

The Parliament of the Commonwealth of Australia

Senate Legal and Constitutional Legislation Committee

**Consideration of Legislation Referred
to the Committee**

**Provisions of the Family Law Amendment (Child
Protection Convention) Bill 2002**

May 2002

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TABLE OF CONTENTS

MEMBERS OF THE LEGISLATION COMMITTEE	III
CHAPTER 1	1
INTRODUCTION	1
Referral of the Inquiry	1
Background	1
Conduct of the Inquiry	2
Notes on references	2
CHAPTER 2	3
THE CONVENTION AND THE BILL	3
The Hague Convention on the Protection of Children 1996 ('the Convention')	3
The Bill	6
CHAPTER 3	15
OUTSTANDING ISSUES.....	15
Conclusion.....	20
APPENDIX 1	21
INDIVIDUALS AND ORGANISATIONS PROVIDING SUBMISSIONS TO THE INQUIRY	21
APPENDIX 2	23
WITNESSES WHO APPEARED BEFORE THE COMMITTEE	23
Public Hearing, Friday 19 April 2002 (Canberra).....	23

CHAPTER 1

INTRODUCTION

Referral of the Inquiry

1.1 The Family Law Amendment (Child Protection Convention) Bill 2002 ('the Bill') was first introduced into the House of Representatives on 20 September 2001 by the Attorney-General. On 8 October 2001 the House of Representatives was dissolved for the federal election and the Bill lapsed. It was reintroduced into the House of Representatives during the 40th Parliament, on 13 March 2002.

1.2 On 20 March 2002 the Senate Selection of Bills Committee referred the Bill to the Legal and Constitutional Committee for inquiry and report by 15 May 2002.¹ At the same time, the Bill was referred to the Joint Standing Committee on Treaties.

1.3 The Selection of Bills Committee requested that the Legal and Constitutional Committee consider "whether the Bill properly meets Australia's obligations under the Convention."

Background

1.4 Australia is seeking to ratify the *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children 1996* (the Convention). Ratification will require amendment to the *Family Law Act 1975* and to some State and Territory laws.²

1.5 The purpose of this Bill is to amend the Family Law Act so that Australia's ratification of the Convention can proceed.

1.6 The objective of the Bill is to address conflicts in jurisdiction in children's matters between courts in different countries. At present there are no clear rules and procedures governing such disputes, with the result that Australian and overseas courts sometimes make conflicting parenting orders in relation to the same children. Authorities in one country may fail to act because they assume that authorities in another country have taken responsibility for a child. The Convention, and the Bill which implements it, are designed to overcome these difficulties by providing clear jurisdictional rules for courts here and abroad.³

1 Selection of Bills Committee, *Report No. 2 of 2002*

2 These are: the *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Children's Court Act 1973* (NSW); *Children and Young Person's Act 1989* (Vic); *Child Welfare Act 1947* (WA); *Children's Court Act 1977* (WA); *Child Protection Act 1999* (Qld); *Children's Services Act 1965* (Qld); *Children's Court Act 1992* (Qld); *Children's Protection Act 1993* (SA); *Community Welfare Act 1972* (SA); *Children Young Person's and their Families Act 1997* (Tas), *Community Welfare Act 1983* (NT); and *Children Services Act 1986* (ACT). In addition, the *Family Court Act 1997* (WA) is affected, as that Act governs the functions in WA that are carried out elsewhere through the Commonwealth *Family Law Act 1975*.

3 In Chapter 2 of the Convention and Division 4, subdivisions B and C of the Bill

1.7 The Bill also implements arrangements to guarantee the recognition and enforcement in Australia of parenting orders for other Convention countries, and vice versa. It will establish mechanisms to facilitate cooperation between courts in Australia and courts overseas in parental responsibility cases.⁴

1.8 The implications of ratification have been widely canvassed. A Commonwealth/State Working Group⁵ was established in 1997 and published two Issues Papers looking at the implications of ratification for State and Territory legislation and for Commonwealth legislation respectively.⁶ The Working Group reported in April 1999⁷. It proposed amendments to Commonwealth, State and Territory laws. The amendments it proposed to Commonwealth legislation – specifically to the *Family Law Act 1975* – have been incorporated in the Bill now before the Committee.

Conduct of the Inquiry

1.9 The Committee wrote to a range of interested individuals and organisations drawing their attention to the Committee's Inquiry and seeking submissions. The Inquiry was advertised in the *Weekend Australian* on 23 March 2002. The Committee received three submissions. These are listed at Appendix 1.

1.10 The Committee attributes the small number of submissions to the non controversial nature of the changes proposed in the Bill. Most of the concerns raised by interested groups and individuals were considered by the Working Party during its deliberations, and have been addressed in the proposed Bill. Few outstanding issues of concern remain. Those brought to the Committee's attention are discussed in Chapter 3.

