



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

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Law and Bills Digest Section

### Contents

Purpose .....	3
Background .....	3
Cluster munitions.....	3
Convention on Cluster Munitions.....	4
Committee consideration .....	5
Parliamentary Joint Standing Committee on Treaties—Report on the Convention on Cluster Munitions, Dublin, 30 May 2008 .....	5
Senate Foreign Affairs, Defence and Trade Committee inquiry into the Bill .....	6
Financial implications.....	6
Main issues and position of major interest groups .....	6
Interoperability or joint military operations.....	7
Investments in cluster munition production .....	11
Key provisions .....	12
Schedule 1— <i>Criminal Code Act 1995</i> .....	12
Offences relating to cluster munitions .....	12
Defences to the offences.....	13
Defence—acquisition or retention for training purposes .....	13
Defence—transfer for destruction etc .....	13
Defence—acts by Australians in military cooperation with States not party to the Convention.....	14
Defence—acts by military personnel of countries not party to the Convention .....	14

Forfeiture of cluster munitions.....	14
Concluding comments .....	14

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

**Date introduced:** 27 October 2010

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** The substantive provisions commence on the day the Convention on Cluster Munitions comes into force for Australia.<sup>1</sup>

**Links:** The links to the [Bill, its Explanatory Memorandum and second reading speech](#) can be found on the Bills home page, or through <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

### Purpose

The Bill amends the *Criminal Code Act 1995* to ensure consistency between Australian law and the *Convention on Cluster Munitions* by creating offences and penalties in relation to cluster munitions and explosive bomblets.

### Background

#### Cluster munitions

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.<sup>2</sup>

Cluster munitions often have a broad effect and submunitions often fail to detonate on impact. Thus, cluster munitions contaminate large areas of land with highly-dangerous unexploded

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1. The Convention will enter into force for Australia on the first day of the sixth month after Australia deposits its instrument of ratification (paragraph 2 of Article 17 of the Convention).
  2. Parliamentary Joint Standing Committee on Treaties, *Report 103: Treaties tabled on 12 March and 13 May 2009*, Canberra, 2009, p. 11, viewed 24 February 2011, <http://www.aph.gov.au/house/committee/jsct/13may2009/report.htm>

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submunitions. This contamination has both immediate and longer-term impacts on civilian populations.<sup>3</sup>

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. 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.<sup>4</sup>

## Convention on Cluster Munitions

The Convention on Cluster Munitions (the Convention) was adopted by 107 states at a conference in Dublin on 30 May 2008, and signed on 3 December 2008 at a ceremony in Oslo by 94 states. It entered into force on 1 August 2010, six months after it was ratified by 30 states.<sup>5</sup>

The negotiating process that culminated in the December 2008 ceremony had begun two years earlier, when Norway, supported by other States, announced that it was launching its own initiative outside of UN disarmament negotiations under the auspices of the Convention on Certain Conventional Weapons (CCW), which had failed to produce agreement to move towards a legally binding ban.

As of February 2011, 51 states had ratified the Convention indicating their intent to be legally bound by all the Convention's provisions and 108 had signed it, meaning that they have agreed to the treaty in principle and are prohibited from violating its 'object and purpose'.<sup>6</sup> The primary manufacturers and users of cluster munitions—the United States, Russia, China, Pakistan, India and Israel—did not participate in the treaty negotiations and have not signed the Convention. Thus, these states are not bound by the Convention.<sup>7</sup>

The Convention prohibits the use, production, stockpiling, and transfer of cluster munitions as well as assistance with any of these activities. The Convention also establishes a set of strong positive obligations. Under these obligations, State Parties must clear their territory of cluster munition remnants, assist victims and provide cooperation and assistance to other State Parties. State Parties are also required to work toward universalisation of the Convention, promote the Convention's norms, discourage cluster munitions use, and notify allies of their Convention obligations.<sup>8</sup>

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3. Ibid, p. 12.

