

Cluster Munitions Debate in Australia

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Introduction

The Commonwealth Parliament has recently been debating legislation to domestically ratify the Convention on Cluster Munitions, which the Australian government signed in 2008. Serious concerns have been expressed about the breadth of exemptions which the government has inserted into the implementing legislation. The debate is set to continue until the legislation passes the Senate.

The Convention was created in response to the dangers posed by cluster munitions to civilian populations and the recitals set out the basis for the Convention in some detail. The Convention followed on from the Ottawa Treaty which banned landmines in 1997.

A total of 94 countries, including Australia, signed the convention in December 2008, and it entered into force as legally binding international law on 1 August 2010. The convention will not be ratified in Australia until legislation has been passed domestically to implement the convention.

The Convention obliges State parties to: never, under any circumstances, use cluster munitions¹, directly or indirectly stockpile, retain or transfer cluster munitions to anyone² or assist, encourage or induce anyone to engage on any activity prohibited to a State Party under the Convention³.

Cluster Munitions

Cluster munitions are either air or ground launched weapons which open to deploy a large number of 'bomblets' which are scattered across the landscape. This scattering over a wide area is indiscriminate and poses a serious risk to civilians if the deployment occurs near civilian populations. In addition, a certain proportion of the bomblets fail to detonate and become

de facto land mines. These unexploded bomblets pose a serious risk to civilians for decades after their deployment.

When cluster munitions are used, they contaminate areas of land which, as a result, become uninhabitable. This land cannot be used to live on or farm without a vast expenditure on clearing the munitions. Clearing, itself, carries serious risk of death and injury to those employed to do the clearing. The deployment of cluster munitions creates a longstanding legacy of civilian death and injury and imposes a massive cost on the attempted eradication of the devices. The clear response to these consequences is to ensure that the devices are not deployed in the first place and the Convention is aimed at achieving this purpose.

Proposed Domestic Implementing Legislation

The *Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010* (Cth) would insert new sections into the *Criminal Code 1995* (Cth), creating offences of using, developing, producing, acquiring, stockpiling or transferring cluster munitions⁴. It would also create an offence if a person assisted another person to do any of these things⁵. A maximum penalty of 10 years imprisonment would apply.

The proposed sections which are a cause of concern would create a defence where:

- an act which would otherwise be an offence is done by a member of the ADF in operations in cooperation with a foreign country not a party to the convention⁶;
- stockpiling, retention or transfer of cluster munitions is done by a member of the armed forces of a foreign country not a party to the convention, in connection with the use

¹ Article 1(a)

² Article 1(b)

³ Article 1(c)

⁴ This would be a new section 72.38(1)(a) of the *Code*.

⁵ This would be a new section 72.38(1)(b) of the *Code*.

⁶ This would be new section 72.41 of the *Code*

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by those forces of the cluster munitions in the course of military cooperation at a base, on an aircraft or on a ship⁷.

The government appears to justify these defences on the basis of paragraph 3 of article 21 of the Convention. This provision has been interpreted as allowing Australian defence personnel to participate in activities in conjunction with USA military personnel, who are not subject to the Convention⁸.

Diplomatic cables released by WikiLeaks have revealed that the newly elected Rudd government was 'critical' in ensuring the loophole in article 21 was inserted into the Convention. The cables also show that, at the behest of the USA⁹, the Australian government lobbied various countries in Asia to defeat more hardline countries and NGOs, who sought a comprehensive ban.

Criticism of the Legislation

An open letter signed by a number of prominent Australian lawyers, academics and heads of NGOs drew attention to serious flaws in the legislation. The letter argues that the further exemptions created by the legislation go much further than those sought to be created by any other signatory and are more than is required to maintain the military alliance with the USA.

The letter criticises the legislation for allowing US forces, or indeed any other non-State Party ally, to store cluster munitions on Australian soil and transit them through Australian ports and airspace. By doing so, the government is arguably acting contrary to its obligations under the Convention, in particular, the obligation to: never, under any circumstances, assist anyone to use or directly or indirectly stockpile cluster munitions.

Australia's stance, as reflected in the implementation legislation, also provides comfort to the USA in its continued use of cluster munitions. This appears to be contrary to the recital of the Convention which emphasises, 'the desirability of attracting the adherence of all States to this Convention' and says States Parties are determined, 'to work strenuously towards the promotion of its universalisation and its full implementation'

⁷ This would be new section 72.42(1) of the *Code*

⁸ <http://www.aph.gov.au/house/committee/jsct/>

governmentresponses/103rd.pdf accessed 7 August 2011

⁹ <http://www.smh.com.au/national/canberra-lobbied-secretly-to-dilute-cluster-bomb-ban-20110501-1e37t.html> accessed 8 August 2011

The Australian Greens in the Senate have proposed amendments to the Bill. The Greens support provisions protecting Australian troops who might, inadvertently, be involved in the use of cluster munitions. They seek removal of the provisions allowing cluster munitions to be stored in, and transited through, Australia and which would allow Australian troops to be directly and actively involved in the use of cluster munitions¹⁰. The Greens have also sought inclusion of provisions prohibiting direct or indirect, public or private investment in cluster munitions¹¹.

It is noted that the Greens have taken up a number of additional Senate seats and now hold the balance of power in that House.

Paul Barratt, former Australian defence chief, has criticised the legislation because it does not apply to acts or omissions done within Australian territory by people not subject to Australian jurisdiction or control, like US soldiers.¹² This is contrasted with New Zealand implementing legislation which applies to all acts or omissions occurring in New Zealand¹³.

Austria has criticised the Australian position, particularly the loophole which would allow cluster munitions to be stockpiled on Australian soil.¹⁴ This criticism focused on the fact that no other signatory to the Convention had allowed this and said, 'foreign stockpiling of cluster munitions of a State Party is prohibited by the Convention... Should a State Party to the Convention allow a foreign state to stockpile cluster munitions on its territory, this action would be in violation of Article 1, paragraph c which prohibits assistance'¹⁵.

Representatives of Columbia and Guatemala supported this view. The Bill passed the House of Representatives on 18 November 2010 and was referred to a Senate Committee on 28 October 2010.

¹⁰ <http://greensmps.org.au/content/motion-refer-flawed-cluster-bomb-legislation-jscot> accessed 7 August 2011

¹¹ This recommendation was made by the Joint Standing Committee on Treaties ('JSCOT')

¹² <http://www.eurekastreet.com.au/article.aspx?aeid=26040> accessed 7 August 2011

¹³ See the New Zealand Cluster Munitions Prohibition Act 2009

¹⁴ <http://harvardhumanrights.files.wordpress.com/2011/03/hrw-and-ihrc-submission-on-the-cluster-munitions-prohibition-bill-19-1-11.pdf> at page 14, accessed 7 August 2011

¹⁵ Ibid quoting from Letter from Amb. Alexander Marschik, director for disarmament, arms control and non-proliferation, Austrian Federal Ministry for European and International Affairs, to Human Rights Watch, March 9, 2009.