

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

- 8.1 The *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (New York, 25 May 2000)* (the Optional Protocol) is intended to establish minimum safeguards to prevent the involvement of children in armed conflict.
- 8.2 The Optional Protocol strengthens the protections contained in the *Convention on the Rights of the Child* (the Convention), to which Australia is a Party.¹ Moreover, the Optional Protocol establishes 18 as the minimum age for direct participation in hostilities, for compulsory recruitment by State Parties, and for recruitment into armed groups. It determines that State Parties shall raise the minimum age for voluntary recruitment beyond the current minimum of 15.

Background

- 8.3 The recruitment and use of children in armed conflict continues to be a serious problem for the international community. The United Nations Children's Fund (UNICEF) estimates that 300,000 child soldiers, persons under the age of 18, are involved in more than 30 conflicts worldwide.² Mr Richard Sadleir, from the Department of Foreign Affairs and Trade (DFAT), stated

1 National Interest Analysis (NIA), para. 5.

2 NIA, para. 5.

The use of child soldiers in conflicts in the Asia-Pacific region demonstrates that this is a problem which directly affects Australia. It affects us by negatively impacting on the social cohesion, economic prospects and stability of our region. It is in our interests to see a prosperous, stable and peaceful Asia-Pacific region, and we believe that ratification of this optional protocol would positively contribute to this aim.³

- 8.4 Mr Sadleir advised the Committee that Australia had been active in ratifying international instruments that seek to enshrine in law and practice the rights of the child. Australia was among the first countries to sign and ratify the Convention on the Rights of the Child in 1990 and we have been active in progressing ratification of the optional protocol to the convention on the involvement of children in armed conflict.⁴
- 8.5 The *Convention on the Rights of the Child* (the Convention) entered into force generally on 2 September 1990.⁵ The Human Rights and Equal Opportunity Commission (HREOC or the Commission) advised the Committee that the Convention is 'the most widely ratified international human rights instrument with 192 state parties'.⁶
- 8.6 Under Article 38 of the Convention, Australia is obliged to prevent persons who have not attained the age of 15 from being directly involved in hostilities or recruited into the Australian Defence Force (ADF). In addition, when recruiting among those who have attained the 15 years, but who have not attained the age of 18, Australia must endeavour to give priority to those who are oldest.
- 8.7 The National Children's and Youth Law Centre advised the Committee that that during the drafting of the Convention, Article 38 was
- one of the Articles that caused greatest dissension amongst the countries present at the working sessions. The Australian delegation (and delegates from Scandinavian and other western countries) argued strongly that the restriction in

3 Mr Richard Sadler, *Transcript of Evidence*, 9 August 2004, p. 23.

4 Mr Richard Sadler, *Transcript of Evidence*, 9 August 2004, p. 23.

5 Multilateral Treaties Deposited with the Secretary-General, Part I, United Nations Treaties, Chapter IV. Human Rights, 11. Convention on the Rights of the Child, <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty19.asp>> (accessed 4 December 2004).

6 Human Rights and Equal Opportunity Commission (HREOC), *Submission 18*, p. 9.

Article 38 be set at a higher age than 15 years. The the age of 15 was eventually decided on as a compromise.⁷