4. Ibid.

5. Convention on Cluster Munitions website, viewed 24 February 2011, <http://www.clusterconvention.org/>

6. Ibid.

7. Article 11, Vienna Convention on the Law of Treaties

8. The text of the Convention is available on the Cluster Munitions website, viewed 24 February 2011, <http://www.clusterconvention.org/files/2011/01/Convention-ENG1.pdf>

Australia was an active participant in the negotiation of the Convention and among its original signatories. On 12 March 2009, Australia initiated the formal ratification process for the Convention by tabling a National Interest Analysis in Parliament that presented the potential benefits and obligations that would arise from ratifying the Convention.<sup>9</sup> Ratification was recommended by the Parliamentary Joint Standing Committee on Treaties (JSCOT) in May 2009.<sup>10</sup>

## Committee consideration

### Parliamentary Joint Standing Committee on Treaties—Report on the Convention on Cluster Munitions, Dublin, 30 May 2008

Australia's ratification of the Convention was considered by the Parliamentary Joint Standing Committee on Treaties in May 2009 (JSCOT or JSCOT inquiry). In its Report No 103 tabled in August 2009, JSCOT recommended ratification, however it expressed concern that:

[...]some of the terms 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.<sup>11</sup>

JSCOT suggested that the Australian Government and the Australian Defence Force (ADF) address this issue when drafting domestic legislation required to implement the Convention and when developing policies by which the personnel of the ADF operate. The JSCOT recommended that particular regard be given to:

[...] preventing inadvertent participation in the use, or assistance in the use of cluster munitions by Australia.<sup>12</sup>

The Committee also recommended regard be given 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.<sup>13</sup>

Further information about these recommendations is set out under the Main issues section of the Digest.

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9. Department of Foreign Affairs and Trade, *National Interest Analysis [2009] ATNIA 5: Convention on Cluster Munitions*, adopted at Dublin on 30 May 2008, tabled March 12 2009, viewed 10 February 2011, [http://www.aph.gov.au/house/committee/jsct/12march2009/treaties/munitions\\_nia.pdf](http://www.aph.gov.au/house/committee/jsct/12march2009/treaties/munitions_nia.pdf)

10. Further detail about the JSCOT inquiry can be found below.

11. Parliamentary Joint Standing Committee on Treaties, *op. cit.*, p. 27.

12. *Ibid.*

13. *Ibid.*

## Senate Foreign Affairs, Defence and Trade Committee inquiry into the Bill

The Bill has been referred to the Senate Foreign Affairs, Defence and Trade Committee for inquiry and report by the end of the 2011 Autumn sittings (the Senate Committee inquiry). The stated reason for this additional Committee inquiry is that the Selection of Bills Committee found that the Bill is inconsistent with the recommendations made by JSCOT when it reviewed the Convention in the 42<sup>nd</sup> Parliament.<sup>14</sup>

Details of the Senate Committee inquiry are at the [Committee inquiry's webpage](#). The Digest draws on submissions to the inquiry.

## Financial implications

The Explanatory Memorandum states that the Bill will have no direct impact on Government revenue. There will be no stockpile destruction costs as Australia has no operational stockpiles of cluster munitions. However, there may be additional costs associated with clearance and destruction of cluster munition remnants. There will also be costs determined by the United Nations associated with the Convention administration.<sup>15</sup>

## Main issues and position of major interest groups

All submissions to the Senate inquiry have welcomed the Bill's object of enacting legislative measures necessary to enable Australia's ratification of the Convention. As has been noted, 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 Mine Action program.<sup>16</sup>

However concerns have been raised about the Convention and its interpretation, both in the JSCOT report and in numerous submissions to the current Senate Committee inquiry, and there have been calls for further revision and clarification of the Bill. Two areas of concern are joint military operations with countries not party to the Convention, and investment by Australian entities in cluster munition production and development.

