



Australian Government

**Government Response
to the Senate Legal and Constitutional Affairs
References Committee Report:**

*International Parental Child Abduction to and
from Australia*

March 2012

INTRODUCTION

On 11 May 2011, the Senate referred the following matter to the Legal and Constitutional Affairs Committee for inquiry and report by 31 October 2011:

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.

While the committee's terms of reference were not confined to the issue of international parental child abduction, the Government notes that this issue formed the core focus of the committee's inquiry and recommendations. As such the Government's response is also focused on this issue.

BACKGROUND

International parental child abduction (IPCA) occurs where a child is either wrongfully removed from their country of habitual residence or is wrongfully retained outside their country of habitual residence without the consent of both parents and anyone who has parental responsibility for the child. The removal or retention is considered wrongful in that it is a breach of the rights of a person with parental responsibility. Broadly, subsection 111B(4) of the *Family Law Act 1975* provides that for the purposes of the *Hague Convention on the civil aspects of international child abduction*, a parent who has parental responsibility is regarded as having 'rights of custody'.

Commonly it is a parent who has removed or retained the child without the consent of the other parent, however children may also be removed or retained by a grandparent, aunt, uncle or other family member who may have parental responsibility for the child.

Responsibility for providing assistance to parents affected by IPCA is primarily the responsibility of three Commonwealth agencies:

1. *The Attorney-General's Department (AGD)* is responsible for international child abduction matters arising under the *Hague Convention on the Civil Aspects of International Child Abduction* (the Convention) as the Commonwealth Central Authority (CCA) for the Convention, and matters arising under bilateral agreements. The AGD also provides financial assistance (both means and merits tested – for both Hague and non-Hague countries) to left behind parents seeking to have their child(ren) returned to Australia.
2. *The Department of Foreign Affairs and Trade (DFAT)* provides consular assistance (for both Hague and non-Hague countries), travel information, and passport issuance services.

3. *The Australian Federal Police (AFP)* assists in the prevention of IPCA through management of the Airport Watchlist, and providing assistance in the location and recovery of abducted children within Australia by facilitating the orders of Australian courts. The AFP also facilitates the promulgation of International Criminal Police Organisation (INTERPOL) Notices and/or Notifications to assist in locating an abducted child and engages with foreign law enforcement agencies. The AFP is the lead agency responsible for the investigation of alleged criminal conduct related to IPCA matters.

IMPROVING AUSTRALIA'S RESPONSE TO IPCA

Australia has been a signatory to the Hague Convention since 1986, and has been a strong advocate for the continued uptake of the Convention around the world. The Convention provides a lawful mechanism for the return of wrongfully removed or retained children to their country of habitual residence. Australia recognises that it is in the best interest of children to be protected internationally from the harmful effects of IPCA. The Australian Government also recognises that the Hague Convention alone is not enough, and that more can be done to strengthen Australia's response to, and management of, this important issue.

For this reason in November 2010 and August 2011, the then Attorney-General, the Hon Robert McClelland MP, sought the advice of the Family Law Council on ways to improve Australia's management and response to IPCA. The Family Law Council provided their advice on 14 March 2011 and 5 August 2011.

On 19 September 2011, in response to the recommendations of the Family Law Council, the Government announced the development of new legislation to improve Australia's response to IPCA. These changes include:

- strengthening the criminal offences for IPCA to include the wrongful retention of a child overseas as a criminal offence;
- extending the coverage of the offences to include where a parent attends, or has been invited to attend, family dispute resolution or where the CCA has received an application under the Hague Convention from another country;
- removing potential barriers to the return of children to Australia by providing the Commonwealth Director of Public Prosecutions with the ability to give an undertaking that prosecution will not be pursued if a child is returned to Australia, the latter being to prevent re-abduction of children;
- providing the Family Law Courts with the power to suspend the requirement for child support or maintenance to be paid by left-behind parents whose children have been abducted from Australia; and
- increasing the information gathering powers of Australian authorities to locate children wrongfully removed from or retained outside Australia.

Draft legislation implementing these changes is expected to be introduced in Parliament in the first half of 2012.

