submunitions often fail to detonate on impact. Thus, cluster munitions contaminate large areas of land with highly-dangerous unexploded submunitions.⁴
- 3.6 The Committee was informed that this contamination has both immediate and longer-term impacts on civilian populations.
- 3.7 In the short term, cluster munitions have the immediate effect of exposing civilians returning to former areas of conflict to the danger of being killed or injured by unexploded submunitions. The Australian Red Cross cited a 2007 Handicap International study that found there have been 13,306 recorded casualties from cluster munitions, with men and children the most frequent victims.⁵
- 3.8 In the longer-term, the presence or suspected presence of unexploded cluster munitions prevents the use and rehabilitation of vital infrastructure, including roads, schools, markets and farms until expensive and arduous clearance activities have taken place. Thus it was argued that the use of cluster munitions imposes longer-term economic and developmental disadvantages on civilian populations.⁶

Obligations

- 3.9 Article 2(2) of the Convention defines a cluster munition as ‘a conventional munition that is designed to disperse or release explosive submunitions’. Article 2(2)(c) excludes from the Convention those cluster munitions where:
- each munition contains fewer than ten explosive submunitions;
 - each explosive submunition weighs more than four kilograms;
 - each explosive submunition is designed to detect and engage a single target object; and

4 Australian Network to Ban Landmines and Uniting Church in Australia Synod of Victoria and Tasmania, *Submission No. 3*, pp. 3-4; Australian Red Cross, *Submission No. 4*, p. 3; Dr Ben Saul, *Submission No. 8*, p. 1.

5 Australian Network to Ban Landmines and Uniting Church in Australia Synod of Victoria and Tasmania, *Submission No. 3*, pp. 5-7; Australian Red Cross, *Submission No. 4*, p. 4; Dr Ben Saul, *Submission No. 8*, p. 1.

6 Australian Network to Ban Landmines and Uniting Church in Australia Synod of Victoria and Tasmania, *Submission No. 3*, pp. 5-6; Australian Red Cross, *Submission No. 4*, p. 3; Dr Ben Saul, *Submission No. 8*, p. 1.

- each explosive submunition is equipped with electronic self-destruction and electronic self-deactivating mechanisms.⁷
- 3.10 Article 1 of the Convention obliges States Parties to never develop, produce or otherwise acquire, retain or transfer cluster munitions, or to assist anyone in any activity prohibited under the Convention.⁸
- 3.11 Article 3 obliges States Parties to separate and destroy stocks of cluster munitions as defined under the Convention, but permits States Parties to retain limited stocks for training purposes.⁹
- 3.12 Article 4 requires States Parties to clear and destroy cluster munitions remnants in areas under their jurisdiction and control, and encourages States Parties to assist in the clearance of cluster munitions in jurisdictions of other States Parties where the former Party has used or abandoned cluster munitions.¹⁰
- 3.13 Article 5 obliges States Parties to provide assistance to cluster munitions victims in areas under their jurisdiction or control.¹¹
- 3.14 Article 6 requires that States Parties in a position to do so shall provide to other States Parties technical, material and financial assistance for the clearance of cluster munitions, and for the economic and social recovery needed as a result of the use of cluster munitions in these jurisdictions.¹²
- 3.15 Articles 7 and 8 oblige States Parties to meet a number of reporting obligations. Under Article 7.1(n), Australia is required to report to the United Nations on its international cooperation and assistance programs provided under Article 6 of the Convention.¹³
- 3.16 Article 9 requires States Parties to enact legislation which criminalises any activity prohibited under the Convention.¹⁴
- 3.17 Article 21 obliges States Parties to encourage other States not party to the Convention to sign and ratify, with the goal of attracting universal adherence. States Parties are also required to make their best efforts to discourage States not party to the Convention from using cluster munitions.¹⁵

7 NIA, para 8.

8 NIA, para 7.

9 NIA, para 9.

10 NIA, para 10.

11 NIA, para 11.

12 NIA, para 12.

13 NIA, para 13.

14 NIA, para 16.

15 NIA, para 14.

- 3.18 Article 21(3) allows States Parties to the Convention to cooperate in military operations with States not party to the Convention and who might use cluster munitions. However, Article 21(4) reaffirms the obligation that States Parties cannot assist, encourage or induce the use of cluster munitions by another State.¹⁶

Reasons for Australia to take treaty action

- 3.19 The Committee was informed of a variety of reasons to support Australian ratification of the Convention:
- the Convention protects civilians from the negative effects of cluster munitions and contains robust provisions on the clearance of unexploded submunitions and on victim assistance;
 - the humanitarian impact of cluster munitions outweighs the questionable military utility of such munitions;
 - the Convention addresses the shortfalls of current arms-control agreements and provides the greatest level of protection to civilians by employing principles of both international humanitarian law and human rights law;
 - the Convention may help to delegitimise the use of cluster munitions;
 - the Convention does not prevent Australia from participating in coalition operations;
 - Australia already meets many of its obligations under the Convention; and
 - ratification would reaffirm Australia's commitment to limiting the impact of armed conflict on civilian populations.
- 3.20 Submitters supported Australian ratification of the Convention on the grounds that it bans cluster munitions, which pose short-term and longer-term risks to civilians.¹⁷
- 3.21 It was also argued that, through its robust provisions on international cooperation in clearance and victim assistance programs, the

16 NIA, para 15.

17 Australian Red Cross, *Submission No. 4*, pp. 1-2; Australian Network to Ban Landmines and Uniting Church in Australia Synod of Victoria and Tasmania, *Submission No. 3*, p. 1.

