

CHAPTER 4

Role of key government agencies

4.1 Certain Australian Government agencies play a role in providing services to support efforts to return children abducted to or from Australia. This chapter considers:

- the AFP's investigation and law enforcement powers with respect to international parental child abduction;
- DFAT's provision of consular assistance to Australian persons involved in international parental child abduction matters;
- the role of the Australian Passport Office in the issuing and cancellation of passports to Australian children;
- the practices and procedures of the Commonwealth Central Authority (CCA) in implementing the process under the Hague Convention to secure the return of abducted children;
- the provision of financial and legal assistance by the Attorney-General's Department to persons involved in international parental child abduction matters;
- the CCA's information-gathering powers and its collection of data relating to international parental child abduction; and
- child support arrangements and the Child Support Agency's role in the event of international parental child abduction from Australia.

AFP's role

4.2 The AFP is the primary Australian law enforcement and investigative agency involved in international parental child abduction matters. Its role relates principally to the enforcement of court orders relevant to international parental child abduction, and includes:

- prevention of the overseas abduction of Australian children who are the subject of court orders which prohibit their removal from Australia; and
- interception of persons who are abducting children to Australia, where such children are the subject of overseas family law orders that prevent removal from their jurisdiction of habitual residence, or where such children are the subject of international policing alerts.¹

4.3 Several submitters commented on the nature and exercise of the AFP's investigation and enforcement powers, with some supporting targeted reforms.

1 Australian Federal Police, *Submission 31*, p. 2.

AFP's Watch List

4.4 The AFP maintains a Watch List at all Australian international airports and sea ports. The list is designed to identify and intercept children who are the subject of a court order preventing their removal from Australia. An alert is triggered when a person whose name is included on the Watch List presents his or her passport at an airport or sea port. When an alert is triggered, the AFP is required to determine whether or not the child may travel.²

4.5 Children who are the subject of a court order prohibiting their removal from Australia are not included automatically on the Watch List. The AFP's policy is that a child can be placed on the list only if there is a court order directing the AFP to include his or her name on the list, or if an application for such an order is pending.³

4.6 Contributors to the inquiry were generally supportive of the Watch List as a preventative measure in respect of outgoing abductions. Several submitters, however—including the AFP—identified various operational issues:

- the triggering of out-of-date alerts (for example, those upwards of 5-10 years old) because court orders for the inclusion of a child's name on the list are not time-limited;⁴
- ambiguity in the provisions of some court orders for inclusion on the Watch List—for example, imprecise descriptions of particular circumstances in which a child is able to be removed from Australia, and inconsistencies between various clauses contained in court orders;⁵
- the fact that, at the time of abduction, many left-behind parents are unaware of preventative remedies available to them, including the existence of the Watch List;⁶
- difficulties encountered by parents who suspect that their child is at risk of international parental child abduction in ensuring their child is listed on the Watch List in a timely fashion;⁷ and
- the malicious or vexatious use of Watch Lists by some parents who may seek to prevent the other from taking the child overseas for permitted purposes (for example, on holidays while the child is living with that parent).⁸

2 Australian Federal Police, *Submission 31*, pp 2-3.

3 Australian Federal Police, *Submission 31*, p. 2.

4 Australian Federal Police, *Submission 31*, pp 5-6.

5 Australian Federal Police, *Submission 31*, p. 4.

6 Department of Family and Community Services, *Submission 8*, p. 6; Mr Ken Thompson, *Submission 22*, p. 19.

7 Mr Ken Thompson, *Submission 22*, pp 19-20; Mr Daniel Wass, *Submission 15*, p. 1.

8 Australian Federal Police, *Submission 31*, pp 9-10.

4.7 The AFP advocated various proposals to address these issues, in particular, the use of standardised wording and sunset clauses in Watch List orders.⁹ Another submitter supported the automatic inclusion of children on the Watch List, or in other databases (such as those operated by the Department of Immigration and Citizenship), when parenting orders are made or when proceedings for such orders are on foot.¹⁰

4.8 The committee was informed that the Family Court, the Federal Magistrates Court and the AFP are already examining options to improve the operation of the Watch List, and that the AFP has published a preferred form of wording for Watch List orders on its website.¹¹ The AFP also indicated that it has held discussions with the Family Court and the Family Court of Western Australia. In addition, the committee understands that the Family Court and the Federal Magistrates Court established a working group in August 2011 to consider procedural reform options, in consultation with the AFP. The Chief Justice of the Family Court, the Hon Diana Bryant, indicated that time-limited orders and automatic listings are under consideration by that working group, as well as other matters concerning the clarity and standardisation of orders.¹²

Execution of recovery orders and warrants

4.9 The AFP executes recovery orders and warrants made under the Family Law Act and the Regulations by Australian family courts, in respect of children who have been wrongfully removed from Australia or retained by one parent within Australia.¹³ Under the Family Law Act, family courts are empowered to grant recovery orders where a child has been removed in breach of a parenting order or otherwise in breach of another person's parental responsibility rights (for example, where there is no parenting order in place).¹⁴

4.10 In the context of international parental child abduction, recovery orders may be relevant in:

- outgoing matters, where a child has been wrongfully removed or retained within Australia by an abducting-parent who then intends to remove the child overseas; and
- incoming matters, where Hague Convention proceedings have been commenced for the return of the child to his or her country of habitual

9 Australian Federal Police, *Submission 31*, pp 4-7.

10 Mr Ken Thompson, *Committee Hansard*, 26 August 2011, p. 7.

11 Australian Federal Police, *Submission 31*, pp 4-5. See also the AFP website: <http://www.afp.gov.au/policing/family-law/family-law-kit.aspx> (accessed 27 October 2011).

