

# CHAPTER 3

## Criminal law responses to international parental child abduction

3.1 The regulatory frameworks outlined in chapter 2 operate under the civil law. Although international parental child abduction is currently recognised to some extent in Australian criminal laws, there is no specific, stand-alone offence relating to international parental child abduction. During the course of the inquiry, the committee received evidence which was both supportive of, and opposed to, enactment of a targeted international parental child abduction criminal offence.

### Recognition under current criminal laws

3.2 There are limited circumstances in which the wrongful removal of a child (or children) from Australia is recognised as a criminal offence. The primary means of recognition occurs under sections 65Y and 65Z of the Family Law Act, where the removal is committed in breach of parenting orders, or in the course of proceedings for such orders.

3.3 In some circumstances, incidents of international parental child abduction may fall within the scope of certain state and territory criminal offences in the nature of kidnapping or abduction.<sup>1</sup> The committee notes, however, that many state and territory offences appear to be directed to the forcible, fraudulent or otherwise non-consensual removal of a child from a jurisdiction by persons other than his or her parent.<sup>2</sup>

### *Family Law Act—sections 65Y and 65Z*

3.4 Sections 65Y and 65Z of the Family Law Act (Family Law Act offences) provide, respectively, for the offences of removal of a child (or children) from

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- 1 For example, the AFP advised the committee that it was able to obtain a telecommunications interception warrant in one international parental child abduction matter, relying on the offence of child stealing in s 363 of the *Criminal Code 1899* (Qld): *Submission 31*, pp 7-8.
  - 2 See further, Family Law Council, *Parental Child Abduction: A Report to the Attorney-General* (January 1998), p. 23. This is consistent with the child abduction-related provisions of the Commonwealth Model Criminal Code, see *Consolidated Model Criminal Code* (1st ed, 28 May 2009), especially clauses 5.1.33 (kidnapping) and 5.1.34 (child abduction). The model offence of child abduction states that a person does not commit an offence under the provision where he or she is the parent of the child (subclause 5.1.34(3)). The model offence of kidnapping may apply to some international parental child abduction matters, in that its parental defence provisions are limited to persons who have *lawful* custody of the child, and who are not acting in contravention of a court order (subclause 5.1.33(3)). See further, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Report on Chapter 5: Non Fatal Offences Against the Person* (September 1998), p. 89.

Australia while parenting orders in relation to a child are in force, or while proceedings for the making of a parenting order are pending. The offences have a maximum penalty of three years imprisonment. The wrongdoing to which the Family Law Act offences are directed is contempt of court, rather than removal *per se*, as they do not apply to non-consensual removals by one parent where no parenting orders have been sought or granted by the court.<sup>3</sup>

3.5 The committee received evidence about the limited scope of the Family Law Act offences. In its submission, the AFP noted that the Family Law Act offences may not capture the overseas departure of an unaccompanied, unassisted child—for example, where he or she leaves Australia on his or her own, possibly at the instigation of one parent who is located overseas. The AFP further stated that, in its view, the offences would not capture the departure of a child who is assisted by persons other than parents—for example, his or her relatives or siblings. In these circumstances, the AFP may not have clear legal authority to prevent a child from leaving the jurisdiction.<sup>4</sup>

3.6 The Family Law Council also examined the scope of the Family Law Act offences in advice it provided to the Australian Government in March 2011. It observed that the provisions in sections 65Y and 65Z do not apply to wrongful retentions—that is, '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'.<sup>5</sup> The Family Law Council considered that there are no principled reasons for such limited coverage, and recommended the extension of the Family Law Act offences to wrongful retentions.<sup>6</sup>

3.7 The Family Law Council also recommended the extension of the wrongful removal offences in sections 65Y and 65Z to circumstances where an invitation to participate in family dispute resolution has been issued. As participation in family dispute resolution is generally a prerequisite to commencing parenting proceedings,<sup>7</sup> parties ought to be aware of their obligations under the Family Law Act at that time.<sup>8</sup>

3.8 The Family Law Council also commented on the absence of safeguards in the Family Law Act offences, and recommended:

- the enactment of specific defences for persons who are fleeing from violence, who are protecting their child from danger of imminent harm, or who have a

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3 Family Law Council, *Submission 13*, Attachment 1, p. 3.