Features of the Agreement

- 8.8 The National Interest Analysis (NIA) states that Australia was an ‘active participant throughout the negotiation of the Protocol and the final outcome fully reflects our preferred position’.⁸
- 8.9 The Agreement establishes a number of key obligations, including
- to take all feasible measures to ensure that members of a State Party’s armed forces who are not 18 years old do not take a direct part in hostilities (Article 1)
 - to ensure that persons who are not 18 years old are not compulsorily recruited into a State Party’s armed forces (Article 2)
 - to raise the minimum age for voluntary recruitment above 15 years, as established in the Convention, and that State Parties deposit a binding declaration upon ratification specifying their minimum age for voluntary recruitment and description of the safeguards adopted to ensure that such recruitment is not forced or coerced (Article 3)
 - that those State Parties permitting voluntary recruitment into their armed forces under the age of 18 shall maintain safeguards to ensure that the recruitment is genuinely voluntary, it occurs with the informed consent of the person’s parents or guardians, the persons are fully informed of the duties involved in military service, and that the person provides reliable proof of age prior to acceptance into the armed forces (Article 3)
 - that armed groups, as opposed to a State’s armed forces, do not recruit or use in hostilities persons under the age of 18 years (Article 4)
 - that State Parties take all feasible measures to prevent recruitment and the use of children by armed groups (including the adoption of legal measures necessary to prohibit and criminalise such practices) (Article 4)
 - to proscribe the preclusion of provisions in the law of a State Party or in international instruments and international humanitarian law

7 National Children’s and Youth Law Centre, *Submission*, p. 1.

8 NIA, para. 6.

that are more conducive to the realisation of the rights of the child (Article 5)

- that State Parties take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the Optional Protocol, and to make its principles and provisions widely known and promoted to adults and children (Article 6)
- that State Parties take all feasible measures to demobilise or otherwise release from service persons recruited or used in hostilities contrary to the Optional Protocol and provide appropriate assistance for their recovery (Article 6)
- to cooperate in the implementation of the Optional Protocol and provide assistance through multilateral, bilateral or other programmes, or through a voluntary fund established in accordance with the General Assembly rules (Article 7)
- reporting procedures allowing the Committee on the Rights of the Child to monitor the implementation of the Optional Protocol (Article 8).⁹

Australia's current compliance with the Protocol

Australian Defence Force policy

8.10 The ADF is already in compliance with the Optional Protocol.¹⁰ The NIA states that on 28 June 2002, the Chief of the Defence Force and the Secretary of the Department of Defence jointly signed Defence Instructions (General) PERS 33-4 (the Defence Instruction).¹¹ The purpose of the Defence Instruction is to give effect to the provisions of the Optional Protocol, detailing the ADF's minimum voluntary recruitment age and the conditions of employment that apply to ADF members under 18 years of age.¹² The Committee understands that the Defence Instruction was effective as at 30 June 2004, before Australia signed the Optional Protocol.¹³

9 NIA, paras 11-17.

10 NIA, para. 7 and Group Captain Michael Maher, *Transcript of Evidence*, 10 August 2004, p. 7.

11 NIA, para. 18 and Air Commodore Roberts, *Transcript of Evidence*, 10 August p. 8.

12 NIA, para. 18 and Defence Instructions (General) PERS 33-4 (the Defence Instruction), para. 4.

13 Air Commodore Lee Roberts, *Transcript of Evidence*, 10 August 2004, p. 2.

8.11 The Defence Instruction determines that the minimum voluntary recruitment age is 17 years. Air Commodore Lee Roberts stated that

We require, on the day that they are actually signed up into the Defence Force, that they be 17 years of age. They have to provide proof of that. They have to have a full birth certificate or a certified copy of one. That is in accordance with the Defence Instruction, so all commanders are aware of that. On top of that, within the Defence Force Recruiting Organisation we have our own internal policy which says that, at the time they are (sic) actually go through the assessment day, they must be a minimum of 16 years and nine months. That is to ensure that we are not wasting their time and our time, because we would not be able to sign them up for at least three months after that. The other aspect is that, because a lot of people who join us now are in technical trades, the testing is quite extensive. It involves psychological tests. The younger they are, the less relevant those tests are.¹⁴

8.12 The Defence Instruction determines that entrants to military schools, apprentices and members of Service cadet schemes are exempt from the minimum voluntary recruitment age of 17 years.¹⁵ Moreover

Age limitations do not apply to entrance to military schools. This exemption extends to civilian institutions used by the ADF to train members, and in particular, apprentices.¹⁶

