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AUSTRALIA'S IMPLEMENTATION OF CLUSTER BOMB TREATY LACKS CONVICTION

Australian Lawyers for Human Rights (ALHR) welcomes the tabling of legislation to implement the Convention on Cluster Munitions, but remains concerned that Australia has interpreted its obligations far too narrowly. 'By effectively exempting Australia when assisting other countries who are not parties to the treaty, it allows Australia to load the cluster munitions gun so long as it does not pull the trigger', said Stephen Keim SC, President of ALHR.

Cluster munitions are an extraordinarily pernicious weapon, carrying sometimes hundreds of smaller submunitions that endanger civilians both during attacks and for years afterwards. The Convention on Cluster Munitions, perhaps the most important weapons treaty of the past decade, not only bans the use, production and stockpiling of cluster munitions, but also prohibits parties from assisting non-states parties with acts banned by the convention.

'The prohibition on assistance is one of the standout features of the treaty. While the draft legislation implements this broad obligation, it is worrying that the obligation is effectively removed in joint operations,' Keim noted.

'It is also very concerning that cluster munitions can be brought to and stockpiled on Australian territory. This is surely inconsistent with the purpose of the treaty.'

Stephen Keim called on the government to strengthen the legislation to bring it into line with a good faith interpretation of the treaty. 'Implementing the treaty is, of course, a welcome first step – but the creation of such a huge 'out clause' must be remedied.'

'The government will have to face the international community at the first Meeting of the Parties in Vientiane in two weeks' time with legislation that effectively fails the litmus test set out in the preamble to the treaty: that States Parties will "put an end for all time to the suffering and casualties caused by cluster munitions at the time of their use,"' said Keim.

Background:

The CMC entered into force on 1 August 2010. The First Meeting of States Parties will be held in Vientiane, Lao PDR from 9-12 November 2010. Australia, which is a signatory to the Convention, has indicated that it will also ratify the treaty once legislation is in force domestically. Australia invariably is involved in joint operations with the United States which is not a signatory to the Convention.

Article 1 of the treaty obliges each State Party 'never under any circumstances' to use, develop, produce, acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions'. Importantly, it also obliges them not to 'assist, encourage or induce anyone to engage in any activity' prohibited under the Convention. This has been implemented in the Australian bill.

Amongst the more contentious provisions of the treaty is article 21. The first part of the article obliges each State Party to encourage others to become party to the treaty, and to discourage such States from using cluster munitions. These are innovative and important provisions. However, article 21(3), the interoperability clause, provides that 'in accordance with international law, States Parties, their military personnel or nationals, may engage in military cooperation and operations with States not party to this Convention that might engage in activities prohibited to a State Party.' Article 21(4) lists activities that nonetheless remain prohibited, notably the development, stockpiling, use or express request of use of cluster munitions 'in cases where the choice of munitions used is within its exclusive control.'

ALHR, along with other NGOs, many States Parties and most commentators, considers that this clause does not waive the crucially important prohibition on assistance that appears in article 1(1)(c). Such a reading would be inconsistent with the object and purpose of the Convention, and contradicts the positive duties in article 21 to ensure that the convention's norms are spread widely through advocacy. The list of activities that continue to be prohibited in article 21(4) should therefore be considered as illustrative and not exhaustive. This is a standard method of treaty interpretation.

However, the Australian legislation does not implement the treaty in this way. Not only does it appear to waive the prohibition on assistance, but it expressly allows for the

continuing stockpiling, retention or transfer of a cluster munition by a non-party in Australia - whether done with the use of a base, aircraft or ship.

As a result, States Parties could potentially participate in many acts of assistance that run directly counter to the convention's purpose, from planning an attack, hosting foreign stockpiles, providing security for stores of such weapons, refuelling vehicles transporting cluster munitions, even identifying targets for attacks or calling in strikes.

ALHR considers that this contradicts the object and purpose of the convention and results in an internally inconsistent reading of article 21.

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