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## Family Law Council

14 March 2011

The Hon Robert McClelland MP  
Attorney-General  
Parliament House  
CANBERRA ACT 2600

Dear Attorney-General

### TERMS OF REFERENCE

On 24 November 2010, you wrote to the Family Law Council (the Council) requesting that the Council consider and advise you by 28 February 2011 on the following issues in relation to international parental child abduction:

- i. Whether there are any identified gaps in existing legislation to deal with this issue.
- ii. Whether there is a need to introduce new offences to strengthen Australia's response to this issue.
- iii. Should a need to introduce new offences be identified, what exceptions or defences should apply.

In your letter, you noted that the Family Law Council should have regard to the *Hague Convention on the Civil Aspects of International Child Abduction* in considering the above, and any benefits or risks to Australia in meeting its obligations under the Hague Convention.

Council's views and recommendations are set out below.

## BACKGROUND

The Hague *Convention on the Civil Aspects of International Child Abduction* (the Convention) came into effect in Australia on 1 January 1987. The main aims of the Convention are to discourage parental child abduction and, where abduction has occurred, to ensure that children who are wrongfully removed to, or retained in, another Convention country will be returned as quickly as possible to their habitual residence country.

In Australia, the Convention is implemented through section 111B of the *Family Law Act 1975* (the Act) and the *Family Law (Child Abduction Convention) Regulations 1986* (the Regulations). The Regulations establish the Secretary of the Attorney-General's Department as the Commonwealth Central Authority with responsibility for coordinating the implementation of the Convention in Australia.

Each year there are more than 100 parental child abduction cases involving Australia. Some of these abductions may involve multiple children. The most recent statistics listed on the Attorney-General's Department website showing the number of children wrongfully removed or retained between Australia and another Convention country in relation to whom an application for return was made under the Convention is below at Table 1.

We are advised that these figures relate only to those abductions that the Attorney-General's Department has become aware of. There would be many abductions each year involving non-Convention countries as well as others involving Convention countries that are handled privately and not drawn to the Department's attention.

**Table 1 - Number of children wrongfully removed or retained<sup>1</sup>**

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

**Are there any identified gaps in existing legislation to deal with the issue of international parental child abduction?**

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<sup>1</sup> Attorney-General's Department, *International Parental Child Abduction Statistics* <<http://www.ag.gov.au/childabduction>> at 16 February 2011. These statistics have been updated by the International Family Law Section (the Section which performs the functions of the Secretary of the Attorney-General's Department as the Commonwealth Central Authority for the Convention) to include 2010 data.

The Council does not identify any inadequacies in the Australian civil legislation which implements Australia's obligations under the Convention.

In relation to criminal sanctions, in order to identify a 'gap' or deficiency in the existing legislation, it is first necessary to identify areas which are not covered by the existing legislation.

Sections 65Y and 65Z of the Act<sup>2</sup> apply where a parent removes a child overseas and parenting orders in relation to a child are in force or proceedings are pending before a federal family law court. The maximum penalty is imprisonment for three years. The legislation does not cover the situation where a parent takes a child overseas with the other parent's consent (or in accordance with a court order), but subsequently retains the child overseas beyond the agreed or authorised period. Secondly, the legislation does not cover the situation where children are taken overseas without the other parent's consent and no parenting orders have been sought from, or granted by, the courts.

The question that arises is whether a parent's behaviour in either or both of these circumstances should be criminalised.

### **Wrongful retention**

The Convention establishes mechanisms for the return of children, whether those children are wrongfully removed or wrongfully retained.<sup>3</sup> Wrongful removal is defined for the purposes of the Convention as where a child has been removed from a Convention country in breach of rights of custody attributed to a person, an institution or any other body. The definition of wrongful retention applies where the child has been lawfully taken to another Convention country but has then not been returned to their country of habitual residence in breach of rights of custody attributed to a person, an institution or any other body. In such cases the taking of the child becomes wrongful once the time period for which the original consent was obtained has expired, or, in some cases, once the 'taking parent' has indicated that they do not intend to return the child.

The current offence provisions in the Act do not deal with the situation where a parent has retained a child, whether in contravention of a court order or where proceedings have commenced. There appears to be no logical reason why wrongful retentions should be dealt with differently to wrongful removals. For this reason, it is Council's view that sections 65Y and 65Z should be amended, or partner provisions inserted, to ensure that the wrongful retention of children where parenting orders in

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<sup>2</sup> The provisions are attached in full at Attachment A.

<sup>3</sup> See for example, Article 1 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, which provides that the objects of the Convention are 'to secure the prompt return of children wrongfully removed to or retained in any Contracting State...'.

relation to a child are in force or proceedings are pending in a federal family law court is also a criminal offence.

### **Where there has been no court involvement**

Sections 65Y and 65Z only apply where parenting orders have been made by the court or where the jurisdiction of the court has been invoked through the initiation of proceedings. There may be cases where a removal or retention is deemed wrongful for the purposes of the Convention but do not attract the provisions of sections 65Y and 65Z, such as where the parties were prior to the removal or retention living together as an intact family or had separated but no orders have been made by a court and no application for such orders has been made.

Extending the coverage of the existing offence provisions of the Act to include situations where there has been no court involvement would have the effect of introducing a general criminalisation offence. A discussion of the advantages and disadvantages of introducing such an offence is provided below.

### **Is there is a need to introduce new offences to strengthen Australia's response to this issue?**

In 1998, the Council at the time concluded, at Recommendation 3 of its Report to the Attorney-General, *Parental Child Abduction* (the 1998 Report),<sup>4</sup> that:

*Parental child abduction, whether at the international level or within Australia, should not be criminalised and alternative means of improving the recovery rate of abducted children should be explored.*

In the 1998 Report, the Council gave extensive consideration to the factors for and against criminalisation of international parental child abduction.<sup>5</sup> The present Council's view is that the factors considered in the 1998 Report remain relevant.

### **Reasons in favour of extending the criminalisation provisions**

It can be argued that there may be some community benefits if criminal sanctions were available in circumstances where a child has been removed or retained in the absence of any court order or pending proceedings. International parental child abduction has serious implications for public policy, the welfare of children and access to justice.

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<sup>4</sup> Family Law Council, *Parental Child Abduction: A Report to the Attorney-General prepared by the Family Law Council*, January 1998, p38.

<sup>5</sup> Ibid, pp29-42. Chapter 4 of the 1998 Report is attached in full at Attachment B.

A general criminal offence may, arguably, provide a deterrent for parents considering taking or retaining their child overseas without the consent of the child's other parent. However, for such an offence to operate as a deterrent it would be necessary for parents to know about the existence of the relevant provisions. Council notes that even under the current regime, in many cases under the Convention parents are reportedly unaware that the removal or retention of their child is unlawful until they are served with the court papers seeking the child's return.<sup>6</sup> Many parents, particularly those who have been primarily or entirely responsible for the care of and decision making in relation to the child, have difficulty understanding that they are not able to make a decision about where the child should live.