And

As members of Service cadet schemes are not recruited into the ADF, and are therefore not members of the ADF, age restrictions do not apply.¹⁷

8.13 The NIA states that

candidates under 17 years must have approval from the single Service Career Management Agency and must reach 17 years of age prior to completion of training in a designated military school.¹⁸ Defence interviewers endeavour to ensure that these candidates have the maturity to cope with

14 Air Commodore Lee Roberts, *Transcript of Evidence*, 10 August 2004, p. 2.

15 Defence Instruction, para. 4.

16 Defence Instruction, para. 17.

17 Defence Instruction, para. 18.

18 NIA, para. 19.

separation from family and the psychological rigours of military training.¹⁹

8.14 Air Commodore Roberts advised the Committee of the number and proportion of permanent force personnel in the ADF under 18 years

Within the trained force—in other words, people who are fully trained and in units—there are 12 members under 18 years of age. They are currently 17. There are 10 men and two women. Within the training course—those who are with training units or in some form of training—there is a total of 242, which brings the total number of permanents aged 17 in the permanent Defence Force to 254. Of those, 46 were under 17½ on 30 June. The other 208 were over 17½...The percentage of members under 18 in the Defence Force was 0.5 per cent on 30 June.²⁰

8.15 Also

The Defence Force Academy takes 290 students each year, and the majority of that first year would be at least 17. So there is your first 100. And then a large number of Army come in as general entry...So, generally, the Army would be the one which would have the younger members coming in. In the case of Air Force and Navy, they tend again to be in technical trades where they might be a year older and, if not, they will certainly be in training for lengthy periods.²¹

8.16 The Department of Defence submission to the Committee advised that the ‘number of personnel aged 17 in the Reserves is 129 males and 9 females’.²² At the public hearing on 10 August 2004 the Committee sought clarification on the application of age limits under the Optional Protocol to reservists. Air Commodore Roberts affirmed that they are treated ‘just the same as anyone else through the recruiting system’.²³ Further

In terms of them going to an operational area, they have to be brought onto full-time service. To come onto full-time service, they come under the normal command structure. Again, the 18 years applies.²⁴

19 NIA, para. 19. See also Mr Richard Sadlier, *Transcript of Evidence*, 9 August 2004, pp. 24-25.

20 Air Commodore Lee Roberts, *Transcript of Evidence*, 10 August 2004, p. 2.

21 Air Commodore Lee Roberts, *Transcript of Evidence*, 10 August 2004, p. 5.

22 Department of Defence, *Submission*, p. 1.

23 Air Commodore Lee Roberts, *Transcript of Evidence*, 10 August 2004, p. 6.

24 Air Commodore Lee Roberts, *Transcript of Evidence*, 10 August 2004, p. 6.

Contractors

- 8.17 The Committee was interested in the protections afforded to contractors and apprentices working for the Department of Defence in hostile environments. Air Commodore Simon Harvey stated

I do not know the detail of what protocols would be applicable. I think the point is made that it is an unlikely scenario—that we would actually deploy contractors into a situation where they would be directly involved in operating in a platform environment. I imagine there are mechanisms in place to ensure that those people are quarantined as best as is possible from operations.²⁵

Group Captain Michael Maher added

generally, because we will be paying extra premiums for the contractors to take people into a theatre we would probably not allow them to take people into a theatre we would probably not allow them to take an apprentice in who needs constant supervision, because effectively you need 1½ or two people to do one person's job. So that would not be cost effective, and I doubt that we would agree to that.²⁶

- 8.18 To this point HREOC's submission to the Committee considers that the ADF should take measures to ensure that minors are not directly or indirectly involved in armed conflict.²⁷ Further, the Commission advised that as a minimum

the *Convention on the Rights of the Child* provides that State Parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities.²⁸

Peacekeeping and other operations

- 8.19 The Defence Instruction determines that

Where a minor is on the strength of a unit that is required to deploy to an area of hostility, the minor is not to deploy with the unit. In the case of a unit that is in transit or on exercise,

