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No. 175 2001–02

Family Law Amendment (Child Protection
Convention) Bill 2002

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No. 175 2001–02

Family Law Amendment (Child Protection Convention) Bill
2002

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Law and Bills Digest Group
25 June 2002

Contents

Purpose	1
Background	1
The Constitution, treaty-making and implementation	1
History of the Child Protection Convention	3
Aims of the Child Protection Convention	3
Implementation of the Child Protection Convention in Australia	4
Benefits of ratification	5
Financial impact.	6
Main Provisions	6
Definitions	6
Conflict of laws	6
Jurisdiction under the Child Protection Convention	7
Subdivision B--Jurisdiction for the person of a child.	8
Subdivision C--Jurisdiction for decisions about a guardian of a child's property.	9

Subdivision D—Applicable law.	9
Parental responsibility.	10
Recognition and enforcement	10
Co-operation.	11
Regulations	12
Concluding Comments	12
Senate Legal and Constitutional Legislation Committee Report.	12
The enforcement of decisions by foreign courts in Australia	13
Conflict between Article 7 of the Child Protection Convention and provisions of the Child Abduction Convention.	13
State legislation required to implement the Child Protection Convention in Australia . . .	14
Endnotes.	15

Family Law Amendment (Child Protection Convention) Bill 2002

Date Introduced: 13 March 2002

House: House of Representatives

Portfolio: Attorney-General

Commencement: The day the Child Protection Convention enters into force in Australia

Purpose

To amend the *Family Law Act 1975* so that is consistent with the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* ('Child Protection Convention') thus enabling Australia to ratify that Convention.

Background

The Constitution, treaty-making and implementation¹

The Bill is intended to implement the Child Protection Convention. The executive power of the Commonwealth, found in section 61 of the Constitution, gives the Australian Government the power to enter into international treaties. While Australia is bound in international law to observe the terms of a treaty once ratification or accession has occurred, the treaty does not become enforceable in Australian domestic law unless and until legislative action is taken to implement it.

Section 51(xxix) of the Commonwealth Constitution, the external affairs power, supports legislation dealing with matters physically external to Australia, foreign nations, or which implements an international treaty or convention to which Australia is a party. In 1995, the Senate Legal and Constitutional References Committee described limits to the power in the following way:

5.64 Some limitations have been identified to the scope of the power. The power is subject to:

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a) those limitations that restrict federal power generally including express constitutional guarantees (such as freedom of interstate trade) and implied constitutional guarantees (such as the prohibition on legislation discriminating against the States or preventing a State from continuing to exist and function as such);

b) the requirement that the treaty be genuine or bona fide; and the requirement that a law implementing the treaty be one that can be regarded as a reasonable and appropriate means of giving effect to its object.

5.65 The Attorney-General's Department's submission has indicated that the power extends not only to support a law calculated to discharge Australia's known obligations, but also to those reasonably apprehended. The power may also extend to compliance with the recommendations of international agencies and the pursuit of international objectives which have not been reduced to binding obligations.²

Importantly, as the Senate Legal and Constitutional Committee emphasised in 2000, the power extends to the implementation of treaties and is not confined to the implementation of treaty obligations *per se*.³ The Committee quoted the judgment of Deane J in *Richardson v. Forestry Commission* in which His Honour said:

I am of the view that it is not necessary for a treaty to which Australia is a party to impose an obligation upon Australia as a condition precedent to engaging the external affairs power.⁴

Lastly, a section 51(xxix) law need not implement a treaty in full. Partial implementation will not result in constitutional invalidity so long as the law can be characterised as a measure implementing the treaty.⁵

Australia is not yet a party to the Child Protection Convention. However, the provisions in the Bill that implement the Convention cannot commence until the Convention enters into force - i.e. 3 months after ratification (**Clause 2, item 2 of the table and article 61 of the Convention**).