1.11 The Committee held a public hearing in Canberra on 19 April 2002. A list of witnesses is at Appendix 2.

Notes on references

1.12 References to submissions in this Report are to individual submissions as received by the Committee, and not to a bound volume. References to the *Hansard* transcript are to the proof transcript. Page numbers vary between the proof and the official *Hansard* transcript.

4 Chapters 4 and 5 of the Convention and Division 4, subdivisions E and F of the Bill

5 It comprised representatives of Commonwealth and State/Territory Attorney-Generals' departments and representatives of Commonwealth and State/Territory Community Services' departments

6 *Hague Convention on the Protection of Children. Proposed Amendments to State and Territory Laws*, August 1998 and *Hague Convention on the Protection of Children. Proposed Amendments to Family Law Legislation*, September 1998

7 *Hague Convention on the Protection of Children. Report of the Commonwealth/State Working Group*, April 1999

CHAPTER 2

THE CONVENTION AND THE BILL

The Hague Convention on the Protection of Children 1996 ('the Convention')¹

Background

2.1 This Convention is an update and revision of the 1961 *Convention on the Powers of Authorities and the Law Applicable in respect of the Protection of Minors* (the 1961 Convention). It was drafted by the Hague Conference on Private International Law and represents an attempt to overcome deficiencies in the 1961 Convention which have limited its success.

2.2 A major problem with the 1961 Convention was that it failed to resolve conflicts or potential conflicts of jurisdiction for the protection of minors between the authorities in a child's habitual country of residence, those in his or her country of nationality and/or authorities in the state in which a child is present. It also failed in cases where the child had dual nationality and there was conflict between the authorities of the two states of the child's nationality. The 1996 Convention attempts to overcome these jurisdictional conflicts. Chapter 2 of the Convention relates to jurisdictional issues. These issues are dealt with in new Division 4, subdivisions B and C of the Family Law Act Amendment (Child Protection Convention) Bill 2002.

2.3 A further difficulty in the 1961 Convention was the unclear relationship between the national law applicable to parental responsibility and the law of the habitual residence, which was applicable in principle to measures of protection. These issues are clarified in Chapter 3 of the 1996 Convention, on applicable law. They are dealt with in new Division 4, subdivision D of the Bill.

2.4 The path of the 1961 Convention was also marred by lack of cooperation between signatory states and, more specifically, the lack of an enforcement mechanism to ensure that a measure of protection taken by one contracting state could be enforced in another. These issues are addressed in Chapter 4 (recognition and enforcement) and Chapter 5 (cooperation). The relevant sections of the Bill are in new Division 4, subdivision E and Division 4, subdivision F respectively.

Objectives

2.5 The Convention's major aim is to eliminate competition between the authorities of different states in taking measures to protect children. It requires contracting states to accept considerable limitations on their jurisdiction in order to avoid conflicts over jurisdiction,

1 The full title is *The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children, 1996*

applicable law, and recognition and enforcement of measures for the protection of children. It also puts in place rules for facilitating cooperation between Convention states.²

2.6 The specific objectives of the Convention are set out in Article 1, as follows:

The objects of the present Convention are-

- a to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
- b to determine which law is to be applied by such authorities in exercising their jurisdiction;
- c to determine the law applicable to parental responsibility;
- d to provide for the recognition and enforcement of such measures of protection in all Contracting States; and
- e to establish such cooperation between the authorities of the contracting States as may be necessary in order to achieve the purposes of this Convention.³

2.7 The Preamble to the Convention states that the best interests of the child are to be a primary consideration in reaching decisions under the terms of the Convention.

Scope

2.8 The Convention applies to children from the moment of their birth until the age of 18.

2.9 The Convention sets out, in Article 3, those areas falling within its scope. They may be summarised as follows:

- the attribution, exercise, termination or restriction of parental responsibility;
- rights of custody and access;
- guardianship and curatorship;
- the designation and functions of any person or body having charge of the child's person or property;
- the placement of the child in foster care, institutional care or any similar arrangement;
- the supervision by a public authority of the care of a child by any person having charge of the child; and
- the administration, conservation or disposal of the child's property.

2.10 The Preamble to the Convention specifically excludes from its scope (in Article 4) the following areas:

- the establishment or contesting of a parent-child relationship;

2 House of Representatives, *Hansard*, Second Reading Speech, Family Law Amendment (Child Protection Convention) Bill 2002, 21 March 2002, p. 31082

3 Family Law Amendment (Child Protection Convention) Bill 2002, Schedule 1, Chapter 1, Article 1

-
- decisions on adoption;
 - the names of the child;
 - emancipation;
 - maintenance obligations;
 - trusts or succession;
 - social security;
 - public measures of education or health;
 - penal offences committed by children; and
 - decisions on the right of asylum and immigration.

Benefits of ratification

2.11 The benefits of ratification were described by the Attorney-General in his Second Reading Speech:

...ratification of the Convention would be of significant benefit to Australian families, and in particular to children who are the subject of international family law or child protection litigation...