Convention has the capacity to deliver real improvements to the lives of people affected by cluster munitions.¹⁸

- 3.22 Dr Ben Saul, the Director of the Sydney Centre for International Law at the University of Sydney, argued that the risk posed to civilians by cluster munitions outweighs any military utility such munitions may provide. It was argued that the considerable cost of identifying and clearing failed submunitions are a burden on military operations, and may restrict the mobility of a military force which deployed cluster munitions prior to entering a territory. Dr Saul argued that, while the military value of cluster munitions is questionable, there are several established cases where the use of cluster munitions has raised serious concerns for the safety of civilians. It was therefore argued that Australia should forgo the use of such munitions by ratifying the Convention.¹⁹
- 3.23 Dr Saul also noted that cluster munitions are currently subject to the ordinary rules of warfare which govern the use of conventional weapons, such as the *Convention on Certain Conventional Weapons*. However, it was argued that these current legal frameworks have failed to effectively limit civilian casualties from cluster munitions, and therefore that further regulation of such munitions, through the implementation of the *Convention on Cluster Munitions*, is justified.²⁰
- 3.24 A submission from the Australian Lawyers for Human Rights (ALHR) welcomed the Convention as a harmonisation of two different legal frameworks: international humanitarian law and human rights law. It was argued that, during a time of conflict, the immediate effect of cluster munitions on civilian populations, and the decision to deploy such munitions, is governed by principles of international humanitarian law. However, ALHR argued that the long-term economic and developmental disadvantages caused by cluster munitions are perhaps best addressed by the different legal framework of human rights law. ALHR considered that the Convention represents an intersection of both of these legal frameworks, and in turn provides the greatest level of protection to civilians.²¹

18 Australian Red Cross, *Submission No. 4*, pp. 1-2; Australian Network to Ban Landmines and Uniting Church in Australia Synod of Victoria and Tasmania, *Submission No. 3*, p. 1; NIA, para 4.

19 Dr Ben Saul, *Submission No. 8*, pp. 1-2.

20 Dr Ben Saul, *Submission No. 8*, p. 2.

21 Australian Lawyers for Human Rights, *Submission No. 2*, p. 3.

- 3.25 The Department of Foreign Affairs and Trade (DFAT) also commented on the Convention's significance to international law:
- We see articles 5 and 6 as important new developments in international law in general and international humanitarian law in particular. They are creating broader obligations with respect to victim assistance and international cooperation, seeking to end the scourge of cluster munitions. To that extent, we see this as another very important positive aspect of this Convention, which, in many senses, goes beyond international humanitarian law in this respect.²²
- 3.26 The submission from the Australian Red Cross argued that ratification of the Convention by countries such as Australia may establish a new norm in international humanitarian law which delegitimises cluster munitions. The submission argued that such a norm may deter the use of cluster munitions, even by States which are not a Party to the Convention. The Australian Network to Ban Landmines and the Uniting Church Synod of Victoria and Tasmania also argued that the Convention has already started to establish this global norm.²³
- 3.27 DFAT informed the Committee that, due to provisions in Article 21, Australian ratification of the Convention would not prevent Australia from participating in coalition operations. DFAT informed the Committee that, under the Convention, Australia would be permitted to participate in coalition operations in which an ally may be using cluster munitions, but would not be permitted to physically use, transfer or expressly request the use of cluster munitions.²⁴
- 3.28 Furthermore, DFAT argued that Australia already fulfils many of its obligations under the Convention as it does not possess any cluster munitions, other than those stocks permitted for training and counter-measure purposes, and provides a range of assistance to victims through the Australian Agency for International Development's (AusAID's) Mine Action program.²⁵
- 3.29 Additionally, DFAT submitted that prompt ratification of the Convention would reaffirm Australia's commitment to limiting the impact of armed conflict on civilian populations.²⁶

22 Dr Greg French, *Transcript of Evidence*, 15 June 2009, p. 11.

23 Australian Red Cross, *Submission No. 4*, p. 3; Australian Network to Ban Landmines and Uniting Church in Australia Synod of Victoria and Tasmania, *Submission No. 3*, p. 1.

24 NIA, para 15.

25 NIA, paras 9, 12 and 13.

26 NIA, para 5.

Use of cluster munitions by Australia

- 3.30 ALHR asserted that during the Convention's negotiation Australia advocated a narrow definition of cluster munitions so that Australia could acquire and use the M85 submunition produced by Israel Military Industries Ltd.²⁷
- 3.31 DFAT told the Committee that this claim is incorrect:
- Australia does not have and, as far as I am aware, has never had any intention of acquiring the Israeli M85. In the negotiations, Australia's position was to have a definition that would achieve the humanitarian objective of avoiding unacceptable harm to civilians. We certainly consider that that objective has been achieved by the definition that has been agreed in the Convention.²⁸
- 3.32 Further, the Department of Defence argued that, in any case, the M85 is classified as a cluster munition and would therefore be banned under the Convention.²⁹
- 3.33 Defence submitted that the Australian Defence Force (ADF) has acquired the Sensor Fused Munition for the Artillery, caliber 155mm (SMArt 155) munition, a submunition capability that is significantly different from the M85. The SMArt 155 is an anti-tank shell which contains two advanced submunitions, each weighing 13.5 kilograms, which identify a target and contain self-destruct and self-deactivation mechanisms. It was submitted that the SMArt 155 has a more reliable fusing system than other submunitions, such as the M85, and that the SMArt 155 has been verified by the Defence Materiel Organisation as a highly reliable weapon. Defence informed the Committee that the acquisition of the SMArt 155 is consistent with the provisions of the Convention.³⁰
- 3.34 The joint submission from the Australian Network to Ban Landmines and the Uniting Church Synod of Victoria and Tasmania argued that weapons that may be classified as highly reliable due to a low failure rate may still have a negative affect on civilians. The submission quoted a manager of the United Nations mine clearance operations in Kosovo:

27 Australian Lawyers for Human Rights, *Submission No. 2*, p. 5.

28 Ms Jennifer Rawson, *Transcript of Evidence*, 15 June 2009, p. 9.

29 Mr Murray Perks, *Transcript of Evidence*, 15 June 2009, p. 10.

30 Mr Murray Perks, *Transcript of Evidence*, 15 June 2009, pp. 9-10; Air Vice Marshall Geoffrey Brown, *Transcript of Evidence*, 15 June 2009, p. 10.

Whether the [failure rate of submunitions] is one of one percent or 20 per cent we still have to search the entire area to clear all submunitions [before the area meets humanitarian standards].³¹

- 3.35 ALHR also argued that, regardless of the number of protective mechanisms installed on a submunition, the use of such weapons can still pose a threat to civilians.³²
- 3.36 Defence acknowledged that any submunition in the presence of civilians is a concern. However, it was argued that this issue is addressed through Australia's obligations under *Protocol V to the Convention on Certain Conventional Weapons* which deals with the explosive remnants of war. Under the Protocol, Parties are required to clean up any unexploded munitions. Defence informed the Committee that the ADF works to meet its obligations under the Protocol in its current engagements and will continue to do so, including in its use of the SMArt 155.³³

Use of cluster munitions for training purposes

- 3.37 The Committee noted that Article 3 permits Parties to retain limited stocks of cluster munitions for training purposes. The Committee queried what these training purposes are and what stocks of cluster munitions are held by Australia.
- 3.38 Defence told the Committee that it is necessary to retain stocks of live cluster munitions in order to train explosive ordinance technicians in the neutralisation and clearance of such munitions, and for explosive hazard awareness training for troops deploying to combat zones where such munitions may be encountered. It was submitted that this sort of training cannot be carried out with simulators.³⁴
- 3.39 Defence stated that Australia currently has two live cluster bombs (which contain several hundred live submunitions), 13 inert cluster bombs and 2,320 inert submunitions.³⁵
- 3.40 Defence's stocks of cluster munitions are employed at various ADF training establishments across Australia. Additionally, a small

31 Australian Network to Ban Landmines and Uniting Church in Australia Synod of Victoria and Tasmania, *Submission No. 3*, pp. 6-9.

32 Australian Lawyers for Human Rights, *Submission 2.1*, p. 2.

33 Mr Murray Perks, *Transcript of Evidence*, 15 June 2009, p. 14.

34 Air Vice Marshall Geoffrey Brown, *Transcript of Evidence*, 15 June 2009, p. 15; Mr Murray Perks, *Transcript of Evidence*, 22 June 2009, p. 13.

35 Mr Murray Perks, *Transcript of Evidence*, 22 June 2009, p. 12.

number of ADF explosive ordnance technicians participate in similar training overseas, including in the United States (US) and the United Kingdom.³⁶

Military cooperation with States not party to the Convention

3.41 As previously mentioned, Article 21(3) of the Convention permits States Parties to cooperate in military operations with States not party to the Convention and who might use cluster munitions. Throughout the inquiry this cooperation was commonly referred to as interoperability between States. The Committee raised the following issues in relation to Article 21:

- the motivations for the inclusion of Article 21(3) in the Convention;
- the ability for Australian personnel to inadvertently participate in the use, or assist in the use, of cluster munitions due the interoperability permitted under Article 21; and
- the risk of Australian personnel being relied upon to carry out an action which would be in breach of the Convention while in the midst of a joint military operation with a State not party.

Origin of clause on cooperation with non-Parties

3.42 The Committee questioned the origins and motivations for the inclusion of Article 21 in the Convention. DFAT responded that:

... Article 21 was a very important provision in the negotiations. Australia and a number of other countries, while certainly wanting to be able to sign up to the Convention, also recognised the importance of being able to continue, in terms of defence cooperation, coalition operations and UN peacekeeping, to cooperate with those countries which do not, either from the beginning or for some time, become Parties to the Convention.³⁷

3.43 DFAT submitted that the Government supported the clause on interoperability to ensure that Australia could continue to cooperate militarily with its allies, particularly with the United States of

36 Mr Murray Perks, *Transcript of Evidence*, 22 June 2009, p. 13; Department of Foreign Affairs and Trade, *Submission No. 7.1*, p. 1.