Treaty-making processes in Australia

In 1996, the Howard Government announced changes to Australia's treaty-making processes.⁶ The reforms introduced in 1996 included the following:

- treaties are tabled in Parliament at least 15 sitting days before final treaty action is taken, except in urgent cases
- a National Interest Analysis (NIA) is tabled with the treaty. The NIA contains a statement of why Australia should become a party to the treaty, describes any foreseeable impact this may have, the obligations contained in the treaty and how it is proposed to implement the treaty, and summarises the views of the States, Territories and any non-government organisations that have been consulted

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- treaties and their accompanying NIAs are considered by the Joint Standing Committee on Treaties which usually reports to Parliament within 15 sitting days.⁷
- The Child Protection Convention and its NIA⁸ were tabled in the Parliament on 12 March 2002. The Joint Standing Committee on Treaties tabled its report on 24 June 2002.⁹

History of the Child Protection Convention

The Child Protection Convention was developed by the Hague Conference on Private International Law to address the problems and limitations of the 1961 *Convention on the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors*. One of the principal difficulties encountered with the 1961 Convention was the fact that it shared competing jurisdiction over the protection of children between the authorities in the child's habitual residence country and in the child's country of nationality, as well as the authorities of the State where the child was actually present. The Convention also failed in cases where the child had dual nationality and there was conflict between the authorities of the two states of the child's nationality. The 1961 Convention was further hindered by the lack of co-operation between national authorities and the absence of provisions for enforcement in one Contracting State of measures of protection taken in another. Australia was never a party to this Convention.

Aims of the Child Protection Convention

The Child Protection Convention aims to address conflicts in jurisdiction between the authorities of different countries in taking measures to protect children¹⁰. It requires contracting states to accept limitations on their jurisdiction in order to avoid conflicts over jurisdictions, applicable law, and recognition and enforcement measures for the protection of children. It also puts in place rules for facilitating cooperation between Convention states.¹¹

The preamble to the Convention states that a primary consideration is to be the best interests of the child and that the provisions are to take account of the Convention on the Rights of the Child.

The objects of the Child Protection Convention, set out in Article 1 are:

- to determine which State has jurisdiction to take measures for the protection of the person or property of the child
- to determine which law is to be applied in the State exercising jurisdiction
- to determine the law applicable to parental responsibility

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- to provide for the recognition and enforcement of measures of protection in all Contracting States, and
- to establish co-operation between the authorities of the Contracting States.¹²

The Convention applies to children under the age of 18 years. The measures of protection which fall within the scope of the Convention include:

- the attribution, exercise, termination or restriction of parental responsibility, as well as its delegation
- rights of custody and access
- guardianship and curatorship
- the designation and functions of any person or body having charge of the child's person or property
- the placement of the child in a foster family or in institutional care
- the supervision by a public authority of the care of a child by any person having charge of the child, and
- the administration, conservation or disposal of the child's property.¹³

The Convention is limited in its scope and does not apply to the establishment or contesting of a parent-child relationship, decisions on adoption, the names of the child, emancipation, maintenance obligations, trusts or succession, social security, public measures of education or health, penal offences committed by children and decisions on the right of asylum and on immigration.¹⁴

Implementation of the Child Protection Convention in Australia

The Child Protection Convention entered into force on 1 January 2002 when in accordance with the rules it had been ratified by three countries namely Monaco, the Czech Republic and Slovakia.

Australia is not yet a party to this Convention. However the implications of ratification have been widely canvassed. A Commonwealth State Working Group was established in 1997 and published two Issues Papers looking at the implications of ratification for State and Territory legislation¹⁵ and for Commonwealth legislation.¹⁶ The Working Group reported in April 1999¹⁷ and proposed amendments to Commonwealth, State and Territory laws. The amendments the Working Group proposed to Commonwealth legislation were incorporated in the Family Law Amendment (Child Protection Convention) Bill 2001 introduced into the House of Representatives on 20 September 2001. However, that Bill had not passed either Chamber before the Parliament was prorogued for the 2001 General

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Election and, consequently, it lapsed. This Bill (ie the 2002 Bill) is written in exactly the same terms as the 2001 Bill.

In addition to this Bill, State and Territory legislation is also required to implement the Convention provisions concerning protection of children from abuse and neglect in international cases.

Benefits of ratification

The Attorney-General in his Second Reading Speech described the benefits of ratification:

ratification of the Convention would be of significant benefit to Australian families, and in particular to children who are the subject of international family law or child protection litigation.

Existing family law litigation across international boundaries is subject to uncertainty as to jurisdiction and unpredictability in relation to the enforcement of orders abroad. The convention attempts to overcome these uncertainties by providing clear jurisdictional rules and by encouraging cooperation between authorities in different countries to protect the best interests of children affected by disputes over parental responsibility.¹⁸

They were summarised in the issues paper on family law as follows:

Ratification of the Convention would have significant benefits for Australia, including:

- clarifying of responsibilities and eliminating conflicts in jurisdiction between Australian and overseas courts in family law and child protection cases;
- ensuring recognition and enforcement abroad of Australian court orders and other measures of protection where appropriate;
- providing mechanisms for child protection authorities in Australia and other countries to co-operate in relation to protective measures for an Australian child abroad, or in relation to a child returning to another country who is subject to Australian protective measures.¹⁹

In the view of the Australian delegation to the Hague Commission the benefits of ratification will be achieved without significant weakening of existing Australian laws.