Council's 1998 Report raised the possibility that criminalising child abduction would mean that greater resources would become available to assist the investigation and return of abducted children (para 3.08). The existence of a criminal offence could attract priority in police resources.

The extension of the ambit of criminalisation may enable the use of investigation tools such as telecommunications interception and surveillance under the *Telecommunications (Interception and Access) Act 1979*, which are currently available for those situations where the removal or retention of a child is covered under section 65Y or 65Z. Similarly, any offence with a penalty of more than 12 months imprisonment would be sufficient to trigger overseas extradition and mutual assistance provisions.

### **Reasons against the extension of criminalisation**

The arguments raised by the Council in the 1998 Report against criminalisation of international parental child abduction continue to be relevant.<sup>7</sup>

A particular issue that has been raised recently in the European Court of Human Rights (ECHR) is the reluctance of overseas courts to return children under the Convention if the removing parent may face criminal charges when they return. In *Neulinger and Shuruk v. Switzerland*<sup>8</sup> the ECHR considered the criminal offence for parental child abduction under Israel's *Penal Law 1977*. The ECHR concluded that criminal sanctions against, and the possible imprisonment of, the mother if she were

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<sup>6</sup> Anecdotal information provided to the Family Law Council by the International Family Law Section of the Australian Government Attorney-General's Department.

<sup>7</sup> Family Law Council, above n 4.

<sup>8</sup> *Neulinger and Shuruk v. Switzerland*, (European Court of Human Rights, Grand Chamber composed of Jean-Paul Costa, President, Nicolas Bratza, Peer Lorenzen, Françoise Tulkens, Josep Casadevall, Ireneu Cabral Barreto, Corneliu Bîrsan, Boštjan M. Zupančič, Elisabet Fura, Egbert Myjer, Danutė Jočienė, Isabelle Berro-Lefèvre, Päivi Hirvelä, Giorgio Malinverni, András Sajó, Nona Tsotsoria, Zdravka Kalaydjieva, judges, and Vincent Berger, *Jurisconsult*, 6 July 2010). The case is available online at <http://www.bailii.org/eu/cases/ECHR/2010/1053.html>.

to return with the child to Israel would not be in the child's best interests. The ECHR ultimately decided that the child should not be returned to Israel. This decision may have widespread implications for Convention cases conducted in Europe.

The responses of nations to the Permanent Bureau's 2006 questionnaire on the operation of the Convention suggest that the threat of criminal proceedings is relevant in the hearing of Convention cases throughout the world.<sup>9</sup> In those responses, the common thread was that pending criminal charges are relevant, but that their impact can be mitigated by applying conditions, such as an undertaking not to prosecute or, if charges have already been initiated, a requirement that the criminal charge be withdrawn.

Criminal sanctions can make it more difficult to encourage a parent to return voluntarily and may also result in parents increasing their efforts to hide their whereabouts. Efforts to mediate the dispute may also be compromised by the threat of criminal sanctions.

Criminal offences are likely to have a negative impact on disadvantaged parents such as those fleeing from situations where interpersonal violence or child abuse is alleged. In the 1998 Report, the Council considered at length the range of exceptions and defences that would need to be considered should a general offence be introduced. These issues are considered further below (at page 10).

### **Application of section 65Z**

There may be some scope for considering extending the applicability of section 65Z to situations where the parties have commenced Family Dispute Resolution as defined by section 10 of the Act.

The date of initiation of court proceedings is a verifiable date and represents a stage at which parents will have considered the need to adhere to legislative requirements regarding their children's futures if they are unable to agree between themselves. As a result of the 2006 amendments to Part VII of the Act, parents who are in dispute about arrangements for their children are generally prevented from filing a court application for contested orders until they have attended a Family Dispute Resolution service and their suitability for participation in Family Dispute Resolution has been assessed.<sup>10</sup>

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<sup>9</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) <[http://www.hcch.net/upload/wop/abd\\_pd02efs2006.pdf](http://www.hcch.net/upload/wop/abd_pd02efs2006.pdf)> at 16 February 2011. The relevant material is located in response to Question 19.

<sup>10</sup> Exceptions apply in certain circumstances, such as where there is a risk of child abuse or family violence: *Family Law Act 1975* (Cth), s 60I(9).

By the point at which parents have attended, or been invited to attend, a Family Dispute Resolution service in order to make future arrangements for the parenting of children, they should, in most cases, be aware that they have an obligation to adhere to legislative requirements governing their children's future care. In Council's view, the following dates in relation to the use of Family Dispute Resolution are relevant identifiable dates, after which an offence of taking a child away may be considered to have been committed:

- For the person initiating Family Dispute Resolution, the date of first contact with the Family Dispute Resolution service;
- For the other parent, the date of receipt of an invitation to participate in Family Dispute Resolution.

## **Conclusion**

Council recommends that the Act be amended to extend the present coverage of sections 65Y and 65Z to include wrongful retentions. Council also recommends that the Act be amended to extend the coverage of section 65Z to include parents who remove a child without the requisite consent or authority in circumstances where Family Dispute Resolution has been initiated or an invitation to participate in Family Dispute Resolution has been received.

**Recommendation 1: The wrongful retention of children should be a criminal offence consistent with the approach taken in relation to wrongful removal of a child.**

**Recommendation 2: The Act should not be amended to include a criminal offence of child abduction in circumstances where Court orders have been neither sought nor granted unless the parents have engaged in, or the taking parent has been invited to engage in, Family Dispute Resolution with a Family Dispute Resolution practitioner in relation to a dispute about a child.**

**Recommendation 3: There should not be a general criminal offence of child abduction.**

## **Possible alternative measures**

### ***Information gathering powers***

Consideration could be given to introducing improved information gathering powers. Such powers already exist in relation to location orders, Commonwealth information orders and recovery orders under Part VII of the Act. Currently a parent or any person concerned with the care, welfare or development of the child can apply to a court for a location order. Although section 67K makes particular mention of the Commonwealth Central Authority having the power to apply for a location order under the Child Protection Convention, it is not clear that the Authority would have such power in relation to the Child Abduction Convention. Consideration should be given to amending section 67K(2) to specifically include the Child Abduction Convention.

### ***Mediation***

The Commonwealth Central Authority should consider introducing a regime of mediation in managing international family law matters.

