

## **RESPONSE TO DISCUSSION PAPER: International Parental Child Abduction proposed amendments**

We refer to the Discussion Paper setting out the proposed amendments. We note that the amendments proposed to the *Family Law Act 1975* and the *Child Support (Assessment) Act 1989* are aimed at addressing the wrongful removal or retention with an intended outcome of facilitating a decrease in the number of children wrongfully removed or retained coupled with an increase the number of children returned. We appreciate being provided with an opportunity to provide input into this very significant topic.

Given the limited timelines, our response in this instance will be confined to brief comments on certain aspects of the proposed criminal offence and the suspension of child support.

### **Preliminary Consideration: Our Capacity to Comment (Background)**

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd (“ATSILS”) provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of: Law and Social Justice Reform; Community Legal Education and Monitoring Indigenous Australian Deaths in Custody. As an organisation which for four decades, has practiced at the coalface of the justice arena, we believe we are well placed to comment upon the proposed changes – not from a purely theoretical basis from a platform based upon actual experiences.

### **Criminal Offences for the wrongful retention of a child**

- (i) Consent: The offence of wrongful retention should not apply where consent or authorisation has been revoked (other than in those instances where the consent is withdrawn on reasonable grounds e.g. harm or risk of harm to the child which could include extreme situations such as a civil war in the overseas jurisdiction).

It would be clearly inappropriate for example, for an offence to arise (pursuant to the withdrawal of consent) where consent has been withdrawn for no reason other than pure spite.

- (ii) Geographical jurisdiction: A Category D extension of extraterritorial application of the proposed new offences is appropriate however, whether this is feasible given practical difficulties is problematical.
- (iii) Defences: The defences are appropriate and should be explicit in the *Family Law Act*.
- (iv) Exceptions: Consent or authorisation should be expressly stated as exceptions.

Clearly, there is no guarantee that criminalising the wrongful retention of a child will be sufficient deterrent to a 'taking parent' but it can be hoped that such will assist the situation in some instances.

### **Proposed suspension of child support**

The suspension of child support as proposed appears to be reasonable. This however would spring from a presumption of guilt on the part of the taking parent. We note that recent data shows that 70% of overseas child abductions were perpetrated by women with 88% of these women being the primary carer for the child<sup>1</sup>. In many of these cases, the abductions occurred as a last resort to escape domestic violence with that parent fleeing to protect themselves or children that are too young to protect themselves.

- (i) *Does this proposed power of the Courts provide an appropriate incentive/disincentive for the return of the children?*

It is doubtful such a sanction would have any significant effect on the return rate. Abducting one's own children is a drastic step of last resort. The loss of child support, especially where the amount is not significant, may not be a sufficient deterrent/incentive.

- (ii) *Who should be able to apply for suspension of child support?*

In our view this should be limited to the person who has been assessed to pay child support. The Child Support Registrar, having properly considered the grounds for a payer's

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<sup>1</sup> *Statistical Analysis of Applications made in 2008 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* HCCH Permanent Bureau, November 2011.

application for suspension, should be permitted to make such application as the Child Support Agency would be an affected party in any case. The Registrar may ultimately be in a better position to serve the Respondent.

*(iii) Should the declaration be able to be used in any related criminal proceedings?*

It is assumed that any declaration would be made on findings of fact, but, most likely based on the evidence of the left-behind parent (i.e. in effect an 'ex parte' application). Such evidence might well be biased and certainly not fully tested. Accordingly, any such a declaration might not be fully reliable – especially in criminal proceedings given the serious consequences.

*(iv) Should the Courts be able to suspend child support where there is no obligation to pay?*

In our view the power should cover a situation where the fleeing parent makes application for child support after the abduction.

*(v) Are the situations in paragraph 124 appropriate for making an application to suspend?*

We are of the view that an application should not be accepted in situations where recovery/location orders are sought. This suggests that the abducting party and child are still in Australia which in turn would require the left-behind parent to seek a Commonwealth information order, recovery order, and have the child placed on the Airport watch list.

*(vi) What should happen if the location of the other party is unknown and cannot be served?*

It would appear that this would be the case in the majority of applications. The matter should proceed ex parte. If child support is critical for the fleeing parent, they will no doubt contact the Child Support Agency, and can be served by the Registrar accordingly.

*(vii) Appropriate considerations for the Court.*

The proposed considerations are appropriate.

- (viii) Considerations the court should take into account - Paragraphs 134 & 135 lists the s60CC factors, and suggests no suspension where a person is fleeing domestic violence.

Presumably, this issue will be considered on the evidence of the applicant who will almost certainly never raise issues of domestic violence if they exist (at least where they are in effect the alleged perpetrator of same). The question then arises as to what opportunity the abducting parent has to be heard on this issue involving an interim decision where it is usual for evidence not to be tested:

- The abducting parent, overseas and most likely with no notice or knowledge of such an application, would have little chance to properly present a response or might be too fearful to do so.
- Should the abducting party flee with the child to a non-Hague State can the 'left behind' party make application to have their child support obligation suspended – or, can such suspension only be married to an application for the return from a Hague convention State?
- There appears to be no provision for dealing with suspended child support in the event the application for recovery from the Hague State is unsuccessful or withdrawn. Is the payer liable for those payments which are omitted from being paid during the determination period? In that regard, it is worth noting that 73% of applications for return took over 6 months to be determined<sup>2</sup>.

(ix) *Are the defences appropriate?*

The proposed defences are appropriate.

(x) *Should the order for suspension be at the discretion of the Court?*

Yes, upon proper consideration of all the evidence. Suspension dates must remain discretionary, to allow for interim suspension. This gives the Respondent an opportunity to present their evidence.

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*(xi) Should child support paid in the interim be recoverable? Is this administratively possible?*

In our view the normal rules should apply. Recovery will be from the payee, not from the Child Support Agency. Orders for recovery of child support paid under s143(1) of the Act may need to be sought which will allow the Court to determine whether, on evidence of the financial circumstances of both parties, such an order would be fair and equitable.

I thank you for your careful consideration of this submission and for affording us an opportunity to have input. I also take this opportunity to acknowledge the invaluable assistance provided to me by two of my Brisbane staff members in an earlier draft: Mr William Hayward (Law and Justice Advocacy Development Officer) and Ms Jenifer Ekanayake (Director of Family Law).

Yours faithfully,

Shane Duffy  
Chief Executive Officer  
16<sup>th</sup> March 2012