Australian authorities would have significant latitude to give effect to the Convention in a way that ensured that Australia gained the benefits of the Convention without undermining the operation of existing family and child protection laws in Australia.²⁰

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Financial impact

According to the Explanatory Memorandum to the Bill, ratification of the Convention is not expected to have an impact on Commonwealth expenditure.²¹

Main Provisions

Items 1-24 are consequential amendments to ensure that existing provisions (such as parenting orders²² and location orders²³) are consistent with the new provisions dealing with the Child Protection Convention.

Item 25 inserts a **new Division 4**—'International protection of children' into the *Family Law Act 1975*. This Division, which will give effect to the Child Protection Convention is divided into Subdivisions A-G.

Definitions

New section 111CA is a definitions section relevant to the Child Protection Convention. It includes definitions of 'Convention country', 'country of refuge', 'refugee', and 'parental responsibility'.

Expressions used in the new provisions are to have the same meaning as they have in the Convention (**new subsection 111CA(2)**). Thus the Convention is relevant in determining the meaning of words such as 'child' (article 2), 'measure' (articles 3 and 4), 'urgency' (article 11) and 'public policy' (article 23.2(d))²⁴. It is of note that neither the Bill nor the Convention provide a definition of a key concept 'habitual residence'²⁵.

Conflict of laws

New section 111CB sets out how the Convention, as incorporated in new Division 4, will interact with other provisions in the Family Law Act. The effect of **new subsection 111CB(1)** is that, to the extent of any inconsistency, the provisions in Division 4 will prevail over provisions elsewhere in the Act. This rule is qualified in regard to matters dealing with State child welfare laws and the Hague Convention on Child Abduction 1980.

In relation to state welfare laws, section 69ZK of the Act provides that neither the Family Law Act nor any order under the Act affects State and Territory child welfare law nor the orders made under them. Thus in the event of a conflict between a State child protection order and a parenting order made under the Family Law Act, the former prevails. Similarly, if a State child protection order conflicts with a foreign parenting order registered under the new regulations the State order will prevail (**new subsection 111CB(2)**). However if a State child protection order conflicts with a foreign child

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protection order registered under the new regulations, the conflict must be resolved according to the rules of the Convention (**new subsection 111CB(3)**).

Section 111B of the Act, and the related regulations implement the Hague Convention on Child Abduction 1980. Article 50 of the Child Protection Convention states that in the event of a conflict between the two conventions, the Child Abduction Convention prevails. **New subsection 111CB(2)** confirms this arrangement.

Jurisdiction under the Child Protection Convention

Under Article 5 of the Convention, jurisdiction lies, with a number of exceptions, with the country in which the child is habitually resident.

The concept of the child's habitual residence is central to the issue of jurisdiction and the Child Protection Convention is based on the premise that, in general, the country of habitual residence should continue to have responsibility for making decisions. An example of how the concept of habitual residence might operate in practice could be:

a child resides with the mother in Australia by court order. Australia is the place of the child's habitual residence. The child goes on a contact visit to the father who lives in a country which has ratified the Child Protection Convention, for example the Czech Republic. If the father refuses to return the child and applies to a court in the Czech Republic for custody of the child, the Czech Republic court is prevented from making any final orders.

...if the mother has evidence that the child is at risk of harm from the father's family, then upon request from Australia, the Czech Republic authorities must take protective measures for the child.²⁶

The centrality of the concept of habitual residence in determining jurisdiction flows from the recognition that the authorities in a child's habitual residence are, in general, better able to assess the child's situation and to enforce any orders made for the child's property. This view already underlies the provisions of the Family Law Act and informs many court decisions in Australia when there is a dispute about jurisdiction.²⁷

Habitual residence is not defined in the Convention. This was an issue raised in a recent Senate Committee inquiry into the Bill.²⁸ However, as the Attorney-General's Department explained to the Committee, the term is widely used but not defined in legislation in Australia and overseas. Because the concept is well understood and because it must be flexible, to cover a wide range of situations, it has been considered inappropriate to define it:

Habitual residence is a question of fact to be determined by reference to all the circumstances of a particular case. In relation to a child, relevant considerations include the intention of the parents and the length of time the child has resided in the

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country. The concept must remain capable of application to a wide variety of factual situations and it is unlikely that any exhaustive definition could usefully be devised.²⁹

Subdivision B--Jurisdiction for the person of a child

New section 111CC confirms that the rules of jurisdiction in subdivision B apply only in international situations, that is, in the event of a conflict in jurisdiction between a court in Australia and a 'competent authority'³⁰ in another country. Thus neither the Convention nor Subdivision B applies to conflicts in jurisdiction between Commonwealth and State authorities.³¹

New subsection 111CD(1) implements articles of the Child Protection Convention in relation to the jurisdiction of courts to take measures to protect the person of a child. Thus a family court in Australia may exercise jurisdiction to take measures to protect a child:

- (a) when a child is present and habitually resides in Australia, or
- (b) when a child is present in Australia but habitually resides in another Convention country,³² if:
 - the child requires urgent protection, or
 - the measure is provisional and limited in effect to Australia,³³ or
 - the Australian authorities have been requested to assume jurisdiction by authorities in the child's habitual residence, or
 - such authorities have agreed to the Australian court assuming jurisdiction, or
 - the Australian court has been asked by both parents to take measures in relation to children in the course of divorce or annulment proceedings.

When a child is present in another Convention country a family court may also take protective measures if:

- the child is habitually resident in Australia, or
- the child has been wrongfully removed from Australia, or
- Australian authorities have been asked to act by authorities in the country of the child's habitual residence, or
- authorities in the child's habitual residence agree to the court assuming jurisdiction, or
- Australian authorities have been asked by both parents to take measures in relation to children in the case of divorce or annulment proceedings.

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The court also has jurisdiction to take protection measures in regard to all refugee children present in Australia.

The grounds of jurisdiction listed above are subject to the limitations set by **new sections 111CE, 111CF, 111CG, 111CH, and 111CI**. For example under **new section 111CE** where a child has been wrongfully removed from or retained outside a Convention country a court only has jurisdiction in matters of urgency. The court's jurisdiction is also limited in cases where there are prior proceedings pending in another Convention country (**new section 111CF**), where Australian child protection measures have lapsed (**new section 111CD**), or where a court has asked another Convention country to assume jurisdiction (**111CH**).

The Convention provides jurisdiction to the courts to take urgent measures and provisional measures to protect children who are in Australia but habitually reside in another Convention country (**new subparagraphs 111CD(1)(b)(i) and 111CD(1)(b)(ii)** respectively). These two grounds of jurisdiction are limited and measures taken under them lapse when the authorities in the country of habitual residence have taken the measures required by the situation.

New paragraphs 111CD(1)(e) and (f) confirm that the current arrangements regarding jurisdiction in relation to countries not participating in the convention will continue to apply.

Subdivision C--Jurisdiction for decisions about a guardian of a child's property

The text of the Convention applies equally to protection of the person and protection of the property of the child. **New Subdivision C** of the Bill contains provisions that relate to the jurisdiction of courts to protect the property of a child. To a great extent these provisions replicate the jurisdiction rules that apply to the personal protection of the child as set out in new Subdivision B. The general intention of the amendments is to ensure that the authority of parents as guardians of their children's property will be recognised in Convention countries.

Subdivision D—Applicable law

Article 15 of the Convention provides that in exercising their jurisdiction the authorities of Convention countries are to apply their own internal law, apart from exceptional circumstances where in order to protect the person or property of the child, it may be necessary to take into consideration the law of another State.

New section 111CR implements article 15. It provides that a court must apply the law of Australia when exercising jurisdiction to protect a child, except in exceptional circumstances where it may apply the law of another country if the protection of the child makes this necessary.

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Parental responsibility

The term ‘parental responsibility’ is drawn from the Convention on the Rights of the Child and is complementary to Australian law. It is defined to include parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child.³⁴

Legal systems regulate who shall have parental responsibility, including parental authority. Most systems provide that on birth each parent shall have parental authority, if married, and the mother solely, if not married. Some states, such as Australia, confer parental responsibility on each parent even if they are not married.³⁵ Under article 16 of the Child Protection Convention the law of the child's habitual residence will determine who has parental responsibility by law. Furthermore, under article 17 the exercise of parental authority is also governed by the law of the child's habitual residence, irrespective of whether the habitual residence of the child is a Convention country.

