

25 August 2011

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

International child abduction to and from Australia

1. The Law Council of Australia appreciates the opportunity to contribute to the Inquiry into international child abduction to and from Australia.
2. The Law Council, established in 1933, is the peak national representative body of the Australian legal profession. It is the federal organisation representing approximately 56,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council). The Family Law Section, with a membership of approximately 2400 practicing family lawyers throughout Australia, is the largest of the Law Council’s specialist Sections.
3. This submission has been prepared by the Law Council’s Family Law Section. It does not strictly address the Inquiry’s Terms of Reference but rather makes a number of general observations. Family Law Section Chair, Geoff Sinclair, will be available to answer specific questions at the public hearing on 26 August.
4. The Family Law Committee of the Law Institute of Victoria has also provided comments for consideration by the Inquiry and these are at **Attachment A** to this submission.

Current Arrangements

5. As a general proposition, the procedures in place to implement Australia’s obligations under the Hague *Convention on the Civil Aspects of International Child Abduction*, and the actions undertaken by the Commonwealth Central Authority and the State Central Authorities in Australia, work well.
6. Where a child has been removed from Australia or is wrongfully retained in an overseas jurisdiction, the Australian Central Authorities usually work effectively with parties to assist in the preparation of the necessary documents for transmission to overseas countries, and thereafter provide the parent in Australia with information about the progress of matters.

7. In relation to the removal of children to Australia, or their wrongful retention in Australia, again the Australian Central Authorities work well in bringing about, in appropriate cases, the return of the child to its habitual place of residence. In this respect, the Family Court of Australia has put in place strategies to deal with Hague Convention matters expeditiously, and it is often no more than 3 months from the time of filing to the time of trial. This helps to ensure that Australia's obligation under the Convention to act expeditiously is met. The Family Court has also given priority to the hearing of appeals against Hague Convention decisions.
8. We note, however, that there is room for improvement in relation to the costs associated with running a Hague Convention matter. For incoming applications under the Convention (ie where a child has been brought to Australia or retained in Australia) the costs of legal proceedings are fully paid by the Australian Government. In relation to outgoing applications (ie where a child has been taken from Australia or wrongfully retained overseas) the level of financial and legal support varies significantly. The resulting financial burden on the left behind parent in Australia can be immense. The Family Law Section would like see Convention signatories encouraged to provide greater financial and legal support in these cases.

Possible improvements

Australian Federal Police Airport Watch List

9. *Timing of placement on Watch List.* As a preventative measure, to stop children being removed from Australia, an application can be made to a court exercising jurisdiction under the Family Law Act for a child's name to be placed on the AFP Airport Watch List. The Watch List is an effective means of preventing the wrongful removal of children from Australia. However, we understand that different practices occur in some jurisdictions in relation to when the 'listing' is activated. For example, some States will only add a child to the Watch List when a court order is made, but some will list a child when an application is filed (usually seeking interim orders). In this respect, we consider there should be some degree of uniformity. The Family Law Section recommends that placement of a child's name on the Watch List should take effect when an application is filed. If an application is unsuccessful, the party making the application must undertake to notify the AFP of the outcome of that application. Placement at the time of filing would also assist in those court registries where there may be delay in obtaining orders.
10. *Sunset Clause.* It is often the case that when a child's name is placed on the Watch List, there is no end date specified in the court order. The Family Law Section believes that a specified period should be nominated in all applications to have a child placed on the Watch List. If that is not practicable, then we recommend the introduction of a generally applicable sunset clause of 2 or 3 years for all children on the Watch List, with the onus on the parent who requested the listing to seek an extension if appropriate. It is often the case immediately after separation that emotions run high and in some families comments can be made which give rise to the fear that one party make take a child overseas. It is in this respect that it is important to set time limits for the Watch List. While there may be genuine fear at the time the order was made, we understand that there are many children still on the Watch List whose parents have long forgotten their existence. This has lead to unfortunate and embarrassing consequences for children who subsequently have the consent of both parents to

travel overseas only to be stopped at the airport because they are still on the AFP Watch List.

Orders under sections 65Y and 65Z of the Family Law Act 1975

11. Under the terms of these provisions it is an offence punishable by imprisonment of up to 3 years to take or send a child out of the Australia without the consent (prescribed) of the other parent, or by order of the court. Section 65Y applies in cases where a parenting order has been made and section 65Z in cases where parenting proceedings are pending. It is of no consequence if the substantive orders under Part VII (or pending proceedings) do not specifically prohibit the removal of a child from Australia, as sections 65Y and 65Z have a general application to parenting orders. It is the experience of Family Law Section members that the significant obligations and penalties imposed by sections 65Y and 65Z are not widely known. The Family Law Section recommends that there should be greater community awareness of the effects of these provisions, including the following:
 - (a) Clear notification in all orders made under Part VII of the Family Law Act as to the effect of sections 65Y and 65Z (this information could be included in the document *Parenting Orders- obligations, consequences and who can help*, which is currently provided to parties when parenting orders are made)
 - (b) Adding information to the 'Travel Smart' booklet issued by the Department of Foreign Affairs and Trade. This booklet currently contains a raft of information for the passport holder regarding, amongst other things, the use of drugs overseas, criminal offences overseas and the like. It would be helpful to include a section devoted to a parent's obligation to obtain the consent of the other parent, before taking a child overseas when parenting orders are in existence, or when an application is pending in the court.
 - (c) Providing information about the obligations and penalties imposed under sections 65Y and 65Z in the passport application and renewal processes.
 - (d) Conspicuous signage at airports about the obligations and penalties imposed under sections 65Y and 65Z if a child is wrongly removed or sent from Australia.

