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The Parliament of the Commonwealth of Australia

# Report 69

**Treaties tabled on 13 September and 11 October 2005**

Amendments to the Schedule to the International Convention for the Regulation of Whaling

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

November 2005  
Canberra

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ISBN 0 642 78727 1 (printed version)

ISBN 0 642 78728 X (HTML version)



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## Membership of the Committee

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(until 5/9/05)

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## Resolution of appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report upon:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
  - (i) either House of the Parliament, or
  - (ii) a Minister; and
- c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



## List of abbreviations

|       |   |
|-------|---|
| AAD   | Australian Antarctic Division   |
| CITES | Convention on International Trade in Endangered Species of Wild Flora and Fauna |
| COAG  | Council of Australian Governments   |
| Cth   | Commonwealth  |
| IWC   | International Whaling Commission  |
| JARPA | Japan Antarctic Research Program  |
| NIA   | National Interest Analysis  |
| NSW   | New South Wales   |
| Tas   | Tasmania  |





## List of recommendations

### 3 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

#### Recommendation 1

The Committee supports the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* and recommends that binding treaty action be taken.



## Introduction

### Purpose of the report

- 1.1 This Report contains advice to Parliament on the review by the Joint Standing Committee on Treaties of two proposed treaty actions tabled in Parliament on 13 September<sup>1</sup> and 11 October 2005.<sup>2</sup> These treaty actions are:

#### 13 September 2005

- *Amendments, done at Ulsan, Republic of Korea on 24 June 2005, to the Schedule to the International Convention for the Regulation of Whaling, done at Washington on 2 December 1946*

#### 11 October 2005

- *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, done at New York on 25 May 2000*

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1 *House of Representatives Votes and Proceedings*, 13 September 2005, p. 621; *Senate Journal*, 13 September 2005, p. 1087.

2 *House of Representatives Votes and Proceedings*, 11 October 2005, p. 657; *Senate Journal*, 11 October 2005, p. 1128.

## Briefing documents

- 1.2 The advice in this Report refers to the National Interest Analyses (NIAs) prepared for the proposed treaty actions. These documents are prepared by the Government agency (or agencies) responsible for the administration of Australia's responsibilities under each treaty. Copies of the NIAs may be obtained from the Committee Secretariat or accessed through the Committee's website at:
- [www.aph.gov.au/house/committee/jsct/13sept2005/tor.htm](http://www.aph.gov.au/house/committee/jsct/13sept2005/tor.htm)
- [www.aph.gov.au/house/committee/jsct/11october2005/tor.htm](http://www.aph.gov.au/house/committee/jsct/11october2005/tor.htm)
- 1.3 Copies of treaty actions and NIAs may also be obtained from the Australian Treaties Library maintained on the internet by the Department of Foreign Affairs and Trade. The Australian Treaties Library is accessible through the Committee's website or directly at:
- [www.austlii.edu.au/au/other/dfat/](http://www.austlii.edu.au/au/other/dfat/)

## Conduct of the Committee's review

- 1.4 The review contained in this Report was advertised in the national press and on the Committee's website.<sup>3</sup> Letters were also sent inviting comment from all State Premiers, Chief Ministers, Presiding Members of Parliament and from individuals who have expressed an interest in being kept informed of proposed treaty actions such as these. A list of submissions and their authors is at Appendix A.
- 1.5 The Committee also received evidence at a public hearing held on 7 November 2005. A list of witnesses who appeared before the Committee at its public hearing is at Appendix B. A transcript of evidence from the public hearing may be obtained from the Committee Secretariat or accessed through the Committee's website at:
- [www.aph.gov.au/house/committee/jsct/11october2005/hearings.htm](http://www.aph.gov.au/house/committee/jsct/11october2005/hearings.htm)

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3 The Committee's review of the proposed treaty actions was advertised in *The Australian* on 19 October and 2 November 2005. Members of the public were advised on how to obtain relevant information and invited to submit their views to the Committee, both in the advertisement and via the Committee's website.