A change of habitual residence of the child will also produce a change of the applicable law. However such a change should not extinguish any parental authority existing under the law of the previous habitual residence (article 16(3)). Thus, assuming Australia were a party to the Convention, the unmarried mother who takes her child from Australia to another Convention country to live (for example England) does not thereby deprive the Australian father of the parental responsibility which Australian law gave him on the birth of the child. The mother could of course apply to an English court, as the forum of the new habitual residence, for an order depriving him of that responsibility. This is permitted by article 18.

Conversely, the unmarried mother who takes her child from England to Australia thereby confers upon the father parental responsibility from the moment the child acquires a habitual residence there, whether the father accompanies them to Australia or not (article 16(4)). The father thereby gains standing before English courts which he did not have under English law and of which the English authorities cannot deprive him.

Article 22 qualifies these arrangements by giving Convention countries the discretion not to apply the articles relating to parental responsibility where it is considered contrary to public policy having regard to the best interests of the child.

New section 111CS incorporates into the Family Law Act these articles of the Convention regarding parental responsibility.

Recognition and enforcement

The basic rule of the Convention is that measures taken by the judicial or administrative authorities of any Convention country must be recognised by operation of law in all other Convention countries. So for example a grandparent who has obtained a custody order in

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one Convention country and who moves with the child to another Convention country does not need to obtain a new order in the second State. These rules are also intended to address problems where one parent moves between countries in order to circumvent court orders relating to parental responsibility, thus forcing the parent seeking to enforce the court order to litigate in the country concerned.

New Sub-Division E deals with recognition and enforcement. According to the Explanatory Memorandum, regulations will regulate the conditions for registration of foreign measures and provide for transfer of Australian measures, such as parenting orders and registered parenting agreements, to other Convention countries for registration and enforcement.³⁶ This is consistent with current arrangements under the Family Law Act and Regulations³⁷ which provide for the reciprocal registration and enforcement of family law parenting orders under arrangements with prescribed overseas jurisdictions.

New section 111CT provides that a registered foreign measure operates as if it were a court order made under the Act and prevails over any prior inconsistent measure in force under the Act.

Co-operation

Chapter V of the Convention deals with co-operation between Convention countries through Central Authorities appointed for each state. The Central Authority will have the function of acting as the point of contact between Convention countries. It will receive information and requests for assistance and channel them to the appropriate authorities. In return it will offer information and make requests to other Convention countries on behalf of child protection agencies in Australia or the Family Court.

In Australia, the Secretary of the Attorney-General's Department is to be the central authority (**subsection 111CA(1)**).

New subdivision F deals with the functions and obligations of the Attorney-General's Department and the court in facilitating contact and cooperation between Convention countries. These functions and obligations include:

- obtaining the consent of the competent authorities in a Convention country before placing a child in foster care (**new section 111CU**)
- advising a Convention country when it considers a child moved to another country is at serious risk (**new section 111CV**)
- providing protection to individuals disclosing information relating to children at risk (**new subsections 111CV(2)-(4)**)
- cooperating with other convention countries on the location of children and implementing measures for their protection (**new subsection 111CX**), and

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- communicating information between authorities as necessary to comply with the requirements of the Convention (**new section 111CY**).

Regulations

Proposed subsection 111CZ(1) provides that regulations may be made under the Act to implement the Child Protection Convention in Australia.

Amongst other things the regulations may:

- specify that the regulations do not affect the operation of State or Territory laws implementing the Convention (**proposed paragraph 111CZ(2)(a)**)
- include a list of Convention countries (**proposed paragraph 111CZ(2)(c)**)
- specify the particular provisions of the Conventions that have the force of law in Australia, (**proposed paragraph 111CZ(2)(b)**), and
- confer jurisdiction on Federal or State courts (**proposed subsection 111CZ(3)**).

Item 26 inserts a **new Schedule 1** at the end of the Act containing the text of the Child Protection Convention.

Concluding Comments

Senate Legal and Constitutional Legislation Committee Report

On 20 March 2002 the Senate Selection of Bills Committee referred the Bill to the Legal and Constitutional Committee to inquire whether it properly meets Australia's obligations under the Convention. The Committee tabled its report on the Bill on 15 May 2002 and concluded that the provisions meet Australia's obligations and accordingly recommended that the Family Law Amendment (Child Protection Convention) Bill 2002 be passed.