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14. A McEwen, 'Selection of Bills Committee: Report', *Hansard*, 28 October 2010, viewed 24 February 2011, [http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2010-10-28/0191/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2010-10-28/0191/hansard_frag.pdf;fileType=application%2Fpdf) Note however that the Government in its submission to the Senate Committee inquiry states that it considers the Bill is consistent with the JSCOT recommendations.
  15. Explanatory Memorandum, Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, p. 2.
  16. A view expressed by the Department of Foreign Affairs to JSCOT, Parliamentary Joint Standing Committee on Treaties, op. cit., paragraph 3.28.

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## Interoperability or joint military operations

The primary object of the Convention is to end the significant humanitarian harm cluster munitions pose to civilians by prohibiting the use, production, stockpiling, and transfer of cluster munitions as well as assistance with any of these activities. In line with this object, Article 21 of the Convention requires State Parties to use their best efforts to encourage non-State Parties to accept the Convention norms. For example, paragraph 21(1) provides:

Each State Party shall encourage States not party to this Convention to ratify, accept, approve or accede to this Convention, with the goal of attracting the adherence of all States to this Convention.

Paragraph 21(2) provides:

Each State Party shall notify the governments of all States not party to this Convention, referred to in paragraph 3 of this Article, of its obligations under this Convention, shall promote the norms it establishes and shall make its best efforts to discourage States not party to this Convention from using cluster munitions.

Paragraphs (3) and (4) of Article 21 expand on relations with non-States Parties in the specific context of military cooperation and operations and permit joint military operations between State Parties and non-State Parties to the Convention. Article 21(3), known as the 'interoperability provision' states:

Notwithstanding the provisions of Article 1 of this Convention and in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party this Convention that might engage in activities prohibited to a State Party.

Paragraph (4) provides:

Nothing in paragraph 3 of this Article shall authorise a State Party:

- to develop, produce or otherwise acquire cluster munitions
- to itself stockpile or transfer cluster munitions
- to itself use cluster munitions, or
- to expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control.

It is these paragraphs (3) and (4) of Article 21 that have arguably proved the most contentious part of the Convention. The Law Council in its submission to the Senate Committee inquiry provides a

useful summary of the varying interpretations of this Article and the section below draws on that submission.<sup>17</sup>

The Law Council points out that during negotiations surrounding the Convention, certain States expressed differing interpretations concerning the relationship between the absolute prohibitions in Article 1 and the interoperability provision in Article 21. The Law Council states:

Some States have taken the view that paragraph 21(3) permits participation in joint military operations by State Parties with non-State Parties, even if cluster munitions are used, provided that the State Party and/or its military personnel do not engage in any of the activities listed in paragraph 21(4). In other words, they consider paragraph 21(3) to be an exception to the prohibitions in Article 1, and consider paragraph 21(4) to be an exclusive list of activities that remain prohibited.<sup>18</sup>

This is the view adopted by the Australian Government and it has influenced the drafting of proposed sections 72.41 and 72.42 in the Bill. Section 72.41 provides a defence for ADF members engaged in joint military operations with foreign countries not party to the Convention who engage in conduct that might otherwise constitute an offence. Proposed section 72.42 exempts military personnel of non-State Parties from prosecution for the stockpiling, retention or transfer of cluster munitions within Australian territory.<sup>19</sup>

Australia's interpretation of this Article 21(3) and (4) is evident in the Explanatory Memorandum<sup>20</sup> and also in the Government's response to the JSCOT report.<sup>21</sup> The Government response states:

the Convention does not prohibit inadvertent participation in the use, or assistance in the use of cluster munitions. During military co-operations and operations with States not party to the Convention, Australian personnel will nonetheless be prohibited from themselves using cluster munitions or expressly requesting the use of cluster munitions in cases where the choice of munitions used is within their exclusive control.<sup>22</sup>

In June 2009, the Department of Defence in evidence to JSCOT, explained their interpretation of the interoperability obligations in the Convention as preventing an ADF officer from being either the first or the last in the chain of command when cluster munitions are used:

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17. Law Council of Australia, *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, Submission to the Senate Foreign Affairs, Defence and Trade Committee*, January 2010, viewed 24 February 2011, [http://www.aph.gov.au/Senate/committee/fadt\\_ctte/ccab\\_cmp\\_2010/submissions.htm](http://www.aph.gov.au/Senate/committee/fadt_ctte/ccab_cmp_2010/submissions.htm)

18. *Ibid*, paragraph 17.