EXECUTIVE SUMMARY

The Australian Government is committed to improving Australia's management of, and response to, IPCA. International law generally provides that children should be protected from the harmful effects of wrongful removal or retention across countries, and that the best interests of children are to have long term matters relating to their care and protection determined in their country of habitual residence. In this regard IPCA mainly relates to identifying which jurisdiction should determine the substantive issues relating to the long term care and protection of the child.

It is also recognised that the issue of IPCA is primarily a civil issue between parents, and that the Australian Government's role and responsibilities in relation to IPCA are limited. However, it should also be noted that removing or retaining a child overseas without the consent of all parties with parental responsibility may also constitute a criminal offence under Australian Law, and that having such laws can prove to be a key prevention mechanism.

The Australian Government supports the majority of the findings of the Senate inquiry, however it is noted that a number of the recommendations made by the Committee will need to be further considered by Government in the context of future Budgetary processes.

The Australian Government's responses to the specific recommendations in the Report are set out below.

Recommendation 1

6.11 The committee recommends that the Australian Government should develop a specific prosecution policy for the offences in sections 65Y and 65Z of the *Family Law Act 1975*; and update the policy as necessary to include guidance on any future amendments to the Family Law Act (including the proposed extension of the offences to wrongful retention and participation in family dispute resolution).

Response: Accept in Part

The Australian Government agrees that the investigation and prosecution of IPCA offences under the Family Law Act requires careful consideration, particularly where an application may also have been made under the Hague Convention for the return of a child to their country of habitual residence.

The Government also notes that a key reason for the existence of these offences is to act as deterrent and prevention mechanisms. Without the offences in sections 65Y and 65Z of the Family Law Act, the Australian Federal Police (AFP) would not be able to prevent the removal of children from Australia. It is anticipated that the reforms announced on 19 September 2011 will provide greater flexibility to prevent the wrongful removal of children from Australia, and encourage the return of wrongfully retained children to Australia.

The Government will develop a specific investigation policy for IPCA offences under the Family Law Act. This investigation policy will operate in conjunction with the *Prosecution Policy of the Commonwealth* which will remain as the primary policy for prosecuting Commonwealth offences, including those relating to IPCA.

The Government will also introduce new legislation providing the Commonwealth Director of Public Prosecutions with the ability to give an undertaking that prosecution for IPCA offences under the *Family Law Act 1975* will not be pursued if a child is returned to Australia under the Hague Convention. It is envisaged the legislation dealing with the function to give an undertaking not to prosecute will list the criteria to be considered in making that decision, including a recommendation from the CCA relating to the offence in light of Australia's obligations under the Hague Convention.

Recommendation 2

6.23 The committee recommends that the Australian Government should maintain a 'watching brief' on the implementation and impacts of the proposed amendments to the offences in sections 65Y and 65Z of the *Family Law Act 1975*, and the extension of the offences to parties who are participating in family dispute resolution. In the event that the proposed amendments do not achieve their intended objective, the committee recommends that the Australian Government should reassess the need for the introduction of stronger measures, including the possibility of a stand-alone criminal offence for international parental child abduction.

Response: Accept

The Australian Government accepts the recommendation to maintain a 'watching brief' on the implementation and impact of the proposed changes to IPCA offences announced on 19 September 2011. It is intended that the legislation implementing the changes to IPCA offences, in line with the recommendations of the Family Law Council, will be introduced into the Parliament in the first half of 2012. The Australian Government will continue to consult with stakeholders in the development of the legislation.

Recommendation 3

6.26 The committee recommends that the Australian Government should give consideration to strategies to improve public awareness of the offences in sections 65Y and 65Z of the *Family Law Act 1975*, including:

- a standard notice in all orders made under Part VII of the Family Law Act about the existence and effect of the offence provisions;
- information about the offences being included in existing Australian Government guidance materials (for example, the Travel Smart booklet published by the Department of Foreign Affairs, and Trade, and in the passport application and renewal process);
- conspicuous signage at international departure points (such as airports and sea ports) about the offence provisions; and
- information materials about the offences being made available at community legal centres, legal aid offices, family relationship centres, international departure points and government shop-fronts.

Response: Accept in Principle

The Australian Government agrees in principle with the Senate Committee's recommendation to improve public awareness of IPCA, including about possible offences under the Family Law Act. Provision of greater information and public awareness of IPCA could act to deter and prevent parents from abducting their children from Australia, and instead seek advice on proper mechanisms for relocation.

