

**Submissions from the NSW State Central Authority
to the Senate Legal and Constitutional Affairs Reference Committee on
the inquiry into International Child Abduction to and from Australia**

On 11 May 2011, the Senate referred the following matter to the Legal and Constitutional Affairs Committees for inquiry and report.

The incidence of international child abduction to and from Australia, including:

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

Submissions should be received by **29 July 2011**. The reporting date is **31 October 2011**.

Information is provided to inform the Senate of the processes in NSW to:

- 1. maximise the provision of services to left behind parents in New South Wales
 - 2. provide information undertaken to reduce the number of outgoing cases from New South Wales. These are cases where children are wrongfully removed or wrongfully retained from NSW and where Australia (NSW in particular) is the country of the child's habitual residence
 - 3. make submissions in a number of areas.
- a) the costs, terms and conditions of legal and departmental assistance for parents whose child has been abducted overseas

The Director General, Department of Family and Community Services is the State Central Authority for NSW. That appointment is made pursuant to the *Family Law (Child Abduction Convention) Regulations 1986*.

NSW has traditionally taken the view that it is the role of the Central Authority to actively provide as much assistance as possible to parents seeking the return of their children to this jurisdiction. This assistance is provided by a dedicated team of lawyers based at the head office of the agency. The legal work associated with the return application is undertaken promptly and at no cost to the left behind parent.

At the outset, the left behind parent is informed that the Central Authority lawyer is not his or her legal representative and therefore whilst the parent's lawyer will do whatever possible to assist in the application for the return, the

State Central Authority's lawyer's obligation is to act as a model litigant and on behalf of the Commonwealth Central Authority. This in turn allows the NSW Central Authority to act at a later stage on behalf of the abducting parent in the event he/she makes an application for access to the child/ren once the child/ren return to NSW.

The NSW Central Authority does the work associated with the Convention in NSW on a fee for service basis which is currently \$250 per hour. These costs are met by the Commonwealth Central Authority (CCA). The NSW Central Authority also organises emotional support for left behind parents to be provided by trained social work staff at International Social Services (ISS).

It is the NSW Central Authority's view that the services offered to parents in NSW are holistic, cost effective, speedy, and sensitive. The good working relationship between the NSW Central Authority and ISS ensures that support is provided to parents. It is our view that this relationship ought to be replicated in other States and Territories. The model allows for parents to have ready access to the Central Authority lawyer dealing with the application and the support of ISS. The Central Authority lawyer has regular communication with the ISS officer as a result of the parent signing a letter of authorisation.

Significant legal costs will be incurred in the jurisdiction that the child has been taken to or retained in, as that is where a judicial determination will be required as to whether the circumstances of the removal/retention comes within the Convention. In these cases, the left behind parent is dependent on the services provided by that country.

Under article 26 of the Convention, a country may, at the time of ratifying or acceding to the Convention, make a reservation that it will not be bound to meet the costs of the legal representation. If a country has made a reservation under article 26, then the CCA has in place a system for meeting the cost of the proceedings incurred outside Australia. At present, this source of funding is subject to a means test.

Given the complexities of child abduction matters, it is unreasonable to place the burden on a left behind parent in Australia to arrange for the conduct of legal matters in a foreign country; meet the financial burden, and deal with the emotional strain of the conduct of the matter in an overseas court.

Australia has not made an article 26 reservation and therefore the costs of all proceedings on behalf of a requesting parent seeking a return of their child from Australia is met by the CCA. To maintain parity with the overseas requesting parent who has the benefit of free representation for his/her matter in Australia, an Australian left behind parent should be provided with free legal representation for his/her proceedings abroad.

Apart from the cost hurdle there are also variations in practice for each country. When dealing with countries which NSW do not have regular

dealings with, the CCA becomes a pivotal source of information as they deal with all applications leaving the Commonwealth of Australia.

Providing information to a parent in Australia on the process abroad is an important aspect of case management. To provide an effective service to left behind parents it is important for the CCA to have a stable workforce so that relationships are built with Central Authorities and the relevant personnel abroad. This allows information about the informal processes each country uses to be gathered at one point and shared with all the State Central Authorities to advance the application of a left behind parent.

Given that staff of the NSW Central Authority have been undertaking the work for a long period of time, considerable corporate knowledge has been built up on how various countries like to receive applications and the way in which some countries like to have information presented.

There may also be variations in how some countries apply the criteria in the Convention for a return order. For example, the threshold to satisfy the exception to return where the child is exposed to "grave risk of physical or psychological harm or otherwise place the child in an intolerable situation"¹ varies in different legal systems. This may result in a non return order being made. It is our experience that this problem is more likely to arise in countries which have less experience of the Convention, particularly new countries joining the Convention and countries that do not adequately resource the implementation of the Convention. The requesting parent will understandably be disappointed.