19. See pp. 12–13 of the Digest for a full description of these provisions.

20. Explanatory Memorandum, pp. 12-13.

21. Australian Government, *Government response to Joint Standing Committee on Treaties Report No 103 on the Convention on Cluster Munitions*, tabled 13 May 2010, viewed 24 February 2011, <http://www.aph.gov.au/house/committee/jsct/governmentresponses/103rd.pdf>

22. *Ibid*.



[...]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—[...]

However, ADF personnel or persons acting under a Commonwealth contract may provide ‘other forms of vital assistance’, including planning, intelligence, logistics and other support roles and carry out senior roles in coalition headquarters. In other words, the Department did not regard the Convention as creating any obligation to limit other forms of cooperation that may amount to direct or indirect assistance to a ‘prohibited act’.<sup>23</sup>

In contrast, human rights organisations such as Human Rights Watch and Australian Lawyers for Human Rights amongst others, interpret Article 21, paragraphs (3) and (4) differently arguing they do not create an exception to any obligations under the Convention, including Article 1(1)(c) which prohibits State Parties from assisting anyone with any activity that is banned under the Convention.<sup>24</sup> In their view Article 21(3) simply serves to clarify that participation in joint military operations, when it does not amount to assistance with acts prohibited by the Convention, is not prohibited under the Convention. In other words, under this interpretation, defences such as those proposed sections 72.41 and 72.42 of the Bill are seem to be based on misinterpretations of Article 21 and are inconsistent with the core obligations in the Convention.<sup>25</sup>

The latter interpretation is said to be preferred as it correctly identifies the prominence given to Article 1 of the Convention, which constitutes a ‘general obligation’ under the Convention and extends to a general prohibition on assistance with any prohibited activity. The placement of the provision in Article 1 and its equation with other banned activities are said to demonstrate that the prohibition on assistance was intended as a foundation of the Convention from which no deviation should be permitted. It is also noted that the language of Article 1(1)(c) is expansive and unqualified. It specifies that the ban on assistance applies to ‘anyone’ and under ‘any circumstances’.<sup>26</sup>

These submissions further argue that accepted rules of treaty interpretation call for a broad reading of the prohibition on providing assistance. For example, under Article 31 of the Vienna Convention on the Law of Treaties, a treaty must be interpreted in context—which includes the text and preamble—and in light of its object and purpose. In this case the Convention aims, as is articulated in its preamble<sup>27</sup>, to eradicate for all time the harm caused by cluster munitions. It is argued that a

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23. Act for Peace, *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, Submission to the Senate Foreign Affairs, Defence and Trade Committee*, January 2010, para 9, viewed 24 February 2011, [http://www.aph.gov.au/Senate/committee/fadt\\_ctte/ccab\\_cmp\\_2010/submissions.htm](http://www.aph.gov.au/Senate/committee/fadt_ctte/ccab_cmp_2010/submissions.htm)

24. Human Rights Watch, *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, Submission to the Senate Foreign Affairs, Defence and Trade Committee*, January 2010, p. 6., viewed 24 February 2011; Australian Lawyers for Human Rights, *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, Submission to the Senate Foreign Affairs, Defence and Trade Committee*, January 2010, paras 37 and 38, viewed 24 February 2011, [http://www.aph.gov.au/Senate/committee/fadt\\_ctte/ccab\\_cmp\\_2010/submissions.htm](http://www.aph.gov.au/Senate/committee/fadt_ctte/ccab_cmp_2010/submissions.htm)

25. Law Council of Australia, op. cit., p. 8.

26. Ibid; and Australian Lawyers for Human Rights, para 12.

27. Article 31(2) of the Vienna Convention of the Law of Treaties

general, extensive prohibition on assistance with activities associated with the use of cluster munitions is the only interpretation of Article 1(1)(c) that is consistent with this aim. Alternative interpretations, such as those relied upon by the Australian Government in the formulation of sections 72.41 and 72.42, are considered to undermine the purpose of the Convention.<sup>28</sup>

