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## Cluster Munitions Prohibition Act of 2009

Review by the Aotearoa New Zealand Cluster Munition Coalition

22 December 2009

### About this Review

The Cluster Munitions Prohibition Act of 2009, signed into law on 17 December 2009, governs New Zealand's implementation of the 2008 Convention on Cluster Munitions.<sup>1</sup> This review of the legislation was written by Mary Wareham on behalf of the Aotearoa New Zealand Cluster Munition Coalition (ANZCMC). It was prepared to assist campaigns in other countries that are interested in using the law as a model for national implementation measures. While the ANZCMC has described the Cluster Munitions Prohibition Act as strong and comprehensive, it is not perfect and could be improved in several areas.

This review draws on reviews of the Cluster Munitions (Prohibition) Bill, introduced on 21 July 2009, by international law experts (including Ms. Bonnie Docherty of Human Rights Watch and Harvard Law School) and ANZCMC members through the coalition's submission on the Bill (provided 9 September 2009).<sup>2</sup> It considers the recommended amendments suggested by the Foreign Affairs, Defence and Trade Select Committee in its report back to Parliament.<sup>3</sup> This review also reflects comments made during the parliamentary debates on the Bill held on 28 July and 10 December 2009.<sup>4</sup> Where

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<sup>1</sup> The Cluster Munitions Prohibition Act of 2009 is available online here:

<http://www.legislation.govt.nz/act/public/2009/0068/latest/DLM2171615.html>

<sup>2</sup> The ANZCMC provided a written submission on 9 September 2009 that received fifteen endorsing submissions by ANZCMC member organizations. On 24 September 2009, ANZCMC Coordinator Mary Wareham provided an oral submission to the Foreign Affairs, Defence, and Trade Select Committee. See: ANZCMC, Submission on the Cluster Munitions (Prohibition) Bill to the Foreign Affairs, Defence and Trade Select Committee, 9 September 2009. [http://www.stopclusterbombs.org.nz/wp-content/uploads/2009/09/anzcmc\\_submissionfact\\_9sep09\\_final.pdf](http://www.stopclusterbombs.org.nz/wp-content/uploads/2009/09/anzcmc_submissionfact_9sep09_final.pdf)

<sup>3</sup> Report of the Foreign Affairs, Defence, and Trade Select Committee on the Cluster Munitions (Prohibition) Bill, 30 November 2009. [http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/1/c/6/49DBSCH\\_SCR4544\\_1-Cluster-Munitions-Prohibition-Bill-52-2.htm](http://www.parliament.nz/en-NZ/PB/SC/Documents/Reports/1/c/6/49DBSCH_SCR4544_1-Cluster-Munitions-Prohibition-Bill-52-2.htm)

<sup>4</sup> Hansard debate on first reading, 28 July 2009: [http://www.parliament.nz/en-NZ/PB/Debates/Debates/7/c/a/49HansD\\_20090728\\_00001019-Cluster-Munitions-Prohibition-Bill-First.htm](http://www.parliament.nz/en-NZ/PB/Debates/Debates/7/c/a/49HansD_20090728_00001019-Cluster-Munitions-Prohibition-Bill-First.htm); Hansard debate on second/final reading, 10 December 2009: <http://www.parliament.nz/en->

relevant, input from the Ministry of Foreign Affairs and Trade (MFAT), which helped draft the bill together with Crown Law Office, is also mentioned.

Many provisions of the Cluster Munitions Prohibition Act 2009 are similar to those contained in the Antipersonnel Mines Prohibition Act 1998, which implements the 1997 Mine Ban Treaty.<sup>5</sup> Clause 5(1) of the Cluster Munitions Prohibition Act provides the same penal sanctions (up to 7 years) and fines (up to NZ\$500,000) as does the Antipersonnel Mines Prohibition Act.

## **Title**

Following the ANZCMC submission and FADT recommendation, the brackets around the word ‘Prohibition’ in the title—Cluster Munitions (Prohibition) Bill—were removed to more clearly reflect the purpose and contents of the bill.

## **Definition of Transit**

The ANZCMC submission recommended that the Bill’s definition of transfer of cluster munitions also explicitly include ‘transit’ of the weapon, but this was not accepted by FADT and the Act does not include transit. The coalition had argued that the definition of transfer would be stronger if it explicitly included transit of the weapon. On the Mine Ban Treaty, New Zealand’s position is that transit of antipersonnel mines is banned.<sup>6</sup> The ANZCMC will seek clarification from the government that New Zealand vies the Convention’s prohibitions on assistance and transfer as prohibiting prohibit the transit of cluster munitions across, above, or through national territory.

## **Definition of Cluster Munition**

The ANZCMC submission said the Bill’s definitions of the terms ‘explosive submunitions’ and ‘explosive bomblets’ were “problematic” because they differed significantly from the definitions used in the Convention on Cluster Munitions and recommended that the exact language provided in Article 2 of the Convention be used. FADT agreed with this recommendation and sought to make the definition of cluster munition clearer, including with the addition of a new Clause 12A.

