Senate Legal and Constitutional Affairs References Committee Inquiry: International Child Abduction to and from Australia
Response of the Chief Justice of the Family Court of Australia
10 August 2011

The Family Court of Australia ("the Family Court") has been invited to provide a submission to the Senate Legal and Constitutional Affairs References Committee's ("the Committee") inquiry into international child abduction to and from Australia. This submission is made by the Chief Justice of the Family Court in consultation with Justice Bennett, a judge of the Family Court of Australia and member of the International Hague Network of Judges. The views expressed in this submission are personal to the Chief Justice and do not necessarily represent those of the judges of the Family Court of Australia as a whole.

Terms of Reference

On the 11 May 2011 the Senate referred the following Terms of Reference to the Committee for inquiry and report:

> "The incidence of international child abduction to and from Australia, including:
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> (a) the costs, terms and conditions of legal and departmental assistance for parents whose child has been abducted overseas;
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> (b) the effectiveness of the Hague Convention in returning children who were wrongly removed or retained, to their country of habitual residence;
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> (c) the roles of various Commonwealth departments involved in returning children who were wrongly removed or retained, to their country of habitual residence;
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> (d) policies, practices and strategies that could be introduced to streamline the return of abducted children; and
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> (e) any other related matters."

The scope of this Submission and the Terms of Reference addressed

Having due regard to the role of the Executive, and in the expectation that the Commonwealth Attorney-General's Department will likely provide a detailed submission from the perspective of the Commonwealth Central Authority ("CCA"), the submission of the Chief Justice will be limited to the terms of reference set out in (b), (d) and (e), to the extent that those relate to the role of the Family Court. This submission is largely directed towards the Family Court's role in hearing and determining applications for return of children wrongfully removed to, or retained in, Australia, where the requesting jurisdiction is a signatory to the

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction ("the Hague Convention").

This submission does not address international child abduction where a child has been abducted to Australia from a country that, at the time of the alleged wrongful removal or retention, was not party to the Hague Convention.[1]

The Hague Convention is a multilateral treaty which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure for their prompt return for the purpose of providing families with an opportunity to have appropriate parenting arrangements determined in the country in which the child or children habitually reside.

[1]Commonly referred to as non-Convention cases, the Family Court's approach to such cases is to determine the application in accordance with the best interests of the child, see *Karim v Khalid* [2007] FLC 93-348 at [51] to [59].

Definition of Terms and Acronyms in this Submission

Definitions

"the 1980 Convention", "the Hague Convention" and "the Convention" *means* the *Convention on the Civil Aspects of International Child Abduction* concluded at the Hague Convention of 25 October 1980

"the 1996 Child Protection Convention" *means* the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children* concluded at the Hague Convention of 19 October 1996

"Hague application" *means* an application pursuant to the Regulations in Australia or an application pursuant to the Convention or the instruments by which the Convention is implemented in contracting States or Convention countries

"contracting States" and "Convention countries" *means* States or countries that have acceded to, or ratified, the Convention (set out in Schedule 2 of the Regulations)

"the Act" *means* the *Family Law Act* 1975 (Cth)

"the Regulations" *means* the *Family Law (Child Abduction Convention) Regulations* 1986 (Cth)

"the Rules" *means* the *Family Law Rules* 2004 (Cth)

"requesting country" *means* the State or Country that has received a request from a left behind parent and, as a consequence, through its Central Authority makes an application to the Commonwealth Central Authority for the return of a child or children

"requesting parent" *means* the parent in the foreign jurisdiction that has made an application to the Commonwealth Central Authority for the return of a child or children pursuant to the Convention

"respondent parent" *means* the parent in Australia that is alleged to have wrongfully removed or retained the child or children from the requesting country, this parent is often referred to as the "abducting parent" or the "taking parent"

"return order" *means* an order for the return of a child or children, wrongly removed to, or retained in, a Convention country

Acronyms

“CCA” - Commonwealth Central Authority

“SCA” - State Central Authority

“ICL” - Independent Children’s Lawyer

“reg” - Regulation

“s” - Section

“ss” - Sections

“r” - Rule

“rr” - Rules

“Art” - Article

Term of Reference (b)

> "the effectiveness of the Hague Convention in returning children who were wrongly removed or retained, to their country of habitual residence;"

The Role of the Family Court in relation to Hague Applications

1. The 1980 Hague Convention is incorporated into Australian law by the *Family Law (Child Abduction Convention) Regulations* 1986 (Cth) ("the Regulations"). Regulation 14[2] provides for applications to be made for the return of a child or children that are alleged to have been wrongly removed to, or retained in, Australia.[3] In accordance with the protocol in force between the Family Court of Australia and the Federal Magistrates Court, Hague applications are to be filed in the Family Court.[4] This Court's experience is that decisions in Hague matters that have been made by a superior court are more persuasive in foreign jurisdictions[5] which is a relevant consideration when Australian courts, and courts in contracting States, strive for consistency and uniformity in the interpretation of international conventions.[6]

2. In Australia, a Hague application will be heard by one of the judges of the Family Court.[7] The judges of the Family Court have significant experience in dealing with applications under the Convention. Additionally, the Chief Justice and Justice Bennett are members of the International Hague Network of Judges. The Chief Justice is the only head of jurisdiction designated by any Convention country to the International Hague Network of Judges.

3. Australia is one of a few contracting States in which the jurisdiction to hear and determine cases under the Convention is effectively concentrated in one specialist court. International experience suggests that the more concentrated and specialised the jurisdiction of the court or courts hearing Hague applications, the more consistent the final determinations,[8] and this accords with the

[2] See also reg 14A.
[3] See also s 111B of the *Family Law Act* 1975 (Cth) ("the Act").
[4] See Annexure B "Protocol for the division of work between the Family Court of Australia and the Federal Magistrates Court as at 29 January 2010".
[5] The Hon. Justice Nygh (2002) "Review of the Hague Convention on Civil Aspects of Child Abduction" 16 *Australian Journal of Family Law* 67 at p 5.
[6] *Povey v Qantas Airways Ltd* (2005) 223 CLR 189, per the majority at 202, per McHugh J at 216 to 217, and per Kirby J at 234. See also INCADAT (2011) "*The International Child Abduction Database"* available online at: http://www.incadat.com/index.cfm?act=text.text&lng=1.
[7] See Family Court of Australia (2011) "*Judges*" available online at: http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Court/Judges/FCOA_Judges.
[8] See Armstrong, Sarah (2002) "Is the Jurisdiction of England and Wales Correctly Applying the 1980 Hague Convention on the Civil Aspects of International Child Abduction" 51 *International and Comparative Law Quarterly* 427 at p 428.

experience of the Court.[9] This applies equally to appellate proceedings relating to Hague applications.

4. Hague applications are filed with the relevant registry of the Family Court, or the registry of the Family Court of Western Australia, by a State Central Authority ("SCA") in each Australian State and Territory, on behalf of the Commonwealth Central Authority ("CCA").[10] In most contracting States the Central Authority will assist the requesting parent to locate a practitioner to act on his or her behalf and may fund the proceedings, but the Central Authority does not become a party. In these cases the requesting parent, rather than the Central Authority, is the applicant in the Hague proceeding before the foreign court.

5. The Family Court's task is to determine as a matter of law whether the Convention applies. If it does and the removal or retention is determined to be "wrongful"[11] within the meaning of the Regulations, then the court decides whether any of the exceptions to mandatory return relied upon by the respondent parent (if any), in reg 16(3) apply,[12] and if so, whether the court in its discretion should decline to return the child to the Convention country of habitual residence.[13]

6. The Family Court also determines matters ancillary to Hague applications. These include applications under reg 17(1)[14] seeking a declaration of the court that the removal or retention of a child or children from Australia to a foreign jurisdiction is "wrongful". Further, the Hague Network Judges respond to a number of communications and requests each year for information from other contracting States and the determination of applications for mirror orders[15] in relation to children who legitimately reside in a foreign jurisdiction but whose parenting arrangements are sought to be regulated and enforced in Australia.

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[9] The Hon. Justice Nygh (2002) as above at pp 2 to 4.

[10] See reg 13(4)(a) in relation to the CCA's role in referring compliant applications from requesting parents and/or a foreign Central Authority to the relevant SCA who will pursue an application on behalf of the CCA.

[11] It should be noted that "wrongful" does not mean criminal or illegal, see reg 2(2) referring to Art 3 of the Convention where it is stated that a removal or retention is considered to be wrongful where "it is in breach of rights of custody".

[12] The exceptions are: no rights of custody at the relevant time (reg 16(3)(a)(i)), consent or acquiescence (reg 16(3)(a)(ii)), grave risk of harm (reg 16(3)(b)), the child's objection (reg 16(3)(c)) and the protection of human rights and fundamental freedoms (reg 16(3)(d)).

[13] See *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 661.

[14] See Art 15 of the Convention.

[15] A mirror order is an order obtained in a primary jurisdiction that is then sought and obtained from a court in a secondary jurisdiction with the effect being that the orders are able to be enforced in both Convention countries.

7. The Family Court also deals with, and accords priority to, international relocation cases where a parent seeks the court's permission to take a child to reside permanently outside Australia.

The Act and Regulations: construction, interpretation and amendments

8. In discussing the role of the Family Court it is useful to outline the legislative framework and precedent applicable to the determination of Hague applications as these provisions impact on the overall effectiveness of the operation of the Convention in Australia. Part XIIIAA, Division 2 of the *Family Law Act* 1975 (Cth) ("the Act") relates to international child abduction. Section 111B(1) provides that the Regulations may make provision as is necessary or convenient to enable Australia to perform its obligations, or obtain any advantage or benefit, under the Hague Convention. The Regulations incorporate the provisions that enable Australia to perform its obligations under the Convention.[16]

9. The manner in which the Convention has been incorporated into the Act has been the subject of judicial comment.[17] In *State Central Authority v McCall* the Full Court of the Family Court observed:[18]

> "The general scheme of the Regulations is to provide a legislative structure for the application of the Convention as a matter of Australian domestic law… the Convention is not directly incorporated into Australian law although it is set out in a schedule to the Regulations… The reason why this method of applying the Convention was chosen is not clear and it is difficult to understand why Australia did not adopt the same method as that adopted by the United Kingdom. It is also apparent that there is, in some cases, no direct correspondence between the words of the Regulation and those of the Convention."[19]

10. It is important to note that the purpose of the Regulations is to give effect to s 111B. Unlike parenting cases conducted under Part VII of the Act, the best interests of the child[20] is not the paramount consideration in a Hague application and the Regulations make no reference to "best interests". In fact, best interest principles play no part in the determination of a Hague application until or unless

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[16] See also Schedule 1 of the Regulations that includes the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*.

[17] See The Hon. Justice Nygh (2002) "Review of the Hague Convention on Civil Aspects of Child Abduction" 16 *Australian Journal of Family Law* 67; The Hon. Justice Kay (2005) "The Hague Convention – order or chaos?" 19 *Australian Journal of Family Law* 245; The Hon. Justice Kirby (2003) "Family Law and Human Rights" 17 *Australian Journal of Family Law* 6.

