

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.¹
- 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.²

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.³
- 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

3 Article 10 of the Optional Protocol.

information on the measures it has taken to implement the Optional Protocol.⁴

Support for the Optional Protocol

- 3.9 The Committee received submissions in support of Australia's ratification of the Optional Protocol.⁵
- 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.⁶
- 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.⁷
- 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.⁸

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.⁹
- 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.¹⁰
- 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.¹¹
- 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.¹² 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

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);¹³

3.21 Definitions of child pornography vary between Federal, State and Territory legislation.¹⁴

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.¹⁵

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.¹⁶

Implementation

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

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).¹⁸

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).¹⁹
- 3.28 Implementation of Australia's extradition obligations under Article 4 will require additional regulations to be made.²⁰
- 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.²¹ 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 18.²²
- 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.²³
- 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.²⁴

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