4 *Submission 31*, p. 9.

5 *Submission 13*, Attachment 1, p. 3.

6 *Submission 13*, Attachment 1, p. 7, recommendation 1.

7 Family Law Act, s 60I.

8 *Submission 13*, Attachment 1, pp 6-7, recommendation 2.

reasonable excuse for failing to return the child to Australia (such as flight cancellations or ill-health);<sup>9</sup> and

- the enactment of prosecutorial safeguards, including a requirement that the Attorney-General give consent before a prosecution for international parental child abduction is commenced (which would then enable the Attorney-General to give a non-prosecution guarantee to overseas courts in appropriate cases) and a specific prosecution policy for Family Law Act offences.<sup>10</sup>

### ***Proposed amendments to the Family Law Act offences***

3.9 The Australian Government has accepted some of the Family Law Council's recommendations concerning the Family Law Act offences.<sup>11</sup> On 19 September 2011, the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs announced the government's intention to introduce reforms, including:

- proposed new Family Law Act offences in respect of wrongful retentions, which mirror the existing provisions in sections 65Y and 65Z dealing with wrongful removals;
- extension of the existing wrongful removal offences to cover the removal of a child overseas where an invitation to participate in family dispute resolution has been issued;
- proposed new defences under the Family Law Act, including fleeing from violence and protecting children from imminent harm, which are additional to the general defences available under the Commonwealth Criminal Code; and
- proposed discretion for the Commonwealth Director of Public Prosecutions (CDPP) (and not the Attorney-General as recommended by the Family Law Council) to give non-prosecution undertakings in appropriate cases—for

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9 *Submission 13*, Attachment 1, pp. 10-13, recommendation 5. Two submitters to the committee's inquiry also supported specific family violence-related defences: Women Everywhere Advocating Violence Elimination, *Submission 9*, pp 6-7; National Council of Single Mothers and Their Children, *Submission 10*, p. 9, recommendation 1.

10 *Submission 13*, Attachment 1, pp 11-13, recommendation 6.

11 In particular, Ms Louise Glanville, Attorney-General's Department, advised the committee that, of the Family Law Council's six recommendations in its March 2011 advice, recommendations 1, 2, 3 and 5 have been accepted in full, and recommendations 4 and 6 in part: *Committee Hansard*, 22 September 2011, p. 7.

example, in cases where exposure to criminal liability may trigger an Article 13(b) exception in Hague Convention proceedings.<sup>12</sup>

3.10 The Ministers indicated that draft legislation will be completed by late 2011, for introduction into the Parliament in the first half of 2012.<sup>13</sup> Officers from the Attorney-General's Department (Department) advised the committee that the government has commenced the policy development process, and will consult with stakeholders on the detail of the proposed legislation.<sup>14</sup>

3.11 Departmental officers specifically advised that the government will consult stakeholders about the proposed extension of the Family Law Act offences to situations where parties have been invited to participate in family dispute resolution, in light of opposition expressed by Women's Legal Services Australia in its submission to the committee's inquiry.<sup>15</sup> Women's Legal Services Australia argued that extending the Family Law Act offences in these situations could be open to abuse, or may be of limited use, since it may be difficult to prove to the requisite standard that a party has received an invitation to participate in family dispute resolution.<sup>16</sup>

### **Possible stand-alone criminal offence**

3.12 The committee also received evidence regarding the enactment of a stand-alone international parental child abduction offence (which would not depend on the existence of family law orders or applications for such orders). Some submitters noted that international parental child abduction is a criminal offence in other countries, citing the United Kingdom and the United States as examples.<sup>17</sup>

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12 The Hon Robert McClelland MP, Attorney-General, and the Hon Jenny Macklin MP, Minister for Families, Housing Community Services and Indigenous Affairs, 'Stronger Laws to Deal With International Child Abduction', Media Release, 19 September 2011. See further, Ms Louise Glanville, Attorney-General's Department, *Committee Hansard*, 22 September 2011, p. 1. Article 13(b) of the Convention provides that the judicial or administrative authority of a requested state is not bound to return a child where there is a 'grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'.

