Australian Government

Department of Foreign Affairs and Trade

Criminal Code Amendment (Cluster Munitions Prohibition) Bill 2010

Department of Foreign Affairs and Trade – Additional information

The purpose of the Bill is to give legislative effect to the Convention on Cluster Munitions (the Convention) in Australian law, and is guided and limited by the contents of the Convention.

Oslo Process and Article 21

1. **Can you provide an overview of the history of Article 21 of the Convention and the negotiation process around its incorporation into the draft treaty?**

The *Convention on Cluster Munitions* (the Convention) was negotiated at a series of conferences held between 2007 and 2008, culminating in the Dublin Diplomatic Conference in May 2008, when the Convention was adopted. Although the text of Article 21 of the Convention was first discussed at the Dublin Diplomatic Conference, interoperability concerns had been raised throughout the negotiation of the Convention. 'Interoperability' refers to the ability of militaries from different countries to effectively engage in military cooperation and operations. Article 21 of the Convention expressly permits military cooperation and operations between States Parties and non-States Parties. Interoperability may be affected by a range of factors, including differences in legal obligations between States.

Interoperability concerns were first raised by a number of delegations, including Australia, Canada, Japan, Poland and the United Kingdom, in relation to the draft text under consideration at the Lima Conference (held in May 2007). This text included an obligation not to 'assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party'.

During the Lima and Vienna Conferences (May and December 2007 respectively), a significant number of delegations, including Australia, expressed their views that the draft text was problematic, as it could pose as a legal barrier to maintaining interoperability, including both military operability with alliance partners (such as the United States, which was not involved in the negotiation of the Convention) and in United Nations mandated operations. Australia considers that such military cooperation and operations is central to the protection of international security, as well as Australia's national security.

At the Wellington Conference in February 2008, Australia along with a number of other countries (Canada, Czech Republic, Denmark, Finland, France, Germany, Italy, the Netherlands, Sweden, Switzerland and the United Kingdom) introduced a discussion paper

on interoperability issues. The discussion paper invited participants to revisit the text in order to develop an appropriate solution and a number of proposals were put forward.

At the Dublin Diplomatic Conference, informal consultations were held with delegations interested in the interoperability issue. Australia participated in these consultations. Participants at the Dublin Diplomatic Conference ultimately agreed that the issue of interoperability would be expressly dealt with in the Convention in a separate article (Article 21).

2. What has Australia and like-minded states parties said in relation to Article 21?

In a joint media release on 27 October 2010, the Australian Attorney-General, The Hon Robert McClelland MP, the Minister for Defence, The Hon Stephen Smith MP and the Minister for Foreign Affairs, The Hon Kevin Rudd MP stated (in relation to the Bill):

> The Bill contains provisions that allow Australia to continue to undertake military cooperation and operations, consistent with the Convention, with allies that have not signed the Convention.

In a media release on 3 December 2008 Canada announced:

> In Canada's view, the Convention on Cluster Munitions strikes an appropriate balance between humanitarian and security considerations. It establishes the highest international humanitarian standards with respect to cluster munitions, while allowing its signatories to continue to engage in combined security operations with allies that have not signed.

On its website, the United Kingdom Foreign and Commonwealth Office stated, in reference to the United Kingdom's Bill implementing the Convention on Cluster Munitions:

> The Bill also includes a defence for certain conduct during the course of, or for the purposes of, military cooperation and operations with countries who have not joined the Convention. This "interoperability" defence implements Article 21 of the Convention which provides for such military engagement. In doing so, the defence will enable the UK to continue to play our full part in current and future coalition operations.

3. What is Australia's current position on the four provisions of Article 21?

Australia's current position on the four paragraphs of Article 21 of the Convention on Cluster Munitions is as follows:

Article 21(1) and (2)

Article 21(1) and (2) provide non-specific obligations on States Parties to encourage other States to become parties to the Convention, to notify non-States Parties of obligations under the Convention, to promote the norms of the Convention and to make best efforts to discourage non-States Parties from using cluster munitions. The Convention allows States Parties discretion as to the means of discharging these obligations. Examples of how these obligations could be fulfilled include through diplomatic, political or military channels as appropriate opportunities arise.