[18] (1995) FLC 92-551 at [81,509] per Nicholson CJ, Ellis and Fogarty JJ. See also, in relation to the interpretation of the Regulations, *Director-General of the Department of Community Services (Central Authority) v Apostolakis* (1996) FLC 92-718 at [23] per Moss J. See also Michael Nichols QC (2010) "Professional Insights: International Child Abduction – Australian Law, Practice and Procedure" 1 *Family Law Review* 82 at pp 83 to 84.

[19] Other jurisdictions have incorporated the Hague Convention directly into local law, see *Child Abduction and Custody Act* 1985 (UK), or as part of its own statute, see *International Child Abduction Remedies Act* 1988 (US).

[20] See ss 60B, 60CA and s 67ZC of the Act.

the court decides that one of the exceptions to mandatory return applies and then only as one of a number of considerations to be considered.[21] This was discussed by Baroness Hale of Richmond of the House of Lords in the decision of *In re M (Children) (Abduction: Rights of Custody)*[22] where it was stated that:

> "The scheme of the Hague Convention is that in normal circumstances it is considered to be in the best interests of children generally that they should be promptly returned to the country whence they have been wrongly removed, and that it is only in exceptional cases that the court should have a discretion to refuse to order an immediate return".[23]

11. The interpretation of the Regulations is provided for in reg 1A(2)[24] which states that the Regulations are intended to be construed:

> "(a) having regard to the principles and objects mentioned in the preamble to and Article 1 of the Convention; and
>
> (b) recognising, in accordance with the Convention, that the appropriate forum for resolving disputes relating to a child's care, welfare and development is ordinarily the child's country of habitual residence; and
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> (c) recognising that the effective implementation of the Convention depends on the reciprocity and mutual respect between judicial or administrative authorities (as the case may be) of Convention countries."

12. Where the Regulations are silent, uncertain or ambiguous, regard may be had to the Convention for the purposes of interpreting of the Regulations.[25]

13. Since Australia became a signatory to the Hague Convention the Act and Regulations have been substantially amended.[26] In particular the enactment of the *Family Law Reform Act* 1995 (Cth), the *Family Law Amendment Act* 2000 (Cth) and the *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth) have resulted in substantial amendments to s 111B[27] and the Regulations.[28]

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[21] *HZ v State Central Authority* [2006] FamCA 466.

[22] [2008] 1 AC 1288 at [34] citing Balcombe LJ in *Re S (A Minor) (Abduction: Custody Rights)* [1993] Fam 242 at 251.

[23] See also the Full Court in *P v Commonwealth Central Authority* [2006] FamCA 461 at [72].

[24] See also reg 2(1B) which provides that unless a contrary intention appears "an expression that is used in these Regulations and in the Convention has the same meaning".

[25] *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* (2001) 206 CLR 401 at [25] and [119]. See also ss 15AA, 15AB(2)(d) of the *Acts Interpretation Act* 1901 (Cth).

[26] The Hague Convention was signed on 25 October 1980, ratified on 29 October 1986. The Regulations came into force on 1 January 1987.

[27] See the *Family Law Reform Act* 1995 (Cth), Act No. 167 of 1995, s 42, inserting s 111B(2) to (6) in the Act (as in force 16 December 1995); the *Family Law Amendment Act* 2000 (Cth), Act No. 143 of 2000, ss 86 to 89, inserting s 111B(1A) to (1E), (5A), and substituting (4) in the Act (as in force 29 November 2000); the *Family Law Amendment (Shared Parental Responsibility) Act* 2006 (Cth), Act No. 46 of 2006, ss 96 to 99, substituting s 111B(1A)(c), (4)(b) and 4(d) in the Act (as in force 22 May 2006).

[28] See the *Family Law (Child Abduction Convention) Amendment* Regulations 2007 (No. 1) (Cth), SLI No. 213 of 2007 (as in force 24 July 2007); the *Family Law (Child Abduction Convention) Amendment Regulations* 2006 (No.1) (Cth), SLI No. 139 of 2006 (as in force 1 July 2006); see in particular the *Family Law Amendment Regulations* 2004 (No.3) (Cth), SLI No. 371 of 2004 (as in force 24 December 2004); the *Family Law (Child Abduction Convention) Regulations (Am)* 1996 (Cth), SR No. 74 of 1996

14. The most recent amendments to the Act and Regulations have attempted to harmonise the meaning of words in the Act with those in the Regulations referable to the language employed in the Convention. For example, note the use of the terms "parental responsibility" and "a person with whom a child is to spend time or to communicate" as opposed to "custody" and "access".[29] Although not a complete statement of the circumstances in which a person will have "rights of custody or access"[30] s 111B(4) illustrates this harmonisation and states that for the purposes of the Convention:

> "(a) each of the parents of a child should be regarded as having rights of custody in respect of the child unless the parent has no parental responsibility for the child because of any order of a court for the time being in force; and
>
> (b) subject to any order of a court for the time being in force, a person:
>
> (i) with whom a child is to live under a parenting order; or
>
> (ii) who has parental responsibility for a child under a parenting order;
>
> should be regarded as having rights of custody in respect of the child; and
>
> (c) subject to any order of a court for the time being in force, a person who has parental responsibility for a child because of the operation of this Act or another Australian law and is responsible for the day-to-day or long-term care, welfare and development of the child should be regarded as having rights of custody in respect of the child; and
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> (d) subject to any order of a court for the time being in force, a person:
>
> (i) with whom a child is to spend time under a parenting order; or
>
> (ii) with whom a child is to communicate under a parenting order;
>
> should be regarded as having a right of access to the child."

15. This approach is further emphasised by s 111B(6) which provides that expressions used in s 111B have the same meaning as in Part VII of the Act.

16. A Hague application is brought where the CCA has been unable to resolve an application amicably pursuant to reg 13(4)(b) and (c). An application will seek a court order to return the child to the Convention country of habitual residence per reg 13(4)(d), and orders securing the whereabouts and safety of the child in the meantime. The Regulations implement the 1980 Convention into Australian law. It follows that the efficacy of the Regulations and the manner in which they have been interpreted by Australian courts impact on the overall effectiveness of the Hague Convention insofar as it enables Australia to perform its obligations under the Convention.

(as in force 11 June 1996); the *Family Law (Child Abduction Regulations (Am)* 1995 (Cth), SR No. 296 of 1995 (as in force 26 October 1995).

[29] See s 111B(2) and (3).

[30] See s 111B(5).

The Regulations as applicable to Hague Applications

17. Currently, the Convention applies if an applicant has filed an application for a return order within the twelve month period following the alleged removal or retention of the child to Australia, and the applicant satisfies the court that the removal or retention was wrongful.[31] The term "wrongful" in the Regulations does not mean illegal. Regulation 2(2) provides for the interpretation of the term "wrongful" and states that the removal or retention of a child is "wrongful" in circumstances, referred to in Article 3 of the Convention, where the removal or retention "is in breach of rights of custody". Regulation 16(1A) further provides that the removal or retention of a child is wrongful if:

    - the child is under 16 years old; and,
    - was habitually resident in a Convention country immediately prior to the removal or retention; and,
    - the requesting parent had "rights of custody" in relation to the child in that country immediately prior to the removal or retention; and,
    - the removal or retention was, or is, in breach of those rights; and,
    - at the time of the removal or retention the requesting parent was actually exercising those rights, or would have exercised those rights but for the removal or retention.

18. The terms "wrongful removal and retention" were considered at length in the decision of *Hanbury-Brown & Hanbury-Brown* and previous decisions of this Court.[32] "Rights of custody" is specifically defined in s 111B(4) and reg 4 which provide that both parents will be regarded as having rights of custody unless an order of a court states one parent has no parental responsibility for a child.

19. In the event that a Hague application is filed in Australia more than one year after the date on which the child was wrongfully removed or retained, the court must still make the return order, subject to the application of the exceptions, if satisfied that the respondent parent has not established that the child has settled in his or her new environment.[33]

20. Habitual residence is not defined in the Act or Regulations. In the decision of *LK v Director-General, Department of Community Services*[34] the High Court discussed habitual residence and clarified that the expression permits the consideration of a wide variety of circumstances including an examination of

[31]Reg 16(1).
[32](1996) FLC 92-671 at [5.28] to [5.29]. See also *Artso v Artso* (1995) FLC 92-566; *Murray v Director, Family Services (ACT)* (1993) FLC 92-416; *State Central Authority v Ayob* (1997) FLC 92-746.
[33]See reg 16(2) and *State Central Authority & Hajjar* [2010] FamCA 648.
[34](2009) 237 CLR 582 at 592 to 599, [22] to [45].

each parent's intentions and the extent to which there was "a shared intention that the child live in a particular place with a sufficient degree of continuity to be properly described as settled". The plurality in *LK* stated that in determining habitual residence the approach in *P v Secretary for Justice*[35] should be followed.[36] That approach is to look at all the circumstances of the case as stated by the majority of the Court of Appeal of New Zealand:[37]

> "Such inquiry should take into account all relevant factors, including settled purpose, the actual and intended length of stay in a state, the purpose of the stay, the strength of ties to the state and to any other state (both in the past and currently), the degree of assimilation into the state, including living and schooling arrangements, and cultural, social and economic integration."

21. The High Court decision of *LK* and the subsequent decision of *MW v Director-General of the Department of Community Services*[38] were discussed in the recent decision of *Zotkiewicz & Commissioner of Police (No. 2)*.[39] In *Zotkiewicz* the Full Court stated that:[40]

> "…Accordingly, we consider the task of the Judge was twofold. The first was to ascertain whether the parents had a shared intention that the child would live in Poland with a sufficient degree of continuity that their purpose could properly be described as settled. The second was to determine whether the period of time spent in Poland was sufficiently appreciable for it to be said that the underlying reality of the connection between the child and Poland was such as to justify a finding he was habitually resident in that country.
>
> In approaching this task, the Judge was obliged to construe the Regulations having regard to the principles and objects of the Convention, recognising "that the appropriate forum for resolving disputes relating to a child's care, welfare and development is ordinarily the child's country of habitual residence"."

22. However, the practical implications of these decisions include an increase in the incidence of cross examination. This has significant implications for the time within which Hague applications can be determined as cases involving cross examination are likely to take longer than cases which proceed without oral evidence. This was observed by the Full Court in *Zotkiewicz*:[41]

> "We do not underestimate the logistical difficulties involved in permitting or requiring cross-examination in Convention cases. The resources of the courts that deal with such matters are already overstretched. Without cross examination, cases can usually be concluded in a few hours, but once cross examination is permitted, it is difficult to "draw the line". Furthermore, it is common for one of the parents not

[35] [2007] 1 NZLR 40.
[36] (2009) 237 CLR 582 at 600, [45].
[37] *P v Secretary for Justice* [2007] 1 NZLR 40 at 61 to 62, [88], as cited in *LK v Director-General, Department of Community Services* (2009) 237 CLR 582 at 599, [44].
[38] (2008) 82 ALJR 629.
[39] [2011] FamCAFC 147 per May, Thackray and Moncrieff JJ at [89] to [90].
[40] [2011] FamCAFC 147 at [82] to [83].
[41] *Zotkiewicz & Commissioner of Police (No. 2)* [2011] FamCAFC 147 at [93] to [94].

to be in attendance at the hearing, but instead to be located on the other side of the globe, awaiting the outcome of an already elongated process.