# Amendments to the Schedule to the International Convention for the Regulation of Whaling

## Introduction

- 2.1 The *Amendments to the schedule to the International Convention for the Regulation of Whaling done at Washington on 2 December 1946* (Ulsan, Republic of Korea, 24 June 2005) (the Amendments) when entered into force will maintain the existing moratorium on commercial whaling for an additional year.<sup>1</sup>

## Background

- 2.2 The International Convention for the Regulation of Whaling (the Convention) is a multilateral treaty<sup>2</sup> that establishes an international system for the regulation of whale fisheries to ensure proper and effective conservation and development of whale stocks.<sup>3</sup>

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1 National Interest Analysis (NIA), para. 3; Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 2.

2 NIA, para. 6.

3 International Whaling Convention, viewed 16 November 2005, <[www.iwcoffice.org/commission/iwcmain.htm](http://www.iwcoffice.org/commission/iwcmain.htm)>.

- 2.3 The Convention also establishes the International Whaling Commission (IWC), which is responsible for reviewing and revising measures contained in the Schedule to the Convention. The Schedule to the Convention governs the conduct of whaling throughout the world.<sup>4</sup>
- 2.4 Australia has been signatory to the Convention since it came into force in 1948. Since 1979 with the closure of the last Australian shore-based whaling operation, Australia has strongly supported whale conservation measures. This includes support for IWC's 1982 decision to implement a moratorium on commercial whaling.<sup>5</sup>

## Features of the Amendments

- 2.5 The Amendments are made pursuant to Article V of the Convention which provides that the Schedule may be amended periodically to incorporate IWC decisions.<sup>6</sup>
- 2.6 These Amendments make changes to the Schedule to the Convention to maintain the moratorium on commercial whaling for an additional 12 months.<sup>7</sup> The extension of the moratorium is a requirement of each annual IWC meeting where a decision is not made to lift the ban on commercial whaling.<sup>8</sup>

## Implementation and costs

- 2.7 The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the Act) prohibits killing, injury or interfering with whales in Australian waters. The Committee received evidence that the Act provides a higher level of protection for whales than is provided under the Convention.<sup>9</sup> No further legislation is required to give effect to the Amendments<sup>10</sup> and there are no costs involved in ratification of the proposed treaty action.<sup>11</sup>

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4 International Whaling Convention, viewed 16 November 2005, <[www.iwcoffice.org/commission/iwcmain.htm](http://www.iwcoffice.org/commission/iwcmain.htm)>.

5 NIA, para. 6.

6 NIA, paras 1-2.

7 Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 2.

8 NIA, para. 7; Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 2.

9 NIA, para. 9; Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 2.

10 NIA, para. 10.

11 NIA, para. 11; Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 2.

## Consultation

- 2.8 The Australian Antarctic Division (AAD) consults via a forum of government organisations and Australian Government departments<sup>12</sup> and meets before and after each annual IWC meeting. Views presented at meetings contribute to the development of Australia's position on proposals considered by IWC.<sup>13</sup>
- 2.9 Following IWC meetings, AAD provides feedback from the Australian delegation to the consultative forum and interested non government organisations, government departments, scientists and institutions.
- 2.10 The consultative forum recently elected two representatives, one each from the Humane Society International and Project Jonah Australia, who formed part of the Australian delegation that attended the 2005 IWC meeting.<sup>14</sup>
- 2.11 No specific consultation took place with State and Territory governments, as the Amendments do not affect them.<sup>15</sup>

## Whaling for scientific research purposes

- 2.12 The Committee received an update on issues it raised in relation to Japan's whaling for scientific research purposes during a recent inquiry.<sup>16</sup>
- 2.13 The Committee was informed that Japan is of the view that it has an inherent right to undertake whaling as under Article 8 of the Convention whaling for scientific research is permitted.<sup>17</sup>

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12 Organisations that attended consultative meetings were: the Department of the Environment and Heritage, Department of Foreign Affairs and Trade, Australians for Animals, Australian Whale Conservation Society, Greenpeace, Humane Society International, International Fund for Animal Welfare, Project Jonah Australia, Royal Society for the Prevention of Cruelty to Animals, Whale and Dolphin Conservation Society and the World Society for the Protection of Animals. NIA, Consultation Annex, para. 1.

