

Mary Wareham, ANZCMC Coordinator  
Tel. +64 (21) 996-905  
[wareham@hrw.org](mailto:wareham@hrw.org)  
[www.banclusterbombs.org.nz](http://www.banclusterbombs.org.nz)

*Aotearoa NZ CMC members:*

Amnesty International Aotearoa NZ, Aotearoa Lawyers for Peace, Auckland University Students' Association, Campaign Against Landmines, Caritas Aotearoa NZ, Christian World Service, Development Resource Centre, Engineers for Social Responsibility NZ, International Physicians for the Prevention of Nuclear War NZ, National Council of Women NZ, National Consultative Committee on Disarmament, Oxfam NZ, Parliamentarians for Nuclear Nonproliferation and Disarmament NZ, Pax Christi Aotearoa-NZ, Peace Foundation NZ, Peace Foundation Disarmament and Security Centre, Peace Movement Aotearoa, Soroptimist International NZ, Umma Trust, UN Association NZ, UN Youth Association NZ, UNICEF NZ, Women's International League for Peace and Freedom, Aotearoa



---

## **New Zealand's Cluster Munitions Prohibition Bill**

Review Issued by Aotearoa New Zealand Cluster Munition Coalition

5 August 2009

This document reviews the Cluster Munitions (Prohibition) Bill (the "Bill"), New Zealand's proposed legislation to implement the 2008 Convention on Cluster Munitions (the "Convention").<sup>1</sup> It provides a brief overview of the status of New Zealand's ratification of the Convention and then a commentary identifies key sections where further revision or clarification is needed.

This review was drafted by ANZCMC Coordinator Mary Wareham (also of Human Rights Watch). It includes feedback received in an ANZCMC campaign meeting held on 28 July, and is drawn from legal review by international law experts including:

- Alexander Breitegger (CMC Austria), an international law lecturer at the University of Vienna;
- Bonnie Docherty (Human Rights Watch), who also teaches at Harvard Law School;
- Steve Goose (Human Rights Watch), co-chair of the international Cluster Munition Coalition (CMC);
- Thomas Nash (CMC Global Coordinator), originally from New Zealand; and
- Virgil Wiebe, law professor at the University of St. Thomas in Minnesota.<sup>2</sup>

---

<sup>1</sup> Cluster Munitions (Prohibition) Bill 52-1,  
<http://www.legislation.govt.nz/bill/government/2009/0052/latest/whole.html>

<sup>2</sup> For further information, these reviewers can be contacted through ANZCMC coordinator Mary Wareham.

## Status

New Zealand was one of the first countries to sign the Convention on Cluster Munitions on 3 December 2008 and, according to Minister for Disarmament and Arms Control Hon. Georgina Te Heuheu, the government is working to complete ratification by the first anniversary of treaty signing (December 2009).<sup>3</sup> Past experience indicates this timeframe is possible, but implementing legislation must first be passed before New Zealand can deposit its instrument of ratification.<sup>4</sup> To date, a total of 98 states have signed the Convention on Cluster Munitions of which 14 have ratified.<sup>5</sup>

The New Zealand Cabinet reviewed the ratification package on 20 April 2009 and approved its referral to parliament. On 7 and 14 May 2009, the Foreign Affairs, Defence and Trade (FADT) Select Committee considered the Convention and issued a "treaty examination report" recommending that the Minister of Disarmament "expeditiously" progress implementing legislation.<sup>6</sup> A National Interest Analysis (NIA) document prepared by MFAT was annexed to the FADT report.

On 21 July 2009, the government introduced the Cluster Munitions (Prohibition) Bill.<sup>7</sup> Its first reading took place on 28 July.<sup>8</sup> It was then referred to the FADT Select Committee to be considered in more detail including through public submissions (submission deadline: 10 September 2009).

The Select Committee will issue a report (due no later than 28 January 2010) recommending amendments, if any, to the legislation and a commentary.<sup>9</sup> The bill will then be read a second time and debated by the whole House. Once agreed, it will be reprinted to show any changes and read a third time. A final vote is taken to pass the bill and then the Governor-General signs it into law.

---

<sup>3</sup> Letter to ANZCMC from Hon. Georgina Te Heuheu, Minister for Disarmament and Arms Control, 19 June 2009.

<sup>4</sup> For example, New Zealand signed the Mine Ban Treaty on 3 December 1997, introduced implementation legislation in June 1998 that was passed on 9 December 1998, and deposited the instrument of ratification on 27 January 1999, making New Zealand the 64th signatory to ratify.

<sup>5</sup> The 14 ratifications are: Albania, Austria, Germany, Holy See, Ireland, Japan, Lao PDR, Luxembourg, Mexico, Niger, Norway, San Marino, Sierra Leone, and Spain.