Publicly available information

12. The website of the Attorney-General's Department contains useful general information about international child abduction and Australia's obligations as a party to the *Hague Convention on the Civil Aspects of International Child Abduction*. In the past, the Department also published detailed information about other countries who were signatories to the Convention and the extent to which they fulfilled their obligations under the Convention. This information included the number of abductions to that particular country, the number of successful returns, the general length of time it takes for an application to be determined and the financial assistance which is available in that country. This information was of tremendous assistance to practitioners, the courts and members of the public. It was particularly useful in helping parents make decisions about whether or not to allow their children to be taken to particular countries by the other parent. The Family Law Section recommends that this information be made available on the Attorney-General's Department's website.

We hope these general comments are of assistance to the Inquiry.

Yours sincerely

Bill Grant
Secretary-General



12 July 2011

Ms Maureen Schull
Director, Family Law Section
Law Council of Australia

Email:

Dear Madam

Senate Legal and Constitutional Affairs Reference Committee Inquiry - International Child Abduction to and from Australia.

The Law Institute of Victoria (LIV) welcomes the opportunity to provide input into the Law Council of Australia's submission to the Senate Legal and Constitutional Affairs Reference Committee inquiry into international child abduction to and from Australia.

The LIV is Victoria's peak body for lawyers and those who work with them in the legal sector, representing over 15,000 members. Many of our members are private practitioners that provide legal services to children and parents in the Federal Magistrates Court and the Family Court of Australia. These comments are based on the experiences of those practitioners.

In January 1998 the LIV provided comments to the Family Law Council's report to the Commonwealth Attorney General's Department "*Parental Child Abduction*".¹ In that submission the LIV expressed concerns regarding the suggestion of making international child abduction a criminal offence and we questioned how criminalization will counteract the effects of abduction. We argued that if the aim of criminalisation is to reduce the incidence of international parental child abduction there however is no suggestion that it will neutralise the effects of abduction. Further we suggested that alternatives to criminalization needed to be explored. The LIV further suggested in that submission

¹ Family Law Council, "*Parental Child Abduction*", January 1998

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some of the existing problems relating to the recovery of abducted children arose for reasons of cost. For example, the LIV queried whether criminalisation would facilitate the search process. There are no guarantees that the resources referred to would become available. We suggested that a loss of priority may occur if cases are unsuccessfully prosecuted.

We suggest that the Senate Legal and Constitutional Affairs Reference Committee give serious consideration to the recommendations made in that report as they continue to be relevant.

The following comments respond generally to the terms of reference for this Inquiry:-

- The LIV believes that making international child abduction a criminal offence may act as a disincentive for parents to return the child if they know that they may face criminal charges in the child's habitual country of residence. In fact criminalization may drive the removing parents further underground. Also, criminalization and possible incarceration of the removing parent may deter the Court considering the removal from ordering the child's return.
- The LIV supports creating greater awareness in all parents of the existence and operation of the Hague *Convention on the Civil Aspects of International Child Abduction* (the convention). This increased awareness of the futility of removal may act as a deterrent to "abducting" parents. The LIV believes that more information about the convention should be made available to parents through brochures or posters which could be distributed to the Courts, family relationship centres, Victorian Legal Aid offices and community legal centres.
- Our members also note that there is an absence of a support service that offers emotional support to parents who have experienced child abduction or are trying to manage a child on return. The lawyers and the staff at the Attorney General's Department involved in discharging convention obligations are focused on the law and the process of securing the return of children. They are not qualified to provide the required emotional support to distraught parents and dislocated children. Such support has been identified by parents who have been involved in the convention process as something that would have been "incredibly helpful and reassuring".² The "*Living in Limbo - The Experience of*

² International Social Service Australian branch and the Commonwealth Attorney Generals Department, "*Living In Limbo – the experience of International Parental Child Abduction*", February 2005, page 24

*International Parental Child Abduction report*³ recommended in 2005 that an advice and referral service be established. The LIV supports this recommendation and believes that a specialist national support service should be established in the near future.

- From a broader perspective, the LIV questions the inclusion of all countries as members to the convention. While it is superficially impressive to have a long list of members, it undermines the confidence in the whole process if convention countries lack the will and/ or resources to discharge their convention obligations. Mexico is a case in point. While it is clearly a member of the convention it is renowned for its lack of cooperation in processing convention applications. In one current instance, more than three years have elapsed since the initial approach to the Central Authority. It has been difficult securing any response whatsoever from the Mexican administrators, notwithstanding that the whereabouts of the mother and child have been provided to them. The LIV believes that for the convention to have any efficacy, a country should have to satisfy certain criteria before its membership is accepted. A country needs to be able to demonstrate that it has the necessary commitment, resources and funding to be able to effectively and efficiently handle convention requests for the return of a child.

The LIV is grateful for the opportunity to provide comment. We would appreciate the opportunity for further input as the consultation proceeds.

If you would like to discuss any of the matters raised in the submission, please contact
or by email

Yours sincerely

Caroline Counsel
President
Law Institute of Victoria

³ International Social Service Australian branch and the Commonwealth Attorney Generals Department, “*Living In Limbo – the experience of International Parental Child Abduction*”, February 2005