

16 August 2011

Committee Secretary  
Senate Legal & Constitutional Committees  
PO Box 6100  
Parliament House  
Canberra ACT 2600

[legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Sir or Madam,

**Re: Inquiry into International Child Abduction to and from Australia**  
**National Legal Aid Submission**

**About National Legal Aid**

National Legal Aid (NLA) represents the Directors of the eight State and Territory Legal Aid Commissions (Commissions) in Australia. The Commissions are independent statutory authorities established under respective State or Territory enabling legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice
- afford the appropriate cost of legal representation
- obtain access to the Federal and State and Territory legal systems, or
- obtain adequate information about access to the law and the legal system.

## **Commission family law services generally**

Each Commission provides legal information, advice, and referral in family law matters. We also provide duty lawyer services at the family courts, and have in-house legal practices and family dispute resolution programs. Our family dispute programs are legally assisted and use mediation and conciliation practices.

At the request of the family courts Commissions appoint Independent Children's Lawyers (ICLs), who may be from Commission in-house practices or from the private profession.

To be eligible for dispute resolution and legal representation (casework) services, a person must make a successful application for a grant of legal assistance. Grants of legal assistance are also made when an ICL is appointed. Grants are made by Commissions to private legal practitioners as well as to Commission in-house legal practitioners to enable them to provide these services.

## **Commission involvement in international child abduction cases**

We would usually expect to receive up to about 20 applications for assistance in a year. The assistance we provide is therefore a relatively small but significant part of our work.

### **Terms of reference for this inquiry**

We have addressed those terms of reference most related to the work we do in this area, being TsOR (a) costs, (b) effectiveness of Hague Convention in returning children, and (d) policies, practices, and strategies that could be introduced to streamline return of children.

#### **(a) *the costs, terms and conditions of legal and departmental assistance for parents whose child has been abducted overseas***

To be eligible for a grant of legal assistance from a legal aid commission in any family law matter, including Hague matters, the applicant must pass means and merits tests, and funds must be available given other competing priorities. Fees paid to practitioners on a grant of legal aid are significantly less than the market rate.

Contributions to the cost of providing legal assistance will be required. These contributions can be up to the full cost of the case. For example, if the applicant for legal assistance has equity in a home at the time of application, an equitable charge would be taken over the home, with a view to recovering some/costs if the home was ever sold.

Commissions might seek contributions from the parties towards the cost of providing an ICL. The courts can also order parties to pay the costs incurred in providing an ICL in a case if an application to this effect is made by the ICL.

The extent of the work, and therefore the cost involved in these cases, varies although the variance is between the low end cost of provision of advice and early assistance, to the point where the Central Authority takes over, as against the cost of full casework representation, which is likely to be necessary where a grant of legal assistance is made to a respondent parent and/or an ICL.

**(b) *the effectiveness of the Hague Convention in returning children who were wrongly removed or retained, to their country of habitual residence***

One of the challenges of the operation of the Convention in practice is the great variation of interpretation of parts of the Convention by different member states. The Hague Conference on Private International Law has published a document, *Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, which provides some insight into issues Convention parties face when dealing with the practical operation of the Convention.<sup>1</sup>

In addition to the 2006 questionnaire, there is a standard questionnaire issued to newly acceded states. This questionnaire asks for information about domestic law introduced to implement the Convention, court processes in place for expeditious determination of these applications, and whether or not the domestic family law treats mothers and fathers differently.<sup>2</sup>

These surveys demonstrate that the effectiveness of the Convention's operation in an individual country will very much depend on the resources that the individual contracting state has provided to its Central Authority, the availability of legal advice, and the jurisdiction and methods of the courts to deal with these matters quickly.<sup>3</sup>

A significant number of cases involve parents fleeing circumstances of family violence. This is relevant when considering the issue of the safety of the child's return. Some countries are more sympathetic to this than others.

Preventative measures which might assist could include the greater use of mirror orders and educative measures to support more consistent approaches across member states. There is a need for deeper and sympathetic consideration of return to the country of origin (for the parent and child/ren). To that extent this relates to the 'effectiveness' question and having problems with returning to the originating jurisdiction, or specific circumstances of returning to the country of origin. This will

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<sup>1</sup> Hague Conference on Private International Law, Collated Responses to the Questionnaire Concerning the Practical Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (2006)

<sup>2</sup> Hague Conference on Private International Law, Responses to questionnaires, [http://www.hcch.evision.nl/index\\_en.php?act=publications.details&pid=3602&dtdid=33](http://www.hcch.evision.nl/index_en.php?act=publications.details&pid=3602&dtdid=33) viewed 31 July 2010.)

<sup>3</sup> Alexandra Harland "All Hague Convention Countries are Not Created Equal", Family Law Review, Vol 1, No, 2 (2010)

require courts in the country to which the parent and child went from the originating jurisdiction to make Orders that ensure the principle of ‘no harm’ pending the determination of the substantive issues in dispute upon return to the originating jurisdiction. This would require all member states having reciprocal provisions to enact.

**(d) policies, practices and strategies that could be introduced to streamline the return of abducted children**

NLA recommends a regime of mediation in managing international family law matters.

Mediation has a role to play in avoiding the need for hearing some of these matters. Mediation could take place without delaying the hearing. It is suggested that this may require amending provisions to ensure consistency across jurisdictions of member countries, and to ensure as far as practicable, the participation of parties in mediation and/or the Court’s ability to take participation in mediation into account.

NLA notes that in her submission, the Chief Justice of the Family Court of Australia has provided extensive material in the support for the use of mediations in Hague matters.

Commissions prefer dispute resolution as the first response in attempting to resolve family law matters, where appropriate. Each Commission has a successful family dispute resolution practice. Commission dispute resolution chair people are accredited under the Family Law Act 1975. They are usually legal practitioners and/or social scientists. Commission dispute resolution is legally assisted, ie one or more of the parties will be legally represented, and mediation and conciliation methods are included in the models of conferencing used by Commissions.

To be able to participate in dispute resolution offered by Commissions, one or more of the parties must be in receipt of a grant of legal assistance, and matters are subject to initial and ongoing screening to ensure that they are appropriate for dispute resolution. Cases involving family violence will not always be screened out, rather this will depend on the circumstances of the case and whether/not the issues presenting can be addressed by the legal assistance model and other conferencing methods, such as remote conferencing/shuttle methods.

In the event that a mediation regime were to be introduced for international child abduction cases, Commissions would be able to assist in appropriate cases. Legal Aid NSW has, for example, facilitated a mediation process during the course of Hague proceedings at the request of the court. This was successful.

## **Conclusion**

Thankyou for the opportunity to make this submission.

Please do not hesitate to contact us should you require anything further.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Andrew Crockett".

Andrew Crockett  
Chair