Existing family law litigation across international boundaries is subject to uncertainty as to jurisdiction and unpredictability in relation to the enforcement of orders abroad. The convention attempts to overcome these uncertainties by providing clear jurisdictional rules and by encouraging cooperation between authorities in different countries to protect the best interests of children affected by disputes over parental responsibility.⁴

2.12 They were summarised in the issues paper on family law⁵ as follows:

Ratification of the Convention would have significant benefits for Australia, including:

- clarifying of responsibilities and eliminating conflicts in jurisdiction between Australian and overseas courts in family law and child protection cases;
- ensuring recognition and enforcement abroad of Australian court orders and other measures of protection where appropriate;
- providing mechanisms for child protection authorities in Australia and other countries to co-operate in relation to protective measures for an Australian child abroad, or in relation to a child returning to another country who is subject to Australian protective measures.⁶

4 House of Representatives *Hansard*, Second Reading Speech, Family Law Amendment (Child Protection Convention) Bill 2002, 21 March 2002, p. 31082

5 Commonwealth/State Working Group, *Hague Convention on the Protection of Children. Proposed Amendments to Family Law Legislation*, September 1998

6 Commonwealth/State Working Group. *Hague Convention on the Protection of Children. Proposed Amendments to Family Law Legislation*, September 1998, p. 10

2.13 In the view of the Australian delegation to the Hague Commission the benefits of ratification will be achieved without significant weakening of existing Australian laws.

...Australian authorities would have significant latitude to give effect to the Convention in a way that ensured that Australia gained the benefits of the Convention without undermining the operation of existing family and child protection laws in Australia.⁷

The Bill

Objectives

2.14 The major objective of the Bill is, as noted, to amend the *Family Law Act 1975* so that it is consistent with the provisions of the 1996 Convention, thus enabling Australia to ratify that Convention. Ratification will also require changes to relevant State and Territory legislation, especially in relation to child protection, which is predominantly a State/Territory responsibility.

2.15 The more specific objectives of the amendments to the Bill were described by the Commonwealth/State Working Group as follows:

The objects of these amendments are to recognise:

- a the importance of international co-operation for the protection of children;
- b the need to avoid conflicts between legal systems of different countries in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children;
- c the best interests of the child are to be a primary consideration in the making of decisions relating to the person or guardianship of a child.⁸

Operation

2.16 The legislation will be used for family law and child protection measures in cases in which a child is present in a country that is a party to the 1996 Convention but his or her habitual residence is in another Convention country.

2.17 The Bill extends to Australia the rules established by the Convention governing:

- whether a court has jurisdiction to hear an international parental responsibility dispute;
- which country's law is to be applied in determining international parental responsibility disputes; and
- what conditions must be satisfied to ensure international recognition and enforcement of parenting orders, and what obligations courts in Australia and overseas have to cooperate in the protection of children.

7 *Report of the Australian delegation to the Special Commission – Hague Convention on the Protection of Children*, January 1997

8 *Hague Convention on the Protection of Children. Report of the Commonwealth/State Working Group*, April 1999, p. 39. The Objects Clause is not however incorporated into the Bill.

Concepts and definitions

2.18 The concepts and definitions used in the Bill are set out in subdivision A, s. 111CA.

Parental responsibility

2.19 The definition used in the Bill is in line with the wording in the *United Nations Convention on the Rights of the Child 1989*. It includes parental authority or ‘any analogous relationship of authority determining the rights, powers, and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.’⁹

Child protection

2.20 The definition used in the Bill is consistent with the definition used in Australian State and Territory child welfare and protection laws.¹⁰

Habitual residence

2.21 The concept of habitual residence¹¹ is central to the issue of jurisdiction, to the 1996 Convention and to the Bill. It is based on the view that, in most cases, the country of habitual residence should have responsibility for making decisions about the child and should expect other Convention countries to enforce its orders in cases where the child is temporarily present in some other country. The following example illustrates how the concept of habitual residence might operate in practice:

... a child resides with the mother in Australia by court order. Australia is the place of the child’s habitual residence. The child goes on a contact visit to the father who lives in a country which has ratified the Child Protection Convention, for example the Czech Republic. If the father refuses to return the child and applies to a court in the Czech Republic for custody of the child, the Czech Republic court is prevented by the Child Protection Convention from making any final orders.

... if the mother has evidence that the child is at risk of harm from the father’s family, then upon request from Australia the Czech Republic authorities must take protective measures for the child.¹²

Major provisions of the Bill

2.22 The major provisions of the Bill are:

1. Jurisdictional issues
2. Applicable law

9 See Article 5, *United Nations Convention on the Rights of the Child 1989*

10 See, for example, Queensland *Child Protection Act 1999*, s. 10 and Western Australia *Child Welfare Act 1947*, s. 4

11 The term ‘habitual residence’ is not defined in the Bill. This was a cause of concern to some, and is discussed in Chapter 3.

12 “The Hague Convention on Protection of Children 1996.” Jennifer Degeling, *Australian Children’s Rights News*, 31 December 2001, p. 15

3. Recognition and enforcement
4. Cooperation.

Jurisdictional issues

2.23 Ratification of the 1996 Convention will necessitate amendments to existing family law legislation as it relates to jurisdiction, to ensure that Australia complies with the provisions of the Convention in any family law case with an international element.