13 The Hon Robert McClelland MP, Attorney-General, and the Hon Jenny Macklin MP, Minister for Families, Housing Community Services and Indigenous Affairs, 'Stronger Laws to Deal With International Child Abduction', Media Release, 19 September 2011.

14 Ms Louise Glanville, Attorney-General's Department, *Committee Hansard*, 22 September 2011, pp 4, 7.

15 Ms Louise Glanville, Attorney-General's Department, *Committee Hansard*, 22 September 2011, p. 4

16 Women's Legal Services Australia, *Submission 33*, p. 10, recommendation 9.

17 In the United Kingdom, the *Child Abduction Act 1984* provides for an offence of wrongful removal of a child from the United Kingdom; and, in the United States, the *Parental Kidnapping Act* provides for the offence of wrongful removal and retention: see Mr Michael Nicholls QC, *Submission 6*, p. 5. See also, Family Law Council, *Submission 13*, Attachment 1, p. 18; Mr Ken Thompson, *Submission 22*, pp 11, 16.

3.13 There was a divergence of views among submitters and witnesses about the desirability of a stand-alone criminal offence. Proponents of a new offence were generally those with personal experiences of international parental child abduction—particularly parents whose children have been abducted overseas, or other persons related to such children.<sup>18</sup>

3.14 Most submitters and witnesses who opposed a new offence were representatives of the legal profession, social support service providers and women's advocacy groups.<sup>19</sup> As noted above, officers from the Attorney-General's Department advised the committee in September 2011 that the Australian Government has decided to extend the Family Law Act offences to wrongful retentions, rather than enact a specific stand-alone offence.<sup>20</sup>

### *Arguments in support of a stand-alone offence*

3.15 In its advice to the Australian Government in March 2011, the Family Law Council set out the arguments in support of a discrete criminal offence for international parental child abduction. In particular, the Family Law Council noted that criminalisation would ensure that international parental child abduction matters are afforded priority in the allocation of policing resources, and would ensure that additional investigation and enforcement mechanisms are made available to assist in locating a child. Such mechanisms could include the use of telephone interceptions and listening devices; the ability to request the assistance of Interpol and overseas police forces to locate abducted children; and the availability of extradition and mutual assistance procedures to return abducting-parents to Australia.<sup>21</sup>

3.16 In evidence at the committee's first public hearing, Mr Ken Thompson argued that the primary objective of criminalisation should not be to impose punitive measures on the abducting-parent; however, it would enable agencies 'to provide the advice, support, assistance and investigation to the [left-behind] parents that needs to

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18 See, for example, Ms Robin Bowles, *Submission 3*, p. 2; Dads on the Air, *Submission 4*, p. 3; Mr Lauchlan Leishman, *Submission 7*, p. 4; Mr Daniel Wass, *Submission 15*, p. 3; Mr Ken Thompson, *Submission 22*, pp 10-16; Mr Ken Thompson and Mr Lauchlan Leishman, *Committee Hansard*, 26 August 2011, pp 1-2, 6. See also, Ms Carolyn Smith, *Submission 23*, pp 1-2.