Australia will adhere to its positive obligations in relation to paragraphs 1 and 2 of Article 21 in the same manner that it does other disarmament treaties concerning humanitarian issues, such as the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate*

Effects as amended on 21 December 2001 (the Convention on Certain Conventional Weapons) and the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction* (the Mine Ban Convention). (See also response to question 5.)

Article 21(3)

Article 21(3) qualifies the key prohibitions specified in Article 1 of the Convention. Article 21(3) provides that States Parties may continue to engage in military cooperation and operations with non-States Parties who may choose to engage in conduct prohibited under the Convention.

Australia's position is that military cooperation and operations between States, including non-States Parties, is central to the protection of international security, as well as Australia's national security.

Article 21(4)

Article 21(4) provides some legal restrictions upon the scope of the exemption in Article 21(3). Developing, producing or acquiring cluster munitions remains prohibited under any circumstances. Also, a State Party must not 'itself' use, stockpile or transfer prohibited cluster munitions. The term 'itself' is included to signify that actual, physical use, stockpiling or transfer of cluster munitions by a State Party is prohibited. State Parties are also prohibited from expressly requesting the use of cluster munitions where the choice of the munitions used is within their exclusive control.

Concerns raised in evidence in relation to interoperability – section 72.41

4. The Law Council of Australia noted that most state parties to the Mine Ban Treaty agree that the treaty allows participation in joint operations, but have maintained an 'expansive understanding of the prohibition on assistance' and that:

> **For example, most State Parties, including Australia, have agreed that State Parties may *not* participate in the planning of use of antipersonnel mines, agree to rules of engagement that permit the use of such weapons, or knowingly derive military benefit from the use of such weapons by others. In 2003 Australia stated that it "will not participate in planning or implementation of activities related to anti-personnel mine use in joint operations".**
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> **(Submission 20, p. 10).**

Is Australia's position on cluster munitions different and if so, why?

Australia's positions on cluster munitions and landmines are the same, in that the Government is committed to a world free from both cluster munitions and landmines.

The legal obligations enshrined in the Mine Ban Convention and the Cluster Munitions Convention are different, in part because anti-personnel landmines and cluster munitions are very different weapons systems. The Government has taken a different legislative approach to landmines and cluster munitions in so far as the Government must ensure that Australia implements its legal obligations under each Convention.

While the Mine Ban Convention does not include an interoperability provision, the issue of interoperability was dealt with during the negotiation of this Convention. At the time of

ratifying the Mine Ban Convention, Australia – as well as Canada, the United Kingdom and others – deposited a declaration which outlined its understanding that:

> in the context of operations, exercises or other military activity authorised by the United Nations or otherwise conducted in accordance with international law, the participation by the Australian Defence Force, or individual Australian citizens or residents, in such operations, exercises or other military activity conducted in combination with the armed forces of States not party to the Convention which engage in activity prohibited under the Convention would not, by itself, be considered to be in violation of the Convention.

The specific provision on interoperability in the Convention on Cluster Munitions (Article 21(3)) was negotiated in light of the experience of the Mine Ban Convention.

Australia's position in relation to both the Mine Ban Convention and the Convention on Cluster Munitions is that military cooperation and operations between States, including non-States Parties to both of these instruments, is central to the preservation of international security, as well as Australia's national security. The ability to maintain interoperability allows Australia to continue to engage in military cooperation and operations involving non-States Parties, including those endorsed by the United Nations.

When undertaking military cooperation or operations, ADF personnel are required to act in accordance with Defence doctrine, procedures, rules and directives. This documentation is consistent with Australia's obligations under the Mine Ban Convention and agencies are working to ensure that such documentation is also consistent with the Convention on Cluster Munitions. This process will be completed before Australia ratifies the Convention on Cluster Munitions and commencement of the relevant implementing legislation.

5. **How is Australia expecting to adhere to its positive obligations specifically in relation to Article 21(1) and (2) and to promote universal adherence to the Convention more broadly? Which governmental body will have carriage of realising these obligations on behalf of the Australian Government?**

The Government takes the Convention obligations very seriously, including in regard to universalisation of the Convention (paragraphs 1 and 2 of Article 21).