Existing jurisdiction

2.24 In most cases there is no dispute about the jurisdiction of Australian courts to hear family law matters relating to children. This is the position when the children in question are both habitually resident and present in Australia.

2.25 Difficulties arise where the children concerned are present in Australia but habitually resident overseas. In these circumstances the jurisdiction of Australian courts is limited. Australian courts may not act where:

- an application is pending under the Hague Abduction Convention
- a child is brought to Australia in breach of overseas custodial arrangements.

2.26 An Australian court in such circumstances is guided in its decision about the exercise of jurisdiction by its assessment of the best interests of the child.

2.27 Where children are not present in Australia the Australian courts will rarely act because of the view that the country of the child's habitual residence is in a better position to assess the child's needs and to enforce court orders. Again, Australian courts are guided by their interpretation of the best interests of the child.

2.28 The existing provisions governing jurisdiction are set out in s. 69E (1) (2) of the Family Law Act.

Changes to jurisdiction in the Bill

2.29 The Bill largely preserves the operation of existing family law and child protection laws in Australia in relation to jurisdiction since many of their provisions are consistent with those set out in the Convention. The jurisdiction changes in the Bill are designed to clarify responsibilities and to deal with potential conflicts of jurisdiction between authorities in Australia and those in Convention countries with respect to measures for the protection of children and in family law cases.

2.30 Authorities in other countries will defer to Australian authorities in the circumstances specified in the Convention¹³ and, in return, Australian courts and child protection authorities will be required by this legislation to comply with the rules and defer to the authorities of other Convention countries in applicable situations. The Bill will remove the existing uncertainty for litigants and the courts in determining the appropriate forum for resolving disputes about parental responsibility.

13 In chapter 2, Articles 5-14

2.31 Most of the amendments in the Bill which deal with jurisdictional issues are in the new Division 4, subdivision B, relating to jurisdiction for the person of a child, and subdivision C, relating to jurisdiction for decisions about a guardian of a child's property.

2.32 In summary, the amendments set out **the circumstances in which a family court in Australia may exercise jurisdiction with respect to measures to protect a child** (*vis a vis* authorities in other countries) as follows:

- a) when a child is present and habitually resides in Australia
- b) when a child is present in Australia but habitually resides in another convention country if:
 - the child requires urgent protection; or
 - the measures proposed are provisional and limited to Australia; or
 - the child is a refugee; or
 - the Australian authorities have been requested by authorities in the courts of the child's habitual residence to assume jurisdiction; or
 - such authorities have agreed to the Australian authorities exercising jurisdiction; or
 - the Australian authorities have been asked by both parents to take measures in relation to children in the course of divorce or annulment.
- c) when a child is present in another Convention country if:
 - the child is habitually resident in Australia; or
 - the child has been wrongfully removed from Australia; or
 - Australian authorities have been asked to act by authorities in the country of the child's habitual residence; or
 - authorities in the child's habitual residence have agreed to Australian authorities having jurisdiction; or
 - Australian authorities have been asked by both parents to take measures in relation to children in the case of divorce or annulment.
- d) when a child is present in Australia and is a refugee
- e) when a child is present in a non Convention country if:
 - the child is habitually resident in Australia; and
 - the child is an Australian citizen, is ordinarily resident in Australia or is resident there on the day proceedings are initiated; or

- the parents of the child or a party to the proceedings falls into one of the categories listed immediately above
- f) when a child is present in Australia if:
- the child is habitually resident in a non Convention country; and
 - the child is an Australian citizen, is ordinarily resident in Australia or is resident there on the day on which proceedings are initiated; or
 - the parent or a party to the proceedings falls into one of the categories listed immediately above.

2.33 Subdivision B also sets out the circumstances in which limitations apply to the jurisdictional arrangements discussed above. These include:

- incompatibility with a measure taken by a Convention country under the Child Protection Convention;
- the parents do not have parental responsibility for the child, and are not habitually present in Australia when proceedings begin;
- a child is wrongfully removed from or retained outside a Convention country;
- prior proceedings are pending in a Convention country;
- a court asks another Convention country to assume jurisdiction under Article 8 of the Convention or asks to assume it under Article 9; and
- Commonwealth personal protection measure lapses.

2.34 The text of the Convention applies equally to the protection of the person and the protection of the property of the child. The relevant amendments are set out in Subdivision C. They will ensure that the authority of parents as guardians of their children's property will be recognised in Convention countries. However, this will be the case only where parents are guardians of their children's property by operation of law. Guardians who assume this responsibility as public trustees will be excluded, as trusts and laws on succession fall outside the scope of the Convention.¹⁴

2.35 The centrality of the concept of habitual residence in determining jurisdiction flows from the recognition that the authorities in a child's habitual residence are, in general, better able to assess the child's situation and to enforce any orders made for the child's property. This view already informs many court decisions in Australia when there is a dispute about jurisdiction.