The Attorney-General's Department, as the Commonwealth Central Authority for the Hague Convention, has developed a range of information and guidance materials to raise parents' awareness of IPCA, and mechanisms available to prevent the wrongful removal of children from Australia. It is intended these information materials will be distributed throughout the family law system and will be available from early 2012.

The Department of Foreign Affairs and Trade has undertaken to provide information about IPCA in a range of publications, including through their Smartraveller publications and webpage, the *Children and Parental Consent* brochure produced by the Australian Passport Office, and in the information pages of future editions of the Australian Passport.

Customs and Border Protection has the capacity to display electronic signage at international airports to improve public awareness of international child abduction. These signs may be displayed on Customs and Border Protection's electronic signage and visible when passengers are queuing for immigration clearance when departing Australia. The signs would be subject to review as part of Customs and Border Protection's regular review of signage to ensure that current priority messages are displayed.

The provision of information about the existence and effect of IPCA offences through a standard notice in all orders made under Part VII of the Family Law Act will require further consideration by Government and consultation with affected agencies, particularly the Family Law Courts.

Recommendation 4

6.27 The committee recommends that the Australian Government should investigate the feasibility of incorporating international parental child abduction screening and risk-assessment processes into key stages of a family's post-separation engagement with the family law system.

Response: Accept

The Australian Government accepts the Committee's recommendation about incorporating IPCA screening and risk-assessment processes into key stages of a family's post-separation engagement with the family law system.

At the Australian Government Family Law System Conference in February 2009 there was strong support for the development of standard screening and assessment principles and a minimum set of questions for clients entering the family law system. To this end, Relationships Australia South Australia (RASA) has been contracted by the Attorney-General's Department (AGD) to develop a standardised frontline screening to identify safety risks for clients across the family law system. The framework is expected to be developed by mid-2012.

One of the safety risks that will be included within the screening and risk assessment framework will be risk of abduction (domestic or international). While the screening and risk assessment framework will be informed by the latest research and examples of best practice, use of the framework will not be mandatory throughout the family law system. Notwithstanding this, family law system agencies will be able use the framework to inform their own screening and risk assessment practices.

Recommendation 5

6.38 In consultation with State Central Authorities, the committee recommends that the Attorney-General's Department should adopt a coordinated strategy for communications between Australian Central Authorities and applicants in Hague Convention proceedings. The strategy should include provision for the following measures:

- **flexible, case-specific communication arrangements, such as enabling applicants to contact the Commonwealth Central Authority directly, rather than the relevant State Central Authority; and**
- **routine progress updates (such as periodic teleconferences between applicants and case officers in the relevant Australian Central Authority).**

Response: Accept

The Australian Government agrees that the current system of managing outgoing applicants under the Hague Convention has resulted in unnecessary 'red tape' for left behind parents and duplication between the Commonwealth and State Central Authorities. While it has been general practice that where applicants receive assistance from a State Central Authority (SCA) to prepare their application, the SCA will be the applicant's primary case manager, there is no restriction on applicants in Australia contacting the CCA directly.

Since the end of 2010, the CCA has formally written to all applicants to advise that, while the SCA may be their primary case manager, they may also contact the CCA directly if they choose. An increasing number of applicants are now taking up that invitation to deal directly with the CCA and the CCA is corresponding directly with applicants where this is appropriate.

The Australian Government has also provided funding to International Social Services (ISS) to establish a national legal assistance service for left behind parents. Following changes to the management of outgoing applications in January 2012, parents in Australia will be able to deal directly with the CCA, following some initial assistance from ISS. This change also addresses recommendation 8.

The Australian Government also notes that the assistance provided by SCAs is undertaken on a full fee for service basis, with all costs of such assistance met by the Australian Government. As such any services provided by SCAs funded by the Commonwealth need to reflect the effective and efficient use of Australian Government funds.

Recommendation 6

6.43 The committee recommends that the Australian Government should develop a specific and comprehensive online information portal about international parental child abduction to and from Australia.

