



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

JOINT STANDING COMMITTEE ON TREATIES

**Reference: Treaties tabled on 22 June 2004**

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## **JOINT COMMITTEE ON TREATIES**

**Tuesday, 10 August 2004**

**Members:** Dr Southcott (*Chair*), Mr Wilkie (*Deputy Chair*), Senators Bartlett, Kirk, Mason, Marshall, Santoro, Stephens and Tchen and Mr Adams, Mr Bartlett, Mr Ciobo, Mr Evans, Mr Hunt, Mr Peter King and Mr Scott

**Senators and members in attendance:** Senators Kirk, Mason and Stephens and Mr Adams, Dr Southcott and Mr Wilkie

**Terms of reference for the inquiry:**

To inquire into and report on:

Treaties tabled on 22 June 2004

**WITNESSES**

<b>HARVEY, Air Commodore Simon John, Director General, Australian Defence Force Legal Service, Australian Defence Force.....</b>	<b>1</b>
<b>MAHER, Group Captain Michael Shane, Director of Joint Operations, Department of Defence.....</b>	<b>1</b>
<b>MASON, Mr David, Acting Director, Directorate of Operations and International Law, Department of Defence .....</b>	<b>1</b>
<b>ROBERTS, Air Commodore Lee Colin, Director General, Work Force Planning, Recruitment and Retention, Department of Defence .....</b>	<b>1</b>
<b>PANAYI, Mr Paul, Executive Director, Treaties Secretariat, Department of Foreign Affairs and Trade .....</b>	<b>1</b>
<b>SADLEIR, Mr Richard, Assistant Secretary, International Organisations Branch, Department of Foreign Affairs and Trade .....</b>	<b>1</b>
<b>SKILLEN, Mr Geoff, Principal Legal Officer, Public International Law Branch, Office of International Law, Attorney-General’s Department.....</b>	<b>1</b>
<b>THOM, Mr Steve, Executive Officer, International Organisations Branch, Department of Foreign Affairs and Trade.....</b>	<b>1</b>



**Committee met at 8.08 p.m.**

**Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict**

**HARVEY, Air Commodore Simon John, Director General, Australian Defence Force Legal Service, Australian Defence Force**

**MAHER, Group Captain Michael Shane, Director of Joint Operations, Department of Defence**

**MASON, Mr David, Acting Director, Directorate of Operations and International Law, Department of Defence**

**ROBERTS, Air Commodore Lee Colin, Director General, Work Force Planning, Recruitment and Retention, Department of Defence**

**PANAYI, Mr Paul, Executive Director, Treaties Secretariat, Department of Foreign Affairs and Trade**

**SADLEIR, Mr Richard, Assistant Secretary, International Organisations Branch, Department of Foreign Affairs and Trade**

**THOM, Mr Steve, Executive Officer, International Organisations Branch, Department of Foreign Affairs and Trade**

**SKILLEN, Mr Geoff, Principal Legal Officer, Public International Law Branch, Office of International Law, Attorney-General's Department**

**CHAIR**—Welcome. I declare open this meeting of the Joint Standing Committee on Treaties. As part of the committee's ongoing review of Australia's international treaty obligations, the committee is currently reviewing five treaties tabled in parliament on 22 June 2004. A public hearing was held yesterday at which those treaties were discussed, but the committee was disappointed to learn that witnesses from the Department of Defence were not present to provide valuable input into the committee's consideration of the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict.

A proof transcript of evidence taken yesterday has been provided to committee members and witnesses, and it is expected that the hearing this evening will continue to examine some of these issues as well as some others relating to the optional protocol. I understand that, together with witnesses who will be giving specific evidence on the optional protocol, witnesses from the Department of Foreign Affairs and Trade and the Attorney-General's Department are available to cover any issues of treaty making and international law that might arise.

I remind witnesses that today's proceedings are being broadcast by the Department of Parliamentary Services. Should this present any problems for witnesses, it would be helpful if they would raise the issue now. Although the committee does not require you to give evidence under oath, I should advise you that hearings are legal proceedings of the parliament and warrant

the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. I understand that you do not wish to make any introductory remarks and so we shall proceed to questions. First of all, what is the proportion of people in the Australian Defence Force who are under 18? What sort of number are we looking at?