12 *Committee Hansard*, 26 August 2011, p. 34. See further, Chief Justice of the Family Court of Australia, response to questions on notice, received 12 September 2011, pp 2-3.

13 Family Law Act, s 67Q.

14 Family Law Act, s 67Q; Regulation 31.

residence, and the CCA applies to the Family Court for a warrant to find and recover the child, to ensure that he or she is not removed from Australia while the Convention proceedings are in progress.¹⁵

4.11 Recovery orders and warrants under the Regulations may authorise or direct the AFP (or other specified law enforcement agencies) to enter premises, and stop vehicles, vessels or aircraft, in order to search for a child, recover him or her, and place him or her in the care of persons specified in the order.

4.12 The AFP submitted that its ability to execute recovery orders is often limited because the orders contain insufficient detail about the specific actions it is required to take. In such cases, it is necessary to clarify the intended action with the court, which may delay execution.¹⁶ The AFP noted that, prior to 2005, the Family Law Rules contained a standard form of wording for recovery orders, and that subsequent removal of this wording has reduced the clarity of recovery orders.¹⁷

4.13 The AFP also identified limitations in its investigation and enforcement powers more broadly, such as an inability to exercise telecommunications interception powers to locate an abducted child, and an inability to exercise coercive information-gathering powers in relation to private individuals and organisations.¹⁸ This is so even with respect to offences under the Family Law Act concerning the removal of a child in breach of parenting orders.¹⁹ These powers would be of significant utility in the law enforcement response to international parental child abduction, in particular to ascertain a child's overseas location—for example, by intercepting phone conversations between the abducting parent and relatives in Australia, or by examining financial transaction records.²⁰

International policing assistance

4.14 The AFP participates in international policing arrangements coordinated through Interpol. The National Central Bureau within the AFP is the Australian contact point for Interpol matters. The AFP is able to respond to requests for international policing assistance where children are abducted to Australia. Similarly, it is able to seek international policing assistance where an Australian child has been wrongfully removed or retained overseas.²¹

15 Regulations 14, 31.

16 *Submission 31*, p. 5.

17 *Submission 31*, p. 5.

18 *Submission 31*, p. 8.

19 *Submission 31*, pp 7-8. See further, Assistant Commissioner Ramzi Jabbour, Australian Federal Police, *Committee Hansard*, 26 August 2011, p. 48.

20 *Submission 31*, pp 7-8.

21 Australian Federal Police, *Submission 31*, p. 3.

4.15 The AFP issues Interpol notices in respect of children abducted from Australia, both on its own initiative and at the request of the CCA.²² Interpol notices are graded into seven colour-coded categories according to the policing response required.²³ The AFP advised that it issues Yellow Notices in respect of children who have been abducted overseas.²⁴ These notices seek assistance in the location of missing persons, often minors, or in helping to identify persons who are unable to identify themselves. Yellow Notices effectively request information about a person's location and cannot support an exercise of coercive power.²⁵ The AFP can issue notices at the request of the CCA, and such notices can be issued to multiple or individual countries.

4.16 The AFP informed the committee that it gives consideration to issuing Red Notices—which require the arrest or provisional arrest of a person pending his or her extradition—where international parental child abduction has enlivened the offence provisions in sections 65Y and 65Z of the Family Law Act (that is, where the child is removed overseas in breach of a parenting order, or where proceedings for such an order are on foot).²⁶ Two submitters to the inquiry indicated that the AFP has also issued Blue Notices in respect of abducted children, which request the collection of information about a person's identity or their activities, often in relation to a crime.²⁷

4.17 While broadly supportive of Interpol as a mechanism for locating and recovering abducted children, submitters identified some operational issues. For example, it was argued that the Interpol alert system is presently of limited use in outgoing international parental child abduction cases because these matters are not usually criminal offences unless the removal is committed in contravention of sections 65Y and 65Z of the Family Law Act. Consequently, it is generally not possible to detain abducting parents and compel their return to Australia via a Red Notice.²⁸

22 Australian Federal Police, *Submission 31*, p. 3.

23 Interpol, *Notices*, <http://www.interpol.int/INTERPOL-expertise/Notices> (accessed 27 October 2011).

24 *Submission 31*, p. 3.

25 Interpol, *Notices*, <http://www.interpol.int/INTERPOL-expertise/Notices> (accessed 27 October 2011).

26 *Submission 31*, p. 3.

27 Mr Lauchlan Leishman, *Submission 7*, p. 3; Mr Ken Thompson, *Submission 22*, p. 2.

28 See, for example, Ms Robin Bowles, *Submission 3*, p. 2; Dads on the Air, *Submission 4*, p. 3; Mr Lauchlan Leishman, *Submission 7*, pp 2-3; Mr Ken Thompson, *Submission 22*, p. 2; Ms Carolyn Smith, *Submission 23*, p. 2.