13 NIA, Consultation Annex, paras 1 and 2.

14 NIA, Consultation Annex, para. 2.

15 NIA, Consultation Annex, para. 3.

16 Evidence received at the Committee's public hearing of 7 March 2005 is included in Report 65: Treaties tabled on 7 December 2004 (3) and 8 February 2005

17 Ms Gillian Slocum, *Transcript of Evidence*, 7 November 2005, p. 4.

- 2.14 Under the latest Japan Antarctic Research Program-JARPA II, Japan will more than double its harvest of minke whales from 440-harvested last season<sup>18</sup> to 935 this season from Antarctic waters.<sup>19</sup> Japan will also harvest another 10 fin whales annually over the course of the two-year duration of JARPA II. Additionally, at the end of JARPA II, Japan will annually harvest up to 50 fin whales and 50 humpback whales including 935 minke whales.<sup>20</sup>
- 2.15 In recent weeks the press has reported on the increased whale harvest in Australia's Southern Ocean<sup>21</sup> and that minke,<sup>22</sup> humpback and fin<sup>23</sup> whales are included under the most endangered among animals listed on the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>24</sup>
- 2.16 CITES<sup>25</sup> provides that species listed under its Appendix I are threatened with extinction and generally prohibits commercial international trade in specimens of these species<sup>26</sup> with the exception of cases involving scientific research. In such cases, trade may be

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18 Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 2; Alford P 2005, 'Japan's whalers bite off too much', *Australian*, 8 November, p. 9.

19 Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 2.

20 Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 2.

21 Alford P 2005, 'Japan's whalers bite off too much', *Australian*, 8 November, p. 9; Trute P 2005, 'Whale killing season begins', *Daily Telegraph*, 8 November, p. 10; Johnson C 2005, 'Use courts to stop whale kill: Professor', *West Australian*, 8 November, p. 6; Johnson C, Dortch E 2005, 'Whales face scientific slaughter', *West Australian*, 9 November, p. 12; Greimel H 2005, 'Japan lifts whale target', *Adelaide Advertiser*, 9 November, p. 36.

22 CITES lists the Southern minke whale by its scientific name of *Balaenoptera bonaerensis*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, <[www.cites.org](http://www.cites.org)>.

23 CITES lists the fin whale by its scientific name of *Balaenoptera physalus*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, <[www.cites.org](http://www.cites.org)>.

24 Alford P 2005, 'Japan's whalers bite off too much', *Australian*, 8 November, p. 9; Trute P 2005, 'Whale killing season begins', *Daily Telegraph*, 8 November, p. 10; Convention on International Trade in Endangered Species of Wild Fauna and Flora, <[www.cites.org](http://www.cites.org)>.

25 CITES is a multilateral environmental treaty that regulates international trade in specimens of wild fauna and flora. CITES provides for different degrees of regulation of trade, resulting in different levels of protection for each species. The level of protection is determined by the Appendix listing of the species. Trade is defined as export, re-export, import and introduction from the sea. Joint Standing Committee on Treaties, Report 65: Treaties tabled on 7 December 2004 (3) and 8 February 2005, p. 49.

26 Article II, Convention on International Trade in Endangered Species of Wild Fauna and Flora, <[www.cites.org](http://www.cites.org)>.



authorised through the granting of an export or import permit.<sup>27</sup> Both Australia and Japan are Member States of CITES.<sup>28</sup>

- 2.17 Representatives from the Australian Antarctic Division informed the Committee that Japan brought forward its proposal for further whaling for scientific research at the recent IWC meeting at Ulsan.
- 2.18 JARPA II will focus on a number of different areas. This includes the population dynamics and biology of the whales being researched, and the relationships between minke whale populations and the recovery of other whale populations.<sup>29</sup>
- 2.19 A large majority of IWC's scientific committee considered Japan's proposal and were highly critical of it.<sup>30</sup> At that meeting, Australia led the charge in raising serious concerns about the scientific merit, scope, and intention of Japan's proposal. A large group of scientists also lodged a paper that raised the same concerns. Further, Australia brought forward a motion that was agreed to, requesting Japan to defer from proceeding with JARPA II until the IWC scientific committee was able to assess the results of the previous 18 year long JARPA.
- 2.20 Japan noted IWC's resolution regarding JARPA II, but is proceeding with its whaling for scientific research program, which commenced in November 2005.<sup>31</sup> Under the Convention, Japan is required to provide the results of its whaling for scientific research to the IWC's scientific committee annually.<sup>32</sup>
- 2.21 The Committee received evidence that Australia has developed a range of non-lethal methods for scientific research on whales, which Japan has openly rejected:

Japan would argue that its research requires lethal activity. [Australia] would argue strongly to the contrary. [Australia] and a number of other pro-conservation countries would argue that there is no basis for scientific whaling of this scale

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27 Article III, Convention on International Trade in Endangered Species of Wild Fauna and Flora, <[www.cites.org](http://www.cites.org)>.