Use of mediation has the potential to address the conflict between the parents that underlies the taking or retention of a child, rather than just managing the crisis of wrongful removal or retention. There are also significant potential benefits for the welfare of the child where the return of the child is facilitated by agreement rather than pursuant to court orders. The value of mediation in international family law matters has been recognised by the Hague Conference on Private International Law, which has coordinated an Expert Group to undertake the task of preparing a *Guide to Good Practice* on mediation. A copy of the draft outline for the Guide is available at [http://www.hcch.net/index\\_en.php?act=text.display&tid=21](http://www.hcch.net/index_en.php?act=text.display&tid=21).

### ***Public education about the Convention***

Publicising the Convention may ensure that parents are aware of the potential consequences of wrongfully removing their children from one Convention country to another. Greater public awareness would potentially mean that parents may not abduct their children.

The Attorney-General's Department website contains extensive information about the Convention. *Travelling Parents*<sup>11</sup> also contains information about the Convention, as does the Department of Foreign Affairs and Trade website. For parents to examine

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<sup>11</sup> Department of Foreign Affairs and Trade, [http://www.smarttraveller.gov.au/tips/travelling\\_parents.pdf](http://www.smarttraveller.gov.au/tips/travelling_parents.pdf), pp15-16.



those documents they would probably have either been directed to them, or already had some knowledge about the Convention.

Publicity about the Convention, and the existing, and any new, offence provisions, could be achieved by adding information about the Convention to family relationship centre and court materials so that it targets parents who have sought assistance about parenting arrangements. The information could be provided through brochures to be made available by family relationship services providers, community legal centres, legal aid commissions, Government agencies such as the Attorney-General's Department, the Department of Immigration and Citizenship and the Department of Foreign Affairs and Trade and legal practitioners.

**Recommendation 4: Council considers there is merit in further legislative and non-legislative measures that could be taken to assist in international parental child abduction cases. These include:**

- **Information gathering powers**
- **Mediation**
- **Publicity about the Convention**

**If the Attorney-General considers that there is a need to introduce new offences, what exceptions or defences should apply?**

The existing offence provisions in the Act are already, and any new provisions would be, subject to the defence provisions of the Criminal Code Act, namely:

- Duress;<sup>12</sup>
- Sudden or extraordinary emergency;<sup>13</sup>
- Self-defence;<sup>14</sup>
- Lawful authority;<sup>15</sup> and
- Mistake of fact.<sup>16</sup>

Council, in the 1998 Report examined a wide range of exceptions and defences,<sup>17</sup> including those in the Code, and proposed some additional defences:

- Fleeing from violence;<sup>18</sup>
- Protecting the child from danger of imminent harm;<sup>19</sup>
- Reasonable excuse;<sup>20</sup> and
- Consent.<sup>21</sup>

The defence of protecting the child from danger of imminent harm might be regarded as falling within the Code in the defence of self defence. Section 10.4 of the Code refers to a person's conduct to defend himself or herself or another person. It covers action to defend others as well as the child. Similarly fleeing from violence is arguably adequately covered by the same provision of the Code. Despite the apparent coverage of these matters, specific inclusion of them as defences to wrongful removal/retention offence provisions in the Act, either in their own right or as examples of protecting a child, would ensure they exist.

Consent given by the other parent is probably sufficiently covered by the existing lawful authority defence of the Code. The written consent of the other persons with parental responsibility for the child, or the written consent of the other parties to the proceedings, are lawful authorities upon which to remove a child from Australia

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<sup>12</sup> *Criminal Code Act 1995* (Cth) s 10.2.

<sup>13</sup> *Criminal Code Act 1995* (Cth) s 10.3.

<sup>14</sup> *Criminal Code Act 1995* (Cth) s 10.4.

<sup>15</sup> *Criminal Code Act 1995* (Cth) s 10.5.

<sup>16</sup> *Criminal Code Act 1995* (Cth) s 9.2.

<sup>17</sup> Family Law Council, above n 4, paragraphs 5.11 – 5.20.

<sup>18</sup> Family Law Council, above n 4, paragraph 5.13.

<sup>19</sup> Family Law Council, above n 4, paragraph 5.16.

<sup>20</sup> Family Law Council, above n 4, paragraph 5.17.

<sup>21</sup> Family Law Council, above n 4, paragraph 5.18.

provided the written consent is authenticated by a person qualified to do so under section 8 of the *Statutory Declarations Act 1959* (in which that person endorses on the statement of consent that he or she is satisfied as to the identity of the person signing the consent and that the consent was signed in the authenticator's presence).

It would be prudent to include a defence of reasonable excuse to cover practical difficulties associated with travel. For example, if a new offence provision relating to wrongful retention is inserted it would protect a parent who has taken a child overseas with consent and who has been unable to return on time due to some unforeseen circumstance beyond their control, such as an airline strike, bad weather or ill health.

### **Should sections 65Y and 65Z be amended to require the Attorney-General's approval to commence proceedings?**

Currently prosecution under sections 65Y and 65Z are taken by the AFP and the DPP. Neither the Attorney-General nor the Attorney-General's Department, are involved in making the decision to take a prosecution forward. As set out above, this has implications for overseas cases under the existing provisions. An overseas court may be minded to refuse an application for return on the basis that the potential imprisonment of the abducting parent creates a grave risk of harm for the child(ren). In that situation, there is nothing under the current legislation that would enable an undertaking to be given that prosecution would not be pursued under those provisions. The DPP has previously been asked (at the request of overseas authorities) to make such a guarantee, but has refused to do so. If a new offence was included to cover circumstances where court orders have not been sought or granted, without a specific provision to dictate how prosecution decisions are made, the implications would be the same.

Including a requirement for the Attorney-General to give consent to the commencement of a prosecution for international parental child abduction would be a useful addition to the current provisions, as well as to any new offence provisions. In the 1998 Report, at Recommendation 6, Council recommended that the consent of the Attorney-General should be necessary before commencing prosecution and a special prosecution policy should be developed.<sup>22</sup> The Attorney-General currently has to provide consent to prosecution in relation to some other offences in the Criminal Code.<sup>23</sup>

Whilst there may be a public perception that taking parents are removing their children from Australia out of malice, the available statistics suggest that many

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<sup>22</sup> Family Law Council, above n 4, paragraph 5.50 (c) and (d).

<sup>23</sup> See for example the *Criminal Code Act 1995* (Cth) s 16.1 in which the Attorney-General's consent is required for prosecution if alleged conduct occurs wholly in a foreign country in certain circumstances.

parents are 'returning home' to the support of family and friends in their country of origin. The Attorney-General's Department does not keep detailed statistics on the nationality of taking parents and the correlation between their nationality and their destination. However, in the statistical analysis of applications made in 2003 under the Convention, prepared by Professor Nigel Lowe and incorporating detailed statistics provided by member countries of the Convention, it was found that worldwide, 68% of taking parents were primary or joint primary carers of the child,<sup>24</sup> and that 55% of taking parents are nationals of the requested country.<sup>25</sup>

If a requirement existed for the Attorney-General to consent to the prosecution of offences related to international parental child abduction, it would be possible for the Attorney-General to give a guarantee to an overseas court, in appropriate cases, that prosecution would not be commenced. This would minimise the adverse effect of the existence of the current, and any future, offence provisions on matters under the Convention. The Attorney-General could develop a special prosecution policy to take into account a range of factors, such as the wishes of the 'left behind parent', the views of the overseas court, the effect of prosecution on the children, and the question of the views of a child. If a guarantee not to prosecute was given in a particular case, an overseas court may be encouraged to return children despite the existence of sections 65Y and 65Z or any other expanded offence provision.