Australia will adhere to its positive obligations in relation to paragraphs 1 and 2 of Article 21 in the same manner that it does other disarmament treaties concerning humanitarian issues (such as the Convention on Certain Conventional Weapons and the Mine Ban Convention).

Once Australia ratifies the Convention on Cluster Munitions and becomes a State Party, Australia will take appropriate measures to promote universal adherence in accordance with paragraphs 1 and 2 of Article 21 as appropriate opportunities arise. In formal and informal diplomatic and other contacts, Australia will urge States not Party to the Convention not to use cluster munitions and encourage them to accede to the Convention. Australia will also continue to work closely with non-government organisations, which make a significant contribution to universalisation.

Australia will also make our obligations under the Convention clear to non-State Parties. When engaged in military cooperation, the limitations contained in the Bill will be reflected in ADF doctrine, procedures, rules and directives. This will ensure that Australia and Australians will act consistently with the object and purpose of the Convention (including paragraphs 1 and 2 of Article 21), including when undertaking cooperative activities with countries that are not obliged to comply with the Convention.

The Department of Foreign Affairs and Trade (DFAT) will have primary carriage of realising these obligations on behalf of the Australian Government. DFAT will work with other agencies, including the Department of Defence, to ensure that the Government takes advantage of all relevant and appropriate opportunities to promote universal adherence to the Convention.

6. **Is there a formalised arrangement under which the Australian Government will realise these positive obligations?**

No, as with other disarmament treaties concerning humanitarian issues, there are no plans for a formalised arrangement concerning the obligations set out in paragraphs 1 and 2 of Article 21, however the Government will use formal diplomatic means to do so. Australia will continue to make all reasonable efforts to promote the adherence of all States to their obligations under the Convention on Cluster Munitions.

7. **How can Australia cooperate militarily with non-states parties to the Convention who may use cluster munitions without undermining Australia's obligations to discourage such states from using cluster munitions?**

The Government has stated its commitment to a world free from cluster munitions. This was a driving factor in Australia's active participation in the negotiation of the Convention. Australia's participation ensured a strong humanitarian outcome that also satisfied Australia's national security concerns.

Paragraphs 1 and 2 of Article 21 – which set out certain obligations relating to the universality of the Convention – must be read alongside paragraphs 3 and 4 of Article 21. The purpose of Article 21(3) is precisely to allow for ongoing military cooperation and operations between States Parties and non-States Parties, while obliging States Parties to discourage non-States Parties from using cluster munitions. These obligations can be undertaken concurrently.

Consistent, therefore, with the Convention on Cluster Munitions, Australia can continue to engage in military cooperation and operations with non-States Parties to the Convention, and concurrently encourage those non-States Parties to adhere to the Convention (as required by paragraphs 1 and 2 of Article 21).

This approach is consistent with the approach of Australia's allies who have also signed the Convention, such as the United Kingdom and Canada.

DFAT is working with the Defence Department and the Attorney-General's Department to ensure that Australian Defence Force (ADF) doctrine, procedures, rules and directives governing ADF operations (including when in military cooperation with non-States Parties) are consistent with the Convention.

8. **The Australian Red Cross argued that 'rather than protecting personnel from liability resulting from inadvertent or indirect participation in activities involving the use of cluster munitions, the defence as currently drafted could in fact allow the intentional violation of the Convention' (Submission 21, p. 3). Please respond to this concern and explain why the section was not drafted to focus on inadvertent participation as recommended by JSCOT.**

As noted in the Government's response to the JSCOT report, the Convention does not prohibit inadvertent participation in the use, or assistance in the use, of cluster munitions. Rather, Article 1 of the Convention prohibits States Parties from using cluster munitions, and

also prohibits assistance in the use of cluster munitions. This prohibition is subject to the exceptions contained in Article 21 of the Convention.

In their submission the Australian Red Cross was referring to the defence contained in section 72.41 of the Bill. Section 72.41 gives effect to paragraphs 3 and 4 of Article 21 of the Convention by providing that certain acts done by Australians in military cooperation and operations with countries that are not party to the Convention are not offences against proposed section 72.38. The purpose of this section 71.41 is to ensure that the Bill is consistent with the Convention and that persons who have not breached the Convention are not prosecuted, rather than to allow intentional violation of the Convention.