Consular assistance by DFAT

4.18 As noted in chapter 2, DFAT's role in supporting Hague Convention and non-Convention matters includes the provision of consular assistance to Australian children and their families. DFAT advised the committee that, in many international parental child abduction matters, it is 'dealing with potentially three consular clients because both parents have their claims'.²⁹ Consular assistance provided to each party focuses on the welfare aspects of the case, and can include providing lists of local lawyers and other support service providers to either or both parents; taking steps to ensure the welfare of abducted children; and assisting in making arrangements for the child's return to Australia.³⁰

4.19 Consular assistance does not extend to intervention in custody or other legal proceedings, and is subject to privacy and confidentiality restrictions. This means that certain information cannot be communicated to the left-behind parents and families of abducted children. DFAT noted that the ability of consular staff to monitor the wellbeing of abducted children often depends on the agreement of the abducting-parent.³¹ Some consular services—generally notarial services such as the witnessing of documents—are charged on a fee-for-service basis. DFAT emphasised, however, that welfare checks and guidance do not attract a fee, and that the fees charged for notarial services are substantially smaller than commercial rates.³²

4.20 Submitters to the inquiry were generally supportive of the consular services provided in international parental child abduction matters. However, one submitter suggested that all consular services provided in these matters should be exempt from fees, in order to reduce the cost burden on parties (particularly left-behind parents who have been unable to obtain financial assistance under the Overseas Custody Scheme).³³

Australian Passport Office's role

4.21 DFAT administers the Passports Act and the *Australian Passports Determination 2005*, which govern the issuing of Australian passports to children, and their cancellation in certain circumstances, and contain provisions relevant to the prevention of, and response to, international parental child abduction. Such provisions include:

29 Ms Paula Ganly, Department of Foreign Affairs and Trade, *Committee Hansard*, 26 August 2011, p. 44.

30 Department of Foreign Affairs and Trade, *Submission 34*, p. 1.

31 *Submission 34*, p. 1.

32 Ms Paula Ganly, Department of Foreign Affairs and Trade, *Committee Hansard*, 26 August 2011, p. 50. See further, Department of Foreign Affairs and Trade, *Consular Handbook*, Chapter 43.8 and Annex 43C (Consular Fees), Additional Information, tabled by the Department of Foreign Affairs and Trade, 26 August 2011.

33 Mr Ken Thompson, *Submission 22*, pp 3, 5.

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- prescribing full parental consent or a court order (of the Family Court or an overseas court of a Convention country) as a prerequisite to the issuing of Australian travel documents to a child;
 - where full parental consent is not possible for reasons falling within the exceptional circumstances set out in the Passports Act, enabling the Minister's delegate to issue a passport to the child on the application of one parent;
 - enabling parents who are concerned that their children are at risk of abduction to raise a 'child alert' with DFAT; and
 - in very limited circumstances, cancelling the passport of a child—generally on the order of an Australian court, or if DFAT becomes aware of information which, if known at the time of the application, would have resulted in refusal to issue the passport at that time.³⁴

4.22 DFAT emphasised that, in regulating the issuing of passports, it must balance the interests of preventing and responding to international parental child abduction with concerns about the welfare of the child. In some cases, a passport is necessary to ensure the child's welfare overseas—for example, it may be necessary for the child to hold an Australian passport to remain resident in the overseas country, or receive essential services.³⁵ In addition to its regulatory functions, DFAT also issues public guidance materials relevant to travelling with children.³⁶

4.23 Submitters identified various operational issues in relation to the issuing and cancellation of passports in international parental child abduction matters, including the following:

- ambiguity in the terms of court orders placing restrictions upon the overseas travel of children (including conditions upon the issuing of passports), which creates difficulties for DFAT in attempting to interpret orders when processing passport applications;³⁷
- limitations on the power to administratively cancel passports, in particular that DFAT cannot unilaterally cancel a child's current passport on notification of actual or apprehended international parental child abduction unless it is provided with:
 - a court order requiring cancellation; or

34 Department of Foreign Affairs and Trade, *Submission 34*, pp 2-3.

35 *Submission 34*, p. 3.

36 See, for example, Australian Passport Office, *Children and Parental Consent*, Additional Information, provided to the committee by Australian Passport Office, Department of Foreign Affairs and Trade, 29 August 2011.

37 Department of Foreign Affairs and Trade, *Submission 34*, p. 2.

- information that, if known at the time the passport was issued, would have resulted in a refusal of the application;³⁸ and
- onerous evidentiary requirements for the issuing of a temporary passport to children who are abducted overseas, to enable their return to Australia where, for example, their passports have expired subsequent to their abduction.³⁹

4.24 Submitters proposed a range of measures to address their concerns. In particular, DFAT supported the use of standardised court orders for the cancellation of passports.⁴⁰ It also noted that there is scope for flexibility in managing individual applications for the issuing of temporary passports to abducted children.⁴¹ Chief Justice Bryant advised the committee that the court working group established to consider Watch List orders, in consultation with the AFP, will also examine these matters.⁴²

4.25 Mr Ken Thompson indicated his support for an expanded administrative power of cancellation, whereby the Australian Passport Office is required to cancel a child's passport upon proof of international parental child abduction.⁴³ DFAT did not support this measure because its view is that courts are better equipped to make determinations about the rights and interests of a child whose passport is being cancelled.⁴⁴