25 Air Commodore Simon Harvey, *Transcript of Evidence*, 10 August 2004, p. 5.

26 Group Captain Michael Maher, *Transcript of Evidence*, 10 August 2004, p. 5.

27 HREOC, *Submission 18.1*, p.

28 HREOC, *Submission 18.1*, p.

and is required to deploy at short notice, minors in that unit are to be returned to a safe area without undue delay.²⁹

- 8.20 The Committee sought clarification on ADF policy in relation to participation of persons under 18 in peacekeeping or armed conflict overseas. Group Captain Maher stated

That same rule is applied to everything that is an operation. It is less of a problem when we go on those UN peacekeeping missions because generally there are only a few personnel required, and they are generally much more experienced and take up quite responsible jobs in the UN peacekeeping force. Generally, the minimum ranks are around the sergeant or captain level, in which case they are well and truly over 18.³⁰

- 8.21 He further explained that only in the most extreme cases will a minor be left of a unit, such as a ship, that goes into an operation.³¹

Norwegian measures to protect children, and voluntary recruitment under 18 years

- 8.22 The Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia advised the Committee of Norway's legislation that enables 17 year olds to have a military career without formally becoming members of the armed forces.³²

- 8.23 HREOC explained that it

understands, from the limited information available to it, that Norway has recently prohibited the recruitment, both compulsory and voluntary, of persons under the age of 18 years.³³ While it does allow persons above the age of 16 to join the Home Guard Youth, and volunteers over the age of 17 years to be affiliated with the armed forces, for example under apprenticeships, person under the age of 18 years enjoy the following protections

- they are not considered to be members of the armed forces in any other way

29 Defence Instructions, para. 12.

30 Group Captain Michael Maher, *Transcript of Evidence*, 10 August 2004, p. 3.

31 Group Captain Michael Maher, *Transcript of Evidence*, 10 August 2004, p. 3.

32 The Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia, *Submission*, p. 2.

33 The Commission understands that the amendments came into force under Om lov om endringer i lov 17. juli 1953 nr. 28 om Heimevernet og lov 17. juli 1953 nr. om verneplikt (heving av aldersgrenser for militær teneste) and that no English translation is available.

- they are not permitted to form part of the mobilisation force or in any other way be affected by mobilisation plans;
- they are free at any time to terminate their affiliation with the armed forces with immediate effect
- they are to be immediately be released from their affiliation with the armed forces if an armed conflict breaks out or becomes imminent, or if the armed forces or any part thereof has been ordered on a war footing
- they shall not be allowed to receive training in combatant disciplines nor shall they be allowed to participate in any form of combatant activities.³⁴

8.24 The Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia considers that it would be beneficial for Australia to adopt a similar scheme.³⁵

8.25 In addition, HREOC notes that during the negotiation of the Optional Protocol

many delegations and NGOs as well as the International Committee of the Red Cross, the UN High Commissioner for Human Rights and the special representative of the Secretary-General for children in armed conflict advocated a minimum age of 18 for voluntary recruitment. In addition, the Committee on the Rights of the Child has repeatedly recommended that states do not voluntarily recruit persons below the age of 18 years.³⁶

8.26 The Commission suggests that

the Australian government consider taking measures to incrementally implement this recommendation. In the interim it might consider providing further protections for voluntary recruits under the age of 18 years (remembering that the

34 HREOC, *Submission 18.1*, pp. 3-4. This information is taken from a paper circulated by the Norwegian Delegation to the European Conference on the Use of Children as Soldiers, Berlin, (18-20 October 1999), cited on the Coalition to Stop the Use of Child Soldiers website <http://www.child-soldiers.org/cs/childsoldiers.nsf/0/367475ace298ace080256ble00533747?OpenDocument>