For of all the reasons above, legal work associated with the return of a child to this jurisdiction should be undertaken by the Central Authority.

Child brought into NSW from another Hague Convention country

There is a legislative framework to file an application to commence proceedings in the Family Court of Australia for an order seeking the return of a child brought into NSW. If the child is in NSW, the proceedings will be filed and run by the State Central Authority; however, the funding for the proceedings is paid by the CCA.

By contrast, the abducting parent who will be the respondent to the proceedings will have to apply for Legal Aid which is means and merits tested. The quality of legal representation of the abducting parent is equally important. Hague proceedings relate to the application of international law which requires special expertise. An unrepresented respondent is severely disadvantaged.

Even when an abducting parent secures the services of a lawyer, that lawyer may have limited experience in this specialised area of law. It is submitted that public funding should be provided to an abducting parent and an attempt

¹ Regulation 16(3)(b), Family Law (Child Abduction) Regulations 1986; article 13(b), Convention

be made to ensure the lawyer is conversant with the area of law. One way of achieving this would be for the relevant legal aid body to set up a panel of lawyers who are familiar with this area of law.

It should also be noted that the Convention and the Regulations observe that applications under the Convention should be dealt with expeditiously² to minimise the harm to children who are the subject of abduction proceedings.

Children brought into NSW from a non-Hague country or taken to/retained in a non-Hague country

These cases fall outside the Convention. The left behind parent's only remedy will be to use one of the bi-lateral agreements (Egypt and Lebanon) or file the equivalent of parenting proceedings in the country where the child is living with the abducting parent. The Central Authority usually does not have a role to play in these proceedings.

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

Below is a list of the number of cases which were dealt with by the NSW State Central Authority in the last 3 years.

Abductions:

- incoming: 37
- outgoing: 78

I. 08 to 09

- incoming - 17
- outgoing - 30

II. 09 to 10

- incoming - 14
- outgoing - 25

III. 10 to 11

- incoming - 6
- outgoing - 23

Statistics on the total number of cases for Australia can be obtained from the Commonwealth Central Authority.

The Convention is effective in returning children because it sets up a legal and administrative framework which allows the Central Authorities in the country from which the child is taken and the country to which the child is taken to work together. It also provides, amongst other things, the framework to locate children, to prevent further harm to children, to secure the voluntary return of

² Article 11, Regulation 15(4) provides that if an order has not been made within 42 days the applicant may request reasons from the Registrar of the court.

children, and to initiate judicial or administrative proceedings for the return of children.

The Convention is effective in returning children as is demonstrated by the number of return orders made, and also matters that are resolved by consent prior to the Court making an order.

The Convention has been effective in putting in place a legal framework in which disputes can be resolved. This is preferable to what exists outside of the Convention. It cannot be emphasised enough that where a child is abducted to a 'non-Hague' country the options available to an Australian left behind parent are severely limited. Outside the Convention, left behind parents are faced with a range of significant barriers such as cultural and language differences, difficulties locating the child, and accessing foreign legal systems.

However, the legal framework provided by the Convention should not be seen as a total solution but instead as just one part of a much larger framework needed to support these families.

While the options available to reduce the number of incoming cases are probably more limited, there are a number of measures which have been implemented to reduce the number of children being taken out of Australia (see below at d).

c) the roles of various Commonwealth departments involved in returning children who were wrongly removed or retained, to their country of habitual residence

Although the CCA takes the coordinating role in this jurisdiction, it has to have a symbiotic relationship with all to State Central Authorities to ensure that the best outcomes are achieved for Australian residents.

Other Commonwealth departments and agencies involved include the Department of Immigration and Citizenship, the Department of Foreign Affairs and Trade, and the Australian Federal Police. Details of their roles can be obtained from the Commonwealth Central Authority.

ISS is an independent non-government organisation and has developed the International Parental Child Abduction Service. ISS receives funding from NSW Central Authority and CCA. The International Parental Child Abduction Service provides counseling and support for parents, plus ISS has also been involved in helping parents resolve cases.

ISS has also provided the NSW Central Authority and CCA with assistance in Convention matters, such as attending court to give evidence of services, facilitating contact between children and parents, and even in one instance driving children to the airport to meet their parent to take them home. It is submitted that it is a model which can be usefully used across Australia to improve service delivery.

d) policies, practices and strategies that could be introduced to streamline the return of abducted children

There should be a bigger commitment to prevention which is aimed at reducing the number of children taken out of Australia. The range of countries of origin of overseas born residents in NSW means that a significant proportion of the population in NSW may not be able to rely on the Convention to provide a remedy.