4.26 Other potential preventative measures included DFAT's proposal for the routine judicial consideration of any restrictions to be placed upon a child's passport in parenting proceedings before the Family Court (for example, in applications for parenting orders post-separation).⁴⁵ Some witnesses, however, did not support such pre-emptive action. For example, Mr Norman Reaburn from National Legal Aid commented that it is appropriate that family courts do not 'assume that in the future parties will not behave in accordance with the decision that has been reached' in respect of custody and access arrangements.⁴⁶ Chief Justice Bryant commented that

38 Mr Lauchlan Leishman, *Submission 7*, p. 4; Mr Ken Thompson, *Submission 22*, pp 3, 5. See also, Department of Foreign Affairs and Trade, *Submission 34*, p. 2.

39 Department of Foreign Affairs and Trade, *Submission 34*, p. 3.

40 *Submission 34*, p. 2.

41 *Submission 34*, p. 3.

42 Response to questions on notice, received 12 September 2011, p. 2.

43 *Submission 22*, p. 5. Mr Thompson argued that this approach would alleviate the burden on left-behind parents who may not be aware that they must seek a court order, and would enable a more timely response to incidents of international parental child abduction.

44 Mr Dominic Trinidad, Department of Foreign Affairs and Trade, *Committee Hansard*, 26 August 2011, p. 45.

45 *Submission 34*, p. 2.

46 *Committee Hansard*, 26 August 2011, p. 20. See also Ms Alexandra Wearne, Legal Aid New South Wales, *Committee Hansard*, 26 September 2011, p. 20.

such an approach may not be appropriate because 'the orders pronounced by the court are dependent on the facts of a given parenting matter and the issues in dispute between the parties'.⁴⁷

Commonwealth Central Authority's communication and information-dissemination practices

4.27 While many submitters indicated that, overall, Australian Central Authorities are upholding Australia's obligations under the Hague Convention,⁴⁸ some concerns were raised during the course of the inquiry. Submitters and witnesses identified two specific issues relating to communication and information-dissemination by Central Authorities.

Liaison with applicants in Hague Convention matters

4.28 In outgoing matters under the Hague Convention, on acceptance of a compliant application (generally from a left-behind parent or family member of the abducted child), the relevant State Central Authority (SCA) and the CCA commence the process to secure the child's return to Australia. The CCA will transmit the application to the Central Authority in the country to which the child has been taken, and seek its assistance in locating the child and facilitating his or her return to Australia.⁴⁹

4.29 Some submitters expressed concern about communication and liaison arrangements between themselves, as applicants, and Australian Central Authorities. They argued that there is an overly bureaucratic chain of communication between overseas Central Authorities, the CCA, SCAs, and applicants, which causes delays in relaying information to applicants about the progress of their cases.⁵⁰ A particular problem appears to be the communication of information about a child's location.⁵¹

4.30 Mr Lauchlan Leishman described his experience as an applicant dealing with the CCA and an SCA as akin to being 'kept in the corner in the dark'.⁵² He stated:

I deal with someone in Brisbane [at the Queensland SCA], who deals with someone in Canberra [at the CCA], who deals, hopefully, with the person

47 Response to questions on notice, received 12 September 2011, p. 3.

48 See, for example, Mr Michael Nicholls QC, *Submission 6*, p. 2; Reunite International (UK), *Submission 12*, p. 2; Northern Territory Government, *Submission 29*, p. 1; Law Council of Australia, *Submission 39*, p. 1.

49 Attorney-General's Department, *Submission 32*, p. 2; Ms Louise Glanville, Attorney-General's Department, *Committee Hansard*, 26 August 2011, p. 41.

50 Mr Lauchlan Leishman, *Submission 7*, p. 2. See also, Mr Craig Cannock, *Submission 2*, p. 2; Mr Ken Thompson, *Committee Hansard*, 26 August 2011, pp 8-9.

51 Mr Ken Thompson, *Committee Hansard*, 26 August 2011, p. 9.

52 *Committee Hansard*, 26 August 2011, p. 4.

where my child has been taken overseas [at the overseas Central Authority]. To me that is illogical. I should be able to talk directly to the person who is dealing with the person overseas.⁵³

4.31 Mr Leishman indicated that he has recently negotiated individual arrangements with the CCA and the Queensland SCA to enable him to liaise directly with the CCA.⁵⁴ ISS Australia supported regular communication between Australian Central Authorities and applicant parents on matters such as 'the progress of their cases, dates and outcomes of any hearings that might take place, and reasons for any delays if they occur'.⁵⁵

4.32 In addition, other submitters, including the Attorney-General's Department (Department), acknowledged the potential for duplication between the work of the CCA and the SCA in some instances.⁵⁶ The committee was informed that some progress has been made towards a formal Memorandum of Understanding between the CCA and SCAs, which would document the division of responsibilities between them.⁵⁷

Information-dissemination and public outreach

4.33 The committee notes that the Department publishes information about international parental child abduction on its website. This includes:

- contact details for the CCA, SCAs and non-government social support service providers;
- application forms for CCA assistance in Convention matters and for financial assistance under the Overseas Custody Scheme;
- lists of frequently asked questions, which provide procedural information about preventing and responding to international parental child abduction; and
- periodic publications of statistical information in respect of Hague Convention abductions to and from Australia.⁵⁸

53 *Committee Hansard*, 26 August 2011, p. 3.