19 See, for example, Mr Michael Nicholls QC, *Submission 6*, p. 5; International Social Service Australia, *Submission 11*, p. 7; Family Law Council, *Submission 13*, Attachment 1, pp 5-6, recommendation 3; Law Society of NSW, *Submission 21*, p. 4; Women's Legal Service Australia, *Submission 33*, p. 9, recommendation 8; Law Council of Australia, *Submission 39*, Attachment 1, pp 1-2. See further, Mr Geoff Sinclair, Law Council of Australia, *Committee Hansard*, 26 August 2011, p. 24; Mr Michael Nicholls QC, *Committee Hansard*, 26 August 2011, pp 24-25; Hon Diana Bryant, Chief Justice, Family Court of Australia, *Committee Hansard*, 26 August 2011, p. 32.

20 Ms Louise Glanville, Attorney-General's Department, *Committee Hansard*, 22 September 2011, p. 2.

21 Family Law Council, *Submission 13*, Attachment 1, pp 18-20.

be carried out'.<sup>22</sup> Mr Thompson's view was that the risk of inappropriately penalising an abducting parent could be managed through measures such as the careful framing of any offence provision, the availability of defences, investing the court with sentencing discretion, and enacting certain procedural protections (such as a prosecutorial consent requirement and non-prosecution guarantees).<sup>23</sup>

3.17 Several submitters drew an analogy with the circumstances of abduction of a child by a person other than his or her parent or guardian, which is an offence under Australian criminal laws. As such, they argued that criminal law responses to child abduction should not discriminate on the basis of a parental relationship between the abductor and the child, or on the existence or otherwise of family law orders. Rather, criminal offences should focus uniformly on the wrongful nature of the removal or retention, in the context of the rights of the child and other persons with parental responsibility.<sup>24</sup>

### ***Arguments against a stand-alone offence***

3.18 Other evidence did not support a stand-alone criminal offence for the following reasons:

- such an offence would deter abducting parents from voluntarily returning children or participating in negotiations, and cause them to further evade law enforcement authorities for fear of prosecution;<sup>25</sup>
- the prospect of the taking-parent being subject to criminal proceedings on their return would undermine the effectiveness of the Convention because the existence of a criminal offence may trigger an Article 13(b) exception;<sup>26</sup>
- even if an Article 13(b) exception cannot be established, there is the potential that the child's best interests would be damaged if a parent is convicted of an offence which may result in his or her imprisonment (thus denying the child

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22 *Committee Hansard*, 26 August 2011, p. 6. See further, Mr Lauchlan Leishman, *Committee Hansard*, 26 August 2011, p. 2.

23 *Committee Hansard*, 26 August 2011, p. 6; *Submission 22*, pp 13-14.

24 Mr Lauchlan Leishman, *Committee Hansard*, 26 August 2011, pp 1-2; Mr Ken Thompson, *Submission 22*, p. 15; Ms Carolyn Smith, *Submission 23*, p. 2.

25 Mr Michael Nicholls QC, *Submission 6*, p. 5; Department of Family and Community Services NSW, *Submission 8*, p. 7; International Social Service Australia, *Submission 11*, p. 7; Family Law Council, *Submission 13*, Attachment 1, p. 6; Law Society of NSW, *Submission 21*, p. 4; Women's Legal Service Australia, *Submission 33*, p. 9; Law Council of Australia, *Submission 39*, Attachment 1, pp 1-2. See further, Mr Geoff Sinclair, Law Council of Australia, *Committee Hansard*, 26 August 2011, p. 24; Mr Michael Nicholls QC, *Committee Hansard*, 26 August 2011, pp 24-25.

26 See Mr Michael Nicholls QC, *Submission 6*, p. 5; Mr Michael Nicholls QC, *Committee Hansard*, 26 August 2011, p. 24; the Hon Diana Bryant, Chief Justice, Family Court of Australia, *Committee Hansard*, 26 August 2011, p. 32.

the opportunity to have a meaningful relationship with, and be cared for by, that parent);<sup>27</sup>

- the threat of criminal prosecution would have a negative impact on disadvantaged parents such as those who have committed international parental child abduction to escape family violence or child abuse committed by the other parent.<sup>28</sup>

3.19 In particular, the committee notes that the Chief Justice of the Family Court, the Hon Diana Bryant, does not support a stand-alone criminal offence:

I have to say that I am not in favour of it, for this reason. What you would say in favour of it is that it is my understanding that it does assist the police and Interpol to look for children overseas, but one would have hoped there might be some other way of doing that. Surely the AFP here can have arrangements in relation to abduction of children short of necessarily having to have criminal offences created. The second reason for doing it, I suppose, is a community perception, particularly from the left-behind parent, that there should be some punishment, but the problem is that in the cases that we see regularly where the children are sought to be returned to a country where there are laws whereby criminality is created by removing a child—typically that is some of the states in the United States, where it is regarded as kidnapping—you often end up having to try to get some kind of undertaking from the other parent not to prosecute so the child can be returned, and that is not always possible if the prosecution is by a district attorney or something. One of the defences that might then arise would be if the father, for example, is not able on the face of it to care for the children and the mother is going to be jailed upon return and there is no-one to look after the child. Then the 'intolerable situation' defence would arise. So this problem arises all the time, and it is not uncommon to be seeking for other jurisdictions to forgo prosecution so that the children can be returned. So it is a real issue.<sup>29</sup>

3.20 The Family Law Council also recommended against the introduction of a new stand-alone criminal offence in its advice to the Attorney-General in March 2011.<sup>30</sup>

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27 Mr Michael Nicholls QC, *Submission 6*, p. 5; Department of Family and Community Services NSW, *Submission 8*, p. 7; International Social Service Australia, *Submission 11*, p. 7; Family Law Council, *Submission 13*, Attachment 1, pp 5-6; Law Society of NSW, *Submission 21*, p. 4. See further, Ms Helen Freris, International Social Service Australia, *Committee Hansard*, 26 August 2011, p. 11.

28 Mr Michael Nicholls QC, *Submission 6*, pp 5-6; Department of Family and Community Services, NSW, *Submission 8*, p. 7; Family Law Council, *Submission 13*, Attachment 1, p. 6; Law Society of NSW, *Submission 21*, p. 4.

29 *Committee Hansard*, 26 August 2011, p. 32. See also Mr Michael Nicholls QC, *Committee Hansard*, 26 August 2011, pp 24-25.

30 *Submission 13*, Attachment 1, p. 7, recommendation 3.

## Alternative reforms to a stand-alone criminal offence

3.21 Some submitters to the inquiry proposed alternative reforms to a stand-alone offence for international parental child abduction. They argued that these alternatives could improve the return rate of Australian children who are abducted overseas, deter future abductions and improve procedural safeguards in the existing Family Law Act offences. Suggestions included:

- greater public education and awareness-raising initiatives about the existence and operation of the Family Law Act offences, which may serve as a deterrent to international parental child abduction;<sup>31</sup> and
- more significant government and third-sector investment in international parental child abduction prevention, with a view to decreasing its incidence and removing the perceived need for additional criminal sanctions.<sup>32</sup>

3.22 In this context, officers from the Department advised the committee that the government has partially accepted other recommendations of the Family Law Council in its March 2011 advice, including the recommendation for further legislative and non-legislative measures to assist in international parental child abduction cases (such as information-gathering powers, mediation and publicity about the Hague Convention).<sup>33</sup> The committee was advised that the detail of these reforms is under development, and will be the subject of consultations in the future.<sup>34</sup>

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31 Family Law Council, *Submission 13*, Attachment 1, pp 8-9, recommendation 4; Law Council of Australia, *Submission 39*, p. 3. See further, Ms Alexandra Wearne, Legal Aid New South Wales, *Committee Hansard*, 26 August 2011, p. 19.

32 International Social Service Australia, *Submission 11*, p. 6.

33 Ms Louise Glanville, Attorney-General's Department, *Committee Hansard*, 22 September 2011, p. 7 (referring to the partial acceptance of recommendation 4 of the Family Law Council's advice).

34 Ms Louise Glanville, Attorney-General's Department, *Committee Hansard*, 22 September 2011, p. 4.