The percentage of the NSW residents' population born overseas increased from 24.0 % in 1996 and 24.9 % in 2001 to 25.6 % in 2006. The largest number of overseas-born residents came from the United Kingdom, followed by China, New Zealand, Vietnam, the Philippines, Lebanon and Italy.

China (apart from the Special Administrative Regions of Hong Kong and Macao), Vietnam, Philippines, and Lebanon are not signatories to the Convention. Australia has signed bi-lateral agreements with Egypt and Lebanon. While these agreements are the best that can be achieved at present insofar as they are tools of dialogue, they do not provide a legal remedy to ensure the return of children abducted from Australia.

Greater awareness will also ensure that left behind parents seek appropriate remedies with minimal delay. This in turn will influence the outcome. Delay in taking appropriate steps allows the abducting parent to plead the defence of acquiescence.

NSW has made an attempt to raise awareness in the public and amongst the legal fraternity. The NSW Central Authority has participated in a panel of speakers organised by International Social Services to speak on the issue and continues to deliver a talk to post graduate students undertaking Family Law twice a year.

NSW has also worked collaboratively with the CCA to encourage non-signatory countries to sign the Convention. In July 2010, the NSW Central Authority met with the Singapore delegation and organised a two day program to inform them of our processes with the pleasing outcome of Singapore acceding to the Convention on 1 March 2011.

It is submitted that Australia should take advantage of its geography. As it is an island it is possible to monitor children entering and leaving the jurisdiction. Adults travelling to and from Australia should be asked if the other parent has given permission and asked to provide evidence of consent or a court order allowing the child to leave Australia. Alerts should be placed in strategic points around the airport. Whilst these steps will not address the problems associated with retention it will help to reduce the number of removals from Australia.

(e) any other related matters

Criminal sanctions

There has been a vocal lobby advocating that parental abduction should be treated as a criminal offence.

Over 30 years ago when the Convention was settled, the reality was that the abductors were fathers who happened to abduct children whilst having contact with the children. By and large when the Convention first came into operation this was primarily the case. In recent years the situation has changed and now the majority of abducting parents are mothers.³

It is the experience of the NSW Central Authority that where mothers are the abducting parent, there may be issues of domestic violence and/or post natal depression with a mother feeling unsupported by the father following the birth of a child. In some cases, there are cross cultural issues such as language barriers, a mother feeling homesick, or needing her own family support.

It is the NSW Central Authority's firm view that parental child abduction is a matter for the family law system and should not attract criminal sanctions. Criminalising may actually hinder a prompt return as the requesting country may seek undertakings from the requesting parent not to press a prosecution. Imposing criminal sanctions may force an abducting parent to take more extreme actions to remain undetected.

The primary purpose of the Convention is to secure a prompt return of a child so that the court that the child is habitually resident can make parenting decisions.

From a child protection perspective, incarcerating the person who has primary care of a child will never be in that child's best interests and has the potential to destroy the future relationship between the child and the parent who requested their return. This is a particularly important consideration as in the majority of cases the primary carer is the abducting parent.⁴

Criminal sanctions force a separation of the child from the abducting parent who will often be the child's primary carer. It denies the Family Court the time to make a measured decision on which parent can best meet the needs of the child. Separation in such circumstances is traumatic for the child.

³ In 2008, global figures show that 69% of abducting persons were the mothers of the children, a figure that has stayed virtually constant since 1999, see Lowe. N., "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 I – Global Report" at para. 11., available at <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf>

⁴ *Ibid.* at para12, the study found that 72% of abducting persons were the "primary carer" of the child.

Mediation

Mediation has been used in New Zealand cases in NSW. The mediation which has taken place has been by video link up. Where the respondent parent has not been entitled to Legal Aid assistance, the costs have been a deterrent. The highest number of incoming and outgoing cases in NSW are from and to New Zealand. Judicial officers in New Zealand and NSW have facilitated mediation by allowing court resources to be used thereby reducing the financial burden for both parents.

Physical distance and different time zones present difficulties in Hague cases, nevertheless, mediation is an important tool and will become increasingly used in many jurisdictions. The Hague Conference's Sixth Meeting of the Special Commission which took place in June 2011 included for discussion a draft Guide to Good Practice on Mediation.

It is submitted that when parents agree to use mediation, that process should be set up in a timely way which does not delay the proceeding being heard given that expediency is an important principle. To allow this to take place, it is necessary for both parents to have access to the facility without cost constraints. Mediation may prove to be cost effective in the long run.