If there is a requirement for the Attorney-General to consent to prosecution the question arises as to whether the consent should be required only for those offences for which a taking parent would be liable (the primary offences of wrongful removal or retention of a child contrary to court order or where court proceedings are pending) or whether the consent should be required for all offences relating to international parental child abduction matters (subsidiary offences). Given that the concerns relating to prosecution relate primarily to the effect of criminal proceedings on Convention cases heard overseas it seems appropriate that those primary offences require consent to prosecute. For subsidiary offences it seems appropriate that they be dealt with according to the usual Commonwealth prosecution policy, providing that appropriate defence provisions are in place to protect third parties who have assisted a taking parent in circumstances of violence.

It is desirable that any change be uniform throughout Australia. On the basis of the State referrals of power, the Family Court of Australia has jurisdiction to make decisions in relation to arrangements for all children regardless of the marital status of the parents except for children in Western Australia and children who are in the care of a state child welfare authority.<sup>26</sup> For uniform national laws, Western Australia

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<sup>24</sup> Nigel Lowe, *A statistical analysis of applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Part II – National reports*, 2007 update, September 2008, p 86.

<sup>25</sup> *Ibid*, p 23.

<sup>26</sup> Unless the order is expressed to come into effect when the child ceases to be under that care: *Family Law Act 1975* (Cth), s 69ZK.

would need to enact mirror amendments to any new laws introduced by the Commonwealth.

**Recommendation 5: A range of exceptions and defences apply to the existing criminal offence provisions, and as well should apply to the new offence provisions proposed above. These exceptions and defences should include:**

- Duress;
- Sudden or extraordinary emergency;
- Self-defence;
- Lawful authority;
- Mistake of fact;
- Fleeing from violence;
- Protecting the child from danger of imminent harm;
- Reasonable excuse; and
- Consent.

**If Government decides, despite Council's recommendation above, to introduce a general criminal offence of international parental child abduction, these exceptions and defences should also apply to that offence.**

**Recommendation 6: The Act should include a requirement for the Attorney-General to consent to prosecution under the primary offences (those relating to the taking parent themselves) and a special prosecution policy should be developed to guide decision making in such cases.**

Council would be pleased to discuss any of the issues raised in this letter of advice with you at your convenience.

Yours sincerely

Associate Professor Helen Rhoades  
Chairperson

## Attachment A

### 65Y Obligations if certain parenting orders have been made

- (1) If a parenting order to which this Subdivision applies is in force, a person who was a party to the proceedings in which the order was made, or a person who is acting on behalf of, or at the request of, a party, must not take or send the child concerned from Australia to a place outside Australia except as permitted by subsection (2).

Penalty: Imprisonment for 3 years.

Note: The ancillary offence provisions of the *Criminal Code*, including section 11.1 (attempts), apply in relation to the offence created by subsection (1).

- (2) Subsection (1) does not prohibit taking or sending the child from Australia to a place outside Australia if:
- (a) it is done with the consent in writing (authenticated as prescribed) of each person in whose favour the order referred to in subsection (1) was made; or
  - (b) it is done in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time of, or after, the making of the order referred to in subsection (1).

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

### 65Z Obligations if proceedings for the making of certain parenting orders are pending

- (1) If proceedings (the ***Part VII proceedings***) for the making of a parenting order to which this Subdivision applies are pending, a person who is a party to the proceedings, or who is acting on behalf of, or at the request of, a party, must not take or send the child concerned from Australia to a place outside Australia except as mentioned in subsection (2).

Penalty: Imprisonment for 3 years.

Note: The ancillary offence provisions of the *Criminal Code*, including section 11.1 (attempts), apply in relation to the offence created by subsection (1).

- (2) Subsection (1) does not prohibit taking or sending the child from Australia to a place outside Australia if:
- (a) it is done with the consent in writing (authenticated as prescribed) of each other party to the Part VII proceedings; or
  - (b) it is done in accordance with an order of a court made, under this Part or under a law of a State or Territory, after the institution of the Part VII proceedings.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

### 65ZA Obligations of owners etc. of aircraft and vessels if certain parenting orders made

- (1) This section applies if:
- (a) a parenting order to which this Subdivision applies is in force; and

- (b) a person in whose favour the order was made has served on the captain, owner or charterer of an aircraft or vessel a statutory declaration made by the person not earlier than 7 days before the date of service that:
    - (i) relates to the order; and
    - (ii) complies with subsection (4).
- (2) The person on whom the declaration is served must not permit the child identified in the declaration to leave a port or place in Australia in the aircraft or vessel for a destination outside Australia except as permitted by subsection (3).

Penalty: 60 penalty units.

- (2A) Subsection (2) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2A) (see subsection 13.3(3) of the *Criminal Code*).

- (3) Subsection (2) does not prohibit permitting the child to leave Australia in the aircraft or vessel if:
  - (a) the child leaves in the company, or with the consent in writing (authenticated as prescribed), of the person who made the statutory declaration; or
  - (b) the child leaves in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time of, or after, the making of the order.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

- (4) The statutory declaration must contain:
  - (a) full particulars of the order, including:
    - (i) the full name and the date of birth of the child to whom the order relates; and
    - (ii) the full names of the parties to the proceedings in which the order was made; and
    - (iii) the terms of the order; and
  - (b) such other matters (if any) as are prescribed.

## **65ZB Obligations of owners etc. of aircraft and vessels if proceedings for the making of certain parenting orders are pending**

- (1) This section applies if:
  - (a) proceedings (the ***Part VII proceedings***) for the making of a parenting order to which this Subdivision applies are pending; and
  - (b) a party to the proceedings has served on the captain, owner or charterer of a vessel a statutory declaration made by the party not earlier than 7 days before the date of service that:
    - (i) relates to the proceedings; and
    - (ii) complies with subsection (4).
- (2) The person on whom the declaration is served must not permit the child identified in the declaration to leave a port or place in Australia in the aircraft or vessel for a destination outside Australia except as permitted by subsection (3).

Penalty: 60 penalty units.

- (2A) Subsection (2) does not apply if the person has a reasonable excuse.



Note: A defendant bears an evidential burden in relation to the matter in subsection (2A) (see subsection 13.3(3) of the *Criminal Code*).