37 Ms Jennifer Rawson, *Transcript of Evidence*, 15 June 2009, p. 12.

America (US). DFAT submitted that such cooperation is a vital pillar of Australia's strategic security and defence arrangements.³⁸

- 3.44 Dr Ben Saul concurred with this view and stated that interoperability of coalition forces is important for security reasons.³⁹

Australian participation or assistance in the use of cluster munitions

- 3.45 Defence told the Committee that the US is likely to continue to use cluster munitions in military conflicts, particularly against armoured vehicles, and DFAT stated that it is likely that Australia will participate in operations where allies may use cluster munitions. DFAT submitted that Australia is currently working with allies to determine how Australia will continue to participate in joint military operations despite the continued use of cluster munitions by its allies.⁴⁰

- 3.46 The Australian Red Cross noted that this issue posed a challenge during negotiations on the Convention, and argued that the interoperability clause in Article 21 may limit the Convention's provision that Parties cannot assist in the use of cluster munitions.⁴¹

- 3.47 The Committee queried how Article 21 would operate in practice, and raised concerns that Article 21 may permit Australian personnel to assist or participate in the use of cluster munitions.

- 3.48 Defence informed the Committee of how Article 21 would operate in practice:

... the simplest way to understand the interoperability provisions in the Convention is that ADF personnel should not be the first or the last in the chain of command when cluster munitions are used. That is, ADF personnel must not be engaged in actually deploying the cluster munitions – an example [is] that of a pilot actually dropping cluster munitions – nor should they be at the top of the chain of command with ultimate responsibility for exclusive control over the choice of using cluster munitions.

However, ADF personnel can support the coalition in a wide variety of roles, even if cluster munitions are used by one of the coalition partners. They could still be employed in

38 Department of Foreign Affairs and Trade, *Submission No. 7.1*, p. 3.

39 Dr Ben Saul, *Submission No. 8*, p. 2.

40 NIA, para 15; Air Vice Marshall Geoffrey Brown, *Transcript of Evidence*, 22 June 2009, p. 11; Ms Jennifer Rawson, *Transcript of Evidence*, 15 June 2009, p. 17.

41 Australian Red Cross, *Submission No. 4*, p. 2.

planning, intelligence, logistics and other support roles ...
and carry out senior roles in coalition headquarters.⁴²

- 3.49 Dr Ben Saul mooted another interpretation of Article 21, where Australia could implicitly call upon an ally to use cluster munitions:

One interpretation of these provisions would allow Australia to, for example, request US air support of Australian forces in a joint operation in circumstances where Australian forces do not expressly request US aircraft to use cluster munitions, but where Australian forces know or reasonably believe that US aircraft are likely to be carrying cluster munitions. In my view, such an interpretation is plausible within the rules of treaty interpretation.⁴³

- 3.50 The Attorney General's Department argued that specific scenarios would need to be examined on a case-by-case basis in order to determine if an action is permissible for an Australian operative to carry out. While Article 21 permits military cooperation with non signatories, this is still subject to the restrictions, reiterated in the final clause of Article 21, which prohibit the use of cluster munitions.⁴⁴

- 3.51 Defence stated that it will continue to monitor its military cooperation with allies that may use cluster munitions:

To ensure Australia complies with its obligations under the Convention, the Australian Defence Force will need to review and issue explicit directives and rules of engagement and conduct awareness training. We will continue to monitor the approach to interoperability by other Parties to the Convention and we will continue to monitor and discuss the implications of Australia's obligations under the Convention with the United States and seek to preserve the greatest degree of interoperability with the US that is consistent with our obligations under the Convention, as we have done with other arms control measures.⁴⁵

- 3.52 Defence told the Committee that, while the ADF is permitted to carry out a range of functions under Article 21, it does not necessarily mean that ADF personnel will be carrying out these roles. It was stated that

42 Air Vice Marshall Geoffrey Brown, *Transcript of Evidence*, 22 June 2009, pp. 11-12.

43 Dr Ben Saul, *Submission No. 8*, p. 3.

44 Mr Geoffrey Skillen, *Transcript of Evidence*, 22 June 2009, p. 15.

45 Air Vice Marshall Geoffrey Brown, *Transcript of Evidence*, 22 June 2009, pp. 11-12.

it is very common for the ADF to place additional restrictions on personnel through directives and rules of engagement.⁴⁶

3.53 DFAT argued that, whilst the specific legal and operational policy issues relating to cooperation with non-signatories are still under consideration, the Government will fully implement its obligations under the Convention, including in its cooperation with States who may use cluster munitions.⁴⁷

3.54 Dr Saul argued that if Australia is serious about prohibiting the use of cluster munitions because of the adverse humanitarian effects, then Australia should ensure the military cooperation permitted under Article 21 does not, under any circumstances, justify the use, or Australia's inadvertent involvement in the use, of cluster munitions:

As an operational matter, Australia should be urged to include in its rules of engagement a requirement that Australian forces should not call upon military support from [another State] where Australian forces know or reasonably believe that the other State will likely use cluster munitions.⁴⁸

3.55 Dr Saul and ALHR also argued that this issue could be further addressed through domestic legislation where Australia clarifies its literal understanding of Article 21. It was argued that, through such legislation, Australia could preclude any unprincipled cooperation with States not party to the Convention, and which may not serve the Convention's protective humanitarian purpose.⁴⁹

Exposure of Australian personnel to the use of cluster munitions

3.56 The Committee raised concerns that, given the likelihood that cluster munitions will be used by allies in joint operations, there is a risk that Australian personnel may be exposed to a situation where, in the midst of a joint military operation, they are relied upon to carry out an action which would be in breach of the Convention.