The Committee noted:

Australia's existing family law, as it relates to cases with an international element, is consistent with many of the provisions of the 1996 Convention. There are already provisions in the Family Law Act relating to international jurisdiction, applicable law and recognition and enforcement. The rules to be applied under the Convention are similar to those already applied by the Family Court in many cases. This is one of the reasons why the amendments foreshadowed in the Bill have been generally supported.³⁸

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However a small number of outstanding issues was brought to the Committee's attention in submissions and during the public hearing. Two of these matters are mentioned below.

The enforcement of decisions by foreign courts in Australia

The Legal Aid Directors' Secretariat expressed concern to the Committee that decisions by foreign courts or authorities may not serve the best interests of children, in which case they should not be enforced in Australia. The Directors' Secretariat suggested that clause 111CT of the Bill, which deals with the recognition of foreign measures, should be amended to include the provision that:

Any decision affecting a child, made by an authority of a Contracting State, which did not have regard to the child's best interest, shall be deemed to be contrary to public policy and is not enforceable.

The Attorney-General's Department advised the Committee that regulations to be made under new section 111CT will give effect to article 23(2)d of the Convention, which provides that recognition of a Convention measure may be refused if such recognition is manifestly contrary to the public policy of the requested State, taking into account the best interests of the child.³⁹

Conflict between Article 7 of the Child Protection Convention and provisions of the Child Abduction Convention

One submission to the Senate Inquiry suggested that article 7 of the Child Protection Convention which deals with wrongful removal or retention of a child, may have unintended consequences as it interacts with the Child Abduction Convention.

In particular it was suggested to the Committee⁴⁰ that the provisions of the Bill and Convention that deal with jurisdictional issues in relation to wrongful removal of children may be interpreted as indicating that the country of prior habitual residence may still retain jurisdiction (even after proceedings have been heard under the Child Abduction Convention for return of a child and the proceedings have been unsuccessful) and could take contrary measures to those taken under the Child Abduction Convention.⁴¹

In practical terms this could mean, for example, that if a mother successfully defends a Child Abduction Convention application because of the grave risk of harm to her child, the Child Protection Convention may still require subsequent parenting proceedings to be heard in the original country of habitual residence from which she may have fled, thus placing the child at unacceptable risk. The parenting proceedings may result in a different outcome from that achieved under the Child Abduction Convention. In this case all Child Protection countries would be obliged to enforce the Child Protection Convention measures. In this view, a court's refusal to return a child under the Child Abduction Convention should be final.⁴²

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The Attorney-General's Department suggested that the drafters of both the Child Abduction Convention and the Child Protection Convention had not intended a decision on jurisdiction under the Child Abduction Convention to be final.

A decision by the Family Court under the child abduction convention was never intended to be a final decision on the question of appropriate forum - that is, which court is appropriate to determine a custody dispute. It was always open to the parent overseas who was unsuccessful with an abduction convention application to nevertheless go on and litigate custody or try to obtain return of the child by other means.

The Department also argued that:

Any difficulty for an abducting parent overseas, faced with litigating custody in Australia, must be weighed against the same difficulty for the left behind parent in Australia who is currently forced to litigate custody overseas as a result of the wrongful removal.

The Attorney-General's Department concluded:

While some abducting parents may disagree with the approach taken by the drafters of the Child Protection Convention in article 7, Australia's decision to ratify must be based on a balanced consideration of the whole Convention. In particular this consideration must take account of the benefits of ratification of the Convention.⁴³

State legislation required to implement the Child Protection Convention

In addition to this Bill, State and Territory legislation is also required to implement the Convention provisions concerning protection of children from abuse and neglect in international cases. The Queensland Government is currently developing a model Bill that will implement the Convention in State and Territory law.