- (3) Subsection (2) does not prohibit permitting the child to leave Australia in the aircraft or vessel if:
- (a) the child leaves in the company, or with the consent in writing (authenticated as prescribed), of the party who made the statutory declaration; or
  - (b) in accordance with an order of a court made, under this Part or under a law of a State or Territory, after the institution of the Part VII proceedings.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

- (4) The statutory declaration must contain:
- (a) full particulars of the Part VII proceedings, including:
    - (i) the full name and the date of birth of the child to whom the proceedings relate; and
    - (ii) the full names of the parties to the proceedings; and
    - (iii) the name of the court, the nature of the proceedings and the date of institution of the proceedings; and
    - (iv) if an appeal has been instituted in the proceedings—the name of the court in which the appeal was instituted and the date on which it was instituted; and
  - (b) a statement that the Part VII proceedings are pending at the date of the declaration; and
  - (c) such other matters (if any) as are prescribed.

### **65ZC General provisions applicable to sections 65ZA and 65ZB**

- (1) A declaration under section 65ZA or 65ZB may be served on the owner or charterer of an aircraft or vessel, or on the agent of the owner of an aircraft or vessel, by sending the declaration by registered post addressed to the owner, charterer or agent at the principal place of business of the owner, charterer or agent.
- (2) The captain, owner or charterer of an aircraft or vessel, or the agent of the owner of an aircraft or vessel, is not liable in any civil or criminal proceedings in respect of anything done in good faith for the purpose of complying with section 65ZA or 65ZB.
- (3) If an act or omission by a person that constitutes an offence against subsection 65ZA(2) or 65ZB(2) is also an offence against any other law, the person may be prosecuted and convicted under that other law, but nothing in this subsection makes a person liable to be punished twice in respect of the same act or omission.

### **65ZD State or Territory laws stopping children leaving Australia not affected**

Nothing in this Subdivision prevents or restricts the operation of any law of a State or Territory under which:

- (a) action may be taken to prevent a child from leaving Australia or being taken or sent outside Australia; or
- (b) a person may be punished in respect of the taking or sending of a child outside Australia.

**Attachment B**

## **4. CRIMINALISATION OF PARENTAL CHILD ABDUCTION**

### **“Criminalisation” of child abduction**

4.01 The main options in relation to “criminalisation” would appear to be:

- Make no change on the basis that the negative effects outweigh the benefits;
- Retain the existing provisions of the *Family Law Act 1975* but also make parental child abduction a criminal offence generally; or
- Replace all existing provisions relating to parental child abduction with a comprehensive provision, similar to say the UK legislation, which “criminalises” parental child abduction.

4.02 *Arguments in favour of criminalisation.* The arguments in favour of making it a criminal offence for a parent to abduct his or her child include:

- The adverse effects parental child abduction may have on the children, and the parents. The Law Institute of Victoria<sup>27</sup> questioned how criminalisation would counteract the effects of abduction. The aim of criminalisation is to reduce the incidence of parental child abduction. There is no suggestion that it will neutralise the effects of abduction;
- The present law in relation to parental child abduction is not entirely clear. A statutory offence would make clear the precise circumstances in which the taking of a child by his or her parent would be regarded as criminal;
- Civil procedures are often ineffective in obtaining the return of an abducted child. Criminalisation could facilitate the search process and may, as a consequence, combat parental child abduction. The existence of a criminal offence would attract the priority in police resources and the advanced procedures (eg telephone interception, listening devices) that apply in the investigation of criminal offences. Internationally the assistance of Interpol and overseas police would become available to locate abducted children. Extradition and mutual assistance procedures would also become available.

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<sup>27</sup> Submission No 23.

- The recovery of abducted children is extremely costly to the Australian taxpayer. Any proposal which has a deterrent effect and which reduces costs deserves close consideration;
- The deterrent and educative effect of criminalisation. The Family Court<sup>28</sup> suggested that the deterrent effect could be specific, by deterring an offending parent from doing it again, or general, by deterring parents in general from abducting their children; and
- Criminalisation would bring parental child abduction into line with State laws relating to child abduction. However, the fact that a parent is involved and the *Family Law Act* 1975 as amended by the *Family Law Reform Act* 1995 now enables each parent to exercise powers in relation to his or her child tends to distinguish parental child abduction from other forms of child abduction.

4.03 Some submissions received by Council strongly supported criminalisation of parental child abduction. The National Children's and Youth Law Centre (NCYLC) said in its submission:

The NCYLC believes that child abduction is a violation of the rights of the child and for this reason alone, abducting a child from Australia, to Australia and within Australia should be criminalised.

For the NCYLC the motives behind criminalisation are a mixture of punishment (for a wrong done against a child) and deterrence. In this way it is hoped that the criminalisation of parental child abduction shows parents, and those aiding parents, that they do not have a property right in a child and that taking advantage of a child's vulnerability will not be tolerated...<sup>29</sup>

4.04 A woman whose children had been abducted by her husband wrote in support of her recommendation for criminalisation:

... Parental child abduction violates the respectful recognition of the selfhood of a child, and has its roots in notions of "ownership" and exclusive "rights" to a child, rather than shared responsibilities.<sup>30</sup>

4.05 The Empty Arms Network<sup>31</sup> said that American research has shown that in 85% of all child abductions the motivating factor is anger or revenge.

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<sup>28</sup> Submission No 27.

<sup>29</sup> Submission No 12.

<sup>30</sup> Submission No 16.

<sup>31</sup> Submission No 28. At the time of writing the Council had not had the opportunity to examine the research findings.

4.06 An important point made in the Family Court's submission was that if it is decided to criminalise parental child abduction it will be necessary to be quite specific about what will constitute a criminal offence. The court suggested that in Austria, France and Netherlands the offence appears to be limited to the taking of the child by a person who does not have parental responsibility for the child. In New Zealand the offence is limited to the removal of a child from the country. However, the Council notes that in other countries with legal systems comparable to Australia, such as the USA, United Kingdom and Canada, the offence usually extends to people with parental responsibility.

4.07 *Arguments against criminalisation.* There are also arguments against such a course of action. These include:

- The existing provisions in the *Family Law Act 1975* are adequate to cope with the problem;
- The possibility of "criminalisation" forcing abductors to go into hiding as they seek to avoid the criminal consequences of their actions, with the consequent impact on the child of being kept in hiding<sup>32</sup>;
- The affect on the child of a parent being imprisoned. It was suggested to Council that jailing of a parent following action by the other parent could destroy the relationship between the child and the parent taking the action which resulted in the jailing<sup>33</sup>. On the other hand, it was also put to the Council that the consequences could also be educative for the child by informing their understanding of right and wrong and of responsible and irresponsible behaviour. The writer added that it was far more serious for a child to observe patently illegal behaviour of a parent going without penalty.<sup>34</sup> Council is of the view that if parental child abduction were to be criminalised, penalties other than imprisonment are more likely in most cases and, therefore, this argument may not be as strong as it first appears.
- The abductor, being the child's parent, has a right, or believes s/he has a right, to the care and/or control of the child. One submission said: "I regard stealing your own youngsters as an oxymoron, how can you steal your own child?"<sup>35</sup>;

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<sup>32</sup> Submission No 24. Submissions No 5 and 27 also considered that criminalisation could prove to be counter-productive.