3.57 Representatives from DFAT and Defence assured the Committee that this would not occur. The Committee was told that the ADF operates according to specific directives and rules of engagement, and that the Government and the ADF will ensure that these directives will prevent Australian personnel from carrying out actions which may be in breach of the Convention. Defence further stated that such

46 Air Vice Marshall Geoffrey Brown, *Transcript of Evidence*, 22 June 2009, p. 11.

47 Ms Jennifer Rawson, *Transcript of Evidence*, 15 June 2009, p. 12.

48 Dr Ben Saul, *Submission No. 8*, p. 3.

49 Dr Ben Saul, *Submission No. 8*, p. 3; Australian Lawyers for Human Rights, *Submission No. 2.1*, p. 2.

measures are already taken to ensure Australia's compliance with other treaty-level agreements.⁵⁰

Australian investment in cluster munition production

- 3.58 The Committee noted that Article 1 of the Convention prohibits States Parties from assisting in the production of cluster munitions, and that Article 9 of the Convention requires States Parties to enact legislation which criminalises any activity prohibited under the Convention. The Committee queried whether investment by Australian entities in companies that develop or produce cluster munitions would be viewed as assisting the production of cluster munitions, and thus if such investment would be criminalised under the Convention.
- 3.59 DFAT told the Committee that the Convention does not explicitly prohibit investment in companies that develop or produce cluster munitions, nor does it define the term 'assist'. DFAT stated that, in accordance with its interpretation of the term under the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, Australia has interpreted 'assist' to mean direct physical participation in any activity prohibited under the Convention. DFAT stated that it is therefore doubtful that Australian investment in companies that develop or produce cluster munitions is prohibited under the Convention.⁵¹
- 3.60 DFAT noted that the Government has not yet drafted the legislation which will be required to implement Article 9 of the Convention, and that the interpretation of terms such as 'assist' will need to be looked at in the development of the legislation.⁵²

Opposition to the Convention

- 3.61 DFAT noted that non-signatories include the US, Iran and Syria.⁵³ The Committee queried if these states are likely to change their position,

50 Air Vice Marshall Geoffrey Brown, *Transcript of Evidence*, 15 June 2009, pp. 17-18; Ms Jennifer Rawson, *Transcript of Evidence*, 15 June 2009, p. 17.

51 Ms Jennifer Rawson, *Transcript of Evidence*, 22 June 2009, p. 10; Department of Foreign Affairs and Trade, *Submission No. 7.1*, p. 2.

52 Department of Foreign Affairs and Trade, *Submission No. 7.1*, p. 2; Ms Jennifer Rawson, *Transcript of Evidence*, 22 June 2009, p. 10.

53 Ms Jennifer Rawson, *Transcript of Evidence*, 15 June 2009, pp. 8-9.

and the reasons that these states have so far not supported the Convention.

- 3.62 DFAT stated that in the case of Iran and Syria, neither country participated in the negotiation of the Convention, which is consistent with their position on other arms-control agreements.⁵⁴
- 3.63 The Committee was told that there is no indication that the US is moving towards signature or ratification of the Convention. However, the US has introduced legislation to phase out the production of unreliable cluster munitions by 2018.⁵⁵
- 3.64 DFAT stated that there are a variety of reasons why States have not signed the Convention. Some countries may have an interest in producing cluster munitions, while others may consider that cluster munitions continue to fulfil an important military purpose.⁵⁶
- 3.65 DFAT emphasised that the Convention is still in its very early stages, and that, given its recent negotiation, the number of current signatories indicates very substantial international support for the Convention. DFAT expressed its expectation that, over time, a significant number of States will become a Party to the Convention.⁵⁷
- 3.66 The Committee noted that Article 21 of the Convention requires States Parties to make their best efforts to discourage States not party to the Convention from using cluster munitions. The Committee queried whether the provision that Australia can continue to cooperate militarily with States who may use cluster munitions will undermine Australia's obligation to discourage States not party to the Convention from using cluster munitions. DFAT responded as follows:

The obligation on States Parties to exert their influence where appropriate in discouraging the use of cluster munitions does not preclude their continued ability to engage in military cooperation and operations with States not party to the Convention. States Parties have considerable discretion as to the means of discharging the obligation to discourage States not party from using cluster munitions. Australia will fulfil this obligation as appropriate opportunities arise. This obligation may be discharged in bilateral or multilateral spheres through oral or written communications aimed at

54 Ms Jennifer Rawson, *Transcript of Evidence*, 22 June 2009, pp. 9-10.

55 Ms Jennifer Rawson, *Transcript of Evidence*, 22 June 2009, p. 8.

56 Ms Jennifer Rawson, *Transcript of Evidence*, 15 June 2009, p. 18.

57 Ms Jennifer Rawson, *Transcript of Evidence*, 15 June 2009, p. 11.

dissuading or advising States not party against using cluster munitions.⁵⁸

Implementation

- 3.67 Under Article 9 of the Convention, Australia will be required to enact legislation which criminalises any activity prohibited under the Convention.⁵⁹
- 3.68 Amendments to Department of Defence standard operating procedures will also be required.⁶⁰

Costs

- 3.69 DFAT submitted that the Convention does not require Australia to dispose of any existing weapons and Australia already meets its assistance provisions through AusAID's Mine Action program.⁶¹
- 3.70 AusAID provided the Committee with an overview of the assistance provided through its Mine Action program:

The contribution in this financial year is a little over \$20 million to a range of countries. ... There is \$5 million for mine clearance in Afghanistan as well as \$200,000 for international support work for [Afghanistan] through the International Centre for Humanitarian De-mining. There is also substantial support for Cambodia, Iraq, Laos, Lebanon ... and Vietnam.⁶²

Thus, ratification of the Convention will not involve any immediate additional financial cost for Australia.