Submissions from these organisations call for a redrafting of section 72.41 to clarify the meaning of interoperability and to ensure that military operations with a non-State Party do not become a loophole in the Bill's prohibitions. They also call for deletion of section 72.42 in order to prevent transiting and foreign stockpiling on Australian territory, noting also that no other country's implementation legislation explicitly allows for transit and foreign stockpiling of cluster munitions.<sup>29</sup>

Interestingly, the Law Council prefers a more cautious interpretation, arguing against a too heavy reliance on the defence provision in proposed section 72.41. It states that the challenge for Australia is to create a regulatory framework, which allows Australia to continue to train with and undertake military operations with non-Party States but only to the extent that this does not result in the provision of assistance to those States to use, store, transfer or retain cluster munitions. The Law Council submits:

Much of the debate around the Bill has focused on the defence in clause 72.41 on the assumption that the scope of that defence alone will define the terms of Australia's lawful engagement with non-party states.

The terms of the defence provision in clause 72.41 are significant in that they demarcate what activities a person may or may not face criminal sanction for in the context of joint military operations with non-Party States. The provision is focused on the individual liability of personnel who probably have limited control over who Australia cooperates with or on what terms.

Rather than focusing primarily on this defence provision, the Law Council suggests that the Committee consider what other mechanisms could be employed to ensure that the Australian Government complies with the spirit of the Convention when engaged in joint military operations with non Party States. The Law Council suggests that the Committee recommend that the Government regularly report to the Committee on how it and the ADF have acted to ensure compliance with the Convention whether this is by way of published government policy, or Rules of Engagement.<sup>30</sup>

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28. Australian Lawyers for Human Rights, para 12.; Article 26 of the Vienna Convention on the Law of Treaties imposes an obligation on a state party to make an effort to meet the purpose of the Convention in good faith

29. For example, Human Rights Watch, op. cit., p. 10; Australian Red Cross, *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, Submission to the Senate Foreign Affairs, Defence and Trade Committee*, January 2010, p. 3, viewed 24 February 2011, [http://www.aph.gov.au/Senate/committee/fadt\\_ctte/ccab\\_cmp\\_2010/submissions.htm](http://www.aph.gov.au/Senate/committee/fadt_ctte/ccab_cmp_2010/submissions.htm)

30. Law Council of Australia, op cit., p. 12.

## Investments in cluster munition production

A further issue that has been raised both in the JSCOT inquiry and in submissions to the Senate Committee inquiry is the matter of investment by Australian entities in cluster munition production and development.

There is no specific article in the Convention that obliges State Parties to prohibit investment in the development or production of cluster munitions, nor does the Convention define the term 'assist'. The Department of Foreign Affairs (DFAT) in evidence to JSCOT stated that, in accordance with its interpretation of the terms under the Convention Australia has interpreted 'assist' to mean direct physical participation in any activity prohibited under the Convention. DFAT stated that is therefore doubtful that Australian investment in companies that develop or produce cluster munitions is prohibited under the Convention.<sup>31</sup>

However, as noted in submissions, a number of State Parties have interpreted the broad prohibition on assistance in Article 1(1)(c) of the Convention to extend to include a ban on investments in companies that manufacture cluster munitions. For example Belgium, Ireland, Luxembourg and New Zealand currently prohibit investments in cluster munitions producers.<sup>32</sup>

The Bill does not include an express prohibition on 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. However the Attorney-General in his second reading speech does refer to this. In relation to the offence of assisting, encouraging or inducing an act relating to cluster munitions the Attorney states:

An example of conduct that would fall within this offence is where a person provides financial assistance to, or invests in a company that develops or produces cluster munitions but only where that person intends to assist, encourage or induce the development or production of cluster munitions by that company.<sup>33</sup>

The Explanatory Memorandum does not provide any further explanation although the submission from the Government to the Senate Committee inquiry does elaborate further stating:

Any acts of investment that fall within the prohibition in Article 1 of the Convention will fall within the offences in section 72.38 of the Bill. For example, the intentional provision of financial assistance to an entity so that the entity can develop or produce cluster munitions would amount to an offence under the proposed provisions in the Bill. However, consistent with the Convention, accidental or innocent acts of assistance, encouragement or inducement will not fall

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31. Joint Select Committee on Treaties, *op. cit.*, paragraph 3.59.