35 The Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia, *Submission*, p. 2.

36 HREOC, *Submission 18*, pp. 5-6 and Mr Craig Lenahan, *Transcript of Evidence*, 9 August 2004, p. 29. See also HREOC, *Submission 18.1*, p. 4, The Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia, *Submission*, p. 2, and National Children's and Youth Law Centre, *Submission*, p. 3.

requirements of the Optional Protocol are minimum standards).³⁷

Also

if the ADF decides to continue recruiting persons under the age of 18 years the Commission would strongly support Australia implementing measures similar to the Norwegian model for their protection.³⁸

8.27 The Committee was interested as to whether the ADF had considered the example of Norway. Air Commodore Robert advised

No, we have not. There are two issues with that. The first is how it would fit into the way we regard military service in Australia and in the Australian Defence Force. We are quite restricted in the numbers we are allowed to have and we are constantly striving to have anyone that we have in the Defence Force as close to combat ready as possible. That is one issue. The second issue, which affects me more in my primary work, is actually getting the number of young people that are available in the community into the Defence Force to meet the numbers we require. A lot of that is based on the fact that the majority of students completing high school throughout Australia are 17; a lot of them are under 18 at that stage. If we do not recruit them at that stage—because, again, most of the training these days in all three services is reasonably high skills training—it will be too late; they will have gone on somewhere else.³⁹

Consultation

8.28 The Committee is aware that there is broad community interest in, and support for Australia's ratification of the Optional Protocol.⁴⁰ Mr Sadleir advised that ratification would accord with the expectations of the public following Australia's signature to the Optional Protocol in 2002.⁴¹

8.29 The Committee understands that the state and territory governments were advised of the proposed treaty action through the Standing

37 HREOC, *Submission 18*, p. 6.

38 HREOC, *Submission 18.1*, p. 4.

39 Air Commodore Lee Roberts, *Transcript of Evidence*, 10 August 2004, pp. 2-3.

40 NIA, para. 6.

41 Mr Richard Sadlier, *Transcript of Evidence*, 9 August 2004, p. 24.

Committee on Treaties and Standing Committee of Attorneys-General.⁴²

8.30 The ACT and Queensland Governments advised the Committee that they support Australia's ratification and recognise that it is 'a significant step forward in efforts to protect the human rights of children worldwide'.⁴³

8.31 HREOC advised the Committee that it supports ratification and implementation of the Optional Protocol as it 'is in the best interests of children as it contains important safeguards against their use in armed conflict'.⁴⁴

8.32 The Committee is aware that the Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia also supports Australia's ratification and believes that it would be a 'step towards building a global moral repugnance to the use of child soldiers'.⁴⁵ The Mission also acknowledged that they were 'aware that there are veterans from the Vietnam War that report that they continue to suffer trauma' from their experiences with child combatants.⁴⁶ Moreover, the Mission considers that wide support for the Optional Protocol

is likely to reduce the possibility that Australian Defence Force personnel will face the situation of having to deal with child combatants.⁴⁷

Reservations concerning Australia's ratification

8.33 The National Children's and Youth Law Centre advised the Committee of one reservation they have in relation to Australia's ratification of the Optional Protocol concerning the involvement of young people in peacekeeping and reconstruction activities overseas.⁴⁸ The Centre states that as the Australian military regularly

42 NIA, para. 23 and NIA, Consultations Annex A.

43 ACT Government, *Submission*, p. 1 and Queensland Government, *Submission*, p. 1.

44 HREOC, *Submission 18*, p. 10.

45 Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia, *Submission*, p. 1.

46 Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia, *Submission*, pp. 1 and 2.

47 Justice and International Mission Unit, Synod of Victoria and Tasmania of the Uniting Church in Australia, *Submission*, p. 1.