**Air Cdre Roberts**—I will give you a couple of statistics on this. These, which we pulled out this afternoon, were effective on 30 June this year, so they align with information that we put out in the Defence report. 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 other statistic is just a comparison. The percentage of members under 18 in the Defence Force was 0.5 per cent on 30 June.

**CHAIR**—Could the department provide comment about Australia's policy of recruiting ADF personnel below the age of 18?

**Air Cdre Roberts**—We operate within the Defence Instruction 33-4, which I think you are aware of. 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 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.

**CHAIR**—Is there an age limit for RMC Duntroon and ADFA?

**Air Cdre Roberts**—Once again, we use 17 years of age, which pretty much equates to people completing high school throughout Australia, to a large extent. That is the minimum age we will take. At somewhere like RMC, for officer training they are more likely to be a couple of years older than that when they are actually selected.

**CHAIR**—The Uniting Church made a submission to the committee. They have highlighted the example of Norway, where they have introduced legislation to allow 17-year-olds a military career without formally becoming members of the defence forces. Has the ADF looked at the example of Norway?

**Air Cdre Roberts**—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.

**CHAIR**—Can I also seek clarification of policy with regard to the minimum age for participation in peacekeeping operations or in armed conflict overseas.

**Group Capt. Maher**—We run in accordance with DI(G) PERS 33-4. As a matter of fact, the third item in the personnel management plan for any operation is the age of deploying personnel. The DI(G) reads:

Minors—

that is, persons under the age of 18—

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

such as a ship that may be on exercise in the Indian Ocean but gets sent at short notice to a deployment—

minors in that unit are to be returned to a safe area without undue delay.

Only in the most extreme case will they be left on a unit, such as a ship, that goes into an operation.

**CHAIR**—Would that also apply to things like a peace monitoring group in Bougainville, INTERFET in East Timor or the operation in the Solomon Islands?

**Group Capt. Maher**—Yes. 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.

**CHAIR**—The Uniting Church have told us that the UN requires 18-year-olds as peacekeepers and prefers those aged 21 and over. Would you care to comment on that?

**Group Capt. Maher**—No.

**Mr WILKIE**—You were talking about operations. Would that apply to operations like Operation Relex, where you are looking for illegal immigrants?

**Group Capt. Maher**—On Operation Relex there would possibly be people under the age of 18, but that is not really a hostile environment. There are certain elements on the ships called tactical security sections. Those elements are Army and those people would be over 18 because

they could be involved in some sort of altercation with illegal immigrants or whatever. There could possibly be someone on the ship who is under 18, but they would not be involved.

**Mr WILKIE**—That would not be the case, for example, on a patrol boat, where you would have a small crew, armed boarding parties and people on the boat manning the coast.

**Group Capt. Maher**—Someone under 18 would not be part of a boarding party.

**Mr WILKIE**—But they may be on the ship?

**Group Capt. Maher**—Yes, they may be on the ship.

**Mr WILKIE**—You do not think that would put them in breach of this protocol?

**Group Capt. Maher**—No, not generally.

**Mr WILKIE**—The Human Rights and Equal Opportunity Commission on page 3 of their submission note:

For the most part, Australian law already complies with the minimum requirements contained in the Optional Protocol.

On page 4, they submit:

... it would be preferable if such fundamental protections were incorporated into the *Defence Act* itself. Amending the Defence Act would place responsibility ... with Parliament rather than the Secretary for Defence and Chief of the Defence Force.

Can the department advise whether incorporating the provisions of the optional protocol into the Defence Act would be a feasible course of action and, if not, why not?

**Air Cdre Harvey**—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 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.

**Mr WILKIE**—The other question is more related to non-defence personnel who may be working on defence assets. For example, with the move more and more towards bringing in private contractors, does Defence have a policy on apprentices working with contractors on defence assets which may place them in harm's way?

**Group Capt. Maher**—I have no information on that. It would have to be in the contract.

**Mr WILKIE**—I imagine it would be an unlikely situation, but I am just wondering what protocols would be in place to deal with it.

**Air Cdre Harvey**—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. I do not know whether Group Captain Maher would disagree with that.

**Group Capt. Maher**—That is true. Yes, 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 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.