32. Law Council of Australia, *op. cit.*, paragraph 50.

33. R McClelland, 'Second reading speech: Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010', House of Representatives, *Hansard*, 27 October 2010, p. 1755, viewed 24 February 2011, [http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-10-27/0026/hansard\\_frag.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-10-27/0026/hansard_frag.pdf;fileType=application%2Fpdf)

within the offences in the Bill. For example, a person who contributes to a superannuation fund which includes investment in companies that may develop or produce cluster munitions is unlikely to satisfy the required mental elements for the offence contained in the Bill. The offences contained in the Bill will apply to bodies corporate in the same way as they apply to individuals.<sup>34</sup>

It is of note that the JSCOT report, a number of submissions from human rights organisations together with the Law Council have all recommended that the Bill should include a provision prohibiting investment by Australian entities in the development or production of cluster munitions

## Key provisions

### Schedule 1—*Criminal Code Act 1995*

#### Offences relating to cluster munitions

Division 72 of the Criminal Code deals with explosives and lethal devices. **Item 1 of Schedule 1** of the Bill inserts into this Division a **new Subdivision C** called ‘Cluster munitions and explosive bomblets’. The stated purpose of this Subdivision is to create offences relating to cluster munitions and explosive bomblets and give effect to the Convention on Cluster Munitions (**proposed section 72.37**). Cluster munitions have the meaning given by paragraph 2 of Article 2 in the Convention and explosive bomblets have the meaning given by paragraph 13 of Article 2 (**proposed section 72.45**).

The provisions in this Subdivision refer only to cluster munitions but are to apply equally to explosive bomblets (**proposed section 72.44**).

There are two new offence provisions namely:

- **proposed subsection 72.38(1)**: which creates the offence of using, developing, producing, acquiring, stockpiling, retaining or transferring a cluster munition. Intention is the fault element for this offence.<sup>35</sup>
- **proposed subsection 72.38(2)**: which creates the offence of assisting, encouraging or inducing another person to do any of those prohibited acts with a cluster munition. For such an offence, the other person must do the prohibited act and the person promoting the act must intend that it be done.

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34. R McClelland, K Rudd, and S Smith, *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010, Submission to the Senate Foreign Affairs, Defence and Trade Committee*, February 2010, p. 2, viewed 24 February 2011, [http://www.aph.gov.au/Senate/committee/fadt\\_ctte/ccab\\_cmp\\_2010/submissions.htm](http://www.aph.gov.au/Senate/committee/fadt_ctte/ccab_cmp_2010/submissions.htm)

35. In relation to conduct, the default fault element to be proven is intention (section 5.6 of the Criminal Code). For further explanation see the Explanatory Memorandum, p. 7.

Both offences carry a maximum penalty of 10 years imprisonment for individuals or \$330 000 for bodies corporate.

The Explanatory Memorandum states these offence provisions are drafted so as to copy the wording of the Convention (Articles 1 and 9)<sup>36</sup>, although several submissions to the Senate Committee inquiry argued that the Convention wording is stronger. Under Article 1 paragraph 1 of the Convention, State Parties undertake ‘never under any circumstances’ to engage in prohibited activities related to cluster munitions.<sup>37</sup> These words are not used in the Bill. Some submissions also commented that the standard of proof required for the conduct of these offences, particularly in relation to the offence of assistance with prohibited act in subsection 72.38(2) was too high. For example the Australian Lawyers for Human Rights recommended that the standard of proof should be recklessness rather than intention.<sup>38</sup>

**Proposed subsection 72.38(3)** states that the offences in proposed subsections 72.38(1) and (2) are Category B – extended jurisdiction offences. The offences, if committed in Australia<sup>39</sup> will apply to any person. As Category B offences, they will also apply extra-territorially to Australian citizens or bodies incorporated under Australian law.