48 National Children's and Youth Law Centre, *Submission*, p. 3.

undertakes peacekeeping and reconstruction activities in states that are recovering from conflict

We are not opposed to young people playing their part in such activities in some circumstances, whether through the military or through volunteer organisations as long as appropriate safe measures are employed, and they are not permitted or required to be involved in combat.⁴⁹

8.34 The Committee believes that the Defence Instructions adequately address the National Children's and Youth Law Centre concerns (as discussed in paras 8.19-8.21).

8.35 The Australian Patriot Movement, whilst supporting Australia's ratification, suggests that major states should also address the conditions that lead to children becoming involved in armed conflict.⁵⁰ The Committee acknowledges the importance of prevention in this issue and understands that the Optional Protocol encompasses these concerns under Article 7, whereby

State Parties shall cooperate in the implementation of the Optional Protocol, including in the prevention of any activity contrary to the Protocol and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol, including through technical cooperation and financial assistance.

8.36 The Committee hopes that the Government will actively enforce Article 7 through the work of Australia's foreign aid program in conjunction with the Department of Defence and DFAT.

Leadership role for Australia

8.37 The Committee agrees with HREOC that ratification and implementation of the Optional Protocol would allow Australia to show leadership on the issue of children in armed conflict, and add further momentum to the international effort to protect children's rights.⁵¹ The ACT Government states that

Positive action by Australia to encourage the widest possible adherence and implementation of this important convention would be particularly valuable.⁵²

8.38 Moreover, HREOC considers that

49 National Children's and Youth Law Centre, *Submission*, p. 3.

50 National Patriot Movement, *Submission 19.1*, pp. 1-2.

51 HREOC, *Submission 18*, p. 9.

52 ACT Government, *Submission*, p. 1.

As the current Chair of the United Nations Commission on Human Rights, Australia has a unique opportunity to demonstrate human rights leadership in the field of children's human rights. Australia's signature and ratification of the Optional Protocol to (sic) would send a clear signal to the international community of the importance of these principles and Australia's continued commitment to their implementation.⁵³

8.39 The Committee understands that many states in the Asia Pacific region are yet to ratify the Optional Protocol.⁵⁴ Mr Sadleir stated that Australia's

ratification of the optional protocol would enhance our ability to encourage states in our region which have not yet done so to accede to this important instrument. Ratification of the optional protocol would also align our international obligations with the active approach of our development and cooperation program to assist countries in the Asia-Pacific deal with the effects of the recruitment and use of child soldiers.⁵⁵

For example

In Sri Lanka, the Australian Government is funding a number of activities aimed at the reintegration and rehabilitation of child soldiers from conflict-affected areas. These activities include the provision of humanitarian assistance, counselling, training, and identifying employment opportunities. The aid program also funds assistance for displaced children in conflict areas in Mindanao, particularly psycho-social services.⁵⁶

8.40 The NIA states that ratification will signal Australia's strong support and continuing commitment to the promotion and protection of child rights in this area, and also to the broader objectives of the Convention.⁵⁷

53 HREOC, *Submission 18*, pp. 10-11.

54 NIA, para. 8.

55 Mr Richard Sadler, *Transcript of Evidence*, 9 August 2004, pp. 23-24. See also NIA, para. 9.

56 NIA, para. 9.

57 NIA, para. 6.

Implementation

- 8.41 As the ADF is already in compliance with the Optional Protocol no changes to Defence policy or regulations are required.⁵⁸

Amendment to the Criminal Code

- 8.42 The NIA states that it is necessary for there to be one amendment to the Commonwealth *Criminal Code* to implement the Optional Protocol.⁵⁹ It suggests that section 268.88, that creates criminal offences of using, conscripting or enlisting persons under the age of 15 years in an internal armed conflict, be amended as it

does not fully accord with article 4 of the Optional Protocol requiring states to adopt legal measures to prohibit the recruitment or use in hostilities of children under 18 years of age by armed groups that are distinct from the armed forces of a State.⁶⁰

