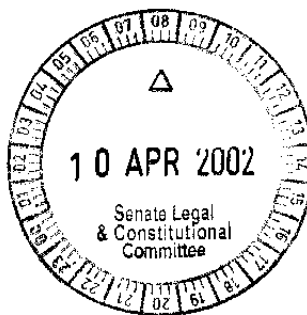


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10 April 2002

The Secretary,
Senate Legal and Constitutional Legislation Committee,
Suite S1.108,
Parliament House,
Canberra, ACT, 2600
Fax: 02 62775794

Dear Sir/Madam,

Re: Inquiry into the Provisions of the Family Law Amendment (Child Protection Convention) Bill 2002

Thank you for the opportunity to comment on the provisions of the Family Law Amendment (Child Protection Convention) Bill 2002. The purpose of the Convention, to codify conflict of law rules to be applied in parental responsibility litigation or child protection matters which have an international aspect and to set in place the mechanisms by which speedy and effective recognition and enforcement of judgments can be taken, is a welcome one. Conflicts of interest between authorities of different jurisdictions may not serve the best interests of children as there may well be conflicting judgments relating to the same issues. Children's lives are not assisted by such confusion.

However, decisions by foreign courts or authorities also may not serve the best interest of children. In addition, a family or child's situation may have dramatically changed from when orders were made in a Convention country, or consideration of a child's best interest may not have been considered when the decision sought to be enforced was made. Section 111CT of the Bill deals with the recognition and enforcement of foreign measures. Article

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23.2 of the Convention sets out when recognition can be refused. Article 23.2.d states: recognition may be refused "if such recognition is manifestly contrary to public policy of the requested State, taking into account the best interests of the child." Given that the Family Law Act 1975 says that the best interests of children is of paramount importance a suggested amendment to the Bill is: - "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."

There appears also to be a need to clarify the implementation of Article 7 of the Child Protection Convention so as to ensure that there are not any unintended consequences when interacting with the Child Abduction Convention. For example Article 7 of the Child Protection Convention provides that the habitual residence country of an abducted child will retain jurisdiction to determine the child's future welfare until the child acquires a new habitual residence. However Article 7.1 makes clear that the change of jurisdiction does not automatically occur with a change of habitual residence. Other conditions must be satisfied. These are either:

- Each person, institution or body having rights of custody has acquiesced to the removal or retention or
- The child has resided in the new country for at least a year and each person, institution or body having rights of custody knows or should know of the child's location and no request for return lodged within that period is still pending, and the child is settled in the new environment.

Consider the following scenario: within 12 months of arriving in Australia, an abducting parent has successfully defended proceedings brought under the Child Abduction Convention by establishing one of the defences set out at Regulation 16(2) or (3) of the Family Law (Child Abduction Convention) Regulations 1986. One would normally assume that this determination would have the effect of changing the child's habitual residence. However the Protection Convention requires additional conditions and could be read to be providing that having defeated the Child Abduction Convention the prior habitual residence still retains jurisdiction over the child and thus make orders to defeat the outcome of the proceedings pursuant to the Child Abduction Convention as incompatible orders in the convention country

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from where the child had been abducted would, by operation of S111CT(2), be enforceable in Australia.

Article 50 of the Protection Convention whilst giving precedence to the Child Abduction Convention says: "Nothing, however, precludes provisions of this Convention from being invoked for the purposes of obtaining the return of a child who has been wrongfully removed or retained or of organising access." This must be read to mean that the Protection Convention can also be used to secure the return of a child but not in a situation where the Child Abduction Convention had been successfully defended, even when the child was wrongfully removed.

The use of the words "no request for return lodged within that period *is still pending*" suggests that the outcome of an application under the Abduction Convention has to be considered when looking at the Protection Convention. However, the Protection Convention is silent about a situation where the Abduction Convention proceedings have been dealt with. There could be an amendment to S111CT so that the provisions of Article 7 of the Protection Convention do not apply when an application for the return of a child pursuant to the Abduction Convention has been heard and was unsuccessful.



Jenny Hardy,
Executive Officer