> In many cases, the court will be able to deal with the matter adequately on the basis of affidavit evidence – looking for the common ground, noting the areas of conflict and weighing the probabilities. However, there are a range of cases where such an approach will be inadequate. In those cases, failure to test controversial evidence in the time honoured way, or otherwise taking steps to resolve evidentiary conflict, will lead to a flawed outcome. The result on appeal in such cases, unless a re-hearing is directed, will usually be the dismissal of the case of the party who carried the burden of proof."

23. Cross examination results in a further practical consideration, namely the cost of videoconferencing and video-links to facilitate cross examination in Hague proceedings. For the purpose of examining a witness, it is preferable for cross examination to be conducted by videoconference rather than teleconference. Fortunately, via the International Hague Network of Judges, there is a high degree of cooperation between contracting States for the provision of court rooms and staff to facilitate the examination of witnesses resident in foreign jurisdictions. However, high resolution videoconferencing is expensive, particularly when regard is had to the duration of cross examination which can often take three or more hours in the final hearing of a Hague application. The Family Court's security system precludes Skype connections, so less expensive videoconferencing alternatives are not currently available. To date, the Family Court has largely met the costs of videoconferencing in the conduct of Hague proceedings. However, given ongoing budgetary constraints faced by the Court, it will be difficult to sustain an expenditure of some thousands of dollars for the cases which require it,[42] and on expenditure which the Court has not previously been required to meet as part of its anticipated budget. Shifting the cost of videoconferencing onto litigants, particularly self-represented respondent parents, raises issues in relation to access to justice and procedural fairness.

24. If the court determines that the child was wrongfully removed or retained and the respondent parent seeks to rely on any of the exceptions to return contained in reg 16(3), the court then considers whether any of the exceptions to mandatory return apply, and whether the discretion should be exercised to refuse to make an order for the return of the child. An exception may apply in circumstances where:

[42]The approximate expense of videoconferencing is $600 to $1000 per hour.

- the requesting parent had no rights of custody at the relevant time (reg 16(3)(a)(i));
- the requesting parent consented or acquiesced to the removal or retention (reg 16(3)(a)(ii));
- the child would be exposed to a grave risk of psychological or physical harm, or otherwise be placed in an intolerable situation if an order for return were made (reg 16(3)(b));
- the child objects to being returned (reg 16(c)); or
- the return of the child would not be permitted by the fundamental principles of Australia relating to the protection of human rights and fundamental freedoms (reg 16(3)(d)).

25. The High Court has held that exceptions, such as a child's objection to return within the meaning of reg 16(3)(c), should not be construed strictly or narrowly but in its ordinary literal sense.[43] In *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services*[44] the High Court discussed the exception of grave risk and stated that:[45]

> "Because what is to be established is a *grave* risk of exposure to future harm, it may well be true to say that a court will not be persuaded of that without some clear and compelling evidence. The bare assertion, by the person opposing return, of fears for the child may well not be sufficient to persuade the court that there is a real risk of exposure to harm."

26. This exception has commonly been relied on in Hague applications in which the respondent parent alleges domestic violence or child abuse and has been the subject of considerable jurisprudence internationally.[46] The majority of the High Court in *DP; JLM* stated that:[47]

> "It is well, nigh inevitable that a child taken from one country to another without the agreement of parent, will suffer disruption, uncertainty and anxiety. That disruption, uncertainty and anxiety will recur, and may well be magnified, by having to return to the country of habitual residence. Regulation 16(3)(b) and Art 13(b) of the

[43] *De L v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 655 to 656. Following this decision s 111B(1B) was inserted into the Act by the *Family Law Amendment Act* 2000 (Cth), Act No. 143 of 2000, ss 86 to 89, inserting s 111B(1A) to (1E), (5A), and substituting (4) in the Act (as in force 29 November 2000). Additionally, reg 16(3)(c)(ii) and (iii) now qualify the application of this exception. See also The Hon. Justice Kirby (2009) "Children Caught in Conflict – The Child Abduction Convention and Australia" Peter Nygh Inaugral Lecture, *International Family Law Congress*, Halifax, Canada, 23 August 2009 at p 8.
[44] (2001) 206 CLR 401.
[45] (2001) 206 CLR 401 at 418.
[46] For further discussion of the "grave risk" exception see the comments of the majority in regards to domestic violence in *DP; JLM* (2001) 206 CLR 401 at 418, [40]. See The Hon. Justice Kirby (2009) "Children Caught in Conflict – The Child Abduction Convention and Australia" Peter Nygh Inaugral Lecture, *International Family Law Congress*, Halifax, Canada, 23 August 2009; The Hon. Justice Kay (2005) "The Hague Convention – order or chaos?" 19 *Australian Journal of Family Law* 245 at pp 12 to 15. See also earlier decisions of *Gsponer v Director-General, Department of Community Services* (1989) FLC 92-001 at [77,160]; *Murray v Director of Family Services ACT* (1993) FLC 92-416 at [80,259}; *Director General, Department of Families, Youth and Community Care v Bennett* (2000) FLC 93-011 and *Wolfe & Director-General Department of Human Services* [2011] FamCAFC 42.
[47] (2001) 206 CLR 401 at 418, per Gaudron, Gummow and Hayne JJ.

Convention intend to refer to more than this kind of result when they speak of grave risk to the child of exposure to physical or psychological harm on return."

27. In respect of the exceptions, and particularly the grave risk exception, the subsequent High Court decision of *MW v Director-General of the Department of Community Services*[48] should also be noted. In *MW* the majority emphasised the need for "…prompt but, so far as the circumstances permit, thorough examination on adequate evidence of the issues arising on wrongful removal applications under the Regulations."[49] These decisions again illustrate that acceptable procedures for the determination of Hague applications in Australia have become more extensive, time consuming and more reliant on evidence than the framers of the Convention likely intended.

28. If the court is satisfied that it must make an order for the return of the child, it may impose such conditions as are necessary. Preconditions to return were considered at some length in the first instance decision of *State Central Authority & Daker*,[50] as follows:[51]

"A number of English cases have considered the extent of conditions which can be ordered or undertakings received prior to the return of children to a contracting state. In *Re H (Abduction: Grave Risk)* [2003] 2 FLR, Dame Butler-Sloss P, with whom Mummery LJ and May LJ agreed, considered the period for which it was necessary to delay the return of children (10 and 7 years) to Belgium "to protect the immediate welfare of the children" in the context of Article 13(b) grave risk of harm exception. Butler-Sloss P noted:-

[35] Lord Donaldson of Lymington MR in *C v C (Abduction: Rights of Custody)* [1989] 1WLR 654, sub nom *Re C (A Minor) (Abduction)* [1989] 1 FLR 403 said at 664 and 413 respectively:

'…in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words 'or otherwise place the child in an intolerable situation' which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the court of the State to which the child is to be returned to minimise or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of those courts in the circumstances of the case, the courts of this country should assume that this will be done. Save in an exceptional case, our concern, ie the concern of these courts, should be limited to giving the child the maximum possible protection until the courts of the other country, Australia in this case, can resume their normal role in relation to the child.'

[48] (2008) 82 ALJR 629.
[49] (2008) 82 ALJR 629 at 650, [18].
[50] [2008] FamCA 1271.
[51] [2008] FamCA 1271 at [65] to [66], [70] to [71].

[36] With Lord Donaldson of Lymington MR's words in mind, I turn to consider what, in my view, should be done to smooth the return of these children to the country of habitual residence and to ensure the best arrangements until such time as the Belgian court, the SAJ or the SPJ take over the management of these children and deal with their future welfare.

. . .

I accept the concept of easing the returning mother and child back into the country in which they were both habitually resident prior to the wrongful retention. The abduction provisions in the 1980 Convention are a means to an end, not an end in themselves. It is obviously for the benefit of the child that the transition between countries should be as smooth and as comfortable as the circumstances of the case allow. However, any attempt by this Court to regulate the conduct or circumstances of the parents once the child has left Australia needs to operate only until a court of competent jurisdiction in the other state can be seized on the matter and must, I think, not impinge on the powers of that court to make relevant orders on the proper and timely applications that could, and should be made by the parties. In my view, the conditions which can be properly imposed on return orders made under the 1980 Convention, should be marked as much by appropriate restraint and respect for the operation of law in the requesting state as they are for the reasonable needs of the returning party and child in the immediate to short term.

In the absence of evidence sufficient to make out the exception to mandatory return, the mother has, nonetheless, provided the court with some evidence of violence on the part of the father toward her. The father contested those allegations and the issue was not tested any further before me. This is material likely to be brought before an Israeli court when the matter is litigated there. No doubt, an Israeli court will also have before it evidence relevant to determining the long term best interests of the child. Notwithstanding the findings of this court, it is prudent to attach some conditions which provide some protection and comfort for the child and herself when they return to Israel."

29. After considering the appropriate or otherwise of some of the numerous conditions sought by the respondent mother, her Honour continued:[52]

"I have already referred to my concerns about formulating conditions that will not impinge on the jurisdiction of the courts in the jurisdiction to which the child will return. Additionally, if conditions are warranted, it is important that the conditions be formulated so as not to create more problems than they seek to address. I recognise that the mother and child should be accommodated. However to make a condition in the terms sought by the mother would likely lead to difficulties in compliance and, I am confident, a much delayed return whilst the parents argue, via Central Authorities, on whether the accommodation secured is possessed of all of the features which the mother describes.

Rather than the piecemeal approach taken by the mother, I prefer to impose a condition whereby the requesting parent is to pay an amount of money to the mother which can later be taken into account, and adjusted against, by the courts in Israel, if those courts see fit to do so. This will be a lump sum in addition to the cost of the airfares which will be paid by the father. It is not intended to remove the requesting parent's liability to pay any statutory liability for child support. If it

[52] [2008] FamCA 1271 at [78] to [80].

transpires that the amount is more than the reasonable requirements of the mother and child, then it will be open to the court in Israel to make an adjustment in that regard. My intention is to replace the child in the contracting state, in the care of his mother without undue hardship to either of them. That corresponds with what I "consider to be appropriate to give effect to the Convention" within the meaning of reg 15(1)(b).

I also wish to avoid injustice to the requesting parent. It is not my intention to sabotage the return by imposing a pre-condition that he cannot meet. However, as indicated, the father was requested, through the State Central Authority, to provide evidence of his financial situation and has failed to do so."

30. Apart from conditions precent to return, the Family Court may seek undertakings or mirror orders from the applicant parent or SCA if it is concerned about the welfare of the child or respondent parent immediately upon their return to the foreign jurisdiction.[53] A condition precedent to return may direct the requesting parent to obtain certain orders in a court of competent jurisdiction in the requesting State. Such conditions and undertakings are frequently imposed in circumstances where the respondent parent alleges the child will face a grave risk of harm if a return order is made.[54] However, difficulties may arise in the enforcement of undertakings in the foreign jurisdiction.[55] Mirror orders or complimentary orders in the foreign jurisdiction may be obtained to ensure the enforcement of undertakings which a requesting parent indicates he or she will give in order to ease the return of the child to the foreign jurisdiction.[56] These orders are frequently obtained through direct judicial communication between members of the International Hague Network of Judges.