In their submission to the Treaties Committee, the Queensland Government expressed concern at the introduction of the Commonwealth legislation prior to the completion of the model State/Territory legislation and without consultation with State and Territory Governments. The Queensland Government stated:

Taking binding treaty action prior to the necessary implementing legislation for States and territories being in place is likely to cause considerable legal and administrative difficulties. It would constrain the effective implementation of the Convention in Australia.⁴⁴

In response to this concern, the Treaties Committee in its report encouraged the Attorney-General's Department to consult with Australian States and Territories in relation to the model State/Territory legislation currently under preparation to ensure all Australian legislation is harmonised to ensure effective implementation of the Convention.⁴⁵

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Endnotes

- 1 Much of this segment on treaty making is extracted from the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, *Bills Digest* No. 120, 2001–02.
- 2 Senate Legal and Constitutional References Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1995, pp. 76–77.
- 3 Senate Legal and Constitutional Committee, Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999, 2000.
- 4 (1988) 164 CLR 261 at 313.
- 5 *ibid.*
- 6 ‘Government reform of treaty-making’, *Press Release* (Minister for Foreign Affairs), 2 May 1996.
- 7 Department of Foreign Affairs and Trade, ‘Stages in the development of treaties’, Australia and International Treaty Making Information Kit, <http://www.austlii.edu.au/au/other/dfat/reports/infokit.html> (accessed 23 June 2002).
- 8 Available at: <http://www.aph.gov.au/house/committee/jsct/12March2002/childnia.pdf> (accessed 23 June 2002).
- 9 A copy of the report can be accessed at: <http://www.aph.gov.au/house/committee/jsct/Reports/report46/report%2046.pdf>
- 10 The measures of protection which fall within the scope of the Convention are listed at p. 5.
- 11 House of Representatives *Hansard*, Second Reading Speech, Family Law Amendment (Child Protection Convention) Bill 2002, 21 March 2002, p. 31082.
- 12 Child Protection Convention, Chapter 1, Article 1.
- 13 *ibid*, Article 3.
- 14 *ibid*, Article 4.
- 15 See: http://www.ag.gov.au/aghome/legalpol/cld/int_judicial_asst/international_child_custody/IssuepaperCPCStateandterritorylawsAugust1998.html
- 16 See: http://www.ag.gov.au/aghome/legalpol/cld/int_judicial_asst/international_child_custody/IssuepaperCPCfamilylawSeptember1998.html
- 17 See: http://www.ag.gov.au/aghome/legalpol/cld/int_judicial_asst/international_child_custody/HagueCPCReportofCwlthStateworkingGroupApril1999.html
- 18 House of Representatives *Hansard*, Second Reading Speech, Family Law Amendment (Child Protection Convention) Bill 2002, 21 March 2002, p. 31082.
- 19 Commonwealth/State Working Group, Hague Convention on the Protection of Children. Proposed Amendments to Family Law Legislation, September 1998, p. 10.6.

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- 20 Report of the Australian delegation to the Special Commission – Hague Convention on the Protection of Children, January 1997.
- 21 page 1.
- 22 subsection 65D(1), **item 13**.
- 23 section 67K, **item 14** and section 67M, **item 15**.
- 24 Although the Convention does not actually define these words.
- 25 A further discussion of habitual residence is found on pp. 7–8.
- 26 Jennifer Degeling, ‘The Hague Convention on Protection of Children 1996’, *Australian Children’s Rights News*, 31 December 2001, p. 15.
- 27 Senate Legal and Constitutional Legislation Committee, *Provisions of the Family Law Amendment (Child Protection Convention) Bill 2002*, para 2.35.
- 28 This inquiry is discussed in further detail at pp.12–14.
- 29 Senate Legal and Constitutional Legislation Committee, *Provisions of the Family Law Amendment (Child Protection Convention) Bill 2002*, para 3.18.
- 30 A ‘competent authority’ is an entity that has authority under the law of a country to take measures of protection for the person or property of a child (**new subsection 111CA(1)**).
- 31 This is in keeping with the preamble and article 46 of the Convention.
- 32 The Bill defines ‘Convention country’ as a country other than Australia, for which the Child Protection Convention has entered into force.
- 33 Providing that the measure is not incompatible with a foreign measure already taken by an authority in a Convention Country (**new subsection 111CD(2)**).
- 34 Article 5, United Nations Convention on the Rights of the Child 1989.
- 35 Section 61C of the Family Law Act.
- 36 p. 18.
- 37 Section 70F and Regulations 23, 24, Schedule 1A.
- 38 Senate Legal and Constitutional Legislation Committee, *op cit*, para 3.1.
- 39 *ibid*, para 3.25.
- 40 Legal Aid Directors’ Secretariat Submission.
- 41 *ibid*, para 3.9.
- 42 *ibid*, para 3.10.
- 43 *ibid*, para 3.13.
- 44 House of Representatives Joint Standing Committee on Treaties, *Report No. 46*, para 10.17.
- 45 *ibid*, para 10.22.

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