## Defences to the offences

**Proposed sections 72.39 to 72.42** provide a range of defences to the offences and are described below.

### Defence—acquisition or retention for training purposes

**Proposed section 72.39** provides a defence to the offence provisions in cases where the Minister for Defence, or delegate, authorises the acquisition or retention of cluster munitions for training in cluster munition detection or destruction techniques or in the development of cluster munition counter-measures. This defence relates to paragraph 6 of Article 3 of the Convention. Neither the Bill nor the Convention state the quantity of cluster munitions allowed, although Article 3 states there should be a ‘limited number’ kept or acquired for these purposes.

### Defence—transfer for destruction etc

**Proposed subsection 72.40(1)** provides a defence to the offence provisions where the cluster munition is transferred to another State Party for training, or destruction purposes or for the development of cluster munition counter measures (**proposed subsection 72.40(1)**) This defence relates to paragraph 7 of Article 3 of the Convention.

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36. Explanatory Memorandum, p. 6.

37. For example: Aotearoa New Zealand Cluster Munition Coalition, paragraph 5.

38. Australian Lawyers for Human Rights, op. cit., paragraph 10.

39. ‘In Australia’ includes on board an Australian aircraft or an Australian ship.

**Proposed subsection 72.40(2)** provides a defence to the offence of prohibited acts where a person contacts without delay the police or the ADF in order to transfer cluster munitions.

### **Defence—acts by Australians in military cooperation with States not party to the Convention**

**Proposed section 72.41** provides a defence to the offence provisions where prohibited conduct takes place in the course of military cooperation or operations with a foreign country that is not a party to the Convention. In this case, the conduct must not be connected with the Commonwealth using, developing, acquiring, stockpiling, retaining or transferring a cluster munition. Further, the Commonwealth may not expressly request the use of cluster munitions in cases where the choice of munitions used is within its exclusive control. The defence applies to Australian citizens, members of the ADF or Commonwealth contractors. This defence relates to paragraphs 3 and 4 of Article 21 of the Convention. The provision is discussed in more detail under the Main issues section of the Digest.

### **Defence—acts by military personnel of countries not party to the Convention**

**Proposed section 72.42** provides a defence in relation to certain acts by personnel of armed forces of foreign countries not party to the Convention when on Australian territory. The defence applies in relation to stockpiling, retention or transferring cluster munitions. Visiting personnel can raise the defence when they are on a base, an aircraft or a ship in Australian territory (**proposed paragraph 72.42(1)(b)**). The Explanatory Memorandum states that the defence does not apply to the use, development, production or acquisition of cluster munitions by such military personnel while on Australia territory.<sup>40</sup> Submissions expressed concern that this provision might be inconsistent with the Convention.<sup>41</sup>

### **Forfeiture of cluster munitions**

**Proposed section 72.43** provides that a court may order the forfeiture to the Commonwealth of any cluster munition involved in the offence of using, developing, producing, otherwise acquiring, stockpiling, retaining or transferring a cluster munition.

## **Concluding comments**

Australia's ratification of the Munitions Convention has bipartisan support in the Parliament and has been welcomed by all submitters to the Senate Committee inquiry.

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40. Explanatory Memorandum, p. 15.

41. Refer to the Main issues section of the Digest for further discussion.

However many submissions raise concerns with the Bill arguing particularly that the drafting of the interoperability provisions could provide an avenue by which Australia could participate in actions that may contravene the humanitarian aims of the Convention.

Undoubtedly there is a tension between Australia's obligation of fulfilling its Convention responsibilities of eliminating cluster munitions while ensuring that Australian defence personnel are not compromised in joint operations with non-State Parties. The Bill represents a challenge for the Parliament—to weigh up the importance of these two seemingly competing aims and ensure that the provisions in the Bill strike the right balance between them.

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