[53] Reg 15(1).
[54] *P v Commonwealth Central Authority* [2000] FamCA 461.
[55] *McOwan v McOwan* (1994) FLC 92-451 at [80,691]. For a discussion of the effectiveness of conditions and undertakings see Australian Law Reform Commission (2010) "*Family Violence – A National Legal Response*" ALRC Report 114, October 2010 at [17.299] to [17.301], available online at: http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114.
[56] *Director-General Department of Families, Youth and Community Care v Hobbs* (2000) FLC 93-007 at [81,178]; *O'Neill & Fletcher* [2007] FamCA 103 at [14]. See also Australian Law Reform Commission (2010) as above at [17.299] to [17.301].

A Snapshot of the Family Court's procedure in relation to Hague Applications

31. The procedure of the Family Court in relation to Hague applications varies depending on the facts and circumstances involved in the particular matter before the court. However, the general procedure is as follows:

    1) The relevant Registry of the Family Court of Australia[57] receives a Hague application from the SCA set out in Form 2.[58]

        - Form 2 attaches the request of the left behind parent, the evidence relied upon as to the circumstances of the wrongful removal or retention, and rights of custody, and details the orders sought. It provides formal notice of the hearing before a judge of the Family Court and indicates that the respondent parent may defend the application and/or seek alternative orders by filing a response or cross-application and affidavit at the earliest practicable date prior to the hearing date.

    2) An initial hearing date is set down before a judge of the Family Court.[59]

        - This may be immediately upon filing or, more generally, within 24 to 48 hours of the filing and service of Form 2. The application may be heard *ex parte* if the respondent parent does not attend court.

    3) At the initial hearing the court considers the application as set out in Form 2 and makes preliminary orders. The orders may encompass the following:

        - A direction that the SCA serve the application and orders made on the respondent parent (if the initial hearing is heard *ex parte*);
        - *Ex parte* orders securing the child's presence in Australia. These would include:
            - An order that the relevant State Government Department make arrangements for the purposes of placing the child or children with an appropriate person, institution or body to secure the welfare of the child or children pending the determination of the application;
            - An order authorising officers of the relevant State Government Department to visit and enter the place of residence of the respondent parent and have access to the child/children as reasonably required for the purposes of investigating and determining the welfare of the child;
            - An order restraining the respondent (and/or requesting) parent from removing the child from Australia and from the child's current residence, and requesting that the Australian Federal Police give force and effect to the provisions of the order if required and place the name of the child or children on the Airport Watch List until further order. The respondent

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[57] There are 19 registries in all States and Territories, except Western Australia which has a separate Family Court, see Family Court of Australia (2011) *"Family Law Registries"* available online at: http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Locations/Locations/. In each of the four main registries (excluding Western Australia) there is a Registrar that deals primarily with Hague related proceedings.

[58] See Form 2 *Application initiating proceedings (other than for access)* in Schedule 3 of the Regulations.

[59] In each region there is a judge that primarily hears Hague related proceedings, although if required other judicial officers are able to hear Hague matters in the event that the Hague judge is absent or unable to hear the application.

(and/or requesting parent) will be entitled to apply to vary or set aside this order;

- o A direction that the respondent parent deliver up to a designated Registrar any or all passports held in the name of the child or children or upon which the child or children appear;
- o An order restraining the respondent parent from applying for any further or other passports for the child or children pending further order;

- ➢ Alternatively where the risk of flight is non-existent the application may be adjourned and service on the respondent parent required before any orders are made;
- ➢ An order restraining the respondent parent from causing or permitting the child to be assessed or examined for the purposes of obtaining evidence for use in the proceedings without further order or the prior input of the other parties to the proceedings including any Independent Children's Lawyer ("ICL");
- ➢ An appointment of an ICL pursuant to s 68L(3) of the Act. In this respect, the Court needs to be satisfied of, and express the "exceptional circumstances" justifying the appointment.[60] In the experience of the Court the appointment of an ICL early in proceedings does not cause delay or protract the proceedings. However, late requests for the appointment of an ICL can seriously delay a final hearing.[61] The restriction on the power to appoint an ICL in Hague applications puts Australia out of step with the rest of the common law contracting States and the majority of civil law contracting States.[62] It is noted that the appointment of an ICL is consistent with Article 12[63] of the *United Nations Convention on the Rights of the Child*.[64]
- ➢ An adjournment of the application to a further hearing date (generally within two weeks of the initial hearing date in order to allow the respondent parent to obtain legal advice and representation);
- ➢ A direction that the respondent parent attend court on the further hearing date and remain at court pending further order;
- ➢ A direction that the respondent parent deliver the child or children to the court's child care facilities on the date of the further hearing.

4) At the further hearing date submissions of the parties are heard and directions are made for the final hearing and may involve:

- ➢ An order fixing the final hearing date for the determination of the application (the fixing of this date is dependent on the facts and circumstances of the

[60]See *State Central Authority v Quang* (2009) 237 FLR 166 at [12], per Bennett J citing Lord Bingham of Cornhill CJ in *R v Kelly (Edward)* [2000] QB 198 at [206].
[61]*State Central Authority v Hotzner (No. 2)* (2010) 44 Fam LR 505 at [5] to [7]; *State Central Authority v Truman* [2010] FamCA 1175 at [23].
[62]See HCCH (2010) "*Guide to Good Practice Child Abduction Convention: Part IV – Enforcement"* Permanent Bureau, at pp 28 to 29, available online at: http://www.hcch.net/index_en.php?act=publications.listing&sub=4.
[63]Article 12 provides that " States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."
[64]Australia became a signatory to UNCROC on 22 August 1990, ratification occurred in Australia on 12 December 1990 and UNCROC came into force on 16 January 1991.

matter, the expert evidence required and the estimated delay involved in the parties obtaining evidence from the foreign jurisdiction. Generally the final hearing will be between 4 and 6 weeks from the date of further hearing);[65]

- A discussion with the respondent as to the basis of opposition to return including which, if any, exceptions will be relied upon;[66]
- An order requiring the parties to file and serve any response, amended response and affidavits prior to the final hearing date. This will include evidence from the requesting contracting State by the requesting parent and other witnesses in reply to the respondent parent's evidence;
- An order appointing a Family Consultant for the provision of expert evidence in the form of a Family Report pursuant to reg 26, on for example, the alleged objection of a child to return (age, degree of maturity and strength of objection) or if the application was made more than twelve months after the removal, the extent to which the child is settled, or the emotional harm to a child that could occur if she or he was separated from siblings,[67] and a direction that the requesting and respondent parents attend an appointment or series of appointments and make the child or children available as required;
- An order requiring the parties to file and serve any expert evidence to be relied on at the final hearing. Expert evidence may include, for example, medical evidence, social science evidence and evidence relating to the relevant law in force in the foreign jurisdiction if rights of custody is in issue;
- A consideration by the parties as to whether the matter would be assisted by direct judicial communications to facilitate the production of documents from the contracting State, for example, court files of prior parenting proceedings, or where possible, police and medical records, or to assess the feasibility of securing mirror or complimentary orders in the requesting state prior to the return of the child (as discussed above);
- An order directing the SCA to ascertain with precision the means by which a child can be returned to the contracting State including in situations where a respondent parent may want to accompany the child but does not have the financial means to do so;
- A consideration of what oral evidence will need to be obtained, by cross examination or otherwise, from the foreign jurisdiction and how this can be achieved having regard to the proximity of the witnesses to the court of the Hague Network Judge (if any) and international time zones.
- If it is envisioned that a requesting parent may attend the final hearing and or a private mediation, some consideration would be given to the time the requesting parent may spend with the child and any conditions on the time to be spent;

[65]For example, the SCA will be required to send a request for evidence and documentation via the CCA to the foreign SCA and then await their response and the provision of the evidence and documentation.

[66]The exceptions are: no rights of custody at the relevant time (reg 16(3)(a)(i)), consent or acquiescence (reg 16(3)(a)(ii)), grave risk of harm (reg 16(3)(b)), the child's objection (reg 16(3)(c)) and the protection of human rights and fundamental freedoms (reg 16(3)(d)).

[67]For a more thorough discussion of the role of Family Consultants in conducting Family Reports in Hague matters see, Fry, Deborah (2010) "Children's Voices in International Hague Convention Child Abduction Cases: An Australian Experience" 1 *Family Law Review* 82.

- If appropriate, an order may provide for the parties to attend a private mediation in relation to the application and substantive parenting matters as a parallel process which will not delay proceedings;[68]

- A further mention date will be set, following the filing of all material, to ensure that the application is ready for final hearing. The parties will be required to file an outline of case and clarify which witnesses are required for cross examination. If witnesses from the foreign jurisdiction are required for cross examination, direct judicial communication with a judge of the International Hague Network of Judges can be contacted to secure the court room for videoconferencing to occur allowing for differences in time zones.[69]

5) At this stage the parties may resolve the dispute by consent. If this occurs then the court will consider the agreement and may make consent orders agreed to by the parties and dismiss the application. If the parties require orders in the foreign jurisdiction, then obtaining such orders will involve direct judicial cooperation and some consideration of jurisdictional issues, particularly in circumstances where the other country is not a party to the 1996 Child Protection Convention.

6) At the final hearing the court will hear the evidence and submissions of each party, and the ICL, where one has been appointed. At the conclusion of the final hearing the court may make orders and provide *ex tempore* reasons for judgment, or make orders and reserve its reasons for judgment, or reserve both orders and reasons for judgment and deliver those reasons and orders at a later date. Generally the time frame for the delivery of reasons is three months from the date of final hearing. However, judges will make concerted efforts to deliver reasons as soon as practicable and most decisions are delivered well ahead of this time frame.

7) Once the orders have been made, and reasons delivered, a party may appeal the orders to the Full Court of the Family Court by filing a Notice of Appeal within 28 days.[70] A party may seek a stay of the orders pending the hearing and determination of the appeal.[71]

   - Hague appeals are prioritised to expedite their hearing and determination.

8) Once the orders of the Full Court are pronounced a party may appeal to the High Court by seeking special leave.[72] Special leave has previously been obtained in a number of Hague applications.

[68]Where there are allegations of child abuse or domestic violence mediation may not be appropriate.
[69]This may require the Court to sit outside of standard court hours.
[70]See s 94(1A) and Rule 23.03 of the *Family Law Rules* 2004 (Cth) ("the Rules").
[71]See r 22.11.
[72]See s 95.

A Statistical Analysis of Hague Applications determined by the Family Court

32. As at July 2011, the Family Court of Australia has received 15 Hague applications in 2011. In 2010 there were 42 applications, 36 applications in 2009 and 52 applications in 2008.[73] Statistics prepared by the Attorney-General's Department show that in 2008, 2009 and 2010 respectively, 100, 83 and 89 children were alleged to have been wrongfully removed to, or retained in, Australia,[74] and of those children, 70, 31 and 49 respectively were returned to Convention countries.