<sup>33</sup> Submission No 5.

<sup>34</sup> Submission No 16. It should be noted, however, that another submission (No 8) pointed out, in another context, that children may not generally be aware of whether an act is legal or illegal.

<sup>35</sup> Submission No 8.

- The consequences of an offence being “criminal” can be quite severe; for example, apart from the penalties imposed, the person acquires a criminal record and this can also affect his or her employment prospects;
- In some circumstances the abductor considers that s/he is merely correcting a wrong, such as denial of reasonable contact with the child, or is saving the child from a perceived danger, such as child abuse. However, one submission commented that “vigilante behaviour in righting a wrong is not condoned by any other jurisdiction”<sup>36</sup>;
- In some cases the parent is fleeing alleged acts or threats of violence, or otherwise escaping an intolerable situation; and
- To make parental child abduction a criminal offence is an undue intrusion by the State into the domain of the family. Council notes, however, that the state has intervened in the family domain in relation to such matters as child abuse and neglect.

4.08 Australia is one of the Convention countries which takes action to locate missing children at government expense. Many other countries require the applicant to meet the costs involved. The *Convention on Civil Aspects of International Child Abduction* provides that a contracting state may make a reservation declaring that it will not be bound to meet certain costs associated with the recovery of abducted children<sup>37</sup>. A significant number of Convention countries have made such a reservation. Australia has not. It also appears that in many cases some countries offer little or no help in locating the child whose whereabouts are not already known to the parent. In the circumstances a number of submissions questioned whether criminalisation would result in any significant improvement in the present situation<sup>38</sup>.

4.09 The Family Court’s submission<sup>39</sup> made the following observation:

It seems likely that taking a child out of the jurisdiction in breach of a court order, or where the child is the subject of court proceedings and the effect of taking the child will be to frustrate the law, will be widely seen as wrongful. People who do not know the law would not be surprised to learn that it was an offence, or a breach carrying a penalty of some kind. It is less obvious perhaps that people would consider non-violent parent removal in the same way. It

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<sup>36</sup> Submission No 16.

<sup>37</sup> Article 26, paragraph 3, *Convention on the Civil Aspects of International Child Abduction*.

<sup>38</sup> Submission No 24 specifically raised the issue in this context but other submissions were pessimistic about the value of criminalisation. See, for example, Submissions No 5, 7, 8, 17, and 19.

<sup>39</sup> Submission No 27.

may be wise to be cautious in extending the criminal law to criminalise behaviour not widely or easily seen as wrongful.

4.10 The Council considers this a strong argument and accepts that there will be situations in which the general community may not regard parental child removal as wrongful.

4.11 One submission expressed grave reservations about using the criminal law to solve social problems:

... It is a very blunt instrument, which may catch some but allows many to escape the net, and often hits those who are weak economically and socially. It is also very much open to question whether it will be an effective deterrent in child welfare cases where emotions are so greatly involved and there is the risk that the problem of abduction will be worsened by forcing the party taking the child to go underground with terrible consequences for the child, emotionally, socially and educationally.<sup>40</sup>

4.12 Another submission expressed similar concerns:

... if child abduction were to be criminalised there would be the added risk of the parent abducting the child, removing the child and never to be found. The 'criminal' label may result in people hiding very well and the abductor taking the whole process serious enough never to be found...<sup>41</sup>

4.13 National Legal Aid<sup>42</sup> (NLA) was concerned that at present some abductors can be persuaded to return the child to Australia voluntarily. If the person were facing criminal charges NLA felt that s/he would be less likely to return voluntarily, given the possible serious consequences.

4.14 The Women's Legal Service (Queensland) raised the question of whether criminalisation might result in the transfer of already inadequate resources away from domestic violence matters with serious social consequences. The Service said:

... from our experience and current research, the police are not well equipped to intervene in domestic violence matters. Their role in parental child abduction could seriously affect the welfare of children.<sup>43</sup>

## Interpol

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<sup>40</sup> Submission No 5.

<sup>41</sup> Submission No 22.

<sup>42</sup> Submission No 18.

<sup>43</sup> Submission No 21.

4.15 The submission from the Empty Arms Network outlined its experience in relation to Interpol in the following terms:

The level of Interpol assistance rendered to Australian authorities when a child is abducted from our country is severely hampered by the fact that, at the present time, parental child abduction is not a criminal offence. There is, at the moment, great difficulty in including these cases on Interpol computer databases with any type of high priority notation. For example, a “red notice” on the Interpol computer system allows a high priority law enforcement tracking of an individual fleeing a criminal warrant deemed to be of a serious nature... If a “red notice” is instituted an abductor may be detained upon entry or exit from a country with an active Interpol force... Criminalisation of parental child abduction would allow an expeditious resolution to a severely traumatic situation for a family and more importantly the abducted child.<sup>44</sup>

4.16 According to its constitution the aim of Interpol is to ensure and promote the widest possible mutual assistance between all criminal police authorities. Each member country of Interpol appoints one police department to serve as the country’s National Central Bureau (NCB) and to act as the focal point for international police co-operation.

4.17 The International Civil Procedures Unit of the (Commonwealth) Attorney-General’s Department has obtained information from the General Secretariat of Interpol suggesting that the General Assembly of Interpol has considered international child abduction regularly since 1985. Since that time most member countries of Interpol have made use of their Interpol channels to search for abducting parents. At the request of member countries, the Interpol General Secretariat issues notices to all members aiming at the search and arrest (or search only) of the abducting parent. The location of the abducting parent usually results in the location of the abducted child, and significantly supplements civil procedures for the recovery of children. A recent meeting of 42 countries involved in dealing with the civil aspects of international child abduction concluded that “Experience with Interpol has shown that it will act on the basis of a missing persons report as well as a criminal complaint. In some cases Interpol has played a helpful role in locating the child.”<sup>45</sup>

4.18 The International Civil Procedures Unit of the (Commonwealth) Attorney-General’s Department advises that in the majority of international abduction cases location is not an issue as the abducting parent’s destination is usually known. However in a small minority of cases (particularly those involving abductions to

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<sup>44</sup> Submission No 28.