2.36 In the Convention and the Bill the countries of habitual residence have jurisdiction to take long term measures for a child's protection. A country in which a child is present but not habitually resident may have jurisdiction in cases of urgency or in cases in which a provisional measure is required to protect the child. These two grounds of jurisdiction are limited and subsidiary and measures taken under them lapse when the authorities in the country of habitual residence have taken the measures required by the situation.

14 As set out in Article 4f

2.37 While most amendments relating to jurisdiction fall within new Division 4, others are scattered throughout the Bill. They refer to specific issues such as, for example, modifications to the jurisdiction of the Family Court and Supreme Courts of a State or Territory in relation to matrimonial causes (s.s. 39(5)) to ensure that their provisions are consistent with those in the Convention and in new Division 4. Others relate to parenting orders (s.s. 65D(1)) and location orders (s. 67K and s. 67M).

2.38 Existing provisions relating to child abduction (s. 111B)¹⁵ and intercountry adoption (s. 111C) are unchanged by the Bill.

Applicable law

2.39 Article 15 of the Convention provides that, in exercising their jurisdiction, the authorities of the contracting states are to apply their own domestic law. This is particularly relevant to issues surrounding the determination of parental responsibility. Many countries, unlike Australia, do not recognise the parental responsibility of a father who is not married to the child's mother.

Existing provisions

2.40 In Australia the Family Law Act provides (in s. 61C) that each of the parents of a child has parental responsibility in relation to the child, regardless of the nature of the relationship between them.

Changes to applicable law in the Bill

2.41 The Bill changes s. 61C of the Family Law Act to provide that, in line with the Convention, other Convention countries are required to recognise the parental rights conferred on fathers in Australia by operation of law, by agreement or by unilateral Act in respect to children habitually resident in Convention countries. Such recognition will be accorded even if, under the law of that country, the father would not be recognised as having rights or responsibilities towards the child. These provisions will help unmarried fathers in Australia who would otherwise be forced to litigate in those countries to establish their parental rights. Similarly, unmarried fathers in Convention countries will gain parental responsibility and obligations under Australian law if their child, born overseas, becomes habitually resident in Australia.

2.42 The practical effect of these changes was illustrated by an example provided by the Commonwealth/State Working Group.

...in countries like New Zealand and the United Kingdom, an unmarried father has no rights of custody by operation of law. Under the Convention (assuming both Australia and New Zealand are parties to the Convention) if a child of unmarried parents changes his or her country of habitual residence from Australia to New Zealand, the father's parental responsibility under Australian law would be recognised in New Zealand. Moreover if a child of unmarried parents changes his

15 Concerns were raised with the Committee about the interrelationship between the 1996 Child Protection Convention and the *1980 Convention on the Civil Aspects of International Child Abduction*, which are given effect in s. 111B. They are discussed in Chapter 3.

or her country of habitual residence from New Zealand to Australia, the father in New Zealand will gain parental responsibility under Australian law.¹⁶

2.43 The major amendments relating to applicable law are set out in Division 4, subdivision D. In summary, they provide that the law that applies in the country of a child's habitual residence governs the exercise of parental responsibility and the circumstances in which parental responsibility is attributed or extinguished. It also sets out rules governing parental responsibility in circumstances in which:

- the habitual residence of the child changes;
- the child is habitually resident in a non Convention country; and
- the best interests of the child necessitate some other course of action.

2.44 In the latter circumstance the Bill permits modifications to s. 42(2) of the Family Law Act to apply the laws of another country where the protection of the child makes this necessary.

2.45 During consultations in the development of the Bill some concerns were expressed about Australian authorities imposing the laws of other countries, in certain circumstances. The proposed legislation generally assumes that Australian authorities will apply their domestic law, although they may apply another law if they consider this is warranted. This issue is discussed in Chapter 3.

Recognition and enforcement

2.46 The purpose of these provisions is to facilitate the recognition and enforcement in Convention countries of parental responsibility orders made by the Australian Family Court. Likewise, the provisions will ensure the recognition and enforcement in Australia of parental responsibility orders from other Convention countries.

Existing provisions

2.47 At present it is difficult to get parental responsibility orders for the Family Court of Australia recognised and enforced overseas, except in the courts with which Australia has bilateral agreements, principally New Zealand and the United States. This means that, in cases in which parents move between countries and thus circumvent court orders relating to parental responsibility, the parent seeking to enforce the court order is obliged to litigate in the country concerned.

Changes to recognition and enforcement provisions in the Bill

2.48 The Bill implements arrangements to guarantee the recognition and enforcement in Australia of parental responsibility orders from other Convention countries and vice versa. Regulations to be inserted into the Bill will lay down rules governing the circumstances in which parental responsibility orders will be entitled to recognition and enforcement. In this way it will provide a degree of finality in litigation and remove the possibility of re-litigation of contact and access arrangements in another country.

