



## Australian Government

### Australian Law Reform Commission

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#### **Submission to the Senate Standing Committee on Legal and Constitutional Affairs—Inquiry into International Child Abduction to and from Australia**

The Australian Law Reform Commission (ALRC) welcomes the opportunity to comment in relation to the Inquiry into International Child Abduction to and from Australia.

The ALRC has considered the *Convention on the Civil Aspects of International Child Abduction* (Hague Convention) and the *Family Law (Child Abduction Convention) Regulations 1987* (Cth) in two reports: *Family Violence—A National Legal Response* (ALRC Report 114 and NSWLRC Report 128, referred to as the *Family Violence Report*); and *Equality before the Law: Justice for Women* (ALRC Report 69, referred to as *Equality before the Law*). Both reports are available on the ALRC's website at [www.alrc.gov.au](http://www.alrc.gov.au).

The *Family Violence Report* was the result of a major inquiry regarding family violence conducted in 2009–10 (the Family Violence Inquiry). It was conducted by the ALRC in conjunction with the NSW Law Reform Commission (the Commissions). The Family Violence Inquiry examined, inter alia, the interactions in practice between state and territory family violence and child protection laws with the *Family Law Act 1975* (Cth) and relevant Commonwealth, state and territory criminal law. The *Family Violence Report* was tabled in Parliament out of sitting on 11 November 2010 to coincide with the launch of the report by the Australian Attorney-General, the Hon Robert McClelland MP, together with the then NSW Attorney General, the Hon John Hatzistergos.

*Equality before the Law* was released in 1994. In this report, the ALRC considered whether laws should be changed, or new laws made, to remove any unjustifiable discriminatory effects of those laws on women, with a view to ensuring their full equality before the law. In particular, *Equality before the Law* addressed the legal system's response to violence by men against women, including in the family law context. Details regarding the Australian Government's implementation of *Equality before the Law* are available on the ALRC website.

The ALRC draws upon its experiences and findings in the above inquiries in making this submission—particularly the more recent Family Violence Inquiry. International child abduction was considered in both

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inquiries as part of a broader examination of family violence and family law—as family violence may be a precipitating factor for a parent in removing their child to another country.<sup>1</sup> In the *Family Violence Report*, consideration of this issue was limited, as the Terms of Reference required the Commissions to examine laws only at specified points of interaction. The Hague Convention and the *Family Law (Child Abduction Convention) Regulations* were therefore considered in the limited context of the interaction between family law and state and territory family violence legislation.

### **Hague Convention and the *Family Law (Child Abduction Convention) Regulations***

#### *Exceptional circumstances*

By way of background, the Hague Convention seeks to ensure that any child abducted from one Convention country to another Convention country is promptly returned to his or her country of residence, so that decisions about the child's welfare can be made in the country in which he or she habitually resides. There are several exceptions to the requirement for prompt return, which are listed in the *Family Law (Child Abduction Convention) Regulations*. In particular, reg 16 provides an exception where there is a 'grave risk that the child's return to the applicant would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'.<sup>2</sup>

In *Equality Before the Law*, the ALRC expressed the view that the application of the Hague Convention may have unjust consequences when it penalises victims of family violence who have fled a country with their children for safety reasons. It stated that it is

not in the child's best interests to enforce the return of the child and mother to the country of habitual residence to determine custody when this would expose the child's mother and perhaps the child to serious danger... Furthermore, to expose the mother to the trauma, difficulty and cost of returning to pursue custody litigation is not consistent with the purpose of the Convention when she is a survivor of her husband's violence and took a reasonable course of action to protect herself.<sup>3</sup>

The ALRC recommended that reg 16 be amended to provide that in deciding whether there are exceptional circumstances due to grave risk that the child's return would expose the child to or an intolerable situation, regard may be had to the harmful effects on the child of past violence, or of violence likely to occur in the future, towards the abductor by the other parent if the child is returned. It further recommended that the *Family Law (Child Abduction Convention) Regulations* should provide that the child should not be returned if there is a reasonable risk that to do so will endanger the safety of the parent who has the care of the child.<sup>4</sup>

The *Family Violence Report* affirmed this recommendation. However, it has not been implemented to date.<sup>5</sup>

#### *Undertakings and conditions*

Undertakings and conditions in Hague Convention matters were considered by the Commissions in the *Family Violence Report*. As noted above, family violence may be a relevant factor in a parent removing a child to another country. One approach that courts have used to attempt to alleviate concerns about violence in such cases is to request 'non-molestation' and other undertakings from the 'left-behind' parent, or to place conditions on the return of the child.<sup>6</sup> The *Family Violence Report* noted concerns about the practical use and effect of conditions and undertakings, as there is no provision in the Hague Convention for automatic enforcement of conditions and undertakings made in the returning jurisdiction.

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1 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), [9.41], see also [9.43]–[9.44]; M Kaye, 'The Hague Convention and the Flight from Domestic Violence: How Women and Children are being Returned by Coach and Four' (1999) 13 *International Journal of Law, Policy and the Family* 191.

2 *Family Law (Child Abduction Convention) Regulations 1987* (Cth) reg 16(3); *Convention on the Civil Aspects of International Child Abduction*, [1980] ATS 2, (entered into force on 1 December 1983) art 13(1)(b).

3 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), [9.46].

4 *Ibid*, Rec 9.5.

5 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [17.315].

6 See discussion in M Kaye, 'The Hague Convention and the Flight from Domestic Violence: How Women and Children are being Returned by Coach and Four' (1999) 13 *International Journal of Law, Policy and the Family* 191, 200–202.

The *Family Violence Report* discussed family violence-related undertakings and conditions made in Hague Convention proceedings in relation to a national register of state and territory family violence orders, which the Australian Government is committed to establishing.<sup>7</sup> The Commissions expressed the view that there is scope to extend the ambit of this anticipated national register to include other information, and that future consideration should be given to including conditions and non-molestation undertakings made in Hague Convention cases. Registering undertakings and conditions would not affect their enforceability, but may ensure that police officers, state and territory courts, and federal family courts are aware that they exist, and may take them into consideration, where appropriate, in state and territory family violence order proceedings or parenting proceedings.<sup>8</sup>

We hope this submission assists you.

Yours sincerely,

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7 Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009). See also Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), Ch 30.

8 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [30.232].