28 Convention on International Trade in Endangered Species of Wild Fauna and Flora, <[www.cites.org](http://www.cites.org)>.

29 Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 3.

30 Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 3.

31 Ms Gillian Slocum, *Transcript of Evidence*, 7 November 2005, pp. 2-3.

32 Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 3.

or for the nature and scope of the scientific whaling that Japan proposes to conduct, and [Australia] would certainly argue that the lethal aspects of that scientific whaling are not necessary. [Australia has] developed a range of non-lethal methods by which [to] conduct and acquire the same data on whales in the areas that Japan is interested in. [Australia has] been promoting those methods to Japan, but at this stage Japan will still proceed with a lethal whaling program. It is not something Australia would support.<sup>33</sup>

2.22 The Committee was also informed that the IWC is polarised with approximately half of the 66 Member States either pro-whaling or pro-conservation of whales. However, the balance is shifting away from Australia's stance of pro-conservation towards a potential majority of Member States who are pro-whaling.<sup>34</sup> The Committee was informed that a three quarter majority of members present and voting at an IWC meeting would be required to overturn the current moratorium on commercial whaling.<sup>35</sup>

2.23 Both Australia and Japan are actively recruiting additional members to support their respective positions. Australia is also continuing to make representations to Japan to stop whaling, in particular in the Antarctic.<sup>36</sup>

There is certainly vigorous activity on the pro-whaling side and on the pro-conservation side to recruit new members to the commission, in order to bolster numbers. We are aware of the allegations that have been made in media reports. Those are scrutinised each time they arise. Our approach has been to work actively with the members of the IWC to bring to them very clearly our perspective and the perspectives of like-minded countries and, through our arguments and our diplomatic action, to convince them of the merits of whale conservation. That is the way we tackle that problem. We have an active campaign with other pro-conservation countries throughout the world.<sup>37</sup>

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33 Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 3.

34 Ms Gillian Slocum, *Transcript of Evidence*, 7 November 2005, p. 4.

35 Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 5.

36 Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 5.

37 Mr Jonathon Barrington, *Transcript of Evidence*, 7 November 2005, p. 6.

## Public comment on the Amendments

- 2.24 The Committee received two submissions in relation to the Amendments, both of which supported the proposed treaty action.<sup>38</sup> The Uniting Church in its submission stated:

We welcome the Australian Government's efforts to ensure the security of the Antarctic whale sanctuary, maintain the ban on commercial whaling, and seeking to restrain Japan from expanding its 'scientific' whaling quota.<sup>39</sup>

## Entry into force and withdrawal

- 2.25 These Amendments automatically enter into force 90 days following the date of notification from the IWC Secretariat,<sup>40</sup> unless a contracting government lodges an objection.<sup>41</sup>
- 2.26 Should an objection be lodged, a further 90 days is provided for other contracting governments to also lodge any objections. Once this time period has elapsed, all contracting governments become bound by the Amendments except those that have lodged an objection.<sup>42</sup>
- 2.27 IWC Secretariat notified contracting governments of the Amendments on 30 June 2005 and advised that providing no objections are lodged, the Amendments would enter into force on 28 September 2005.<sup>43</sup>

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38 The Australian Patriot Movement, *Submission 1* and The Uniting Church in Australia, Synod of Victoria and Tasmania, Justice and International Mission Unit, *Submission 2*.

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

40 NIA, para. 1.

41 Article 5(3) of the Convention provides that within 90 days of notification of a decision, a contracting government can object to any decision which it considers to seriously affect its interests. International whaling Convention, viewed 16 November 2005, <[www.iwcoffice.org/commission/iwcmain.htm](http://www.iwcoffice.org/commission/iwcmain.htm)>.

42 NIA, para. 2; International Whaling Convention, viewed 16 November 2005, <[www.iwcoffice.org/commission/iwcmain.htm](http://www.iwcoffice.org/commission/iwcmain.htm)>.