33. Recent research suggests that in Australia between 2003 and 2008 there has been a 74 percent increase in the number of applications to the CCA for the return of a child or children under the Convention.[75] The largest number of applications received in 2008 by the CCA from Convention countries were from New Zealand, the United States of America, and the United Kingdom.[76] Of the applications received in 2008, seven were rejected by the CCA and ten were resolved by voluntary return and did not involve the Family Court. Of the applications that did result in a SCA applying for a return order the judicial outcomes are as follows:[77]

Judicial Outcome (not including 17 applications rejected by the CCA (9%) or resolved by voluntary return (13%)	
Consent Order	17 (23%)
Order allowing return	11 (15%)
Order refusing return	16 (21%)
Order for contact	3 (4%)
Application withdrawn	11 (15%)

N.B. this data is taken directly from the research of Professor Lowe.

[73] See Annexure A: Statistical Services Unit, Family Court of Australia "Forms/Documents Lodged, Family Court of Australia – All Locations" from 1 July 2010 to 30 June 2011, from 1 July 2009 to 30 June 2010, from 1 July 2008 to 30 June 2009 and from 1 July 2007 to 30 June 2008.
[74] Department of Attorney-General (2010) *"International Child Abduction – Statistics"* available online at http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_Children_Internationalchildabduction. Note that these statistics relate to the number of children for whom the CCA had received an application for their return.
[75] Lowe, Nigel (2011) "A statistical analysis of applications made in 2008 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part III – National Reports" Preliminary Document No. 8 C of May 2011, Permanent Bureau, at p 4, available online at: http://www.hcch.net/index_en.php?act=progress.listing&cat=7.
[76] Lowe, Nigel (2011) as above at p 5.
[77] Lowe, Nigel (2011) as above on p 9.

34. When compared with global figures more Hague applications were resolved by consent in Australia and there was an overall higher judicial return rate of 51 percent, compared with 46 percent globally. The number of applications in which the court refused to return the child (21 %) was higher than the global average (15%).[78] Of the judicial reasons for refusal, six applications were refused as it was determined that the Convention did not apply, four as the child was found not to be habitually resident in the requesting Convention country,[79] and two as the requesting parent was found to have no rights of custody at the relevant time.[80] In those refusals where the Convention did apply, five applications were refused as the exception of acquiescence applied, four as the grave risk exception applied, and three as the exception relating to the objection of the child applied.[81]

Judicial Refusal – Convention not applicable	
Habitual Residence not established	4 (22%)
Rights of Custody not established	2 (11%)
Total number of judicial refusals where Convention not applicable	6

Judicial Refusal - Convention applicable	
Exception: consent	0 (0%)
Exception: acquiescence	5 (28%)
Exception: grave risk	4 (22%)
Exception: objection of the child	3 (17%)
Total number of judicial refusals where Convention applicable	**12**

N.B. this data is taken directly from the research of Professor Lowe.

35. Those refusals where the Convention was found not to apply were higher than the respective global average of 15 percent, where habitual residence was not established, and 8 percent, where rights of custody was not established. In relation to the refusals where the Convention was found to apply, only judicial

[78]Lowe, Nigel (2011) as above on p 9.
[79]See reg 16(1)(c) and reg 16(1A) (b).
[80]See reg 16(1)(c) and reg 16(1A)(c), (d) and (e).
[81]Lowe, Nigel (2011) as above on p 12.

refusals where the exception of acquiescence applied were of a higher rate than the global average of 5 percent, and judicial refusals based on the grave risk exception in Australia were lower than the global average.[82] This suggests, as much as it can be gleaned from the data relating solely to 2008, that reg 16(1) and reg 16(1A) have been interpreted by the courts in Australia in a manner that results in higher refusals than the global average. This appears to be particularly so in relation to findings that the child was not habitually resident in the requesting Convention country.

[82] Lowe, Nigel (2011) as above on p 12.

Term of Reference (d)

> "policies, practices and strategies that could be introduced to streamline the return of abducted children;"

Time frames in Act and Regulations

36. Regulation 15 relates to orders that the court may make in Hague applications brought by the SCA. Regulation 15 states that:

    "(2) A court must, so far as practicable, give to an application such priority as will ensure that the application is dealt with as quickly as a proper consideration of each matter relating to the application allows.

    (4) If an application made under regulation 14 is not determined by a court within the period of 42 days commencing on the day on which the application is filed:

    (a) the responsible Central Authority or Article 3 applicant who made the application may ask the Registrar of the court to state in writing the reasons for the application not having been determined within that period; and

    (b) as soon as practicable after being asked, the Registrar must give the statement to the responsible Central Authority or Article 3 applicant."

37. Recent research indicates that there have been significant global increases in the time taken for Hague applications to be determined voluntarily, by consent, by an order for return or by an order refusing the return of a child:[83]

Method of Resolution – Global Averages	**1993**	**2003**	**2008**
Voluntary Return	84 days	98 days	121 days
Consent Order/ Judicial Order – Return	107 days	125 days	166 days
Judicial Order – Refusal	147 days	233 days	286 days

N.B. this data is taken directly from the research of Professor Lowe.

38. Further, research indicates that Hague applications received by the CCA in 2008 in Australia took an average of 140 days to be resolved.[84] However, the manner in which the application was resolved affected the time taken.

39. In Australia, of the ten applications where the child was voluntarily returned without seeking a return order from the court, the amount of time taken was between one and 57 days. In the 17 applications where a return order was

[83] Lowe, Nigel (2011) "A statistical analysis of applications made in 2008 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part III – Global Report" Preliminary Document No. 8 A of May 2011, Permanent Bureau, at pp 40 to 43 , available online at: http://www.hcch.net/index_en.php?act=progress.listing&cat=7.
[84] Lowe, Nigel (2011) as above on p 12.

sought from the court but the matter resolved by way of consent orders, the time taken was between 33 and 300 days. In the 11 applications that proceeded to a final hearing with an order made for the return of the child, the time taken was between 44 and 546 days. Finally, in the 16 applications where the matter proceeded to a final hearing and the court refused to make an order for the return of the child, the time taken was between 53 and 518 days.[85] Although the number of days taken in some of the applications appear significant, applications received by Australia resolved by voluntary return, consent order or judicial order, the average were concluded in a significantly shorter timeframe than that of the global average:[86]

Method of Resolution	**Australia**	**Global Average**
Voluntary Return	18 days	121 days
Consent Order	105 days	163 days
Judicial Order – Return	156 days	204 days
Judicial Order – Refusal	202 days	286 days

N.B. this data is taken directly from the research of Professor Lowe.

40. Where an order for the return of the child was made, whether by consent or after a final hearing, it took an average of 125 days in Australia as compared with a global average of 166 days.[87] Where an order refusing to return the child was made after a final hearing it took an average of 202 days in Australia, compared with a global average of 286 days.[88] Additionally, on receipt of an application from the SCA in 2008 the court took an average of 128 days to determine the application whereas the global average was 153 days.[89] Finally, of Hague applications that were before the court in 2008, only two percent of the judicial decisions were appealed, which is substantially less than the global average of 28 percent. The average time taken to determine appeals in 2008 was 207 days compared with a global average of 324 days.[90] The Chief Justice is confident that the fact that jurisdiction in these matters is effectively concentrated in the Family Court, which itself has a reasonably small number of judges (excluding Appeal Division judges) hearing the applications, is a significant factor in finalisation of matters in less time than international averages. Overall, from this

[85] Lowe, Nigel (2011) as above on p 13.
[86] Lowe, Nigel (2011) as above on p 13.
[87] Lowe, Nigel (2011) as above on p 13.
[88] Lowe, Nigel (2011) as above on p 13.
[89] Lowe, Nigel (2011) as above on p 14.
[90] Lowe, Nigel (2011) as above on p 14.

limited snapshot of data relating to 2008, those applications determined by the Family Court on the filing of a Hague application by the SCA, whether resolved by consent or after a final hearing, have been dealt with promptly when compared with the respective global average. It should be noted that in Australia the time taken to resolve an application is calculated from the date upon which the CCA confirms that the child is in Australia. In some other jurisdictions the time taken to resolve the application is calculated from the date when proceedings are issued, or the date the respondent parent first comes before the court, or at some other time.[91]

41. Although Hague applications dealt with by an order of the court in Australia compare favourably with global averages from the research of Professor Lowe it is apparent that some Hague applications take longer to resolve than the 42 day period imposed by reg 15(4). One reason for this may be the judicial process currently undertaken in Hague proceedings in Australia. It should be noted that the Family Court is bound by precedent and regard should be had to reasoning of the majority of the High Court in *ZP v PS*[92] indicating that applications relating to international child abduction should not necessarily be dealt with summarily or on the papers.[93]

42. Regard should also be had to the reasoning of the majority of the High Court in *MW v Director-General, Department of Community Services*[94] and the Full Court in *Zotkiewicz & Commissioner of Police (No. 2)*.[95] As indicated, in Hague applications that proceed to a final hearing where it is contended that one of the exceptions in reg 16(3) applies, the court will require thorough examination of issues of fact.[96] Further, it should be noted that even in Hague applications where the issue for determination is whether the Convention applies based on whether habitual residence or rights of custody are established by the applicant SCA, the proceedings are likely to involve contested issues of fact and require the testing of evidence by way of cross examination.

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[91] Lowe, Nigel (2011) as above at p 5.

[92] (1994) 181 CLR 639 at 648 to 649 per Mason CJ, Toohey and McHugh JJ, and at 271, per Deane and Gaudon JJ.

[93] The authority of *ZP v PS* (1994) 181 CLR 639 related to an application in which the requesting country was not at that time a Convention country and hence the Convention did not apply. However, it is clear that the issues discussed in this decision are relevant to the determination of Hague applications where the requesting country is a Convention country, the Convention applies and the respondent parent relies on one of the exceptions to an order for return.

[94] (2008) ALJR 629 at [118] per Gummon, Heydon and Crennan JJ.

[95] [2011] FamCAFC 147 per May, Thackray and Moncrieff JJ at [89] to [90].

[96] In accordance with the reasoning of the majority in *DP v Commonwealth Central Authority; JLM v Director-General NSW Department of Community Services* (2001) 206 CLR 401 at [41] to[44] per Gaudron, Gummow and Hayne JJ and the Full Court in *Zotkiewicz & Commissioner of Police (No. 2)*) [2011] FamCAFC 147 per May, Thackray and Moncrieff JJ at [89] to [90].

43. This may be one reason for the increased timeframe in determining Hague applications that proceed to a final hearing and require judicial determination as opposed to those that settle by consent.