- 3.71 DFAT stated that Australia may incur additional costs if further assistance is requested under the Convention, however acceding to such requests will be a matter for Government.⁶³

58 Department of Foreign Affairs and Trade, *Submission No. 7.1*, p. 2.

59 NIA, para 16.

60 NIA, para 16.

61 NIA, para 17.

62 Mr Alistair Sherwin, *Transcript of Evidence*, 15 June 2009, p. 10.

63 NIA, para 18.

Future treaty action

- 3.72 Article 13 provides that amendments may be made to the Convention if adopted by a two-thirds majority of States Parties. An amendment shall enter into force following acceptance of the amendment by a majority of the States Parties.⁶⁴
- 3.73 Article 20 of the Convention provides that a State Party can withdraw from the Convention by notifying the Secretary-General of the United Nations and giving notice of withdrawal to all other States Parties and to the United Nations Security Council. Withdrawal would take effect six months after the receipt of the instrument of withdrawal unless, on the expiry of that six-month period, the withdrawing State Party is engaged in an armed conflict, in which case the withdrawal shall not take effect before the end of the armed conflict.⁶⁵

Consultation

- 3.74 Relevant Commonwealth Ministers and agencies, and State and Territory Governments, were notified of Australia's proposed ratification of the Convention.⁶⁶
- 3.75 An active dialogue was maintained with civil society organisations during the negotiation of the Convention, particularly with the 21 Australian members of the Cluster Munitions Coalition. Australia included representatives of civil society organisations in its delegations to meetings on the Convention including Austcare, the Australian Network to Ban Landmines, the Australian Red Cross and World Vision Australia.⁶⁷

Conclusions and recommendations

- 3.76 The Committee is of the view that ratification of the Convention would reaffirm Australia's commitment to limiting the impact of armed conflict on civilian populations, and will significantly improve the lives of people affected by cluster munitions. The Convention will also permit Australia to continue to cooperate militarily with its allies.

64 NIA, paras 21 and 22.

65 NIA, para 22.

66 NIA, Attachment on Consultation, para 23.

67 NIA, Attachment on Consultation, para 24.

3.77 The Committee also acknowledges concerns regarding the potential for Australia to inadvertently participate in the use or assist in the use of cluster munitions, despite the provisions of the Convention. The Committee is concerned 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. The Committee therefore considers that the Australian Government and the ADF should address these issues when drafting the domestic legislation required to implement the Convention, and when developing policies by which the personnel of the Australian Defence Force operate.

Recommendation 2

The Committee recommends that the Australian Government and the Australian Defence Force (ADF) have regard to the following issues when drafting the legislation required to implement the *Convention on Cluster Munitions*, and when developing policies under which the personnel of the ADF operate:

- **the definition of the terms ‘use’, ‘retain’, ‘assist’, ‘encourage’ and ‘induce’ as they apply in Articles 1, 2 and 21 of the *Convention on Cluster Munitions*;**
- **preventing inadvertent participation in the use, or assistance in the use, of cluster munitions by Australia; and**
- **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.**

Recommendation 3

The Committee supports the *Convention on Cluster Munitions* and recommends that binding treaty action be taken.

Agreement on Employment of the Spouses and Dependants of Diplomatic and Consular Personnel between the Government of Australia and the Portuguese Republic

Background

- 4.1 The Agreement on Employment of Spouses and Dependants of Diplomatic and Consular Personnel between the Government of Australia and the Portuguese Republic (the Agreement) provides a legal framework permitting the spouses and dependants of Australian diplomatic and consular personnel stationed in Portugal to engage in work for the duration of the official's posting. The Agreement extends a similar arrangement for the spouses and dependants of Portuguese personnel in Australia.¹
- 4.2 The Agreement is one of a series of bilateral employment agreements that Australia has concluded with countries in which the Australian Government has a diplomatic or consular presence.²
- 4.3 The Agreement authorises family members of an official household of the sending country to engage in gainful employment in the receiving country.³ The procedure authorising a request to engage in employment will be applied by the receiving country in a way that will permit family

1 National Interest Analysis (NIA), para 4.

2 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 1.

3 NIA, para 11.

members to be employed as soon as possible. Any rights relating to work permits and any similar formalities are to be favourably applied.⁴

- 4.4 The Agreement will apply to families of Australian Embassy personnel in Lisbon, and for Portugal it will apply to the dependants of personnel of the Portuguese Embassy in Canberra and the Portuguese Consulate-General in Sydney.⁵

Reasons for the treaty action

- 4.5 The series of agreements of which this Agreement is part reflect the changing nature of Australian society and changing social mores of Australia's diplomatic community. Dual-income families are now an accepted part of Australian life and many spouses and dependants of Australian consular and diplomatic personnel have established careers.⁶
- 4.6 According to the Department of Foreign Affairs and Trade (DFAT), the lack of employment opportunities for family members of Australian diplomatic and consular personnel is a disincentive for officers to serve abroad.⁷ One of the issues on which potential consular and diplomatic personnel seek advice before applying for a posting is whether their spouse or children will be able to work in their country of choice. Anecdotal evidence suggests that the advice provided is a factor that affects their decision to apply for a posting or not.⁸
- 4.7 Consequently, this Agreement and its equivalents assist the Australian Government in recruiting and retaining high-quality employees with families willing to serve abroad.⁹
- 4.8 In order to encourage other countries to enter into agreements of this type, the Australian Government offers reciprocal opportunities to spouses and dependants of foreign personnel.¹⁰

4 NIA, para 12.

5 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 1.