<sup>45</sup> Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, March 1997.

countries which are not parties to the Hague Abduction Convention) a determined abductor will move from country to country using false identities and bribery of officials in an effort to evade detection. In the absence of assistance from overseas police forces, the searching parent's chances of locating the child are slim and s/he is left with the costly and often ineffective alternative of employing private investigators.

4.19 The International Civil Procedures Unit of the (Commonwealth) Attorney-General's Department advises that the Australian Federal Police, as the Interpol National Central Bureau (NCB) for Australia routinely accepts requests from National Central Bureaus from other countries to locate children abducted to Australia. Interpol requests from the USA in particular are regularly acted upon even though in practice prosecutions rarely occur when the child is returned to the USA. Paradoxically the Australian NCB refuses to transmit requests to other Interpol members to locate children abducted from Australia where those requests are sent to it by the International Civil procedures Unit of the (Commonwealth) Attorney-General's Department, which is the Hague Convention Central Authority in Australia. To date the NCB has justified this refusal on two grounds:

- (a) Interpol is established to provide mutual assistance between police authorities on criminal matters; the NCB therefore feels it is prevented from accepting requests to locate abducted children from non police sources (ie parents, child welfare authorities or Hague Abduction Convention Central Authorities);
- (b) the NCB has made a decision that it will not assist in the location of abducted children in civil matters as its resources are very thinly spread in trying to cover criminal cases; the NCB will not assist unless an offence has been committed, a warrant issued and it is planned to proceed with a prosecution once the abductor has been found. This is the advice given orally to the International Civil Procedures Unit of the (Commonwealth) Attorney-General's Department in September 1996 by Interpol. In its submission, the Australian Federal Police states that the "ANCB does assist to coordinate inquiries for the recovery of children who are abducted from Australia" and that there is "no pre-existing requirement for warrants to be issued or for abductors to be prosecuted before action may be taken by Interpol to assist in the recovery of children wrongfully removed from Australia".

4.20 In view of the fact that the International Civil Procedures Unit of the (Commonwealth) Attorney-General's Department disagrees with the NCB for Australia in relation to what is happening in practice, the Family Law Council suggests that a protocol be drawn up between the two organisations in relation to procedures to apply for the referral of cases from the Australian Hague Convention Central Authority to the NCB for Australia.



4.21 In a small number of international child abduction cases a parent's ability to quickly locate his or her abducted children is essential. The traumatic impact of an abduction is likely to be increased if a child is kept in hiding and is moved from country to country. The refusal of the Australian NCB to involve itself in resolving the small number of parental child abduction cases requiring overseas police assistance<sup>46</sup> appears to ignore these consequences and appears to be inconsistent with the practice of Interpol NCBs in other countries.

4.22 The Council has concluded that many of the problems confronting persons and agencies trying to recover children in international child abduction cases would be overcome if the Australian Federal Police, as the Interpol National Central Bureau for Australia (the NCB), were to make arrangements for requests from non police sources (ie child welfare authorities or Hague Convention Central Authorities) to locate children abducted from Australia to be channelled to the NCB, either directly or via State and Territory Police Missing Persons Bureaus.

## RECOMMENDATION 2

**4.23 (a) That arrangements be made for requests from non police sources (ie child welfare authorities and Hague Abduction Convention Central Authorities) to locate children abducted from Australia be channelled to the National Central Bureau (NCB), either directly or via State and Territory Police Missing Persons Bureaus.**

**(b) That a protocol be drawn up between the NCB and the Australian Hague Convention Central Authority (the International Civil Procedures Unit of the Commonwealth Attorney-General's Department) setting out arrangements which will enable the Central Authority to refer cases directly to the NCB.**

## Criminalisation and parental responsibility

4.24 The *Family Law Reform Act* 1995 came into effect from 11 June 1996. The legislation abolished the concepts of custody, access and guardianship, which imply ownership of children by parents, and replaced them with the broader concept of parental responsibility. Unless it specifically says so, a parenting order of the court will no longer change a parent's sharing of the responsibility for his or her child.

4.25 Under the new arrangements, therefore, both parents generally retain the same responsibilities in relation to their children as they did before marriage

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<sup>46</sup> The International Civil Procedures Unit of the Attorney-General's Department estimates that the number of cases would probably be less than 10 a year.

breakdown. This remains the situation irrespective of whether the child resides with one parent and the other has contact with the child.

4.26 If both parents have parental responsibility, the “abduction” of a child by one parent clearly prevents the other parent from exercising his or her responsibilities in relation to that child. Since 11 June 1996 parental child abduction involves the taking over of all responsibilities for a child’s care without regard for the other parent who shares those responsibilities.

4.27 While the legal situation is not substantively altered by the changes made in the *Family Law Reform Act* 1995, Council notes that some parents who now share parental responsibility may feel that this enables them to act with more latitude than previously. This is considered to be a relevant, although not a mitigating, factor in determining whether parental child abduction should be regarded as “criminal”.

### Conclusions on criminalisation

4.28 The majority of submissions made to Council were against criminalisation of child abduction at both the international level and in relation to internal abductions. While there was a clear majority against criminalisation of international child abduction, the submissions commenting on criminalisation of internal abductions were overwhelmingly against the proposal, with 73 percent opposing the idea.

4.29 It should be mentioned, in relation to criminalisation of the abduction of a child in an overseas country to Australia, doubts were expressed in some submissions about difficulties in rendering criminal, actions substantially connected with a person’s country of habitual residence. For example, one submission made the following comments:

... At least one could anticipate practical difficulties in the proof of the necessary matters...<sup>47</sup>

The Council has similar doubts in respect of such cases.

4.30 **Costs to the taxpayer.** The cost to the taxpayer of locating abducted children in Australia is significant. The Attorney-General's Department estimates that in a recent case involving the location of a child abducted to Victoria from the USA the cost in police resources, State and Commonwealth public service resources and legal fees was in excess of \$1 million. There is a view that a parent who deliberately conceals a child, knowing that authorities are lawfully attempting to

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<sup>47</sup> Submission No 1.

locate the child, should be subject to some sanction if the cost to the community is significant.

4.31 While the Council acknowledges that the cost in government resources arising from parental child abduction is significant, it considered that the detriment flowing from criminalisation of parental child abduction is such that it negates it as a consideration.

4.32 *Summary of conclusions.* There are strong arguments both for and against criminalisation of parental child abduction. The Council appreciates the various arguments for criminalisation. For example, parental child abduction can have adverse effects on the child, there are circumstances where the lack of a criminal offence can hinder location and return of an abducted child, child abduction is quite costly for the Australian taxpayer and criminalisation could have deterrent and educative results.