54 *Committee Hansard*, 26 August 2011, p. 3.

55 Ms Helen Freris, International Social Service Australia, *Committee Hansard*, 26 August 2011, p. 10. See also, Mr Ken Thompson, *Committee Hansard*, 26 August 2011, p. 8, who suggested that periodic teleconferences between case officers at the CCA, the relevant SCA and the applicant could improve the flow of information to applicants.

56 Attorney-General's Department, *Submission 32*, p. 9. See further, Department of Communities, QLD, *Submission 24*, p. 1.

57 Department of Communities, QLD, *Submission 24*, p. 1.

58 Attorney-General's Department, *International Child Abduction*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Families2_Internationalchildabduction (accessed 27 October 2011).

4.34 The Department also operates a telephone advice hotline and a central CCA email address. Supporting agencies, including the AFP and DFAT, also publish guidance materials on matters within their responsibilities.⁵⁹ Other non-government agencies have also produced various resources on international parental child abduction.⁶⁰

4.35 Several submitters, including legal practitioners and social service providers, argued that there is scope to improve existing information-dissemination and public education practices.⁶¹ Some expressed concern that public awareness and understanding of international parental child abduction, and its legal and social consequences, remain limited. In particular, some submitters argued that public awareness is a crucial prevention strategy because an understanding of the Hague Convention may dissuade some abducting parents from removing their children, and enable left-behind parents to instigate prompt preventative or remedial action.⁶²

4.36 Submitters suggested a range of improvements to existing information-dissemination and public outreach measures, including the following initiatives:

- the development of a comprehensive international parental child abduction web portal, maintained by the Australian Government, which provides members of the public and professional service providers with a specific and comprehensive access point for resources about prevention and response, including referrals to relevant non-government support service providers;⁶³
- updating existing guidance materials produced by the CCA for legal practitioners engaged in Convention proceedings;⁶⁴
- resuming the former series of CCA publications on individual Convention countries, which detailed the number of incoming abductions and average return rates, the average length of time for the determination of applications,

59 For example, the AFP has produced an information kit about the Airport Watch List; and DFAT produces information booklets on children's passports, and incorporates relevant information in its *Smartraveller* series of publications, as well as in guidance materials produced by the Australian Passport Office.

60 See, for example, International Social Service Australia, *Family Safety and Child Abduction Planning and Prevention Resource Kit*.

61 See, for example, Mr Michael Nicholls QC, *Submission 6*, p. 4; Department of Family and Community Services NSW, *Submission 8*, p. 6; International Social Service Australia, *Submission 11*, pp 5-6; Reunite International (UK), *Submission 12*, p. 3; Law Society of NSW, *Submission 21*, p. 3; Mr Ken Thompson, *Submission 22*, pp 22-24; Law Council of Australia, *Submission 39*, p. 3.

62 Ms Alexandra Wearne, Legal Aid New South Wales, *Committee Hansard*, 26 August 2011, p. 19; Reunite International (UK), *Submission 12*, pp 2-3; Mr Ken Thompson, *Submission 22*, pp 19-20.

63 Mr Lauchlan Leishman, *Committee Hansard*, 26 August 2011, p. 1.

64 Northern Territory Government, *Submission 29*, p. 1.

and the financial and legal assistance available to applicants and respondents in the relevant country;⁶⁵ and

- leveraging existing public engagement opportunities and events, such as International Missing Children's Day, to raise awareness and to engage the broader community in the implementation and continuous improvement of prevention and early response strategies.⁶⁶

Financial and legal assistance schemes administered by the Attorney-General's Department

4.37 The committee received evidence relating to the provision of financial and legal assistance to applicants and respondents in Convention and non-Convention proceedings.

Financial assistance—outgoing matters

4.38 Several submitters commented that financial assistance granted under the Overseas Custody Scheme does not provide adequate support to left-behind parents. Concerns were expressed about the application of the means test, and the limited purposes for which financial assistance is available.⁶⁷

4.39 Applications under the scheme appear to be assessed according to a standardised means test, which is applied to all financial assistance schemes administered by the Attorney-General.⁶⁸ Two submitters argued that the assessment of an applicant's assets under this test may not reflect the circumstances of international parental child abduction cases, namely that:

- an applicant may need to liquidate his or her assets quickly if financial assistance is not provided, as time is of the essence (consequently, the applicant may realise only a small fraction of the market value of the assets);⁶⁹ and
- it is likely that an applicant would, in any event, be using these assets to finance his or her case.⁷⁰

4.40 The Queensland Law Society (QLS) criticised the application of the means test in non-Convention matters, in circumstances where an applicant is required to

65 Law Council of Australia, *Submission 39*, p. 3.

66 Mr Ken Thompson, *Submission 22*, pp 22-24.

67 Mr Ken Thompson, *Submission 22*, p. 2; Queensland Law Society, *Submission 25*, p. 2; Northern Territory Government, *Submission 29*, p. 1.