44. Another potential reason for the difference in the time taken to determine Hague applications where an order is made for the return of the child, as opposed to an order for the refusal to return a child, is the difference in time taken for the judge to deliver reasons for judgment. The rationale for providing reasons for judgment is the subject of well known authority and was stated in *Soulemezis v Dudley (Holdings) Pty Ltd*.[97]

Procedural delays in the determination of Hague Applications before the Court

45. In addition to the reasons for the differences in time taken to resolve Hague applications discussed above, other procedural matters may increase the time taken to resolve applications. Procedural delays may result in an increase in the time taken to resolve an application due to the delay of the final hearing of a Hague application. Such delays include:

   - Locating the respondent parent and effecting service;
   - Time taken for the respondent parent to obtain legal representation and advice, file a response or cross application and gather evidence from the foreign jurisdiction to support his or her case or refile the case of the SCA.
   - Time taken for the applicant SCA to request and obtain instructions and evidence via the CCA who forward the request to the foreign SCA.
   - Delay associated with parties contacting relevant witnesses and preparing affidavits.
   - If applicable, the time taken by the ICL to obtain and review the evidence of both parties prior to the ICL filing submissions.
   - If applicable, the time taken for a Family Consultant to produce a family report after meeting as required with the parties and a child or children.
   - Time taken to ensure all witnesses are available for cross examination on the final hearing date, taking into account time zone related issues.

46. It should be noted that Hague applications are not proceedings to which Division 12A (Less Adversarial Trials) applies.

[97] *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 279; *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 431; *Public Service Board of NSW v Osmond* (1986) 159 CLR 656; *Bennett & Bennett* (1991) FLC 92-191 at [78,267].

Non-compliant Countries

47. Australia has had some unfortunate experiences with some contracting States that, arguably, have not complied with their obligations under the Convention. This may indicate that additional consideration is required by Australia prior to its acceptance of the ratification of the Convention by certain States and, in particular, whether such States have met the necessary criteria of having a fully operational Central Authority prior to the Convention becoming operative.

48. Article 7 of the Convention sets out the duties of a Central Authority as follows:

> "Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through any intermediary, they shall take all appropriate measures—
>
> *a* to discover the whereabouts of a child who has been wrongfully removed or retained;
>
> *b* to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
>
> *c* to secure the voluntary return of the child or to bring about an amicable resolution of the issues;
>
> *d* to exchange, where desirable, information relating to the social background of the child;
>
> *e* to provide information of a general character as to the law of their State in connection with the application of the Convention;
>
> *f* to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access;
>
> *g* where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
>
> *h* to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
>
> *i* to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application."

49. Unsurprisingly, if there is no functioning Central Authority in a contracting State, the Convention cannot operate.[98]

50. If a State is consistently non-compliant, the Court may favour the establishment of something in the nature of an alert system to notify other Convention countries that there may be difficulties in relation to the manner in which the

[98]This sentiment applies also to the 1996 Child Protection Convention, although the Court accepts that the operation of the 1996 Convention is less reliant on Central Authorities than the 1980 Convention.

Convention has been, or will be, implemented in the non-compliant State. Obviously, this could be highly political but would be sought in an attempt to avoid contracting States, courts, and requesting parents falling under a misapprehension, or making an assumption, that the principles of the Convention will be observed by a contracting State when, in fact, recent history indicates otherwise. How best to deal prophylatically with repeated and apparent non-compliance is likely to be a matter which is raised for discussion at Part II of the Special Commission which will be held at the Hague in January 2012.

The Criminalisation of International Parental Child Abduction

51. The Family Court does not generally comment on matters of policy and does not intend to do so in relation to this particular issue. However, in the event that new offences are introduced in respect to international parental child abduction it would be highly desirable for the Commonwealth Attorney-General to have the capacity to grant immunity from prosecution in respect of such charges.

Mediation in the context of Hague Applications

52. Hague applications involve a determination of the most suitable forum in which to decide parenting issues. With few exceptions, the most appropriate forum is the jurisdiction in which the child was "habitually resident" immediately prior to the wrongful retention or removal.[99] Although this determination relates primarily to forum rather that the best interests of individual children, mediation or conciliation in Hague proceedings can focus on long-term parenting issues in addition to issues such as pre-conditions to the return of a child or children the subject of a Hague application.

53. Mediation and conciliation in Hague applications occurs between the parents of the child rather than between the applicant SCA and the respondent parent. There are no provisions in the Act, Regulations or the Convention that provide for compulsory mediation or conciliation. It is of note that the 1996 Child Protection Convention[100] (implemented in Australia in Part XIIIAA, Div 4, s 111CA of the Act and the *Family Law (Child Protection) Regulations* 2003 (Cth)), specifically mandates mediation. Article 31 provides that:

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[99]See reg 16(1) and (1A) and the exceptions in reg 16(3).
[100]See *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children* in schedule 1 of the Act.

"The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to –

. . .

b) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies…"

54. In discussing mediation or conciliation in the context of Hague applications it should be noted that research conducted in 2008 suggested that in the majority of Hague applications in Australia the respondent parent, or abducting parent, is the mother of the child or children (67%) and the primary carer in the majority of those applications (91%).[101] Only a third of Hague applications involved fathers (27%) or grandparents (6%) who abducted the child or children, and of those applications, in only a quarter was the father the primary carer.[102] Often the abducting parent who is the primary carer is motivated by a desire to return to their country of origin on the breakdown of the relationship.[103] This in many cases relates to a perceived or actual need for familial support following the dissolution of a relationship that may have previously provided that support.[104]

55. It is also important to note that the average age of children involved in Hague applications in Australia was 6.8 years, compared with a global average of 6.3 years.[105] International parental child abduction occurs most frequently in very high conflict cases. Generally, younger children are more vulnerable to the emotional and psychological effects of disturbance in their parental relationships than older, more independent children.[106] The effect on children subject to international abduction, and particularly younger children, has been described as "catastrophic". The Australian Branch of the International Social Service observed that:[107]

"Children who are abducted are usually already going through the pain of their parents' relationship breakdown. They now face the trauma of losing contact with their familiar world including grandparents, school, friends and local community. The experience is perplexing and shocking as children try to make sense of a situation which is difficult to understand."

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[101] Lowe, Nigel (2011) as above at pp 6 to 7.
[102] Lowe, Nigel (2011) as above at pp 6 to 7.
[103] See for example *Sheldon & Weir* [2011] FamCA 2; *State Central Authority & Perkis* [2010] FamCA 649; *Harris & Harris (No. 2)* [2010] FamCAFC 221.
[104] See for example *Sheldon & Weir* [2011] FamCA 2; *State Central Authority & Perkis* [2010] FamCA 649; *State Central Authority & Weston* [2010] FamCA 599; *Harris & Harris (No. 2)* [2010] FamCAFC 221.
[105] Lowe, Nigel (2011) as above at p 8.
[106] See also Tuohey, Anne (2005) "Living in Limbo: the experience of International Child Abduction" *International Social Services Australian Branch*, February 2005, at p 3, available online at: http://www.iss.org.au/content/view/34/.
[107] Tuohey, Anne, as above at p 5.

56. Hague applications relate to forum as opposed to the welfare of the child. Accordingly, the nature of the proceedings encourages parents to adopt a relatively short term perspective. Hague proceedings require the parties to focus, within the terms of the international treaty, on why one jurisdiction is preferable for the purposes of litigation. This focus does not tend to complement, encourage or support a child focussed approach. In contrast to parenting proceedings, neither parent is required to consider the ongoing need to co-parent or to focus on the child or children's long-term needs and consequentially the needs of a particular child or children can be overlooked.

57. Conciliation or mediation between parents can refocus parents on the ongoing needs of the child or children and reality test the respective proposals involved in the Hague proceedings. Further, mediation and conciliation can require each parent to consider how the child or children, and each parent, will be affected in the event that the child is, or is not, returned to the requesting Convention country. Mediation and conciliation in this context can assist parents to think beyond the Hague proceedings and encourage a consideration of the long-term interests of the child or children.

58. Another unique aspect of Hague applications is the lack of scope for compromise. In Hague proceedings a return order or refusal to make a return order will ultimately result in one parent feeling as though he or she has succeeded. Ultimately, the victory may be pyrrhic when regard is had to the eventual outcome of any parenting proceedings in whichever country a child is held to be habitually resident. However, there will also be very significant consequences for the parent who is not successful in terms of where that parent will want to live (at least pending any determination of parenting arrangements) and his or her residence of, and access to, the child or children. Conciliation and mediation can facilitate the parents being able to look beyond the result in the Hague application and assess their realistic options and the likely outcomes, in real terms, for the child or children concerned.

59. Invariably, the end of any Hague proceeding is the beginning of a new process which will usually require parenting proceedings to be commenced in the jurisdiction that the court has, pursuant to the terms of the 1980 Convention, concluded is the appropriate forum. The purpose of the substantive proceedings will be to decide where, and with whom, the child shall live, and how regularly, for what duration, and under what conditions, the child will see the other parent.

The parent who is unsuccessful in the determination of the Hague application is likely to face difficulties in the substantive parenting proceedings. Absent an agreement between the parents, if the unsuccessful parent chooses not to commence parenting proceedings in the jurisdiction in which the child is present after the determination of the Hague application, that parent may not obtain enforceable rights to spend time with the child,[108] or to participate in major long-term decisions affecting the child.[109] That may not represent a principled outcome or an outcome which is even remotely consistent with the child's best interests. Accordingly, it underscores that desirability of conciliation and mediation which requires the parents to look past the issues in the Hague proceedings and assess their realistic options and the likely outcomes for the family.

60. Other special factors that need to be considered in the mediation of Hague applications include any criminal proceedings that may arise in the foreign jurisdiction as a result of the respondent parent's actions in removing or retaining the child or children in Australia, and any visa or immigration related issues that may result due to the separation of the parents and the breakdown of the parental relationship.[110]

61. In considering the viability of mediation in Hague application proceedings in Australia, it should be noted that the parties to Hague proceedings are the respondent parent and the applicant SCA.[111] The left behind parent frequently has a limited role in the proceedings, often confined to being called as a witness to give evidence relied on by the applicant SCA. It is difficult for parents to contemplate mediating a compromise in Hague proceedings. In general terms, each parent is wholly convinced that their claim is meritorious and there is little common ground. It follows that often the position of parents in Hague proceedings are more polarised than in other parenting proceedings before the court and it is not uncommon for each of the parents to have entrenched family support, often in different countries, willing to devote a high level of resources to defending or prosecuting an application with the belief that those proceedings,

[108] See s 111B(4) definition of rights of custody, in particular s 111B(4)(d) and reg 4. See also the definition of "rights of access" in reg 2.
[109] See s 111B(4)(c), s 4 definition of "major long-term issues" and s 64B(3) of the Act.
[110] HCCH (2011) "*Draft Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part V - Mediation*" Preliminary Document No. 5 of May 2011, Permanent Bureau, at p 25, available online at: http://www.hcch.net/index_en.php?act=progress.listing&cat=7.
[111] In other jurisdiction the relevant State Central Authority will only assist in the provision or location of legal services to enable a requesting parent to commence proceedings in the foreign jurisdiction.

alone, will decide whether the child or children will be able to remain in, or be returned to, their country. Frequently, this leaves the parent who is unsuccessful in the Hague proceedings with depleted resources and a diminished capacity to participate in substantive parenting proceedings.