Response: Accept in Principle

The Australian Government agrees that the development of a single specific and comprehensive online information portal about IPCA to and from Australia would be beneficial to families in Australia. Such information is currently provided through a variety of platforms, including through the Attorney-General's Department (the Hague Convention); the Department of Foreign Affairs and Trade (Consular assistance, passport, and travel information); and the AFP (the Airport Watchlist).

Implementation of this recommendation will be considered when the Budget allows.

Recommendation 7

6.44 The committee recommends that the Australian Government should, in consultation with relevant stakeholders in the legal profession, re-instate and update international parental child abduction resources for legal practitioners, particularly in respect of Hague Convention matters.

Response: Accept

The Australian Government agrees that the development of resources for legal practitioners for IPCA matters, particularly in Hague Convention matters, would be beneficial. The Government will provide funding to the Law Council of Australia to develop the resources.

Recommendation 8

6.50 The committee recommends that the Australian Government should, in consultation with relevant stakeholders such as International Social Service Australia, investigate strategies to improve the availability and coordinated delivery of support services in international parental child abduction cases, including post-return services.

Response: Accept

The Australian Government agrees that additional resources should be provided to deliver nationally consistent support services for families in Australia in IPCA matters.

To date most applications received by the CCA under the Hague Convention have been prepared with the assistance of SCAs. However such assistance has not been available nationally, with applicants in Western Australia, the Northern Territory and the Australian Capital Territory required to seek assistance through Legal Aid Commission or private lawyers. Additionally, all costs for SCAs to provide assistance to left behind parents, including for both preparing the application and ongoing case management/communication, have been met by the Australian Government. This has resulted in duplication of costs for services to Convention applicants.

To provide a nationally consistent service to left behind parents, the Australian Government has decided to establish a centralised national assistance service for left behind parents dealing with

IPCA. For a number of years the Government has provided funding to International Social Services (ISS) to provide counselling and mediation support to families dealing with IPCA. From January 2012 ISS will also receive funding to provide a national service for legal assistance to assist left behind parents to prepare outgoing applications and documentation under the Hague Convention. Left behind parents will thus be able to access legal assistance to prepare their Hague Convention applications and targeted counselling and social support from one service provider. Ongoing case management will be provided directly between the CCA and applicants.

Post-return services are available through Australian Government funded post-separation services such as Family Relationship Centres.

Recommendation 9

6.55 The committee recommends that the Australian Government should continue to:

- **encourage non-contracting states to accede to the Hague Convention;**
- **support new and existing contracting states to implement the Hague Convention effectively; and**
- **pursue bilateral agreements, where appropriate, with countries which have not acceded to the Hague Convention, and which are unlikely to do so in the foreseeable future.**

Response: Accept

The Australian Government agrees that the Hague Convention should be promoted internationally and that bilateral agreements should be pursued with those countries which are not parties to the Convention.

Australia consistently encourages non-contracting states to accede to the Hague Convention. Australia actively encouraged and provided information and support to both Singapore and Japan prior to those countries announcing their ascension to the Hague Convention.

Australia is also currently actively engaged with a number of countries in the Asia-Pacific region to enter into bilateral arrangements with Australia in relation to IPCA matters, where those countries have indicated an unwillingness to join the Hague Convention.

Recommendation 10

6.61 The committee recommends that the Australian Government should investigate strategies for the periodic collection and analysis by an appropriate government agency, or agencies, of comprehensive statistical data on international parental child abduction to and from Australia.

Response: Accept in Principle

The Australian Government agrees that comprehensive statistical data on IPCA to and from Australia would be of benefit. Currently information about IPCA is only available in relation to applications received under the Hague Convention or requests for consular assistance received by the DFAT.

Implementation of this recommendation will be considered when the Budget allows.

Recommendation 11

6.63 The committee recommends that the Australian Government should review the continuing appropriateness of the exceptional circumstances requirement in subsection 68L(3) of the *Family Law Act 1975*, in respect of the appointment of the Independent Children's Lawyer in Hague Convention proceedings before the Family Court of Australia.

Response: Accept

The Australian Government is currently in the process of commissioning research to help inform future policy developments into the role and use of Independent Children's Lawyers in the family law system. It is expected that this research will include consideration of the effect of having an ICL involved in Hague Convention international parental child abduction proceedings.