68 Attorney-General's Department, Application Form—Assistance by the Commonwealth for Legal and Related Expenses for Schemes Administered by the Attorney-General, p. 1.

69 Mr Lauchlan Leishman, *Committee Hansard*, 26 August 2011, p. 8.

70 Mr Ken Thompson, *Committee Hansard*, 26 August 2011, p. 8.

obtain a legal opinion from a lawyer in the jurisdiction to which the child has been taken, as to the merits of his or her case.⁷¹ Although the Department indicated that it may provide a small grant of financial assistance specifically for this purpose,⁷² the QLS expressed concern that such assistance may also be means tested. It argued that this could have the effect of 'delaying or deterring applications for which time is of the essence'. The QLS submitted further that there should be no means test applied at the initial stage of obtaining overseas legal advice, and a merits test applied at this stage should '[take] into account the gravity of the situation, including any child safety issues'.⁷³

4.41 Submitters also expressed concern that the Overseas Custody Scheme does not apply in respect of domestic legal expenses in outgoing matters: for example, the costs associated with obtaining relevant orders under the Family Law Act,⁷⁴ orders for the cancellation of a child's passport; and subpoenaing various records which may disclose information about the child's location, such as documents held by financial institutions, telecommunications providers and airlines.⁷⁵ According to one witness, domestic legal costs in the range of \$50,000-\$100,000 are not unusual for such orders.⁷⁶

4.42 The committee also heard that, in some Convention matters, these orders may be necessary to establish the overseas location of a child so that an application can be accepted by an overseas Central Authority, and to enable a law enforcement response.⁷⁷ In non-Convention matters, these orders may be the primary means of locating a child. As noted earlier in this report, although left-behind parents may apply for legal aid in respect of domestic legal action taken in international parental child abduction matters, such assistance is means-tested.⁷⁸

Legal assistance—outgoing and incoming matters

4.43 Some submitters emphasised the importance of ensuring that all parties to return proceedings are able to obtain legal representation, including applicants (or interveners) and respondents. Reunite International (UK)—a United Kingdom-based non-profit organisation which provides social support services in international

71 *Submission 25*, p. 2.

72 *Submission 32*, p. 4.

73 *Submission 25*, p. 2.

74 For example, parenting, location, recovery and Airport Watch List orders, and arrest warrants in respect of breaches of ss 65Y and 65Z.

75 Mr Ken Thompson, *Submission 22*, p. 3. See further, Queensland Law Society, *Submission 25*, p. 2.

76 Mr Ken Thompson, *Submission 22*, p. 3.

77 Mr Ken Thompson, *Committee Hansard*, 26 August 2011, p. 9; Mr Paul Hansen, Attorney-General's Department, *Committee Hansard*, 26 August 2011, p. 42.

78 National Legal Aid, *Submission 37*, p. 2.

parental child abduction matters—submitted that, in its experience of abductions from Australia to the United Kingdom, inadequate or no representation for respondents (abducting-parents) is creating an imbalance between parties to return proceedings.⁷⁹ Women's Legal Services Australia expressed similar concerns with respect to respondents involved in proceedings in the Family Court which relate to incoming abductions, and in the mediation of such cases.⁸⁰

4.44 Other submitters identified problems encountered by applicants or interveners in outgoing matters (that is, left-behind parents whose children are abducted overseas). Mr Craig Cannock, a father whose children were abducted to Canada, provided information about the significant difficulties and delays he encountered in securing overseas legal aid to commence return proceedings in Canada.⁸¹

4.45 Reunite International (UK) identified a further potential cost barrier encountered by Australian left-behind parents who are involved in return order proceedings in the United Kingdom, advising that such parties often instruct Australian legal representatives, who then brief overseas legal teams. This practice can unnecessarily duplicate expenses when there are no language or cultural barriers to the parent instructing directly his or her overseas legal representatives.⁸²

4.46 In addition, the Chief Justice of the Family Court, the Hon Diana Bryant, commented on the limited circumstances in which the court may appoint an Independent Children's Lawyer to represent the interests of an abducted child in Convention proceedings. In particular, Chief Justice Bryant argued that the statutory criteria in the Family Law Act for the appointment of an Independent Children's Lawyer may now be too restrictive.⁸³

Information-gathering by the Commonwealth Central Authority

4.47 An officer from the Department advised the committee that the overseas location of an abducted child is often known to the applicant parent, or is readily ascertainable because abducting-parents frequently return to their country of nationality, or to a country in which they have family, friends or other support

79 *Submission 12*, p. 1.

80 Ms Angela Lynch, Women's Legal Services Australia, *Committee Hansard*, 26 August 2011, p. 22.

81 *Submission 2*, pp 2-3.

82 *Submission 12*, p. 1.

83 *Submission 35*, p. 42. The Family Law Act provides that the court may make an order for the representation of a child's best interests in incoming Convention matters only if it considers that there are 'exceptional circumstances' that justify doing so: see Family Law Act, s 68L(3). Chief Justice Bryant argued that a finding of exceptional circumstances may no longer be an appropriate pre-condition to the engagement of an Independent Children's Lawyer, due to the increasing complexity of Convention proceedings: see *Committee Hansard*, 26 August 2011, pp 30-31.

networks.⁸⁴ However, the committee received anecdotal evidence suggesting that complexities can arise where the overseas location of a child is uncertain.

