

To the Committee Secretary
Senate Legal and Constitutional Affairs Committee
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6 February 2008 (late submission)

Submission of the Family Law Amendment (Financial Agreement and Other Measures) Bill 2015

Background: I have been a self represented litigant in the Family Court and in a number of Courts across different legal jurisdictions. I appreciate the opportunity to provide this (late) submission to the Committee.

Summary:

- The proposed amendment concerning international parental child abduction focuses on the minority of cases in which a parent wrongfully removes a child from the jurisdiction and fails to introduce additional defences which were recommended by the Family Law Council to address the majority of parental child removals – women fleeing domestic violence and abuse.
- Today 70% of parental child removals are women, the majority fleeing violence and abuse.
- The Family Law Amendment Bill 2015 as it currently stands potentially further criminalizes these women and children
- The Family Law Council recommended introducing additional defenses to protect mothers and children who flee abuse from being charged with the criminal offence of wrongful removal
- The Family Law Amendment Bill 2015 broadens criminal sanctions for wrongful removal to cover wrongful retention in addition to wrongful removal. This was recommended by the Family Law Council to make the laws consistent.
- However, the Family Law Amendment Bill 2015 fails to introduce defenses such as the defence of fleeing from violence and the defence of protecting the child from danger of imminent harm. The Family Law Council stated that if criminal sanctions are broadened to cover wrongful retention, then additional defences *must* be introduced to ensure that women fleeing harm will be protected from criminalisation.
- Today the defence of 'Self Defence' is relied on by women who remove children from Australia in order to prevent harm. The defence of Self Defence is inadequate. It was not intended to apply to these circumstances and the common law has not developed to defend women in circumstances where they are forced to remove children to avoid harm.

THE TWO PROFILES OF A PARENT WHO TAKES A CHILD OVERSEAS

There are two vastly differing profiles of a parent who takes a child overseas. One is an international parental child abduction, the other is an international parental child protection

In 1970: In 82% of cases, the father was the abductor

The three most common reasons for the abduction:

- A wish to control the cultural upbringing of the child.
- Fear of loss of the relationship with the child; and
- Frustration in relation to residence and contact arrangements.

In 1999: In 70% of cases the mother was the protector

The most common reason for the protection was:

- fleeing from violence and child abuse.

(Living in Limbo: The Experience of International Parental Child Abduction.
International Social Services Australia Branch 2005, [2.6.1] – [2.6.2] page 7-8).

TO ADDRESS 70% OF CURRENT INTERNATIONAL PARENTAL DEPARTURES

In 2011 the Family Law Council recommended that the Attorney General should introduce defences to specifically protect rather than criminalise women with children fleeing violence and child abuse.

THE 14 MARCH 2011 FAMILY LAW COUNCIL RECOMMENDATION TO THE ATTORNEY GENERAL

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

Council, in the 1998 Report examined a wide range of exceptions and defences,

including those in the Code, and proposed some additional defences:

- Fleeing from violence;
- Protecting the child from danger of imminent harm;
- Reasonable excuse; and
- Consent.

(Family Law Council Views and Recommendations, letter to the Attorney General 14 March 2011, page 10)

The Family Law Council undertook a detailed study of the problem in 1998 and stated that although the defence of Self Defence *theoretically* would cover women fleeing domestic violence and child abuse additional defences were necessary:

“ specific inclusion of [the additional defences] 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.”

(Family Law Council Views and Recommendations, letter to the Attorney General 14 March 2011, page 10)

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:

- ...
- **Fleeing from violence;**
- **Protecting the child from danger of imminent harm;**

(Family Law Council Views and Recommendations to the Attorney General 14 March 2011, page 13)

The reason these additional defences are necessary is because the authorities are failing to respond appropriately to evidence of sexual abuse and domestic violence. Women who are forced to flee from violence are being treated as child abductors rather than child protectors. Children are being separated from their mothers, traumatised and re-abused.

THE STEREOTYPICAL VIEW THAT ALL CHILDREN ARE HARMED BY INTERNATIONAL PARENTAL DEPARTURES IS WRONG

As mentioned by Merle Weiner, a Professor of Law and expert in international child abduction, there have been no studies performed on children taken overseas by mothers protecting them from abuse. One study conducted by Greif and Hegar (1993) found that 24% of children improved post abduction and in 21% of cases there was no difference. The particular circumstances of each case will determine the benefit or detriment to the child (Merle Weiner, 2000, International Child Abduction and the Escape from Domestic Violence, Fordham Law Review). Each case must be taken on its merits.