**Mr ADAMS**—I am concerned about the training, but you do not seem to have any concerns about this protocol and the training for the Defence Force. You think that you can cover it with 17-year-olds. I take it that most of the 254 would be in the college.

**Air Cdre Roberts**—They would be. 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. For instance, of the 12 who are in the trained force, 11 of those are in the Army and one is in the Navy. 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.

**Mr ADAMS**—You do not employ many young apprentices these days; you usually buy in most of that expertise.

**Air Cdre Roberts**—I notice from the previous day's reporting the comments on the apprentices. The Defence Force in fact has not had apprentices for at least 10 years. I think it was in the early nineties that we went away from the old apprentice system which most people think of—in terms of 15-year-old apprentices joining the Navy. You may see advertisements at the moment where we talk about people joining as apprentices or for apprenticeships in the Defence Force. In fact, they are not true apprenticeships; it is actually training. They join the Defence Force and we give them training. It is very similar to the government's New Apprenticeships scheme rather than what most people consider as the traditional apprenticeship.

They are first signed up into the Defence Force, and then they are given training which is the equivalent of what an apprentice would get outside.

**Mr ADAMS**—That is something else. It is passed on. You mentioned 100 in the college and 11. Where would the other 140 be?

**Air Cdre Roberts**—One hundred at the Defence Force Academy; of the remainder, a lot of them would be at the recruit training school for the Army; a smaller number would be at the Air Force recruit training school and the Navy recruit training school. It would easily add up over one year with the sheer numbers we bring in through the Army.

**Mr ADAMS**—Most of those go into the Army at that age?

**Air Cdre Roberts**—A majority would, yes.

**Senator STEPHENS**—I want to ask Air Commodore Roberts about any potential activity by reservists. Are reservists limited by age?

**Air Cdre Roberts**—We treat reservists just the same as anyone else through the recruiting system. They have to meet the same standards and they have to be the same age, so they will be at a minimum age of 17. There will have to be a minimum age of 16 years and nine months before we will actually process them on the assessment day. As far as we are concerned, there is no difference. 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.

**Mr WILKIE**—Would the 254 include reservists?

**Air Cdre Roberts**—No. This was ADF permanent force personnel; it did not include reservists. I did not get that pulled out.

**Mr WILKIE**—Do you have any information about reservists to hand?

**Air Cdre Roberts**—I do not have any with me. I could obtain it.

**Mr WILKIE**—That would be great. Could you take that on notice, please.

**CHAIR**—Could I ask you about the 12 that are under 17—11 Army and one Navy. As I understand it, the minimum age for service in the ADF is 16. However, candidates under 17 must have approval from the single service career management agency and they cannot have completed their training before they are 17 years of age. Is that correct?

**Air Cdre Roberts**—No. That is the minimum requirement; in fact, we operate to a higher standard than that. You cannot be signed up into the Defence Force unless you are 17 years of age to start with. We do not apply the 16 in the Australian Defence Force. It is still there. Should we deem it necessary, that could be changed, but our policy, as spelled out in defence instructions, is 17 years of age to start training.

**CHAIR**—Didn't you say that there were 12 people under 17?

**Air Cdre Roberts**—Sorry, those 12 people were younger than 18. They are the 17-year-olds in the service. My apologies.

**CHAIR**—What of the 254?

**Air Cdre Roberts**—That is the total number. You have 254 in total who are signed up in the permanent Defence Force who are 17 years of age. Of those, 12 are actually fully trained. One is on a ship; the other 11 are in Army field units. The remaining 242 are somewhere in the training system, at one of the training schools.

**CHAIR**—Just so that I get this right, you do not sign 16-year-olds?

**Air Cdre Roberts**—No, we do not. We do not sign anyone younger than 17.

**Mr ADAMS**—How does the Defence Force see this protocol affecting its mode of operation? What changes would you have to make if this was picked up?

**Group Capt. Maher**—We have already made all the changes to comply with the protocol. We do not see a change in our current ops at all.

**Air Cdre Harvey**—I might point out for the record—I think it is obvious from our comments—that Defence does not have a problem with the proposed optional protocol. In fact, our Defence Instruction, as has been mentioned, is basically the implementing mechanism. I should have said that at the outset just for the sake of completeness.