- 8.43 However, HREOC's submission states that it is

of the view that if Australia wished to implement its obligation under article 4(2) in this way it would also be necessary to amend s 268.68 of the *Criminal Code*, which contains the same offences as s 268.88, but applies in international, as opposed to internal, armed conflict.⁶¹

- 8.44 At the Committee's public hearing on 9 August 2004 Mr Geoff Skillen, from the Attorney-General's Department, advised that the Government intends to introduce legislation that amends both sections of the Criminal Code referred to in the HREOC submission.⁶²

- 8.45 Mr Craig Lenehan, from HREOC, subsequently stated

An alternative and possibly preferable approach would be to create a new provision which more closely reflects the wording of article 4 of the optional protocol. In particular, such a provision might make use of the term 'hostilities' and pick up the notion of armed groups distinct from the armed forces of a state.⁶³

58 NIA, para. 7.

59 NIA, para. 20.

60 NIA, para. 20.

61 HREOC, *Submission 18*, p. 7.

62 Mr Geoff Skillen, *Transcript of Evidence*, 9 August 2004, p. 26.

63 Mr Craig Lenehan, *Transcript of Evidence*, 9 August 2004, p. 29.

Possible amendment to the Defence Act

8.46 The Committee is aware that HREOC considers it appropriate for the protections in the Defence Instructions to be incorporated into the *Defence Act*. Mr Lenehan explained that

Amending the Defence Act would place responsibility for these important protections with parliament rather than the Secretary of Defence and Chief of Defence Force and, as such, would better entrench those protections.

Including those protections in the Defence Act would also assist Australia to meet the obligation in article 6(2) of the optional protocol, which requires that Australia make the principles and provisions of the optional protocol widely known. Incorporating those provisions in the Defence Act would, in the commission's view, raise the profile of those protections and ensure that they are easily accessible to members of the public. In that regard, the commission understands that the Defence Instruction is only available on written request to the Department of Defence.⁶⁴

8.47 At the Committee's public hearing on 10 August Air Commodore Harvey advised

The Defence position is that the defence instruction provides the implementing mechanism for the requirements of the optional protocol. We do not see a requirement for that to be enshrined in legislation *per se*, recognising that that is obviously a policy call rather than a strict legal requirement. The point I would make is that its being in a defence instruction, which is issued by the CDF and the secretary under their powers under section 9A of the Defence Act, means that it does have a source of sorts in legislation already. Obviously, the CDF and the secretary are accountable to the Minister for Defence and, through that mechanism, to the parliament.

I might add that one of the suggestions which was raised in the submission was that by putting it in legislation it would be more openly available to members of the general public. In my experience, if you are a 16- or 17-year-old, you probably do not spend a lot of time reading legislation. I think the more likely scenario would be that they would do a search on the

64 Mr Craig Lenehan, *Transcript of Evidence*, 9 August 2004, p. 28.

Internet and, it being a treaty, it would be recognisable and discoverable for that mechanism.

The short answer to your question is that Defence does not see a need legally to give effect to it. I might also point out that there is a requirement, as I understand it, under the optional protocol to provide a report after two years and also regular reporting under the primary convention. That is again a mechanism which will make sure that we comply with our requirements, notwithstanding the fact that it is not enshrined in legislation.⁶⁵

- 8.48 In response, HREOC submitted to the Committee that as a matter of policy, all rules, instructions, regulations and legislation should be accessible to members of the public in accordance with the principle of open and responsible government. This is particularly important in the case of Australian laws that implement fundamental protections such as those contained in the Optional Protocol. Actual and potential members of the ADF who are minors, their parents and (if necessary) their legal representatives, should have ready access to that information – including on the internet – which they may require at short notice (for example, at a time of imminent conflict).⁶⁶
- 8.49 The Committee considers that it is not necessary to incorporate the protections of the Defence Instruction into the *Defence Act*. However, the Committee is concerned that the inquiry evidence indicates that the Defence Instruction is only available on written request to the Department of Defence. The Committee particularly believes that all important policy documents should be readily accessible by the Australian community through a range of means. Further, as the Optional Protocol is available on the DFAT website, Australia's implementing mechanism should be available on the Department of Defence website.