4.48 Some witnesses indicated that overseas Central Authorities may not accept applications where the location of a child is uncertain, because these Central Authorities are unable to establish their jurisdiction in the matter.⁸⁵ Further difficulties may arise where the abducting-parent moves between several countries, especially where entry barriers are relatively minimal, as is the case between member states of the European Union.⁸⁶

4.49 Officers from the Department informed the committee that, in its capacity as the CCA in Hague Convention matters, it engages various strategies to locate children in such cases. For example, it can make requests to multiple overseas Central Authorities to seek their assistance in locating the child.⁸⁷ The Department may also request the AFP, as the Australian Interpol National Central Bureau, to issue diffusion notices seeking the policing assistance of multiple countries.⁸⁸ Overseas Central Authorities are then able to make inquiries of other agencies in their jurisdictions to obtain information about the child's location.⁸⁹

4.50 A departmental officer also informed the committee that the Department has recourse to various domestic information-sharing mechanisms to locate abducted children. These include arrangements with the Department of Immigration and Citizenship to cross-check records of a child's travel movements, a Memorandum of Understanding with Centrelink for the provision of information relevant to a child's location, and the ability to apply to the Family Court for Commonwealth Information Orders under the Family Law Act to seek similar information from other Commonwealth agencies.⁹⁰

4.51 The Family Law Council also identified an area of uncertainty in respect of the CCA's information-gathering powers. In its advice to the Attorney-General of March 2011, the Family Law Council stated that it was unclear on the face of the Family Law Act whether the CCA has standing to seek location orders, which would

84 Mr Paul Hansen, Attorney-General's Department, *Committee Hansard*, 26 August 2011, p. 42.

85 Mr Ken Thompson, *Committee Hansard*, 26 August 2011, p. 4. See also, Mr Paul Hansen, Attorney-General's Department, *Committee Hansard*, 26 August 2011, p. 42.

86 Mr Ken Thompson, *Committee Hansard*, 26 August 2011, p. 4. See also, Ms Robin Bowles, *Submission 3*, p. 2.

87 Ms Jennifer Furze and Mr Paul Hansen, Attorney-General's Department, *Committee Hansard*, 26 August 2011, p. 42.

88 Mr Paul Hansen, Attorney-General's Department, *Committee Hansard*, 26 August 2011, p. 43. See also, Assistant Commissioner Ramzi Jabbour, Australian Federal Police, *Committee Hansard*, 26 August 2011, p. 43.

89 Mr Paul Hansen, Attorney-General's Department, *Committee Hansard*, 26 August 2011, p. 42.

90 Mr Paul Hansen, Attorney-General's Department, *Committee Hansard*, 26 August 2011, p. 42.

require private individuals or organisations to furnish the Family Court with information concerning the location of the child.⁹¹

4.52 The proposed reforms announced by the Australian Government on 19 September 2011 include amendments to expand the information-gathering powers of the CCA in locating abducted children.⁹² Officers from the Department informed the committee that these amendments will enable the CCA to apply to the court to seek additional information from individuals and entities which may disclose the location of the child—for example, travel records and the financial transaction records of the abducting parent. The committee was also advised that the proposed amendments are intended to enhance the CCA's ability to identify and contact the appropriate overseas central authorities in order to secure a child's return to Australia.⁹³

Commonwealth Central Authority's capture of data

4.53 Some submitters expressed concern that the CCA's collection of data with respect to international parental child abduction is incomplete. In particular, the CCA does not keep records of abductions to and from non-Convention countries or Convention abductions in which CCA assistance is not sought; nor does the CCA keep statistical information on the motivations of abducting parents in either category of case, or information on the number of abductions committed in breach of family law orders.⁹⁴ Some submitters argued that greater domestic data capture and analysis could aid the continuous improvement of Australian policies and practices, by providing a clear profile of the nature and magnitude of the problem.⁹⁵

4.54 The Department advised that it does not routinely capture this data because its role as the CCA is limited to processing applications for assistance in Convention matters. As such, it is not concerned with the substantive merits or motivating factors present in individual cases, and it does not have visibility of matters which are not the subject of an application made to it. A departmental officer noted that the Permanent Bureau periodically collates data from member states, and commissions its

91 *Submission 13*, Attachment 1, p. 8.

92 The Hon Robert McClelland MP, Attorney-General, and the Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Stronger Laws to Deal With International Child Abduction', Media Release, 19 September 2011.

93 Ms Louise Glanville and Mr Paul Hansen, Attorney-General's Department, *Committee Hansard*, 22 September 2011, pp 5-6.

94 International Social Service Australia, *Submission 11*, p. 6; Mr Ken Thompson, *Submission 22*, pp 17-18; Queensland Law Society, *Submission 25*, p. 3; Attorney-General's Department, response to question on notice, received 16 September 2011.