**Senator MASON**—You mentioned the Defence Instruction before. In a sense, that reveals that the concern with minimum ages in the Defence Force came in a long time before this protocol was received. That states that the minimum age for recruitment to the ADF will be 17 years and that you will not send minors into an area of potential hostilities. Why is that? Is that because people who are 17 do not make good soldiers, is it because of human rights concerns or is it because of political concerns? It was most vividly expressed in the Vietnam War: if you cannot vote, you should not be sent to battle. What is it? Is it because, all of a sudden, at 18 you magically become a better soldier or is it simply because 16-year-olds and 17-year-olds do not make good soldiers?

**Group Capt. Maher**—As far as I know, the reason is because we have guardianship of people under 18.

**Senator MASON**—Is that for legal reasons?

**Group Capt. Maher**—Yes, legal care. The commanding officer of a unit with people younger than 17 is required to show duty of care to those people, like a parent or a guardian would. I think it has just come about that we would not send someone like that into an operation, where he needs to be cared for as a minor.

**Senator MASON**—So that was the reason rather than some international human rights arrangement?

**Group Capt. Maher**—We have been doing that for a long time, before that happened.

**Senator MASON**—My next question—and you have perhaps pre-empted it—is: in the past, in World War I, in World War II and in the Vietnam War, did we send people under 18 years of age into battle?

**Group Capt. Maher**—I know that in World War II we did, because my father was only 16.

**Mr ADAMS**—Alex Campbell was 15.

**Senator MASON**—Maybe he lowered his age—I do not mean that people lowered their age but in the context of people saying they were 15, 16 or 17. Did you have to be 18 for overseas service then?

**Group Capt. Maher**—I know that there were certain entry schemes—for instance, midshipmen could join the Navy when they were 12. Certain midshipmen were actually on ships at the age of 13 or 14 at the outbreak of war.

**Senator MASON**—In areas of potential hostility?

**Group Capt. Maher**—Yes.

**Senator MASON**—So the guardianship rules that you referred to earlier came into operation subsequent to that?

**Group Capt. Maher**—I could not tell you when they came in.

**Mr WILKIE**—This question is slightly offbeat. I suppose that leaves questions open, such as: did we have underage people on the vessels when the *Voyager* and the *Melbourne* collided? I am not expecting you to answer that question—it is just hypothetical. We received evidence that the minimum age for ADF service is 16. You said they would have to be aged 16 and nine months before you would sign them up, but candidates who are under 17 years of age must have approval from the single-service career management agency and must reach 17 years of age prior to completion of training at a designated military school. There is supposed to be a Defence Instruction with regard to that but it has not been made available to the committee secretariat. Is that Defence Instruction still around or has it been made obsolete by new developments?

**Air Cdre Roberts**—That is possibly the previous Defence Instruction. The new one that we are talking about, No. 33-4, was signed on 28 June 2002. That has replaced a previous Defence Instruction. I can only assume that that was a previous Defence Instruction. I operate the Defence Force recruiting organisation and they have set the age at 17, so no-one will pass that unless they are over 17 years of age and have been able to prove it with a birth certificate. We do not make any reference to that at the career management agencies in the single services, and there is no way we would take on anyone who is under 17. I suspect that that was previous to setting this policy in place.

**CHAIR**—I would like to ask a question of the DFAT representatives. The treaty entered into force on 12 February 2002. We signed it on 21 October 2002. I am wondering about the time between the signing of the treaty in October 2002 and the tabling of the treaty. Was there a period to ensure that we were compliant with the treaty? What was the reason for the time lapse?

**Mr Sadleir**—My understanding is that we had to have a period in which we checked the existing legislative situation under which we undertook consultations, which included consultations with Defence and the need to do comprehensive internal consultations within Defence. All of that took time, including the consultation processes with other stakeholders. That is the only explanation I could provide.

**CHAIR**—As there are no further questions, I thank you very much for your attendance before the committee today. It was very important to hear your responses to some of the submissions that we have received on this and complete the public record. We really appreciate that. On behalf of the committee, I thank you for your evidence this evening.

Resolved (on motion by **Mr Wilkie**):

That this committee authorises publication of the proof transcript of the evidence given before it at public hearing this day.

**Committee adjourned at 8.36 p.m.**