16 *Hague Convention on the Protection of Children. Report of the Commonwealth/State Working Group, April 1999, p. 19*

2.49 The Bill encapsulates the relevant provisions of the Convention, which set out a simple and rapid registration procedure. Once registered, the order can be enforced by a parent initiating proceedings in an Australian court (or an Australian parent initiating proceedings in the court of a Convention country). Government agencies will not generally be involved. This streamlining of the process will, it is anticipated, reduce the time and costs involved.

2.50 Different arrangements will be required for recognition and enforcement of child protection orders and these will be incorporated into State and Territory legislation.

2.51 The provisions relating to recognition and enforcement are in Division 4, subdivision E of the Bill. The provisions modify existing provisions of the Family Law Act, especially:

- S. 63E and s. 63F, relating to registration of, and child welfare provisions of, a parenting plan, respectively
- S. 70G and s. 70H relating to the registration in Australia of overseas child orders.

Cooperation

2.52 The Bill sets out mechanisms to facilitate cooperation between courts in Australia and courts overseas in cases relating to international access or contact.

Existing provisions

2.53 At present it is often difficult for parents in Australia who want to establish their legal rights of contact with their children in another country to persuade overseas courts that they are suitable persons to have contact or access. The Bill will facilitate this process.

Changes to facilitate cooperation

2.54 The Bill sets out measures designed to ensure that authorities in other Convention countries cooperate with Australian authorities on issues of child protection or parental responsibility orders for an Australian child in a Convention country or for a child moving to a Convention country who is the subject of Australian protection measures or parental responsibility.¹⁷

2.55 The Convention establishes authorities in all Convention countries whose role is to facilitate contact and cooperation between participating countries, to exchange information and to assist in protecting the interests of children at risk. In Australia, the authorities for child protection matters will be State and Territory welfare departments. For parental responsibility orders it will be the Family Court.

2.56 Under the terms of the Convention each participating country will also establish a Central Authority, the function of which is to act as the point of contact between Convention countries. The Central Authority will receive information and requests for assistance and channel them to the appropriate authorities. In return it will offer information and make requests to other Convention countries on behalf of child protection agencies in Australia or

17 In Division 4, subdivision F of the Bill

the Australian Family Court. In Australia the Central Authority will be the Commonwealth Attorney-General's department.

2.57 The provisions relating to cooperation are in Division 4, subdivision F of the Bill. They include:

- the obligations upon an Australian court to obtain the consent of the competent authorities in a Convention country before placing a child in foster care;
- the obligation upon the Australian Central Authority to advise a Convention country when it considers a child moved to that country is at serious risk;
- protections to individuals disclosing information in relation to children at risk;
- cooperation between Convention countries on issues of parental contact;
- cooperation between Convention countries on the location of children, and implementation of measures for their protection; and
- the communication of information between authorities, as necessary to comply with the requirements of the Convention.

CHAPTER 3

OUTSTANDING ISSUES

3.1 Australia's existing family law, as it relates to cases with an international element, is consistent with many of the provisions of the 1996 Convention. There are already provisions in the Family Law Act relating to international jurisdiction, applicable law and recognition and enforcement. The rules to be applied under the Convention are similar to those already applied by the Family Court in many cases. This is one of the reasons why the amendments foreshadowed in the Bill have been generally supported.

3.2 The Bill has also received support as a result of those concerns raised during the consultation process undertaken by the Commonwealth/State Working Party during development of the legislation being largely addressed in the Bill.

3.3 A small number of outstanding issues was brought to the Committee's attention in submissions and during the public hearing. They are briefly outlined below, together with the responses provided by the Attorney-General's Department.

3.4 The major issues raised were:

- Conflict between Article 7 of the 1996 Convention and provisions of the Child Abduction Convention
- The definition of habitual residence.

3.5 Other concerns raised related to certain aspects of:

- extension of the rights of non married fathers under applicable law provisions
- provisions governing the enforcement in Australia of decisions by foreign courts
- extension of the jurisdiction of the Family Court to Convention countries.

3.6 Each of these issues is discussed below.

Conflict between Article 7 of the 1996 Child Protection Convention and provisions of the Child Abduction Convention¹

3.7 The Legal Aid Directors' Secretariat submission to the Committee² suggested that Article 7 of the Child Protection Convention (CPC), which deals with wrongful removal or retention of a child, may have unintended consequences as it interacts with the Child Abduction Convention (CAC).

3.8 Article 7 of the CPC provides that the habitual residence of an abducted child will retain jurisdiction over the child until it acquires a new habitual residence, and providing certain conditions are satisfied. These additional conditions are set out below:

1 The full title of the Convention is *Convention on the Civil Aspects of International Child Abduction 1980*

2 *Submission 2*, Legal Aid Directors' Secretariat, pp.2-3

Article 7

1. In case of wrongful removal or retention of the child, the authorities of the contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State and,

(a) each person, institution or other body having rights of custody has acquiesced in the removal or retention: or

(b) the child has resided in that other State for a period of at least one year after the person, institution or other body having rights of custody has or should have had knowledge of the whereabouts of the child, no request for return lodged within that period is still pending, and the child is settled in his or her new environment.