95 International Social Service Australia, *Submission 11*, p. 6; Mr Ken Thompson, *Submission 22*, pp 17-18.

analysis to identify international and country-based trends.⁹⁶ The Department advised that it does not keep statistics on the number of abductions committed in breach of family law orders because such information is often only incidental to an application to the CCA.⁹⁷

Child support arrangements in the event of international parental child abduction

4.55 Submitters to the inquiry raised concerns about child support and maintenance arrangements in the event of international parental child abduction.⁹⁸ Some left-behind parents submitted that they have experienced difficulties in obtaining an adjustment of their liability following the overseas abduction of their children, notwithstanding that the overseas location of the abducting parent may be unknown.⁹⁹ International Social Service (ISS) Australia asserted that the continued liability of a left-behind parent to make child support or maintenance payments where the location of a child is unknown is an 'enormous injustice' which can fuel resentment on the part of the left-behind parent.¹⁰⁰

4.56 Some left-behind parents submitted that the Child Support Agency (CSA) had not informed them of their right to seek a variation on their child support liability, or had provided incomplete or incorrect advice when notified that international parental child abduction had occurred and advice was sought about future child support obligations.¹⁰¹ Mr Ken Thompson proposed the extension of the CSA's statutory powers to administratively vary a left-behind parent's liability, so that he or she is not required to seek a court order to suspend or vary child support payments in the event of international parental child abduction.¹⁰²

4.57 In relation to whether information held by the CSA might be used to help locate a child who has been abducted overseas to an unknown location, the Department advised the committee that the CSA is not included in the information-sharing protocol between the CCA and other Australian Government agencies (which includes Centrelink). The Department noted, however, that the CCA or individual

96 Mr Paul Hansen, Attorney-General's Department, *Committee Hansard*, 26 August 2011, pp 46-47. See also Nigel Lowe (for the Hague Conference on Private International Law), *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 and Part III: National Reports (2011).

97 Attorney-General's Department, response to question on notice, received 16 September 2011.

98 See, for example, Mr Daniel Wass, *Submission 15*, pp 1-2.

99 Mr Matthew Wyman, *Submission 1*, p. 4; Mr Ken Thompson, *Submission 22*, pp 18-19.

100 Ms Helen Freris, International Social Service Australia, *Committee Hansard*, 26 August 2011, p. 13.

101 Mr Matthew Wyman, *Submission 1*, p. 4; Mr Ken Thompson, *Submission 22*, p. 19.

102 Mr Ken Thompson, *Submission 22*, p. 19.

parents are able to apply to the Family Court for a Commonwealth Information Order under the Family Law Act, which would require the CSA to disclose to the court certain information concerning the child's overseas location.¹⁰³

4.58 ISS Australia also queried whether limited information from child support records could be provided to left-behind parents to enable them to commence proceedings for the return of their child, without disclosing the specific location of the abducting-parent.¹⁰⁴

Family Law Council advice and proposed legislative amendments

4.59 Departmental officers informed the committee that, in August 2011, the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs sought advice from the Family Law Council on whether Australian family law courts should be able to suspend the requirement for left-behind parents to pay child support or maintenance in the event of international parental child abduction; and what circumstances should apply to subsequently reinstate the obligation to pay child support.¹⁰⁵

4.60 The Family Law Council provided its advice to the government on 5 August 2011, recommending legislative amendments to enable the Family Court to suspend child support or maintenance obligations, where it has found that a child has been wrongfully removed from, or retained outside, Australia. The Family Law Council considered that this power should apply equally to Convention and non-Convention matters, and recommended that a removal or retention should not be deemed wrongful in circumstances broadly analogous to the matters falling within the exceptions in the Hague Convention (set out in Article 13). The Family Law Council also stated that, in determining whether the removal or retention is wrongful, the court should also have regard to whether:

- the taking-parent was fleeing from violence;
- the child objects to returning to Australia; and
- any other factors it considers relevant.¹⁰⁶

4.61 The Family Law Council also recommended that the obligation to pay child support or maintenance should be reinstated in the following circumstances:

103 Mr Paul Hansen, Attorney-General's Department, *Committee Hansard*, 26 August 2011, p. 46.

104 Ms Helen Freris, International Social Service Australia, *Committee Hansard*, 26 August 2011, p. 13.

105 Ms Louise Glanville, Attorney-General's Department, *Committee Hansard*, 22 September 2011, p. 1. See further, Family Law Council, *Letter of Advice to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs*, 5 August 2011, p. 1, Additional Information, tabled by the Attorney-General's Department, 22 September 2011 (Letter of Advice).

106 Letter of advice, 5 August 2011, pp 3-6 (recommendations 1 and 2).

- upon agreement by the parties;
- by the return of the child to Australia; or
- by declaration of the Family Court upon application by either party, including in circumstances where an application for a relocation order is subsequently made by one party which seeks permission to relocate the child to another country.¹⁰⁷

4.62 Officers from the Department advised the committee that the government has announced its support for these proposals. Details of the proposed amendments are currently under development and the government intends to introduce legislative reforms in the first half of 2012.¹⁰⁸ In addition to the specific matters in the Family Law Council's recommendations, the government has announced that the proposed reforms will include an overarching requirement that the court must be satisfied that the suspension of child support or maintenance obligations would be in the best interests of the child.¹⁰⁹

107 Letter of advice, 5 August 2011, p. 6 (recommendation 3).

108 Ms Louise Glanville, Attorney-General's Department, *Committee Hansard*, 22 September 2011, pp 1, 4.

109 The Hon Robert McClelland MP, Attorney-General, and the Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Stronger Laws to Deal With International Child Abduction', Media Release, 19 September 2011.