62. A further constraint on the conciliation or mediation of Hague application proceedings are the time limitations placed on the determination of applications.[112] Mediation is often not available, encouraged or feasible once proceedings have been instituted. This is unfortunate because, until proceedings are instituted, the strengths and weaknesses of each parent's case may not be known to the other party, and neither parent is inclined to look beyond his or her grievances in regard to the past conduct of the other parent. In view of the clear time limits stated in reg 15 for the determination of Hague applications, the Family Court does not support mediation in circumstances where it will result in any delay or postponement of a judicial determination. Consequently, the delivery of mediation services in Hague matters must be highly flexible, available on short notice, unattended by many of the usual formalities, capable of being conducted in person as well as electronically, and, in particular cases, be free of cost to the participants. Currently mediation or conciliation services meeting these requirements are not readily available in Australia.

63. In appropriate Hague proceedings before the court, conciliation or mediation has been suggested to the parties, on the proviso that the mediation will not delay the proceedings.[113] The opportunity to mediate will not always be pursued by the parties, as apparent in the decision of *State Central Authority & Hajjar,*[114] where Bennett J noted that:

> "The Court cannot compel the parties to mediate proceedings under the Convention on Civil Aspects of International Child Abduction ("1980 Convention"). Further, whilst alternative dispute resolution is a cornerstone of Australian family law, a proceeding brought under the Regulations (1980 Convention), will not be delayed to permit mediation. The upshot is that the Court will encourage mediation early on in a proceeding provided that mediation does not delay a judicial determination. This proceeding appeared to me to be a matter which could very well benefit from a mediation about all parenting matters including the return of the children to the United Kingdom. Accordingly, I reminded the parties at each turn that they could consider mediation. Suffice it is to say that the SCA has indicated consistently that neither it nor the requesting parent were prepared to enter into a private mediation. I am not critical of that stance, but wish to record here that the Court

[112] Reg 15(2) and (4). See also Article 11 of the Convention.
[113] *State Central Authority & Lore (No. 2)* [2007] FamCA 1434; *State Central Authority & Hajjar* [2010] FamCA 648; *State Central Authority & Wattey* [2008] FamCA 1108.
[114] [2010] FamCA 648 at [75].

and the parties were alive to the possibility of mediation but, ultimately, no mediation was pursued."

64. However, in appropriate Hague cases where conciliation or mediation is pursued, the benefits are numerous. Conciliation and mediation enables the parties to fashion an agreed solution that:

    - addresses their respective needs and those of the child or children;
    - provides the parents with responsibility for decision-making in relation to the child or children;
    - lays a foundation for parenting into the future as well as being able to negotiation future parenting arrangements;
    - reduces conflict between the parents and encourages a child-focussed approach;
    - reduces the costs borne by the parents and the delay associated with litigation, particularly the litigation subsequent to the Hague proceedings;
    - reduces the stress experienced by the parents and the child or children; and
    - reduces the potential for the child or children to be returned to a Convention country only to be relocated to, say, Australia pursuant to parenting orders made by a foreign court.

65. Conciliation and mediation of Hague applications has the benefit of; providing a potentially swift resolution, preventing the respondent parent from taking the child or children to a third country or from going into hiding, reducing the travel costs incurred by the requesting parent related to litigation, and providing for provisional contact and parenting arrangements until the determination of the application.[115]

66. Mediation or conciliation can also elucidate what is necessary by way of pre-conditions to return.

67. The Draft Guide to Good Practice on Mediation under the Hague Convention emphasises the different considerations involved in Hague mediation by virtue of cross-border issues and multiple jurisdictions. The Draft Guide observes that:[116]

    "The interplay of two different legal systems, different cultures and languages makes mediation much more difficult in such cases. At the same time, the risks that go with the parties relying on mediated agreements which do not take into account the legal situation and have no legal effect in the jurisdictions concerned are much higher. The parties might not be aware that the cross-border movement of persons

[115] HCCH (2011) "*Draft Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part V - Mediation*" Preliminary Document No. 5 of May 2011, Permanent Bureau, at p 27, available online at: http://www.hcch.net/index_en.php?act=progress.listing&cat=7.

[116] HCCH (2011) "*Draft Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part V - Mediation*" Preliminary Document No. 5 of May 2011, Permanent Bureau, at p 25, available online at: http://www.hcch.net/index_en.php?act=progress.listing&cat=7.

> or goods, to which they have agreed, will result in a change of their legal situation. When it comes to rights of custody or contact, for example, habitual residence is a widely used "connecting factor" in private international law. Hence the agreed change of a child's habitual residence from one country to another may affect jurisdiction and applicable law regarding custody and contact, and may thus affect the legal evaluation of the parties' rights and duties."

68. Significantly, all of the powers of this court and cooperation between Hague Network Judges will be available to implement an agreed solution which, by virtue of it having been mediated, may meet the needs of the family to a far greater degree than a decision which relates only to the forum for future litigation.

69. A respondent parent may allege that the requesting parent perpetrated domestic violence or child abuse and seek to rely on the grave risk exception.[117] It is generally accepted that in circumstances where there has been domestic violence or child abuse mediation or conciliation may not be not appropriate as the process is undermined in situations where a party participates due to a fear of violence or harm.[118] Accordingly, the skill of the conciliator or mediator in Hague applications, where the parties can come from diverse cultural and religious backgrounds is crucial, particularly in circumstances where domestic violence or abuse may not have been identified.[119] Additionally, it should be noted that mediation as a process operates on a basis of voluntary participation and it has previously been observed that "compulsory mediation quite simply does not work, and is a contradiction in terms".[120]

70. The Principal Family Court Judge in New Zealand has published a Practice Note in relation to the mediation of Hague Convention cases in New Zealand.[121] The Practice Note stipulates that counsel for the Central Authority shall advise the court of whether mediation is considered to be appropriate and provides for the procedure if the court considers that mediation is appropriate, including for the appointment of counsel or a solicitor to conduct the mediation.[122] In relation

[117] See, for example, *State Central Authority & Hotzner (No. 2)* [2010] FamCA 1041; *State Central Authority & Perkis* [2010] FamCA 649; *Harris & Harris (No. 2)* [2010] FamCAFC 221.

[118] Freeman, Marilyn, et. al (2002) "Child Abduction – A role for Mediation?" *International Family Law* Journal 104 at p 105.

[119] Freeman, Marilyn, (2002) as above at 105; See also HCCH (2011) "*Draft Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part V - Mediation*" Preliminary Document No. 5 of May 2011, Permanent Bureau, at p 29, available online at: http://www.hcch.net/index_en.php?act=progress.listing&cat=7.

[120] Freeman, Marilyn, (2002) as above at 105 citing the Lord Chancellor of the House of Lords.

[121] Judge Boshier (2011) "*Practice Note: Hague Convention Cases: Mediation Process - Removal, Retention and Access*", Family Court of New Zealand, 24 March 2011, available online at : http://www.courts.govt.nz/courts/family-court/practice-and-procedure/practice-notes/practice-note-hague-convention-cases-mediation-process-removal-retention-and-access

[122] See Judge Boshier (2011) above at 2.1 to 2.4.

to the issue of delay, the Practice Note provides that the mediation must not delay Hague proceedings and must occur within seven to fourteen days of the court's receipt of the application.[123] The Practice Direction details the process of determining which duly qualified legal practitioners that may mediate Hague cases.[124] The "Counsel-led Mediation Guidelines" state that:[125]

> "8.2. During mediation, the mediator will assist the parties to resolve the dispute by:
>
> Identifying the issues which underlie the dispute;
>
> Identifying the interests of each person involved with the dispute. In family proceedings that includes the interests of the children, which are generally regarded as paramount;
>
> Developing options for the resolution of the issues underlying the dispute. The options can be short or long term and may propose a resolution of all issues or just some;
>
> Exploring those options and, if possible, agreeing on a resolution of the dispute or some or all of the issues underlying it. If a comprehensive agreement cannot be reached, it may still be possible to reach a short term agreement or resolve some of the issues. However, mediators should note that the Court's expectation is that most agreements should be final and that interim agreements should only be arrived at if it is clearly inappropriate for a final agreement to be made."

71. The above guidelines suggest an approach that is more similar to conciliation than mediation. In any event, the Hague judges favour conciliation over traditional mediation. Traditional mediation could be convened by a specialist mediator whereas a conciliation can be convened by a lawyer who is extensively qualified and experienced in the area of Hague Convention proceedings and international family law, with or without the assistance or input of a social scientist. Within this paradigm, counsel-led mediation is the preferred option. However, it is acknowledged that paying for counsel led mediation is presently beyond the financial resources of the Family Court, even if the families, which have the means and ability to pay do so. To date Hague applications which have been mediated by experienced counsel or lawyers have been privately funded by one or both of the parents to Hague proceedings.[126]

72. Alternative mediation services are provided by Family Relationship Centres. However, Justice Bennett understands that the time taken by Family Relationship Centres to conduct the initial intake and screening procedures exceeds that

[123] See Judge Boshier (2011) above at 3.1 to 3.4.
[124] See Judge Boshier (2011) above at 8.1 to 8.5.
[125] Family Court of New Zealand (2010) *"Counsel-led Mediation Guidelines"* Ministry of Justice, October 2010, at pp 4 to 5, available online at: http://www.justice.govt.nz/courts/family-court/practice-and-procedure/guidelines
[126] Private mediations with counsel in family law proceedings can cost up to $5000.

which is feasible given the strict timeframes applicable to Hague applications. The exception has been the Melbourne City Family Relationship Centre which has, on one occasion, made a very experienced conciliator (a former Family Consultant) available on very short notice.

73. The Family Relationship Advice Line, provided by the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs provides information about dispute resolution services including dispute resolution between parties via telephone.[127] However, in Justice Bennett's experience, while the electronic mediation service can be made available to parents involved in Hague matters, the waiting time for the mediation has been stated to be at least two months. Very recently, two hours of telephone mediation was made available to parents in a Hague application when the requesting parent was in Melbourne, as was the respondent parent. The Department is to be commended for making that particular mediation service available. However, Hague proceedings require an established framework of conciliation which can be delivered reliably, within about a week or on request, free to the parties and conducted quickly but not hastily.

74. Currently, the Court has no capacity to devote additional resources to private mediations or conciliation. However, a practical alternative may lie in expanding the Child Dispute Services section of the Family Court to make appropriately trained Family Consultants available for the conciliation of Hague applications where the parties cannot meet the cost of private mediation. Whereas the conciliator would not be legally trained, he or she would have extensive experience in parenting matters before the Court and could be assisted by the legally trained ICL.

75. On a small number of occasions Child dispute Services has been able to assist by allocating a Family Consultant to mediate or conciliate Hague application proceedings. This however has occurred on an ad hoc basis which is not sustainable.

76. The advantages of Family Consultants as court appointed conciliators in Hague matters are that they are readily available (funding permitting), are prepared to accommodate international time zones, have access to the Court file and documents produced on subpoena, and are not proposed by either parent.

[127] Family Relationships Online (2011) "*The Family Relationship Advice Line*" Department of Families, Housing, Community Services and Indigenous Affairs, available online at: http://www.familyrelationships.gov.au/Services/FRAL/Pages/default.aspx

Additionally, Family Consultants have a significant degree of expertise in international family law matters and childhood development, and are in a position to reality test the proposals of each parent vis-à-vis the outcome for children. Expert family consultants would be able to assess how the position propounded by each parent would impact on the child's short and long-term emotional development and the child's capacity to maintain a meaningful relationship with both parents and advise the parents accordingly. Currently, the services of Family Consultants is provided free of cost in some Hague proceedings.[128]

77. In circumstances where parents involved in Hague proceedings genuinely lack the capacity to pay for a private conciliation, the Child Dispute Services section of the Court, if adequately resourced, would offer a timely alternative with a skilled mediator that has the necessary expertise.