Paragraph 3 of Article 21 of the Convention states that, notwithstanding the provisions of Article 1 of the Convention, States Parties, their military personnel or nationals may engage in military cooperation and operations with States not Party to the Convention that may use cluster munitions. Paragraph 4 of Article 21 states that States Parties are nonetheless prohibited from themselves using, developing, producing, otherwise acquiring, stockpiling or transferring cluster munitions, or expressly requesting the use of cluster munitions in cases where the choice of munitions used is within their exclusive control.

The scope of the defence in section 72.41 is limited to the conduct that is permitted by paragraph 3 or Article 21.

Consequently, the Bill does not permit any conduct that is a violation of the Convention. The Bill uses the same language as the Convention, to ensure that the Bill accurately reflects the provisions of the Convention, and that all conduct that is prohibited by the Convention is the subject of a criminal offence under Australian law. Thus, rather than referring to ‘inadvertent participation’, the Bill picks up the particular language of paragraph 1(c) of Article 1 and paragraph 3 of Article 21.

Stockpiling, retention and transfer of cluster munitions by non-states parties – section 72.42

9. **Many witnesses argued that section 72.42 would violate Article 9 of the Convention, undermine the Convention's objectives and contribute to the continued use of cluster munitions whilst making it impossible to reconcile the section's exemptions with positive obligations under Article 21(1) and (2). What is the Australian Government's response to these concerns?**

The Government’s position is that the defence for acts by military personnel of non-States Parties (section 72.42) is consistent with Article 9 of the Convention.

Article 9 of the Convention requires States Parties to take appropriate measures to implement the Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under the Convention when undertaken by persons or on territory under its jurisdiction or control. In accordance with this provision, the offences created in the Bill apply to all persons on Australian territory and, under certain circumstances, to persons outside of Australia.

The defence in section 72.42 applies to military personnel of countries that are not party to the Convention who in the course of their military duties stockpile, retain or transfer cluster munitions while on a base, aircraft or ship that is in Australian territory. This defence takes into account that Australia engages in military cooperation and operations with some countries that are not party to the Convention, as permitted by Article 21. This military cooperation and operations may extend to hosting foreign bases, aircraft or ships. Article 9 must be read alongside Article 21. The defence in the Bill recognises that it is not

appropriate to require military personnel of non-States Parties to comply with an international legal obligation to which their sending country has not consented.

The conduct that is the subject of the defence for the military personnel of non-States Parties relates only to conduct that is permitted by Article 21 of the Convention. Consistent with paragraph 4 of Article 21, visiting forces would not be excused from prosecution if they use, develop, produce or acquire cluster munitions in Australia.

Consistent with the Convention on Cluster Munitions, Australia can cooperate militarily with non-States Parties to the Convention (as permitted by Article 21(3)), and concurrently encourage those non-States Parties to adhere to the Convention (as required by paragraphs 1 and 2 of Article 21).

10. **Human Rights Watch and IHRC state that allowing foreign forces to stockpile cluster munition violates the prohibition on assistance 'because it facilitates stockpiling and can potentially aid in the use of cluster munitions'. They note that the language of Article 1(1)(c) makes clear that states parties should not 'assist, encourage or induce *anyone*' – including foreign military personnel – to engage in "any" acts that the convention prohibits. They and many other submitters concluded that section 72.41(1) permits foreign military personnel to do an act – stockpile cluster munitions – prohibited by the Convention (Submission 7, p. 9). Could you please reconcile this inconsistency? What is Australia's definition of 'assistance' for the purposes of the Convention?**

The submissions by Human Rights Watch and the Harvard Law School's International Human Rights Clinic refer to section 72.42 of the Bill, rather than 72.41(1). The submission referred to (Submission 7, page 9) states:

> Section 72.42(1), which allows Australia to host foreign stockpiles of cluster munitions, should be removed because it runs counter to Articles 1 and 9 of the convention [sic]. Allowing foreign forces to stockpile cluster munitions violates the prohibition on assistance because it facilitates stockpiling and can potentially aid in the use of cluster munitions. The language of Article 1(1)(c) makes clear that states parties should not 'assist, encourage or induce anyone' – including foreign military personnel to engage in 'any' acts that the convention [sic] prohibits. In addition, Section 72.42(1) permits foreign military personnel to do an act – stockpile cluster munitions – prohibited by the convention [sic].

