CONSISTENCY WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990:
CLUSTER MUNITIONS (PROHIBITION) BILL

1. We have considered whether the Cluster Munitions (Prohibition) Bill (PCO 13413/11.0) (the 'Bill') is consistent with the New Zealand Bill of Rights Act 1990 (the 'Bill of Rights Act'). We understand the Bill is likely to be considered by the Cabinet Legislation Committee at its meeting on Thursday, 18 June 2009.

2. The Bill will enable ratification by New Zealand of the United Nations Convention on Cluster Munitions (the ‘Convention’), adopted by the United Nations on 30 May 2008 and signed by New Zealand on 3 December 2008. The Bill implements New Zealand’s obligations under the Convention to prohibit the use, acquisition, possession, retention, stockpiling and transfer of cluster munitions, subject to certain exceptions.

3. We have concluded that the Bill does not appear to be inconsistent with the rights and freedoms affirmed in the Bill of Rights Act.

4. In reaching this conclusion, we have considered potential issues of consistency under sections 21 and 25(c) of the Bill of Rights Act. Our analysis of these issues is set out below.

POTENTIAL ISSUES OF CONSISTENCY UNDER THE BILL OF RIGHTS ACT

Section 21 – the freedom from unreasonable search and seizure

5. Section 21 of the Bill of Rights Act provides the right to be secure against unreasonable search and seizure. There are two limbs to the section 21 right. First, section 21 is applicable only in respect of those activities that constitute a ‘search or seizure’. Second, where certain actions do constitute a search or seizure, section 21 protects only against those searches or seizures that are ‘unreasonable’ in the circumstances.

6. Clause 13 of the Bill provides that cluster munitions in respect of which an offence has been committed may be seized without a warrant by an authorised officer and forfeited to the Crown.

7. The powers granted under clause 13 of the Bill constitute a ‘seizure’ for purposes of section 21 of the Bill of Rights Act. We consider, however, that section 21 is not engaged because the seizure is reasonable in the circumstances contemplated by clause 13. Clause 13 only permits the seizure of cluster munitions when an offence has been committed and will typically operate post-conviction. While clause 13 may permit warrantless searches and seizures to be undertaken, for instance, in respect of unwitting transferees of cluster
munitions, we note that such conduct may only be conducted by an officer and, implicitly, must be exercised by that officer in a manner that is consistent with the Bill of Rights Act.

**Section 25(c) – the presumption of innocence**

8. Section 25(c) of the Bill of Rights Act affirms the right to be presumed innocent until proved guilty. This means that an individual must not be convicted where reasonable doubt as to his or her guilt exists; therefore, the prosecution in criminal proceedings must prove, beyond reasonable doubt, that the accused is guilty.

**Clause 17 – summary offences**

9. Clause 17 of the Bill sets out a series of summary offences. Clause 17(2) provides that a person commits an offence if she or he, without reasonable excuse, fails or refuses to comply with the notice, recording and reporting requirements in clause 17(1).

10. Clause 17(2) is a strict liability offence. Strict liability offences give rise to an issue of inconsistency with section 25(c) of the Bill of Rights Act because, while the prosecution is required to establish the elements of the offence, the accused is required to prove (on the balance of probabilities) a defence. This means, where an accused is unable to prove the defence, that he or she could be convicted even though reasonable doubt exists as to his or her guilt.

11. A provision containing a strict liability offence may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of section 5 of that Act. In our view, justification for strict liability provisions can occur where: the offence relates to a public welfare regulatory regime rather than truly criminal behaviour; the information sought is 'peculiarly within the realm of the defendant'; and the penalty for breach is at the lower end of the scale.

12. The reporting requirements in clause 17 will enable the Government to monitor cluster munitions and comply with New Zealand’s international reporting obligations under the Convention. In addition, it is reasonable to require persons who are authorised under the Bill to possess and use cluster munitions to comply with clause 17 and for non-compliance without reasonable excuse to be an offence. We note that proof of whether non-compliance is reasonable is likely to be information available only to the accused. Finally, we note that the penalty for non-compliance, while on the high end, is within the range considered to be appropriate for strict liability offences.

13. For these reasons, we consider that clause 17(2) is a reasonable limitation on the right to be presumed innocent under section 25(c) of the Bill of Rights Act.

**Clauses 11 and 12 – indictable offences**

14. Clause 11 of the Bill sets out a series of indictable offences, while clause 12 provides a number of exceptions for conduct that does not constitute an offence under the Bill.
15. For the sake of completeness, we note that the exceptions listed in clause 12 are not cast as defences, which would shift the burden of proof to the accused, contrary to section 25(c) of the Bill of Rights Act. Rather, these exceptions form part of the definition of an offence under the Bill. The Ministry of Foreign Affairs and Trade advises that clause 12 is intended to provide a further guide as to what constitutes an offence under clause 11. As such, the burden of proof to establish the offences in clause 11 will remain with the prosecution. Accordingly, we do not consider that clause 12 constitutes a prima facie breach of section 25(c) of the Bill of Rights Act.

CONCLUSION

16. This advice has been prepared by the Public Law Group and the Office of Legal Counsel. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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