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International Security and Human Rights Branch  
Office of International Law  
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14 July 2008

Dear International Security and Human Rights Branch

**Re: Consultation on Draft Report under the Optional Protocol on the Involvement of Children in Armed Conflict**

Thank you for the opportunity to contribute to your consultation on Australia's Draft Report under the Optional Protocol to the Convention on the Rights of the Child. This submission addresses only the Optional Protocol. We congratulate Australia on its comprehensive compliance with the Optional Protocol. The Draft Report illustrates that Australia has adhered to the letter and the spirit of the Protocol, and the Government's efforts are to be commended.

We make the following recommendations on how Australia could further improve its reporting on provisions of the Optional Protocol. These recommendations draw on the United Nations *Guidelines regarding initial reports of States Parties to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*.

**Article 1** requires that States shall take 'all feasible measures' to ensure that members of armed forces who are below the age of 18 years do not take a direct part in hostilities. Article 6(1) then requires States to take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the Optional Protocol.

The Draft Report indicates that a Defence Instruction provides that all feasible measures will be taken to ensure that minors are not deployed to an area of hostilities. This Defence Instruction, according to the Report, is the Department of Defence implementing mechanism for the Protocol. *However, in our view, it would strengthen the protection of children in conflict if this safeguard was enshrined in legislation rather than in a Defence Instruction.*

We also note that the scope of taking a 'direct part in hostilities' is controversial in international humanitarian law, stemming from article 51 of 1977 Additional Protocol I (and

which reflects customary law). *It would, therefore, be useful if the Draft Report provided the ADF's interpretation of what range of activities constitute direct (as opposed to indirect) participation in hostilities*, drawing on Australian military law manuals, in order to better delineate what kinds of activities Australia sees as permissible for personnel below 18 years.

We nonetheless commend Australia for its protective interpretation of this provision which seeks to remove personnel under 18 years from the theatre of hostilities altogether, thus ensuring that child soldiers will not usually be 'indirectly' participating on the battlefield.

However, one exception in the Defence Instruction is of concern: where removing a minor 'would prejudice the effectiveness of the mission'. This exception is problematic because it will often be the case that *not* utilizing a minor to fight would prejudice the effectiveness of the mission, and thus the benefit of using child soldiers becomes a justification for not removing them from the zone of hostilities. *It would be preferable to narrow the exception to cases where removing minors 'would prejudice the safety or security of the mission'.*

We also note that while the Optional Protocol permits the recruitment of soldiers below the age of 18 years, as long as they do not participate in hostilities, we share the policy view of the International Committee of the Red Cross, UN High Commissioner for Human Rights, Special Representative of the UN Secretary-General for Children in Armed Conflict, and the Human Rights and Equal Opportunity Commission, that *Australia should raise the minimum age for voluntary recruitment into the Australian Defence Forces to 18 years of age.*

**Article 2** requires that persons under the age of 18 are not compulsorily recruited into a State's armed forces. The Report states that under s 59 of the *Defence Act 1903 (Cth)*, only persons over 18 years of age are liable for service in the Australian Defence Forces (ADF) in times of war. *However, the Guidelines request that States provide more detailed information about compulsory recruitment than is currently provided in the Draft Report, in particular:*

- Detailed information on the process of compulsory recruitment (i.e. from registration up to the physical integration into the armed forces) indicating the minimum age linked to each step and, at what time in that process, recruits become members of the Armed Forces.
- The reliable documents to verify age which are required prior to acceptance into compulsory military services.

**Article 3(3)** governs the conditions upon which individuals under the age of 18 may voluntarily enlist in their national armed forces. The Draft Report shows that Australia has complied with the requirement that recruitment is genuinely voluntary and with the informed consent of the person's parents or legal guardians, and that such persons are fully informed of the duties involved in military service and provide reliable proof of age. *However, the Guidelines also request that States Parties provide information about:*

- The effective minimum service time and the conditions for early discharge;
- The use of military justice or discipline on under-18-years recruits and disaggregated data on the number of such recruits under-trial or in detention; and
- The minimum and maximum sanctions foreseen in the case of desertion.

**Article 3(5):** This paragraph governs any schools or programs operated by or under the control of the armed forces. The Draft Report indicates that the ADF does not operate any military schools, but does coordinate a cadet scheme. Although this provision relates specifically to schools, many of the reporting requirements of the UN Guidelines also apply to the cadet scheme. *To fully conform with the Guidelines, the Draft Report should include:*

- Disaggregated data on the composition of the scheme (for example, by gender, age, region, rural/urban areas and social and ethnic origin); and
- Information on what measures have been taken to ensure that discipline is administered in a manner consistent with the child's human dignity and any complaint mechanisms are available in this regard.

Article 6(1)-(2) requires States to disseminate the Protocol's provisions and principles to adults and children alike. The UN Guidelines note that States should here report on the relevant training provided on the rights of child and on the Optional Protocol. The Draft Report provides details of training provided to the ADF and peacekeepers (at paras 46-53).

However, none of those paragraphs in the Draft Report mentions whether any training is provided specifically on the Optional Protocol or on the rights of children in armed conflict. *It is recommended that the Draft Report provide specific details on any training which is provided about the Optional Protocol and children's rights. If none is currently provided, then Australia should report on steps it is taking to provide such training and education.*

In addition, the obligation in article 6(2) to disseminate the Protocol is not limited to the training of armed forces or peacekeepers. *Australia should also report on steps it takes or is planning to take to disseminate information about the Optional Protocol and children's rights in conflict to the public and community at large, including in school education.*

**Article 6(3)** requires States Parties to provide a framework for demobilising, rehabilitating and re-integrating persons within their jurisdiction recruited or used in hostilities contrary to the Protocol. The Draft Report highlights that no children within the jurisdiction of Australia are recruited or used in hostilities contrary to the Protocol, and so Australia applies this provision only to those who arrive in Australia from States where they may have been engaged in armed conflict. Commendably, Australia offers a comprehensive counselling and mental health assistance program for such individuals. *However, to comply even more fully with the Guidelines, the Draft Report should indicate:*

- How these mental health programs take due account of the specific situation of girls;
- What measures are available beyond counselling, such as education and vocation training and reintegration with the family and community;
- Measures to guarantee the confidentiality of participants in mental health programs;
- The criminal liability of children for crimes they may have committed during their service in armed forces.

**Article 7** requires inter-State cooperation in the implementation of the Protocol. The Draft Report provides examples of some of the positive ways in which Australia is furthering children's rights in conflict areas in Australia's development programs. *In addition, it is recommended that Australia consider including humanitarian law training in children's rights and the Optional Protocol in its military-to-military cooperation with Asia-Pacific States, in order to enhance the protection of children amongst the region's militaries.*

Please do not hesitate to get in touch if you require any further information.

Yours sincerely



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