<sup>6</sup> "International treaty examination of the Diplomatic Conference for the Adoption of a Convention on Cluster Munitions, done at Dublin, 19-30 May 2008," *Report of the Foreign Affairs, Defence and Trade Select Committee*. [http://www.parliament.nz/NR/rdonlyres/9BC976BD-5A1F-44D1-8266-438956298E31/103915/DBSCH\\_SCR\\_4371\\_Internationaltreatyexaminationofthe.pdf](http://www.parliament.nz/NR/rdonlyres/9BC976BD-5A1F-44D1-8266-438956298E31/103915/DBSCH_SCR_4371_Internationaltreatyexaminationofthe.pdf)

<sup>7</sup> Bills Digest 1697 - Cluster Munitions (Prohibition) Bill <http://www.parliament.nz/en-NZ/PB/Legislation/Bills/BillsDigests/b/b/f/49PLLawBD16971-Cluster-Munitions-Prohibition-Bill-2009-Bills-Digest.htm>

<sup>8</sup> "Parliament debates cluster bomb ban," ANZCMC website entry, 28 July 2009. <http://www.stopclusterbombs.org.nz/2009/07/28/parliament-debates-cluster-bombs/>

<sup>9</sup> Select Committee - Cluster Munitions (Prohibition) Bill [http://www.parliament.nz/en-NZ/PB/Legislation/Bills/4/d/1/00DBHOH\\_BILL9288\\_1-Cluster-Munitions-Prohibition-Bill.htm](http://www.parliament.nz/en-NZ/PB/Legislation/Bills/4/d/1/00DBHOH_BILL9288_1-Cluster-Munitions-Prohibition-Bill.htm)

## Review

Many provisions of the Cluster Munitions (Prohibition) Bill are similar to those contained in the Antipersonnel Mines Prohibition Act 1998, which implements the 1997 Mine Ban Treaty.<sup>10</sup> Clause 5(1) of the Cluster Munitions (Prohibition) Bill provides the same penal sanctions (up to 7 years) and fines (up to NZ\$500,000) as does the Antipersonnel Mines Prohibition Act 1998.

Overall, the reviewers view the Cluster Munitions (Prohibition) Bill as appropriate legislation that could be passed as currently drafted with minor revisions. These reviewer comments do not intend to provide an exhaustive analysis of the Bill; instead they seek to identify key sections where further revision or clarification would be helpful.

### 1. Transit

Clause 5(1) - The Bill's definition of transfer of cluster munitions would be stronger if it also included transit of the weapon. Both Austria and Germany explicitly prohibit transit of cluster munitions in their ratification/implementing legislation on the Convention. The Convention's prohibitions on assistance and transfer can be read to prohibit the transit of cluster munitions across, above, or through national territory, but the Bill should state this more explicitly.

► *Action:* Amend Clause 5(1) to include transit of cluster munitions under the definition of transfer. Under transfer, add "(a)(iii) - transit of cluster munitions across, above, or through national territory and territorial waters."

### 2. Divestment

Clause 11(1) - The Bill does not directly prohibit investment in the production of cluster munitions and this should be added. While the Convention does not explicitly ban investment, New Zealand should clarify that it accepts that the prohibition on assistance in Article 1(c) prohibits investments in cluster munitions producers. Legislation passed by Austria, Belgium and Luxembourg explicitly states that such investments are prohibited.<sup>11</sup>

► *Action:* Amend Clause 11(1) to prohibit investment in the production of cluster munitions. Under the list of offences, add "(f) invests, directly or indirectly, in the production of cluster munitions or components used exclusively/primarily for cluster munitions."

---

<sup>10</sup> Anti-Personnel Mines Prohibition Act 1998, <http://www.legislation.govt.nz/act/public/1998/0111/latest/DLM17801.html>

<sup>11</sup> For example, the Luxembourg law reads as follows: "Il est interdit à toute personne physique ou morale de financer, en connaissance de cause, des armes à sous-munitions ou des sous-munitions explosives." ("It is prohibited for all persons, or businesses or corporal entities, to knowingly/intentionally finance cluster munitions or explosive submunitions.") Loi du 4 juin 2009 portant approbation de la Convention sur les armes à sous-munitions, ouverte à la signature à Oslo le 3 décembre 2008, [http://www.chd.lu/wps/PA\\_1\\_084AIVIMRA06I4325L10000000/FTSShowAttachment?mime=application%2fpdf&id=998826&fn=998826.pdf](http://www.chd.lu/wps/PA_1_084AIVIMRA06I4325L10000000/FTSShowAttachment?mime=application%2fpdf&id=998826&fn=998826.pdf).