43 NIA, para. 4.

- 2.28 Should a contracting government lodge an objection to the Amendments before 28 September 2005, then the Amendments would enter into force for non objecting contracting parties on 27 December 2005.<sup>44</sup> Australia does not propose to lodge an objection to the Amendments.<sup>45</sup>
- 2.29 Australia may withdraw from the Convention by giving notice to the Depository Government (the United States of America) before 1 January of any year. Withdrawal would become effective from 30 June following notification.<sup>46</sup>

## Conclusion

- 2.30 The Committee understands that the Amendments maintain the moratorium on commercial whaling and supports the Amendments and Australia's continued participation in the IWC.
- 2.31 In addition, the Committee strongly supports Australia's tireless efforts in promoting the conservation of whales to the international community and its lobbying of Japan and other pro-whaling countries to end all forms of whaling.

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44 NIA, para. 4.

45 NIA, para. 3.

46 NIA, para. 17.

## Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

### Introduction

- 3.1 The *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (the Optional Protocol) supplements the *Convention on the Rights of the Child*, which Australia has signed and ratified.<sup>1</sup>
- 3.2 The Optional Protocol further develops the obligations and protections contained in the *Convention on the Rights of the Child* and is designed to protect children from the worst forms of commercial sexual exploitation.<sup>2</sup>

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1 Joint Standing Committee on Treaties Report 17, entered into force 16 January 1991.

2 National Interest Analysis (NIA), para. 4.

## The Optional Protocol

- 3.3 Article 1 contains the key obligation of the Optional Protocol, requiring States Parties to prohibit the sale of children, child prostitution and child pornography.
- 3.4 Article 3 requires States Parties to prohibit supplementary acts which might aid or assist in the sale of children, child prostitution or child pornography. These include:
- offering, delivering or accepting a child for the purposes of sexual exploitation, the transfer of organs for profit, the engagement of the child in forced labour
  - improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable legal instruments on adoption
  - offering, obtaining, or procuring a child for child prostitution
  - producing, distributing, disseminating, importing, exporting, offering, selling or possessing child pornography.
- 3.5 Under Article 5 of the Optional Protocol, the offences listed in Article 3 are deemed to be included as extraditable offences in any extradition treaty existing between States Parties and must be included as an extraditable offence in every extradition treaty subsequently concluded between them.
- 3.6 Article 8 of the Optional Protocol obliges States Parties to provide certain rights and protections to children involved in the prosecution of offences under the Optional Protocol. Among other provisions, this includes recognising the vulnerability of the child victim, adapting procedures to recognise their special needs and providing for their safety from intimidation and retaliation.
- 3.7 The Optional Protocol requires States Parties to cooperate with each other to prevent, detect, investigate, punish or prosecute acts of child prostitution, child pornography or the sale of children.<sup>3</sup>
- 3.8 States Parties are required to report to the Committee on the Rights of the Child two years after the entry into force of the Optional Protocol for that State Party. In doing so, it must provide comprehensive

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3 Article 10 of the Optional Protocol.

information on the measures it has taken to implement the Optional Protocol.<sup>4</sup>

## Support for the Optional Protocol

- 3.9 The Committee received submissions in support of Australia's ratification of the Optional Protocol.<sup>5</sup>
- 3.10 The National Children and Youth's Law centre commented that ratification of the Optional Protocol, among other things, reflects Australia's commitment to preventing trafficking in persons, prosecuting perpetrators, and protecting victims of trafficking.<sup>6</sup>
- 3.11 The New South Wales Council for Civil Liberties encouraged the Committee to recommend binding treaty action be taken, as the Optional Protocol is:
- an important human rights instrument aimed at protecting some of the most vulnerable members of our community – children.<sup>7</sup>
- 3.12 The Committee received a submission from the Hon. Ruth Forrest, MLC of the Tasmanian Parliament, inquiring whether the definition of 'sale of children' in Article 2(a) could be misinterpreted to include the legitimate adoption of children, and secondly, whether the Optional Protocol includes provisions relating to advertising material that depicts or describes a person who is, or who appears to be, under the age of 18 in a sexual context or activity.
- 3.13 The Committee received evidence relating to the question of adoption which clarifies and limits the definition of 'sale of children'. Although the definition contained in the Optional Protocol provides that:
- Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.<sup>8</sup>

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4 Article 12 of the Optional Protocol.