3.9 These provisions, it is suggested,³ may be interpreted as indicating that the country of prior habitual residence may still retain jurisdiction (even after proceedings have been heard under the CAC for return of a child and the proceedings have been unsuccessful) and could take contrary measures to those taken under the CAC.

3.10 In practical terms this could mean, for example, that if a mother successfully defends a CAC application because of the grave risk of harm to her child, the CPC may still require subsequent parenting proceedings to be heard in the original country of habitual residence from which she may have fled, thus placing the child at unacceptable risk. The parenting proceedings may result in a different outcome from that achieved under the CAC. In this case all CPC countries would be obliged to enforce the CPC measures. In this view, a court's refusal to return a child under the CAC should be final.⁴

3.11 The Attorney-General's Department suggested that the drafters of both the CAC and the CPC had not intended a decision on jurisdiction under the CAC to be final.

A decision by the Family Court under the child abduction convention was never intended to be a final decision on the question of appropriate forum – that is, which court is appropriate to determine a custody dispute. It was always open to the parent overseas who was unsuccessful with an abduction convention application to nevertheless go on and litigate custody or try to obtain return of the child by other means.⁵

3.12 The Department also argued that: “Any difficulty for an abducting parent overseas, faced with litigating custody in Australia, must be weighed against the same difficulty for the left behind parent in Australia who is currently forced to litigate custody overseas as a result of the wrongful removal.”⁶

3.13 The Attorney-General's Department concluded:

While some abducting parents may disagree with the approach taken by the drafters of the Child Protection Convention in article 7, Australia's decision to

3 For example, in *Submission 2*, Legal Aid Directors' Secretariat, p. 3

4 *Submission 2*, Legal Aid Directors' Secretariat, pp. 2-3

5 *Transcript of evidence*, Commonwealth Attorney-General's Department p. 3

6 *Submission 3*, Commonwealth Attorney-General's Department p. 4

ratify must be based on a balanced consideration of the whole Convention. In particular this consideration must take account of the benefits of ratification of the Convention.⁷

3.14 Other commentators see the provisions of the CPC and the CAC as complementary rather than conflicting.

In medical terms the role of the Child Abduction Convention is that of an ambulance crew. The objective is to get the patient as quickly and safely as possible to the right hospital where the most appropriate measures of treatment can be taken. The role of the new Hague Convention on the Protection of Children is more that of the hospital administrator. The objective is to prevent problems and conflicts from arising, to ensure the efficient allocation and use of resources, and to maximise cooperation. Both functions are necessary and the two conventions should supplement each other very well.⁸

3.15 While mindful of concerns raised on this issue during the Inquiry, the Committee is persuaded that passage of the Bill will be likely to promote rather than impede the best interests of the child in almost all circumstances in which the two conventions may interact.

The definition of ‘habitual residence’

3.16 The concept of the habitual residence of the child is fundamental to the Child Protection Convention. It is the main ground of jurisdiction. However, it is not defined in the legislation.

3.17 In their submission and in evidence, the National Council of Single Mothers and their Children stated the importance of defining the term. They noted that the current lack of clarification can lead to problems in enforcing the Convention in certain circumstances, for example in the case of newborn children, who do not have a habitual residence, and in the case of children who have spent equal amounts of time in several countries:

In one particular case before the High Court, the child resided for part of its life in its country of origin, but was then detained in Australia by an application by the father to remain in Australia. If that case were presented to a court, it would be very difficult, with the current amendments, to define what habitual residency would include. In that case, the child would reside in two countries, but that would be by virtue of a court order for the second part of the child’s life.⁹

3.18 The Attorney-General’s Department explained that the term is widely used, but not defined, in legislation in Australia and overseas. It has been used, for example, in the Family Law Act to determine cases under the Child Abduction Convention. Because the concept is well understood and because it must be flexible, to cover a wide range of situations, it has been considered inappropriate to define it:

Habitual residence is a question of fact to be determined by reference to all the circumstances of a particular case. In relation to a child, relevant considerations

7 *Submission 3*, Commonwealth Attorney-General’s Department p. 4

8 “The Role of the New Protection of Children Convention,” Eric Clive, *Globalization of Child Law* (Sharon Detrick & Paul Vlaardingerbroek eds.) 1999

9 *Transcript of evidence*, National Council of Single Mothers and their Children, p. 7

include the intention of the parents and the length of time the child has resided in the country. The concept must remain capable of application to a wide variety of factual situations and it is unlikely that any exhaustive definition could usefully be devised.¹⁰

3.19 Other commentators have reached similar conclusions:

Although a proposal was made at the Conference to include a definition of habitual residence, it went against the Conference's tradition and received no support. As with earlier Hague Conventions, including the 1961 Convention, it remains undefined.