## **Application**

The ANZCMC submission stated that Clause 9 dealing with application of the Bill abroad “may inadvertently criminalize humanitarian action by New Zealand citizens/residents working for clearance operators.” FADT agreed and recommended

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[NZ/PB/Debates/Debates/4/3/d/49HansD\\_20091210\\_00000900-Cluster-Munitions-Prohibition-Bill-Procedure.htm](#)

<sup>5</sup> Anti-Personnel Mines Prohibition Act 1998, <http://www.legislation.govt.nz/act/public/1998/0111/latest/DLM17801.html>

<sup>6</sup> In October 2002, the Campaign Against Landmines (CALM) received a letter from the New Zealand Ministry of Foreign Affairs that stated the government’s position that the transit of antipersonnel mines through New Zealand’s territorial waters is prohibited by domestic laws. It also noted that efforts to enforce these laws against a vessel exercising the right of innocent passage were limited. Letter to John V Head, Convenor, CALM, from Geoff Randal, Director of the Disarmament Division, Ministry of Foreign Affairs, 15 October 2002. See ICBL, *Landmine Monitor Report 2003* (Washington DC: Human Rights Watch, 2003).

recommended a new subclause--Clause 9(2)(d)--to provide for the application of the Act overseas to a body incorporated in New Zealand. FADT also recommended new language--Clause 12(4)(a)--to ensure that such people are not inadvertently criminalized for humanitarian action. It also recommended additional clarifications on application for the purposes of prosecution. These recommendations are included in the Act.

## **Divestment**

The ANZCMC submission recommended that Clause 11(1) be amended to explicitly prohibit investment in the production of cluster munitions. FADT agreed and recommended new language to make investment by a person or company in cluster munitions an offence. The Act now provides an extensive definition of what a fund is and includes clear sanctions. The Act's new Clause 11A, states that "A person commits an offence who provides or invests funds with the *intention* that the funds be used, or *knowing* that they are to be used, in the development or production of cluster munitions" [italics added by ANZCMC]. During the 10 December debate on the legislation, the government stated, "The wording of the offence is not directed at investors who unknowingly find themselves with an investment in a company involved in cluster munitions production, but there would, however, be a reasonable expectation that fund managers and investors would investigate the full portfolio of a company before investing, in case prohibited activities were involved."

The ANZCMC will seek further clarification from the government on the qualifying words 'knowingly' and 'intention,' as they are the highest standard possible and thus do not penalize those who invest recklessly or negligently. Using the Belgian divestment law (March 2007) and an example, the ANZCMC will ask the New Zealand government to identify and maintain a list of cluster munition producers.

## **Prohibition on Assist**

The Act prohibits assistance with acts banned by the Convention without qualification or limitation (e.g. 'direct' or 'active' assistance), reflecting 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. The ANZCMC Submission recommended the addition of the phrase 'under any circumstances' to apply to all of the prohibitions of the Bill (as the Convention does), but this was not accepted by FADT.

## **Interoperability**

The ANZCMC submission described the Bill's addition of 'merely' before 'engage in operations, etc' as "helpful" because it suggested that participation in a joint military operation is permitted, but anything more than that is not. The ANZCMC recommended use of the term 'that might engage' in banned acts rather than 'that engage,' to cover a wider range of non-states parties and situations and make the Bill more consistent with the Convention's Article 21(3). FADT did not accept this recommendation and described the words 'that engage' as "limiting" and instead proposed insertion of the words 'has the capability' before 'engage' in Clause 12(5). The addition of this language in the Act ('has the capability') was unhelpful as it has helped to make the application broader.

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

The ANZCMC submission said, “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” and recommended the deletion of the bill’s language allowing for the importation, development, or production of cluster munitions for training purposes. FADT recommended that the words “developed, produced” be deleted as unnecessary, which was done in the Act, but retained the provisions allowing for importation of cluster munitions for training. During the 10 December debate, the government stated that, “[t]here is no present intention to bring any cluster munitions into New Zealand. However, the bill does not rule out that possibility, as new types of cluster munitions may be developed and New Zealand Defence Force personnel may need appropriate training to continue our ongoing humanitarian assistance.” According to MFAT, the retention of cluster munitions for training was a government policy position agreed by Cabinet in 2008 ahead of the Dublin negotiations.<sup>7</sup>

## **Positive Obligations**

The ANZCMC submission recommended that the Convention’s positive obligations (Article 21) to promote universalisation and the norms of the Convention with states not party, “make best efforts” to discourage cluster munition use, and notify non-state party allies of its obligations under the Convention be inserted into the Bill. The ANZCMC urged the government to frequently undertake notification at both the military and political levels. These obligations have not been included in the Act. During the 10 December debate, the government stated that, the Article 21’s positive obligations of “do not need legislative implementation” and noted, “Rather, they will be implemented through mechanisms such as diplomatic representation.”

The ANZCMC will continue to urge the New Zealand to:

1. Specify the range of measures that will be taken to discourage prohibited acts and encourage universalization;
2. Detail the form and content that notification will take, as well as the levels and frequency of notification;
3. Detail how the implementation of these obligations will be made public, including through the Convention’s annual transparency reporting mechanism.

## **Attorney General’s consent to prosecute**

As a result of its review, FADT recommended the addition of a “procedural protection that is often found in statutes that give New Zealand courts extraterritorial jurisdiction” by requiring the Attorney-General’s consent to prosecute the offenses provides for in the bill. This change makes it harder to prosecute and leaves more room for discretion, but that may be consistent with New Zealand law and is not clarified by the Convention. There is no similar language in the Antipersonnel Mines Prohibition Act 1998.

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<sup>7</sup> Email to ANZCMC Coordinator Mary Wareham from Jillian Dempster, MFAT, 17 November 2009.