5 See Appendix A 'Submissions' of this Report.

6 National Children and Youth's Law Centre, *Submission 2*, p. 1.

7 NSW Council for Civil Liberties, *Submission 7*, p. 1.

8 Article 2(a) of the Optional Protocol.

- 3.14 This definition is limited by Article 32 of the *Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoptions*, which provides that:
- Only costs and expenses, including reasonable professional fees of persons involved in the adoption, may be charged or paid.<sup>9</sup>
- 3.15 This interpretation allows for a distinction to be made between the sale of children and the legitimate adoption of children, where fees or costs may be incurred.
- 3.16 In addition, the Optional Protocol contains provisions requiring States Parties to criminalise the improper inducement of consent for adoption.<sup>10</sup>
- 3.17 There are two issues raised by the second question of whether the Optional Protocol includes provisions relating to advertising material that depicts or describes a person who is, or who appears to be, under the age of 18 in a sexual context or activity. The first relates to the question of advertising, the second relates to the definition of child pornography.
- 3.18 In relation to advertising, the Optional Protocol requires States Parties to:
- take appropriate measures aimed at effectively prohibiting the production and dissemination of material advertising the offences described in the present Protocol.<sup>11</sup>
- 3.19 In relation to the definition of child pornography, Tasmanian law prohibits both the depiction and description of a person under 18 in a sexual context or activity.<sup>12</sup> Furthermore, this would appear to relate to both a person who actually **is** under 18 years of age and to a person who **appears to be** under 18 years of age.
- 3.20 In Tasmania:
- “child exploitation material” means material that describes or depicts, in a way that a reasonable person would regard as

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9 Ms Renee Leon, *Transcript of Evidence*, 7 November 2005, p. 26.

10 Article 3, see also Matt Minogue, *Transcript of Evidence*, 7 November 2005, p. 25.

11 Article 9(5).

12 See the *Criminal Code Act 1924 (Tas)*, Schedule 1, section 1A ‘Definitions for purposes of sections 130, 130A, 130B, 130C, 130D, 130E, 130F, 130G and 337C’, Definition of ‘child exploitation material’.



being, in all the circumstances, offensive, a person who is or who appears to be under the age of 18 years –

(a) engaged in sexual activity; or

(b) in a sexual context; or

(c) as the subject of torture, cruelty or abuse (whether or not in a sexual context);<sup>13</sup>

3.21 Definitions of child pornography vary between Federal, State and Territory legislation.<sup>14</sup>

## Costs and entry into force

3.22 The NIA states that ratification of the Optional Protocol will have no financial implications at the Commonwealth or State and Territory levels.<sup>15</sup>

3.23 The Optional Protocol entered into force generally on 18 January 2002.

3.24 Australia signed the Optional Protocol on 18 December 2001 and pursuant to Article 14, it will enter into force one month after the date of deposit of the instrument of accession.<sup>16</sup>

## Implementation

3.25 Implementation of the Optional Protocol will require cooperation between the Federal, State and Territory governments.<sup>17</sup>

3.26 At the Federal level, Australia currently complies with most of the mandatory obligations of the Optional Protocol through the *Criminal Code*, the *Crimes Act 1914* (Cth) and the *Customs Act 1901* (Cth).<sup>18</sup>

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13 See Schedule 1, section 1A, definition of ‘child exploitation material’.

14 Commonwealth - *Criminal Code Act 1995* (Cth) section 473.1(c), New South Wales – *Crimes Act 1900* (NSW), section 91H, Australian Capital Territory – *Crimes Act 1900*, section 64, Victoria – *Crimes Act 1958*, section 67A, Queensland – *Criminal Code 1899*, section 228D, Northern Territory – *Criminal Code*, section 125A ‘Interpretation’ definition of ‘child abuse material’.

