

Your Ref: Ms Julie Dennett

Quote in reply: International Law and Relations Section: 21000325/85

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Ms Julie Dennett
Committee Secretary
Senate Standing Committees on Legal and Constitutional Affairs
PO Box 6100
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Canberra ACT 2600

By Post and Email: legcon.sen@aph.gov.au

Dear Ms Dennett

INQUIRY INTO INTERNATIONAL CHILD ABDUCTION TO AND FROM AUSTRALIA

Thank you for the opportunity to comment on the Senate Standing Committees on Legal and Constitutional Affairs inquiry into international child abduction to and from Australia. This response has been compiled with the assistance of the Queensland Law Society's International Law and Relations Section and Family Law Committee who have an awareness of the issues impacting this area of law.

We note that your Inquiry requests information on the incidence of international child abduction to and from Australia, including:

- (a) the costs, terms and conditions of legal and departmental assistance for parents whose child has been abducted overseas;
- (b) the effectiveness of the Hague Convention in returning children who were wrongly removed or retained, to their country of habitual residence;
- (c) the roles of various Commonwealth departments involved in returning children who were wrongly removed or retained, to their country of habitual residence;
- (d) policies, practices and strategies that could be introduced to streamline the return of abducted children; and
- (e) any other related matters.

We provide responses to items (a), (b), (c) and (e). Our responses are noted below, however we note the terms of reference are extremely broad making it difficult to provide meaningful input. We advise that we will not address the term of reference in relation to the roles of various Commonwealth departments

involved in returning children who were wrongly removed or retained, to their country of habitual residence.

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

Australian parents whose children are ordinarily resident in Australia and are removed from or detained outside of Australia without their consent, are able to apply to the Commonwealth Attorney General's Department for financial assistance under the Overseas Custody (Child Removal) scheme to commence legal proceedings in overseas jurisdictions for the recovery of their children.

The scheme is means tested. It covers the cost of engaging a lawyer from overseas if Legal Aid is not available in that jurisdiction. The scheme may also cover travel costs for an applicant if required to travel overseas to attend a hearing or to take charge of the children.

A pre requisite to receiving assistance under this scheme is a consideration by the Commonwealth of the Applicant's prospects of success in having the children returned to Australia. To this end, in some instances the applicant is required to obtain written advice from an Australian lawyer and a lawyer in the jurisdiction where the children are retained, before a decision is made on providing financial assistance for the proceedings overseas.

This scheme does not cover costs associated with overseas access or visitation. Nor does the scheme cover legal costs incurred by an applicant in Australia – which will have to be claimed from the legal aid commission of the State or territory of the applicant. Financial assistance under this scheme is prospective and will not cover expenses already incurred.

We submit that the above assistance is inadequate and that there should be no means test applied at the initial stage of obtaining legal advice from a lawyer from the jurisdiction where the child has been retained. The requirement of applying a means test has the effect of delaying and deterring applications for which time is of the essence. Therefore, it would be better to grant assistance on a merits basis, taking into account the gravity of the situation, including any child safety issues.

The means test should only be applied after these issues of urgency and the need to protect children from potential harm have been considered.

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

The Hague Convention is based on the assumption that the Courts of the child's country of habitual residence are best able to make decisions in the best interests of the child. The Convention is implemented in Australia by the Family Law (Child Abduction Convention) Regulations 1986 which provide the legislative structure for the application of the convention as a matter of Australian domestic law. The Convention is administered by Central authorities established by the contracting states. Figures

released by the Commonwealth Attorney General, reveal the following removals to and from Hague Conventions Countries.

Year	From Australia	To Australia
2007	147	112
2008	136	100
2009	95	83
2010	125	89

These figures reveal that there are more removals “from”, than “to”, Australia. This calls for greater vigilance on the part of commonwealth departments such as the Department of Immigration and the Australian Federal Police in taking preventive steps to stem the removal of children from the commonwealth by one parent.

We suggest increasing public awareness on the preventative measures available such as activating the Airport Watch, Pace Alert Systems and the provision of a legally affirmed document consenting to the travel by the remaining parent.

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

We suggest that the Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (Part 2 Implementing Measures) be endorsed and adopted by the Australian Government. This may streamline the return of abducted children. We suggest that a short document outlining the key concepts be prepared and distributed to all parties dealing with the Convention, for example:

- Commonwealth Government Departments;
- The Australian Central Authority; and
- Hague Convention officers in each Australian mission overseas.

This should be accompanied by training for persons dealing with the document and a public awareness campaign to bring the document to the attention of the public. We also suggest advocacy by the Australia Government with other jurisdictions to become signatories to the Hague Conventions, and thereby, adoption of the Guide to Good Practice.

(e) any other related matters

There is a paucity of information in relation to removals to and from non-Convention countries. This tends to skew the available figures and present an obscure picture of the actual child abduction scenario in Australia. Given that different international jurisdictions vary in their approaches to enforcement of the Hague Convention even where they are parties, the Family Law Committee considers it difficult to discuss any uniform response.

We understand there are instances of the illegal trafficking of babies and children to supply the international adoption market and would like to see greater investigation and public awareness to counter this abuse of basic human rights. These issues are pressing and of concern to the International Committee. Further research and public awareness of these issues is recommended. In fact the Queensland Law Society has jointly sponsored with the University of Queensland a public awareness campaign addressing human trafficking.

Just prior to lodging this submission we were made aware of recent documents, statistical surveys, reports and Preliminary Conclusions and recommendations of the Special Commission held in the Hague by the Hague Conference on Private International Law in June 2011 which are available on the Hague Conference website www.hcch.net under child abduction/ work in progress. Given the last minute nature of this information we have not fully reviewed this material. However the Queensland Law Society supports the general recommendations of the Special Commission and refers the Senate Committee to these materials which are directly relevant and may well be finalised during the course of your inquiry.

If you have any questions regarding the issues raised in this submission, please do not hesitate to contact Ms Binny De Saram, a Policy Solicitor with our office on (07) 3842 5885 or b.desaram@qls.com.au.

Thank you again for consulting with us.

Yours faithfully

Bruce Doyle
President