6 NIA, para 8; and Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 1.

7 NIA, para 8.

8 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 3.

9 NIA, para 5; and Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 1.

10 NIA, para 8.

Status of agreements relating to the employment of family members of consular and diplomatic officials

- 4.9 Bilateral employment agreements usually take the form of Arrangements or Memoranda of Understanding (MOU).¹¹ DFAT generally prefers that arrangements take the form of an instrument of less-than-treaty status because Australian law already permits dependants of diplomatic and consular personnel to work in Australia, and it is therefore not normally necessary for Australia to conclude an arrangement-of-treaty status.¹²
- 4.10 However the domestic legal regimes in some countries require an arrangement-of-treaty status, and this is the case for Portugal.¹³ Issues pertaining to taxation and social security regimes under Portuguese law go beyond the scope of an MOU.¹⁴
- 4.11 Negotiations for employment agreements are based on a standard text and this Agreement broadly follows that text.¹⁵
- 4.12 Australia has six treaty-level employment agreements and 31 less-than-treaty-status agreements. Negotiations are under way with seven countries to conclude similar agreements.¹⁶ Table 1 lists the employment agreements in place to date, and indicates whether the agreement is a treaty level agreement or an MOU.
- 4.13 In relation to the speed at which these agreements are being negotiated, DFAT believes that the families of staff of the Department should have the opportunity to work.¹⁷ However, other countries give greater or lesser priority to the issue because not all countries have the same social arrangements as Australia. While DFAT places a very high priority on enabling the spouses and dependants of consular and diplomatic personnel to find employment, the matter is not always given the same priority by other countries.¹⁸

11 NIA, para 9.

12 NIA, para 9.

13 NIA, para 9.

14 NIA, para 9; and Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 2.

15 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 2.

16 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 3.

17 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 3.

18 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 4.

Table 1 Countries with agreements on the employment of spouses and dependants

Country	Type of arrangement
	<i>Memorandum of Understanding (MOU) or Treaty action</i>
Belgium	Treaty
Brazil	MOU
Canada	MOU
Chile	Treaty
Croatia	MOU
Cyprus	MOU
Denmark	MOU
Ecuador	MOU
Fiji	MOU
France	Treaty
Germany	MOU
Ghana	MOU
Greece	MOU
Hungary	MOU
India	MOU
Israel	MOU
Kenya	MOU
Malta	MOU
Mauritius	MOU
Mexico	MOU
Mongolia	MOU
Nepal	MOU
The Netherlands	Treaty
New Zealand	MOU
Pakistan	MOU
Poland	MOU
Samoa	MOU
Spain	Treaty
Sri Lanka	MOU
Sweden	MOU
Turkey	MOU
The United Kingdom	MOU
The United States of America	Treaty
Venezuela	MOU
Zimbabwe	MOU

Source Department of Foreign Affairs and Trade, Submission No. 4, p. 1.

4.14 In addition, as employment agreements of this sort are negotiated on a bilateral basis, the rate of progress in negotiating these agreements is not as quick as DFAT would like it to be.¹⁹

Operation of the Agreement

4.15 Spouses and dependants of Australian diplomatic and consular personnel can seek employment in most of the countries with which Australia maintains diplomatic relations. However, DFAT made it clear that it is preferable to have a formalised arrangement that removes the discretionary aspects of decisions on these issues.²⁰

4.16 Agreements of this sort also cover the general legal framework of employment, such as what happens to people's immunities and privileges in matters relating to employment.²¹

4.17 For example, the Agreement obliges the sending country to waive immunity from civil and administrative jurisdictions in relation to any matter arising out of the employment of spouses and dependants and falling within the civil and administrative law of the receiving country.²² In other words, spouses and dependants of Australian consular and diplomatic personnel working in Portugal will be subject to Portuguese civil and administrative jurisdiction relating to matters arising from their employment.

4.18 In relation to criminal matters arising from employment, the immunity of spouses or dependants will be waived except in special circumstances when such a waiver is contrary to the sending country's own interests.²³ Accordingly, the spouses and dependants of Australian consular and diplomatic personnel in Portugal will be subject to Portuguese criminal law relating to matters arising from their employment unless Australia considers the situation to be a special circumstance.

4.19 The Agreement further provides that the sending country shall give serious consideration to a request from the host country for a subsequent waiver of immunity with respect to the execution of any sentence.²⁴

19 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 4.

20 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 4.

21 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 4.