This is a deliberate policy which is unlikely to change. Although the concept of habitual residence is known to some legal systems and is used by them for private international law purposes, the Hague Conference concept must be seen as an autonomous non technical concept. It indicates the centre of gravity of the child's life and activities at the relevant time. To try and define it would risk distortion.¹¹

3.20 The Committee supports this approach.

Extension of the rights of unmarried fathers under applicable law provisions

3.21 As pointed out in the previous Chapter,¹² the Bill provides that unmarried Australian fathers will be able to retain their parental rights over children habitually resident in other Convention countries. Unmarried fathers in Convention countries will gain parental rights for children, born overseas, who subsequently become habitually resident in Australia.

3.22 The National Council of Single Mothers and their Children suggested an education campaign may be necessary to alert women to the implications of the legislation for children born of a non cohabiting liaison. It also advocated the linking of parental rights to the liability for child support:

Any exercise of Australian paternal rights over children born in other countries to citizens of other countries should include liability for payment of child support to the woman as determined by Australian law. In this way fathers would acquire a financial obligation along with the power to intervene in the lives of the child and the mother.¹³

3.23 The Attorney-General's Department responded that the maintenance liabilities of unmarried fathers are already enforceable internationally:

In fact, maintenance liabilities of unmarried Australian fathers are enforceable internationally under Australia's treaty and non-treaty arrangements on maintenance with many other countries. These include the UN Convention on the

10 *Submission 3*, Commonwealth Attorney-General's Department p. 2

11 "The Hague Convention on the Protection of Children," Peter Nygh, *Netherlands International Law Review*, XLV: 1998, p. 12

12 See paragraphs 2.42 – 2.46 of Chapter 2

13 *Submission 1*, National Council of Single Mothers and their Children, pp. 1-2

Recovery Abroad of Maintenance 1956 and the Hague Convention on the Recognition and Enforcement of Maintenance Obligations 1973.¹⁴

Provisions governing the enforcement in Australia of decisions by foreign courts

3.24 The Legal Aid Directors' Secretariat expressed concern that decisions by foreign courts or authorities may not serve the best interests of children, in which case they should not be enforced in Australia. The Directors' Secretariat suggested that s. 111CT of the Bill, which deals with the recognition of foreign measures, should be amended to include the provision that:

...Any decision affecting a child, made by an authority of a Contracting State, which did not have regard to the child's best interest, shall be deemed to be contrary to public policy and is not enforceable.¹⁵

3.25 The Attorney-General's Department advised that regulations to be made under new s. 111 CT will give effect to Article 23(2) d of the Convention, which provides that recognition of a Convention measure may be refused "if such recognition is manifestly contrary to the public policy of the requested State, taking into account the best interests of the child."¹⁶

3.26 The same regulations could also be used to refuse recognition of decisions under the Child Abduction Convention where these were thought not to be in the best interests of the child.

Extension of the jurisdiction of the Family Court to Convention countries

3.27 The National Council of Single Mothers and their Children raised their concerns with what in their view are deficiencies of the Family Court of Australia in handling allegations of child abuse. It argued that the Court's failure to protect children from abuse has increased the incidence of parents fleeing overseas in an attempt to protect their children from the Court's directives. This legislation could extend to such parents and children, if they flee to Convention countries, the Family Court directives which, it is alleged, expose children to unacceptable risks.¹⁷

3.28 The Committee notes the concerns expressed. However, the Committee considers they do not directly relate to the amendments proposed in the Bill under consideration. The Committee has previously noted its concerns in relation to such issues in a report tabled in 1999.¹⁸

14 *Submission 3*, Commonwealth Attorney-General's Department p. 2

15 *Submission 2*, Legal Aid Directors' Secretariat, p. 2

16 In *Submission 3*, Commonwealth Attorney-General's Department, p. 2

17 In *Submission 1*, National Council of Single Mothers and their Children, p. 2

18 "Provisions of the Family Law Amendment Bill 1999", Senate Legal and Constitutional Legislation Committee, December 1999

Conclusion

3.29 The Committee has examined the provisions of the Bill to determine whether or not they meet Australia's obligations under the Child Protection Convention. It concludes that the provisions meet Australia's obligations. Accordingly:

Recommendation

The Committee recommends that the Family Law Amendment (Child Protection Convention) Bill 2002 be passed.

Senator Marise Payne
Chair

APPENDIX 1

INDIVIDUALS AND ORGANISATIONS PROVIDING SUBMISSIONS TO THE INQUIRY

1. National Council of Single Mothers and their Children
2. Legal Aid Directors' Secretariat
3. Commonwealth Attorney-General's Department

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Public Hearing, Friday 19 April 2002 (Canberra)

National Council of Single Mothers and their Children

Ms Maimiti Brook, Canberra Convenor

Ms Kay Buckley, Executive Officer

Commonwealth Attorney-General's Department

Ms Amanda Bush, Acting Principal Legal Officer, International Family Law Section, Family Law and Legal Assistance Division

Mr John McGinness, Assistant Secretary, B Branch, Civil Justice Division