### 3. Definition

Clause 5(1) - The Bill's definitions of the terms "explosive submunitions" and "explosive bomblets" are problematic because they differ significantly from the definitions used in the Convention. The Bill states that explosive submunitions are released from a dispenser, and in doing so excludes most kinds of submunitions, including those released from bombs, rockets, or missiles. The Bill's structure also differs from the Convention in making explosive "bomblets" a subset of explosive "submunitions." On a positive note, however, the Bill does make clear that all of its provisions apply to both terms.

► *Action:* Amend Clause 5(1) by using the exact language provided in Article 2 of the Convention (both 3. Submunition and 13. Bomblet)

### 4. Application

Clause 9 - The Bill's application abroad may inadvertently criminalize humanitarian action by New Zealand citizens/residents working for clearance operators. Clause 12 creates exceptions to the prohibitions that allow the government to 'officers' (Police employees, members of the Armed Forces, Customs officers, or enforcement officers) that are allowed in limited circumstances to engage in otherwise prohibited activities. A person who is not an officer can possess a cluster munition only for as long as it takes to call up the authorities and hand it over to a New Zealand officer. How would this apply for a New Zealander working as a clearance specialist for an international NGO or commercial clearance firm in Laos PDR or elsewhere?

► *Action:* Amend Clause 12 to include deminers and add definition for deminer to the definitions contained in Clause 5.

### 5. Interoperability

The Bill's provisions related to interoperability are overall clear and strong, but the language could be improved.

Clause 11(1)(e) - Like the Convention, the Bill includes the prohibition on assistance with acts banned by the Convention without qualification or limitation (e.g. "direct" or "active" assistance). This reflects the nature of the prohibition on assistance as a core and absolute obligation of the Convention. The inclusion of the phrase "in any way" is consistent with other international law. It would strengthen Clause 11 to add the phrase "under any circumstances" as the Convention does.

► *Action:* Amend Clause 11(1) to include "under any circumstances" (i.e. "A person who does any of the following things under any circumstances commits an offence")

Clause 11(2) – In a more problematic provision of the Bill, a member of the Armed Forces participating in a joint operation with a non-state party commits an offense if she/he "expressly requests" a prohibited act such as cluster munition use. This language ("expressly requests") is drawn from Article 21(4) of the Convention, but the intent is unclear and should be clarified. Clause 11(2) appears to suggest that it may be permissible to request a cluster munition strike so long as you know that the choice of munitions is not in your "exclusive control."

► *Action:* Delete subparagraph 11(2)(b)

Clause 12(5) – The Bill's the addition of "merely" before "engage in operations, etc" helps to avoid interpretation of the problematic language contained in Article 21(3) of the Convention, which some have interpreted to create an exception to the prohibition on assistance. The addition of "merely" suggests that participation in a joint military operation is permitted, but anything more than that is not. Using the term "that might engage" in banned acts rather than "that engage," however, would cover a wider range of non-states parties and situations and make the Bill more consistent with the Convention's Article 21(3).

► *Action:* Amend Clause 12(5) to say "that might engage in conduct prohibited by section 11(1)" rather than "that engage" in such conduct.

The Bill makes no mention of the Convention's positive obligations (Article 21) to promote universalization of the Convention with States not Party, "make best efforts" to discourage prohibited acts such as cluster munition use, and the requirement that New Zealand notify non-state party allies of its obligations under the Convention. In the NIA (para 20), these obligations were described as potential "disadvantages," but Australia, Germany, Norway and other members of the Convention on Cluster Munitions view these provisions as obligations. The Afghanistan deployment of New Zealand troops exemplifies a situation in which we need to ensure (through the rules of engagement for example) that cluster munitions are not used by the United States, the leader of this joint military operation and a non-signatory. Preventive measures would help clarify that assistance with prohibited acts is banned during joint operations, and, most importantly, help avoid civilian casualties and strengthen the norm against the weapon.

► *Action:* Insert language from Article 21 (1) and (2) into the Bill:

"1. 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.

2. 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."

► *Action:* Clarify how these obligations will be undertaken (e.g. specify the form and content that notification should take, the levels and frequency of notification, the range of measures that should be taken to discourage use, etc...).

## **6. Retention of Cluster Munitions for Training**

Clause 15 - Overall, the Bill's extensive language exempting cluster munitions for training purposes contrasts starkly with New Zealand's diplomatic stance against the retention of cluster munitions. Within the Mine Ban Treaty, New Zealand has also led calls for no live antipersonnel mines to be retained for training. The language contained in the Bill is not found in the Convention, but does feature on the Antipersonnel Mines Prohibition Act 1998.

► *Action:* Clarify that New Zealand will never seek to import cluster munitions or submunitions/bomblets for training purposes.

Clause 15(1) - The Bill may inadvertently allow for the production and development of cluster munitions and explosive bomblets in violation of the Convention's Article 1(1) prohibitions on development and production.

► *Action:* Delete the words "developed" and "produced" from Clause 15(1)

# # #