22 NIA, para 13.

23 NIA, para 13.

24 NIA, para 14.

Definition of spouse and dependants

- 4.20 The definition of who is covered by the Agreement is contained in article 1. It defines a member of the family as a person whom the receiving country has accepted as such and who forms part of the official household. It includes:
- spouses;
 - unmarried dependant children under 21 years of age;
 - unmarried dependant children under 25 years of age who are in full-time attendance as students at a post-secondary educational institution; and
 - unmarried dependant children who are suffering from a physical or mental disability.²⁵
- 4.21 In practice, DFAT will determine who constitutes the official household of an Australian consular or diplomatic official and advise the Portuguese authorities accordingly. The Agreement will apply to those determined by Australia to be part of the official household. A similar process applies to the official households of Portuguese personnel based in Australia.²⁶
- 4.22 For Australian consular and diplomatic personnel the term 'spouse' includes same-sex partners and heterosexual de facto partners. For Portuguese consular and diplomatic officials, the term 'spouse' includes heterosexual de facto partners, but does not include same sex partners.²⁷

Limitations on the type of employment

- 4.23 DFAT recognises that, in certain circumstances, limitations should be placed on the type of employment spouses or dependants of a consular or diplomatic personnel can undertake.
- 4.24 There is one limitation in the Agreement itself, in article 2, paragraph 2, which prohibits a spouse or dependant from undertaking work that requires a security clearance or work that is reserved for nationals of the receiving country. For instance, a spouse or dependant of Portuguese

25 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 2.

26 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 2.

27 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 2.

consular or diplomatic personnel could not work in the Australian Public Service.²⁸

- 4.25 DFAT cited another circumstance in which it had received a request for a family member of a consular or diplomatic official to open a child care centre in their home. The request was refused on the grounds that diplomatic premises are inviolable so that the premises could not be entered by people wanting to do inspections, by police or by emergency services.²⁹

Conclusion

- 4.26 The Committee is of the view that ratification of the Agreement would be in the interests of the families of Australia's diplomatic community.

Recommendation 4

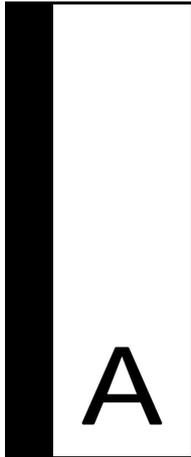
The Committee supports the *Agreement on Employment of the Spouses and Dependants of Diplomatic and Consular Personnel between the Government of Australia and the Portuguese Republic* and recommends that binding treaty action be taken.

Kelvin Thomson MP

Chair

28 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 4.

29 Department of Foreign Affairs and Trade, *Transcript of Evidence*, 15 June 2009, p. 4.



Appendix A - Submissions

Treaties tabled on 12 March 2009

Convention on Cluster Munitions

- 2 Australian Lawyers for Human Rights
- 2.1 Australian Lawyers for Human Rights
SUPPLEMENTARY (to Submission No. 2)
- 3 Australian Network to Ban Landmines and Uniting Church in
Australia
- 4 Australian Red Cross
- 6 Act for Peace - NCCA
- 7 Department of Foreign Affairs and Trade
- 7.1 Department of Foreign Affairs and Trade
SUPPLEMENTARY (to Submission No. 7)
- 8 Dr Ben Saul

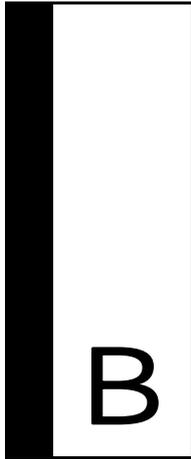
Treaties tabled on 13 May 2009

Agreement between Australia and the Socialist Republic of Vietnam concerning Transfer of Sentenced Persons

- 1 Australian Patriot Movement
- 2 Foreign Prisoner Support Service

Agreement on Employment of the Spouses and Dependants of Diplomatic and Consular Personnel between the Government of Australia and the Portuguese Republic

- 1.1 Australian Patriot Movement
SUPPLEMENTARY (to Submission No. 1)
- 4 Department of Foreign Affairs and Trade



Appendix B - Witnesses

Monday, 15 June 2009 - Canberra

Attorney-General's Department

Mr Geoffrey Skillen, Principal Legal Officer, Office of International Law

AusAID

Mr Alistair Sherwin, Assistant Director General, Middle East and West Asia Branch

Department of Defence

Air Vice Marshal Geoffrey Brown, Deputy Chief of Air Force

Mr Murray Perks, Assistant Secretary, Exports and Arms Control

Department of Foreign Affairs and Trade

Dr Greg French, Assistant Secretary, International Legal Branch

Mr David Mason, Executive Director, Treaties Secretariat, International Legal Branch

Ms Jennifer Rawson, First Assistant Secretary, International Security Division

Mrs Justine Braithwaite, Director, Administrative and Domestic Law Section

Ms Anne Moores, Assistant Secretary, Protocol Branch

Monday, 22 June 2009 - Canberra**Attorney-General's Department**

Mr Geoffrey Skillen, Principal Legal Officer, Office of International Law

Ms Victoria Bickford, A/g Director, International Crime Cooperation Division

Mr Stephen Bouwhuis, Principal Legal Officer, International Law and Trade, Office of International Law

Ms Maggie Jackson, First Assistant Secretary, International Crime Cooperation Division

Ms Kerry Knowler, Director, International Transfer of Prisoners Unit

AusAID

Mr Greg Weichard, Director, Iraq and Middle East Section

Department of Defence

Air Vice Marshal Geoffrey Brown, Deputy Chief of Air Force

Mr Murray Perks, Assistant Secretary, Exports and Arms Control

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Dr Greg French, Assistant Secretary, International Legal Branch

Ms Jennifer Rawson, First Assistant Secretary, International Security Division

Ms Lyndall McLean, Assistant Secretary, South East Asia (North) Branch