15 NIA, para. 27.

16 NIA, para. 2.

17 Mr Matt Minogue, *Transcript of Evidence*, 7 November 2005, p. 24.

- 3.27 Australia is compliant with the Optional Protocol's jurisdictional obligations under Article 6 through the *Crimes at Sea Act 2000* (Cth) and the *Crimes (Aviation) Act 1991* (Cth).<sup>19</sup>
- 3.28 Implementation of Australia's extradition obligations under Article 4 will require additional regulations to be made.<sup>20</sup>
- 3.29 At the State level, the Committee was informed that although legislation exists that implements the obligations of the Optional Protocol, there was some inconsistency in the detail from State to State, and from State to Federal, legislation.<sup>21</sup> For instance, child pornography legislation in New South Wales defines a child as a person under the age of 16 where as Federal child pornography legislation defines a child as a person under the age of 18.<sup>22</sup>
- 3.30 The Committee recognises the importance of consistency across Federal, State and Territory child pornography laws and welcomes the referral of this issue by the Council of Australian Governments (COAG) to the Standing Committee of Attorney-General's, in consultation with the Australasian Police Ministers' Council.<sup>23</sup>
- 3.31 The Committee notes that action to implement Australia's obligations was taken after Australia had signed the Optional Protocol but before the NIA or treaty text was tabled in the Parliament. Indeed, the NIA states that:

Since Australia signed the Optional Protocol on 18 December 2001, amendments have been made to other relevant legislation at Commonwealth and State and Territory level to ensure that Australia complies with the legislative requirements of the Optional Protocol.<sup>24</sup>

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18 NIA, para. 26.

19 NIA, para. 26.

20 NIA, para. 25.

21 New South Wales Council for Civil Liberties, Submission No. 7, p. 1.

22 *Crimes Act 1900* (NSW), section 91H and *Criminal Code Act 1995* (Cth), section 473.1.

23 Council of Australian Governments' Meeting 3 June 2005 available from <http://www.coag.gov.au/meetings/030605/>.

24 NIA, para. 25.

## Conclusion and recommendation

- 3.32 The Committee recognises that children are vulnerable members of society and should be protected from exploitation and abuse.
- 3.33 The Committee supports the ratification of the Optional Protocol as demonstrative of Australia's commitment to eliminating the sale of children, child pornography and child prostitution and as a means to better protect children.

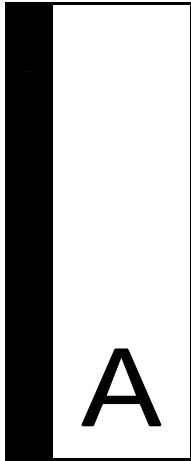
### Recommendation 1

**The Committee supports the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* and recommends that binding treaty action be taken.**

**Mrs Margaret May MP**

**Acting Committee Chair**





## Appendix A - Submissions

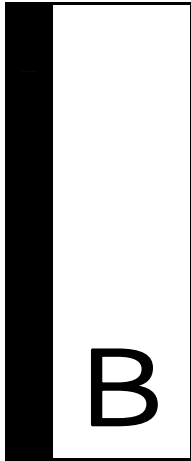
### Treaty tabled on 13 September 2005

- 1 Australian Patriot Movement
- 2 The Uniting Church in Australia

### Treaties tabled on 11 October 2005

- 1 Australian Patriot Movement
- 1.1 Australian Patriot Movement (supplementary)
- 2 National Children and Youth's Law Centre
- 3 The Uniting Church in Australia
- 4 Presbyterian Women's Association of Australia in NSW
- 5 The Hon. Ms Ruth Forrest MLC
- 6 Government of Western Australia
- 7 NSW Council for Civil Liberties
- 8 Northern Territory Government





## Appendix B - Witnesses

**Monday, 7 November 2005 – Canberra**

### **Attorney-General's Department**

Mr Geoffrey Gray, Assistant Secretary, Criminal Law Branch

Ms Renee Leon, First Assistant Secretary, Office of International Law

Mr Matt Minogue, Assistant Secretary

Mr Peter Thomson, Principal Legal Officer

Mr Scott Wilson, Senior Legal Officer, International Family Law  
Section, Family Law Branch

### **Department of Foreign Affairs and Trade**

Mr Michael Jonathan Thwaites, Executive Director, Treaties  
Secretariat

Ms Justine Braithwaite, Executive Officer, International Law and  
Transnational Crime Section, Legal Branch, International  
Organisations and Legal Division

### **Department of the Environment and Heritage (TAS)**

Ms Gillian Slocum, Senior Policy Advisor, Australian Antarctic  
Division

Mr Jonathon Harold Sutherland Barrington, Senior Policy Adviser,  
Australian Antarctic Division