65 Air Commodore Simon Harvey, *Transcript of Evidence*, 10 August 2004, p. 4.

66 HREOC, *Submission 18.1*, p. 5.

Recommendation 6

The Committee recommends that the Department of Defence ensure that the appropriate implementing mechanism for the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (New York, 25 May 2000)* is readily available on the Department's website and through other means.

Discrepancies between the Optional Protocol and the Defence Instruction

8.50 The Committee acknowledges HREOC's recognition that there are discrepancies between the wording of the Optional Protocol and the protections contained in the Defence Instruction. Specifically, the Defence Instruction does not require that the recruitment of persons under the age of 18 be 'genuinely' voluntary, or that the minor be 'fully' informed about their duties, or that their parents or legal guardians give 'informed' consent, as is required under Article 3(3) of the Optional Protocol.⁶⁷ HREOC considers that the Defence Instruction 'be strengthened to better match the wording of the optional protocol'.⁶⁸ The Committee considers that the Department of Defence should amend the implementing document to include the three additional aforementioned words.

Recommendation 7

The Committee recommends that the Department of Defence include 'genuinely', 'fully' and 'informed' where appropriate in the implementing mechanism for the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (New York, 25 May 2000)* so as to accurately reflect the treaty.

67 HREOC, *Submission 18*, p. 5 and HREOC, *Submission 18.1*, p. 4.

68 Mr Craig Lenehan, *Transcript of Evidence*, 9 August 2004, p. 28.

Article 6

8.51 HREOC also considers that

Article 6(3) is likely to have limited significance for Australia given the absence of armed conflict in Australian territory. However, it would seem to require Australia to ensure that asylum seekers under the age of 18 years who have been involved in armed conflict are given all appropriate assistance for their physical and psychological recovery and their social reintegration. That might include creating a special category of visa for such children. This would also give effect to the pre-existing obligations in articles 22 and 39 of the *Convention on the Rights of the Child* to which Australia is already a party.⁶⁹

Costs

8.52 The NIA states that ratification of the Optional Protocol will have no financial implications at Commonwealth or State and Territory levels.⁷⁰ However, Parties to the Optional Protocol are required to submit a report to the Committee on the Rights of the Child concerning their compliance to the treaty within two years of it entering into force for the Party.⁷¹ According to the NIA, the associated costs for Australia with presenting the report to the Committee in Geneva can be covered by existing resources.⁷²

Entry into force

8.53 The Optional Protocol was adopted by the UN General Assembly on 25 May 2000 and entered into force generally on 12 February 2002. As at 4 December 2004, there were 117 signatories and 88 parties to the Optional Protocol.⁷³

⁶⁹ HREOC, *Submission 18*, p. 8.

⁷⁰ NIA, para. 22.

⁷¹ See Article 8.

⁷² NIA, para. 22.

⁷³ Multilateral Treaties Deposited with the Secretary-General, Part I, United Nations Treaties, Chapter IV. Human Rights, 11.b. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty21.asp>> (accessed 4 December 2004).

- 8.54 Australia signed the Optional Protocol on 21 October 2002. Under Article 10, it would enter into force for Australia one month after the date of the deposit of Australia's instrument of ratification with the UN Secretary-General.

Concluding observations and recommendation

- 8.55 The Committee believes that responsibility lies with the international community to condemn and prevent the involvement of children in armed conflict and that the Optional Protocol is an important mechanism to this effect. Australia's ratification of the Optional Protocol would not only reflect the protections afforded through current Australian law and institutions, but it would contribute to the international effort to address the serious issue of the involvement of children in armed conflict.

Recommendation 8

The Committee supports the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (New York, 25 May 2000) and recommends that binding treaty action be taken