78. Recently, the Child Dispute Services section of the Family Court entered into discussions with Australian Branch of the International Social Service in relation to mediation or conciliation for parents in Hague proceedings that would be available in electronic form, internationally. It is understood that the Australian Branch of the International Social Service is optimistic about some international mediation process being available at some point in the future but there is nothing currently available or likely to be available in the short to medium term.[129]

79. Notwithstanding the obvious benefits of mediation or conciliation, the availability of experienced Hague conciliators and the question of who will bear the cost remains a problematic issue in Australia. Conciliation and mediation could be introduced or pursued to streamline the return of children wrongly removed to, or retained in, Australia in appropriate Hague application proceedings and this would assist in managing the safe and humane return of children. The Family Court is supportive of the establishment and funding of mediation and conciliation in such circumstances.

[128]See s 11F of the Act and reg 26.
[129]See International Social Service Australian Branch (2011) "*Services & Fees*", International Social Service, available online at: http://www.iss.org.au/content/view/28/ .

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"any other related matters."

The International Hague Network of Judges

80. The International Hague Network of Judges was first proposed in 1998. It was recommended that the relevant authority in Convention countries nominate one or more members of the judiciary to communicate and liaise with judges of other contracting States in respect of issues relevant to the Convention. In Australia, the relevant authority is the Chief Justice of the Family Court. In March 2001, at the fourth Special Commission meeting on the Practical Operation of the Hague Convention, the Commission adopted the following recommendation that focussed on international judicial communications or communications between relevant authorities:

> "5.5 Contracting States are encouraged to consider identifying a judge or judges or other persons or authorities able to facilitate at the international level communications between judges or between a judge and another authority.
>
> 5.6 Contracting States should actively encourage international judicial co-operation. This takes the form of attendance of judges at judicial conferences by exchanging ideas / communications with foreign judges or by explaining the possibilities of direct communication on specific cases.
>
> In Contracting States in which direct judicial communications are practised, the following are commonly accepted safeguards:
>
> - communications to be limited to logistical issues and the exchange of information;
> - parties to be notified in advance of the nature of proposed communication;
> - record to be kept of communications;
> - confirmation of any agreement reached in writing;
> - parties or their representatives to be present in certain cases, for example via conference call facilities.
>
> The Permanent Bureau should continue to explore the practical mechanisms for facilitating direct international judicial communications."

81. In some jurisdictions legislation has been enacted to formalise direct judicial communications and give effect to the recommendations in domestic law.[130] The creation of the International Hague Network of Judges is an important strategy that enables Convention countries and judicial members of those countries to understand the procedures that relate to the substantive proceedings that may

[130] See for example *Uniform Child Custody and Jurisdiction and Enforcement Act* 1997 (US), s 107.

follow a return order in a particular Convention country. This is important for the reasons stated in *McOwan & McOwan* by Justice Kay:[131]

> "Unless contracting States can feel reasonably assured that when children are returned under the Hague Convention, their welfare will be protected, there is a serious risk that contracting States and Courts will become reluctant to order the return of children."

82. Judicial communications have occurred in accordance with the safeguards in the recommendation, and with the parties' consent, in Hague matters between Australia and England, Scotland, Canada, Holland, the United States and New Zealand. Although it is essential to recognise the necessary limits of judicial communications[132] it is also important to note that the largest number of Hague applications are made and received between Australia and New Zealand, the United Kingdom and the United States, and this network improves the effectiveness of the Hague Convention as it operates between Australia and these contracting States.[133]

83. The Chief Justice and Justice Bennett of the Family Court of Australia represent Australia on the International Hague Network of Judges. Their role includes facilitating discussions with other countries on the merits of the Hague Conventions. This has included discussions with the courts of Singapore (which has recently acceded to the Convention), Indonesia (which is a non-Convention country) and Hong Kong (which is a Convention country). In early July 2011 the Chief Justice was invited by LAWASIA to be a keynote speaker at a symposium which included a session on the 1980 Hague Convention in Japan. The Chief Justice was invited to attend a meeting with members of the Department of Justice and Foreign Affairs, a number of Japanese Judges, and members of the legal profession, to discuss the practical implications of the implementation of the 1980 Convention in light of Japan's recent accession in May 2011.

84. Additionally, the Chief Justice and Justice Bennett recently attended the fifth Special Commission on the Practical Operation of the 1980 and 1996 Hague

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[131] (1994) FLC 92-451 at p 8.

[132] See Young, James (2003) "The Constitutional Limits of Judicial Activism: Judicial Conduct of International Relations and Child Abduction", 66 *The Modern Law Review* 6.

[133] See HCCH (2011) "*Collection of Responses on the Draft General Principles for Judicial Communications*" Preliminary Document No. 3 C of June 2011, Permanent Bureau, available online at: http://www.hcch.net/index_en.php?act=progress.listing&cat=7; HCCH (2011) "*Report on Judicial Communications in relation to International Child Abduction*" Preliminary Document No. 3 B of April 2011, Permanent Bureau, available online at: http://www.hcch.net/index_en.php?act=progress.listing&cat=7; HCCH (2011) "*Emerging Rules regarding the Development of the International Hague Network of Judges and Draft General Principles for Judicial Communications, including Commonly Accepted Safeguards for Direct Judicial Communications in Specific Cases, within the Context of the International Hague Network of Judges*" Preliminary Document No. 3 A of March 2011, Permanent Bureau, available online at: http://www.hcch.net/index_en.php?act=progress.listing&cat=7.

Conventions. The Special Commission meetings provide an opportunity for Central Authorities to raise difficult cases with other Convention Countries. It is understood that productive discussions were had with two European Convention countries at the June 2011 meeting in relation to current applications made by the Australian Commonwealth Central Authority.

85. Unfortunately, there is no further impetus for contracting States to designate a Network Judge or to even send a delegation to the Special Commission. It is noteworthy that the contracting States that did not attend Part I of the Special Commission in June 2011 include some of the contracting States that appear to have difficulties meeting their obligations under the Convention. It was understood that the Australian Commonwealth Central Authority had sought to discuss a particular Hague application with a Convention country that did not attend the June 2011 Special Commission meeting.

Conclusion

The Chief Justice of the Family Court thanks the Committee for the opportunity to provide a submission to the inquiry into international child abduction to and from Australia. The Chief Justice is of the view that, in relation to the role of the Family Court of Australia in determining Hague applications, Australia is meeting its obligations under the 1980 Convention.

Nevertheless, the Chief Justice and Justice Bennett are of the view that the operation of the Hague Convention between Australia and other member states could be improved in the following ways. The first is for a mediation or conciliation service to be established whereby appropriately trained and skilled mediators are available to assist in mediating or conciliating Hague cases (in appropriate circumstances). Ideally this service would be appropriately funded to enable mediation or conciliation to be provided as discussed in this submission; namely highly flexible, available on short notice, unattended by many of the usual formalities and capable of being conducted in person as well as electronically.

Allied to the above is the need to establish a mediation fund so that, in appropriate cases, impecunious participants could have the cost of mediation met in whole or in part. As discussed in this submission, and consistent with High Court authority, cross examination, via electronic means to foreign jurisdictions is increasingly being relied on in the hearing and determination of Hague cases and funding is also required to meet the cost of high resolution videoconferencing where the parties are unable to do so themselves.

Finally, it would be beneficial to re-examine the use of Independent Children's Lawyers in Hague cases in light of jurisprudential and other developments. In particular, regard may wish to be had to whether a finding of 'exceptional circumstances' as a pre-condition to the appointment of an ICL remains appropriate.

The Chief Justice believes that, were the above matters attended to, the achievement of the objectives underlying the Hague Convention would be improved and protection of the interests of children better served as a result.

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Annexure A

Statistical Services Unit, Family Court of Australia - "Forms/Documents Lodged, Family Court of Australia – All Locations"

From 1 July 2010 to 30 June 2011:

LFC2	Lodge Form FC2	-	2	1	1	4	.	1	6	7	.	6	2	8	.	3	4	7	26
LFC2A	Lodge Form Response Hague Convention FC2A	-	4	1	1	6	3	.	.	3	1	2	4	7	1	1	.	2	18

From 1 July 2009 to 30 June 2010:

LFC2	Lodge Form FC2	-	3	2	5	10	2	5	1	8	3	6	6	15	7	5	4	16	49
LFC2A	Lodge Form Response Hague Convention FC2A	-	3	3	.	6	4	.	2	6	2	.	.	2	3	1	4	8	22

From 1 July 2008 to 30 June 2009:

LFC2	Lodge Form FC2	-	4	5	4	13	3	7	4	14	2	2	1	5	3	5	5	13	45
LFC2A	Lodge Form Response Hague Convention FC2A	-	2	1	4	7	1	3	5	9	2	2	1	5	1	3	.	4	25

From 1 July 2007 to 30 June 2008:

LFC2	Lodge Form FC2	-	2	5	8	15	6	6	2	14	2	5	3	10	6	7	2	15	54
LFC2A	Lodge Form Response Hague Convention FC2A	-	4	.	3	7	7	5	3	15	2	3	2	7	3	2	3	8	37

Annexure B

Protocol for the division of work between the Family Court of Australia and the Federal Magistrates Court as at 29 January 2010

The Chief Justice and the Chief Federal Magistrate have published this Protocol for the guidance of the legal profession and litigants, so as to enable matters to be directed properly to the court appropriate to hear them. The Protocol may on occasions give way to the imperatives of where a case can best be heard and is not intended to constrain the discretion of a judicial officer having regard to the applicable legislation and the facts and circumstances of the case before him or her.

If any one of the following criteria applies, then the application for final orders ordinarily should be filed and/or heard in the Family Court of Australia ("FCoA"), if judicial resources permit, otherwise the matter should be filed and/or heard in the Federal Magistrate Court ("FMC").

1. International child abduction.

2. International relocation

3. Disputes as to whether a case should be heard in Australia.

4. Special medical procedures (of the type such as gender reassignment and sterilisation).

5. Contravention and related applications in parenting cases relating to orders which have been made in FCoA proceedings; which have reached a final stage of hearing or a judicial determination and which have been made within 12 months prior to filing.

6. Serious allegations of sexual abuse of a child warranting transfer to the Magellan list or similar list where applicable, and serious allegations of physical abuse of a child or serious controlling family violence warranting the attention of a superior court.

7. Complex questions of jurisdiction or law.

8. If the matter proceeds to a final hearing, it is likely it would take in excess of four days of hearing time.

Note: The FCoA has exclusive jurisdiction in relation to adoption and the validity of marriages and divorces.

<u>Transfers</u>

1. Either Court on its own motion or on application of a party can transfer a matter to the other Court.

2. There is no right of appeal from a decision as to transfer.