As outlined in the response to question 9, the Government's position is that section 72.42 is consistent with Article 9.

Article (1)(c) must be read in conjunction with Article 21 of the Convention. Consistent with Article 21 of the Convention, proposed section 72.42 provides that certain acts done by military personnel of countries not party to the Convention are not offences against proposed section 72.38. Section 72.42 takes into account the fact that Australia engages in military cooperation and operations with some countries that are not party to the Convention. This military cooperation and operations may entail the use by foreign countries of bases on Australian territory, or the entry of foreign ships or aircraft into Australian territory. Paragraph 3 of Article 21 of the Convention expressly permits the continuation of such cooperation and operations between States Parties and non-States Parties.

The military personnel of countries that are not party to the Convention are not required to comply with the Convention's obligations, and should not be subject to the offences in proposed section 72.38 while they are in Australia. Proposed section 72.42 provides a defence for the military personnel of countries that are not party to the Convention to reflect the fact that they are not required to comply with the Convention's obligations.

'Assistance' is not defined by the Convention and so this term should be read according to its plain English meaning where it is used in the Bill.

11. Witnesses have questioned how this provision which would permit foreign stockpiling on Australian territory can be reconciled with the fact that Australia itself does not currently have any operational stockpiles of cluster munitions. How does Australia reconcile allowing foreign stockpiling on Australian territory when Australia does not stockpile cluster munitions on its own territory?

As a State Party to the Convention, Australia is prohibited from stockpiling cluster munitions. The military personnel of countries that are not party to the Convention are not required to comply with the Convention's obligations.

The issues of domestic and foreign stockpiles of cluster munitions are separate. Australia does not have any operational stockpiles of cluster munitions and is committed to a world free from cluster munitions. However, Australia recognises that some non-States Parties to the Convention – including Australia's allies – may continue to use cluster munitions. Article 21 of the Convention permits continued military cooperation and operations between States Parties and non-States Parties, and such military cooperation and operations may extend to the hosting of foreign bases, and the use of those foreign bases for stockpiling of cluster munitions by non-States Parties.

12. How is Australia expecting to balance this provision against its obligations under Article 21(1) and (2) to encourage non-states parties to adhere to the Convention and to discourage non-states parties from using cluster munitions?

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. Australia will not legislate to prohibit activities that are permitted by the Convention (see response to question 15 as to why this is the case). Concurrently, the Government will discharge its responsibilities in regard to paragraphs (1) and (2) of Article 21 of the Convention (as outlined in the response to question 5).

13. Has a government agency been identified to monitor foreign transit and stockpiling on Australian territory? How will foreign cluster munitions on Australian territory be monitored and will a reporting regime be established accordingly?

The Bill creates the penal sanctions required by Article 9 of the Convention. Article 9 of the Convention requires States Parties to take all legal, administrative and other measures to implement the Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under the Convention.

Consistent with other international agreements that Australia has ratified, Australia will implement reporting obligations through administrative measures.

All munitions owned by foreign armed forces that are stored on Australian soil are required to be managed as 'Commonwealth Explosives', in accordance with the Explosives Act 1961, and its subordinate regulations and codes. This requires specific approval for the storage and transportation of these munitions, and their inclusion in Defence information holdings. Additionally, they are stored in Defence facilities licensed to store explosive ordnance, and are managed on the Computer System for Armaments. Consequently, Defence both approves and has full visibility of all foreign armed forces munitions that are stored on Australian soil.

No foreign armed force will be approved to fire cluster munitions on any Australian training range. All munitions fired on Australian training ranges by foreign armed forces are required to comply with the requirements specified and prohibitions for each range by the Director of Operations and Training Area Management.

Positive obligations

14. The bill realises Convention Article 9 obligations to introduce penalties, however, witnesses queried how Australia will realise other obligations as a states party and principally those enshrined in Article 21(1) and (2)?