4.33 After considering all of the relevant factors, however, the Family Law Council is opposed to criminalisation of parental child abduction, mainly on the following grounds:

- The Council is not convinced that parental child abduction is generally in the nature of a criminal offence;
- There is no strong evidence that criminalisation is likely to result in any appreciable improvement in the rate of recovery of abducted children. In fact, there are some arguments which tend to support the view that criminalisation may reduce the possibility of some children being returned voluntarily;
- The alternatives to criminalisation, which could achieve the aim of improving the recovery rate of abducted children without having the adverse effects associated with criminalisation, would seem to be a more satisfactory policy option on available evidence;
- There would be a danger that criminalisation could operate to the disadvantage of the economically and socially weaker members of the community;
- The negative effects criminalisation would have on parent-child and parent-parent relationships;
- The Council is concerned that an unintended consequence of criminalisation could be that it might, in some situations, operate to the disadvantage of women fleeing domestic violence.

### RECOMMENDATION 3

**4.34 Parental child abduction, whether at the international level or within Australia, should not be criminalised and alternative means of improving the recovery rate of abducted children should be explored.**

### RECOMMENDATION 4

**4.35 That a broad discretionary power be given to the courts to make reparation, from the property of persons responsible for international child abductions, to the Commonwealth, or other bodies associated with the recovery of the child, of the costs associated with the recovery of those abducted children.**

#### **Alternatives to criminalisation**

4.36 Having concluded that it does not favour criminalisation of child abduction either at the international level or within Australia, the Council has considered whether there may be ways of improving the present rate of recovery of abducted children.

4.37 *Improve existing arrangements* . A number of submissions opted for retention of the existing legislative framework supplemented by improvements in current administrative arrangements. One submission suggested improvement in the police response to reported missing children and the introduction of a Telephone Interception Order (TIO) system similar to that provided for in the (NSW) *Crimes Act* 1900 for apprehended violence orders when State Police are called to a violent scene. Under the proposal, State or Territory Police would be given the power to list children on the Watch List by themselves applying for the order through a scheme similar to the one provided for TIOs<sup>48</sup> The proposal relates to abductions from or within Australia and would not assist in relation to international abduction to Australia from an overseas country.

4.38 *Police priorities.* A number of submissions considered that the alternatives to criminalisation needed to be further explored. For example, the Law Institute of Victoria suggested:

If the abduction involves an international element it is difficult to argue against the benefit of utilising the assistance of the obvious agencies. The question

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<sup>48</sup> Submission No 19.

becomes one of whether it is necessary to criminalise the behaviour to prevail upon those agencies or whether there are other alternatives.

4.39 The Women's Legal Service (Queensland) said:

Undoubtedly, it would be very useful to have the involvement of Interpol in parental child abduction cases. However, given the additional problems created by criminalisation, we consider the benefits would not outweigh the costs. We do, however, recommend that the government explore other avenues of using this expertise without criminalisation.<sup>49</sup>

4.40 The Women's Legal Resources Centre (NSW) made similar comments:

... There are civil laws which empower police to find and return children. Some other policy may be necessary to ensure that the police actually use their present powers and perhaps look at ways to enable the various police services to use greater powers... If the civil law is not sufficient in its present form to locate children overseas, then the civil law should be amended. We do not accept that lack of police response at present is good enough excuse to criminalise domestic abductions.<sup>50</sup>

4.41 Following the receipt of submissions the Council has examined in more detail the possible alternatives to criminalisation.

4.42 A central issue relates to resources. As indicated in Recommendation 2 the Council considers that the costs of agencies involved in the recovery of abducted children should be recoverable from the person responsible for the abduction.

4.43 The priority given by police to recovery of abducted children is a further issue. The question of the police services giving recovery of abducted children a higher priority inevitably raises the issue of resources. It was suggested to Council that some of the existing problems relating to the recovery of abducted children arise for reasons of cost. For example, the Law Institute of Victoria<sup>51</sup> related priority and resources in its submission. It said:

We also query that criminalisation would facilitate the search process. There are no guarantees that the resources referred to would become available. A loss of priority may occur if cases are unsuccessfully prosecuted. There may be appropriate exceptions pursuant to the legislation to enable the "abducting" parent to resist the penalty.

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<sup>49</sup> Submission No 21.

<sup>50</sup> Submission No 19.

<sup>51</sup> Submission No 23.

4.44 The Council does not have enough information to make a specific recommendation about resources, but it considers that this issue should be further explored with the police services and other interested agencies, including the Attorney-General's Department and the Department of Finance.

## RECOMMENDATION 5

**4.45 That the Attorney-General's Department and the Department of Finance and Administration give consideration to how more resources can be made available to the Australian Federal Police for the recovery of abducted children.**

### A Central Registry

4.46 The Council has considered whether considerably less emotional and financial resources might be expended in relation to parental child abductions if mechanisms were in place which would give "abducting" parents some secure way of arranging for them to be further contacted without that information being available to the other parent. The purpose of such an arrangement would be to minimise the use of scarce police resources in locating missing children who have been removed from the matrimonial home by one of the parents, particularly where the "abducting" parent wishes, for whatever reason, to make a permanent break with the other parent.

4.47 Such a proposal would involve the establishment of a central registry. Its role would be:

1. To receive information from parents who are leaving the matrimonial home permanently about how the registry can contact and advise them of any application is made to the court by the other parent in relation to a child of the marriage;
2. To take steps to ensure that the information supplied to the registry is completely secure and is not made available to any other person or organisation;

4.48 When a parent leaves the matrimonial home, or within a specified period after leaving, and takes a child or children of the marriage with him or her, that person would be required to notify the central registry of how the registry can contact that person.

4.49 Under the proposal, leaving the matrimonial home and taking a child would not be an offence. However, failure by a parent to advise the central registry of

where s/he can be contacted would be an offence, but not a criminal offence. Existing offences in the *Family Law Act* in relation to child abduction would remain.

4.50 Under this arrangement the at-home parent would be able to make an application to the court for location of the child/ren, or for residence or contact orders in relation to such child/ren. The central registry would notify the “abducting” parent of the application. The need for police action to locate the children so removed from the family home would be reduced under the proposal.

4.51 The proposal was not raised in Council’s discussion paper. Council is reluctant to recommend a proposal of this type without appropriate public consultation. Some of the problems with the proposal include:

- The possibility that it would drive some abductors further underground rather than have a positive effect on the recovery of abducted children.
- Concerns about the security of information supplied to the central registry, based on experience with adoption registers.
- Probable resistance from some “abductors”, especially women fleeing from violent situations.
- While the proposal appears sound in theory, Council considers that there would be a number of practical difficulties in putting it into practice.
- Difficulties the proposal would raise for some cultural groups.
- Perceived judicial reluctance to order return under a Hague Convention application because the abductor could be punished and there are implications for the child.

4.52 With these factors in mind, Council does not favour implementation of the proposal at this stage. Should the Government want the proposal to be further examined, Council recommends that there should be consultation with interested bodies, including domestic violence groups and women’s refuge workers.