As stated in the response to question 5, Australia will realise its obligations in relation to paragraphs 1 and 2 of Article 21 in the same manner that it does other disarmament treaties concerning humanitarian issues (such as the Convention on Certain Conventional Weapons and the Mine Ban Convention).

Once Australia ratifies the Convention and becomes a State Party, Australia will fulfil the obligations imposed by paragraphs 1 and 2 of Article 21 as appropriate opportunities arise, such as multilateral, bilateral or regional meetings. Australia will strongly encourage non-States Parties to ratify the Convention through a range of diplomatic means, both formal and informal. This encouragement could be through oral or written communications aimed at dissuading or advising non-States Parties against using cluster munitions, and encouraging non-States Parties to ratify or accede to the Convention. Australia will also continue to work closely with non-government organisations that make a significant contribution to the universalisation of the Convention.

Australia will also advise non-States Parties of our obligations under the Convention, including through bilateral talks (both diplomatic and military-to-military). When engaged in military cooperation, the limitations contained in the Bill will ensure that Australia and Australians will continue to act consistently with the object and purpose of the Convention (including paragraphs 1 and 2 of Article 21), including when undertaking military cooperation and operations with countries that are not obliged to comply with the Convention.

As a State Party, Australia will also assume humanitarian obligations under the Convention, such as in relation to victim assistance (Article 5) and international cooperation and assistance (Article 6). Although Australia has not yet ratified the Convention, the Australian Government is already playing a constructive role to support these objectives. Through Australia's Mine Action Strategy for the Australian aid program 2010-2014, Australia has pledged $100 million to work towards a world free from landmines, cluster munitions and other explosive remnants of war. This builds upon Australia's contribution of over $75 million for Mine Action in 2005-2009. Australia contributed approximately $730,000 to support the Lao Government host the First Meeting of States Parties to the Convention on Cluster Munitions (9-12 November 2010).

15. Witnesses argued in favour of the inclusion of a statement of intent in light of Article 9 which mandates states parties to implement all obligations of the Convention. Union Aid Abroad – APHEDA, for example held that

implementing the Convention's positive elements through legislation is the 'best way to set clear binding rules and ensure that Australia is fulfilling all of its treaty obligations' (Submission 12, p. [3]). Was a statement of intent or objects clause considered when the bill was drafted? If so, what did is say and why was it omitted? If not, would such a provision assist interpret the statute and could you provide an example?

Section 72.37 of the Bill sets out the purpose of the amendment to the Criminal Code Act 1995 (the Code), which is to create offences relating to cluster munitions and explosive bomblets and give effect to the Convention.

DFAT is unaware of the precise drafting history of the Bill, including whether a statement of intent was ever drafted. As the lead agency for the preparation of the Bill, the Attorney-General's Department is best placed to answer that question. However, it is DFAT's understanding that it is not necessary to include in the Criminal Code statements of intent regarding provisions in the Convention that do not require legislative implementation.

The Office of Parliamentary Counsel (OPC) is currently working with government agencies to reduce the complexity and length of legislation. One way to achieve this aim is to ensure that the Bill contains only those provisions necessary to give effect to the Convention. The positive obligations contained in the Convention do not require legislative implementation, and can be implemented through administrative and other means. Consequently, they have not been referred to in the Bill.

The clearest demonstration of Australia's intent to comply with the Convention was Australia's signing of the Convention on 3 December 2008. Having signed the Convention, Australia is bound to comply with the spirit and intent of the Convention and is obliged not to act in a manner inconsistent with the Convention.

In addition, the Attorney-General, Minister for Foreign Affairs and the Minister for Defence have stated publicly Australia's commitment to implementing the Convention's obligations, including its positive obligations. Similar statements have also been made by Australian officials, including at the First Meeting of States Parties to the Convention, held in Laos from 9 to 12 November 2010.

Investment in cluster munitions production

16. **Witnesses supported an explicit prohibition in the bill which realises JSCOT's recommendation on investment. Was an explicit prohibition considered? If so, why was it omitted? If not, what would be the ramifications of such a prohibition?**

The Joint Standing Committee on Treatise (JSCOT) recommended that the Australian Government 'have regard 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'. The Government tabled its response to the JSCOT report on 13 May 2010. In developing the Bill, the Government carefully considered JSCOT's recommendations.

DFAT is unaware of the precise drafting history of the Bill, including whether an explicit prohibition on investment was ever drafted. As the lead agency for the preparation of the Bill, the Attorney-General's Department is best placed to answer that question. However, it is DFAT's view that an explicit prohibition on investment in companies that develop or produce cluster munitions is not appropriate because the Convention does not contain such a prohibition.

Rather than expressly prohibiting investment, Article 1 of the Convention prohibits the direct or indirect development or production of cluster munitions, and the provision of assistance, encouragement or inducement to anyone engaged in such activities. The Bill uses the language of the Convention in order to ensure that any conduct that is prohibited by the Convention is the subject of a criminal offence under Australian law, as required by Article 9. Any acts of investment that fall within the prohibition on assistance in the Convention will fall within the offences in the Bill.

As noted above, the Bill reflects the legal obligations that were agreed internationally when the Convention was negotiated. The Bill gives effect to the Convention in Australian law, and is guided and limited by the contents of the Convention. Of course, the enactment of the Bill would not preclude the Government and/or industry from deciding, as a matter of policy, from adopting standards in relation to investment that go beyond those obligations contained in the Convention.

17. What is Australia's position on indirect investment?

The Bill gives effect to the Convention in Australian law, and is guided and limited by the contents of the Convention. As the Convention does not include an explicit prohibition on investment in companies that develop or produce cluster munitions, the Bill similarly does not include an investment offence. However, some acts of investment will fall within the scope of the offences in the Bill. Importantly, the intentional provision of financial assistance to an entity for the purpose of developing or producing cluster munitions will amount to an offence.

Paragraph 1(b) of Article 1 of the Convention prohibits the direct or indirect development or production of cluster munitions, and the provision of assistance, encouragement or inducement to anyone engaged in such activities.

The conduct prohibited in Article 1 of the Convention is reflected in the offences in section 72.38 of the Bill. Specifically, the Convention prohibits the provision of assistance, encouragement or inducement in the development or production of cluster munitions. Proposed section 72.38 creates offences that reflect the Convention obligations. Proposed subsection 72.38(1) creates the offence of developing or producing cluster munitions. The operation of the Code's ancillary offences means that a person who aids, abets, counsels or procures the commission of this offence commits an offence. In addition, proposed subsection 72.38(2) creates the offence of assisting, encouraging or inducing the development or production of cluster munitions.

18. During its 2009 inquiry into the Convention, JSCOT noted that DFAT was doubtful that Australian investment in companies that develop or produce cluster munitions is prohibited under the Convention (JSCOT, p. 23). In light of the Attorney-General's second reading speech, has the Australian Government reconsidered its interpretation of the term 'assist' in the Convention?

In the JSCOT hearing on the Convention on 22 June 2009, DFAT's representative stated:

> The Convention itself prohibits states' parties from directly or indirectly developing or producing cluster munitions or assisting, encouraging or inducing anyone to engage in activities prohibited by the Convention. That is, the Convention does not explicitly prohibit investment in companies that develop or produce cluster munitions nor does it define the term 'assist'.
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> Australia has interpreted the word 'assist' to mean actual and direct physical participation in any activity prohibited by the

> convention in regard to, for example, the Mine Ban Convention. That is the interpretation of 'assist' that has been taken by Australia. Under that interpretation it is therefore doubtful that investment in companies that develop or produce cluster munitions is prohibited by the Convention. But I should emphasise that the government—as we discussed last week—has not yet considered the terms of the legislation to implement the obligations of the convention, and issues such as the interpretation of 'assist' will need to be looked at there.

As foreshadowed by DFAT's representative, the Government has considered the terms of the legislation to implement the obligations of the Convention, including in regard to the interpretation of 'assist'.

As outlined in the response to question 16 and 17, the Government's position is that the Convention on Cluster Munitions does not include an explicit prohibition on investment in companies that develop or produce cluster munitions. However, some acts of investment will fall within the scope of the prohibitions in the Convention. As set out in the response to question 17, to the extent that such acts are prohibited by the Convention, they fall within the scope of the offences in the Bill.