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CHILD ABDUCTION

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Quatrième réunion de la Commission spéciale sur le fonctionnement de la *Convention de La Haye du 25 octobre 1980 sur les aspects civils de l'enlèvement international d'enfants*
La Haye, 22-28 mars 2001

Informations sur l'ordre du jour et l'organisation de la Commission spéciale
et
Questionnaire sur le fonctionnement pratique de la Convention et avis sur d'éventuelles recommandations
établi par William Duncan, Secrétaire général adjoint

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Fourth Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*
The Hague, 22-28 March 2001

Information concerning the agenda and organisation of the Special Commission
and
Questionnaire concerning the practical operation of the Convention and views on possible recommendations
drawn up by William Duncan, Deputy Secretary General

Document préliminaire No 1 d'octobre 2000
à l'intention de la Commission spéciale de mars 2001

Preliminary Document No 1 of October 2000
for the attention of the Special Commission of March 2001

Permanent Bureau of the Conference . Scheveningseweg 6 . 2517 KT The Hague . Netherlands

Information concerning the agenda and organisation of the Special Commission and Questionnaire concerning the practical operation of the Convention and views on possible recommendations

PART A – INFORMATION CONCERNING THE AGENDA AND ORGANISATION OF THE SPECIAL COMMISSION

INTRODUCTION

1 The first two Special Commissions to review the operation of the 1980 Convention were held in 1989[1] and 1993.[2] The third Special Commission took place from 17-21 March 1997.[3] At that time, there were forty-five States Parties to the Convention of which thirty-five were represented at the Special Commission. In addition, thirteen States which were not at the time Parties to the Convention (seven Member States of the Hague Conference and six other States participating as observers) attended the Special Commission. Four intergovernmental and seven non-governmental international organisations attended as observers.

2 Since 1997 a further seventeen States have become Parties to the Convention, four by ratification or analogous procedure (Belgium, China, (Hong Kong Special Administrative Region and Macau only), the Czech Republic and Turkey) and thirteen by accession (Belarus, Brazil, Costa Rica, Fiji, Georgia, Malta, Moldova, Paraguay, South Africa, Trinidad and Tobago, Turkmenistan, Uruguay and Uzbekistan). At the same time as this process of globalisation, the Convention has become the subject of close scrutiny in several of the States Parties. Commissions and enquiries of various kinds have been established at national level.[4] Academic research and writing on the Convention has proliferated.[5]

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[1] See Overall Conclusions of the Special Commission of October 1989 on the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, *International Legal Materials*, Vol. XXIX, March 1990, p. 219. (See Hague Conference website at: http://www.hcch.net.)

[2] See Report of the second Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, *International Legal Materials*, Vol. XXXIII, January 1994, p. 225. (See Hague Conference website at: http://www.hcch.net.)

[3] See Report of the third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, drawn up by the Permanent Bureau, August 1997. (See Hague Conference website at: http://www.hcch.net.)

[4] See for example, A Report to the Attorney General on International Parental Kidnapping. *Report of Subcommittee on International Child Abduction of the Federal Agency Task Force on Missing and Exploited Children and the Policy Group on International Parental Kidnapping* (USA, April 1999); Government of Canada, *Government's Response to the Fourth Report of the Standing Committee on Foreign Affairs and International Trade* (International Child Abduction: Issues for Reform), November 1998; Belgian Senate, Seminar on the Application of the Hague Convention on the Civil Aspects of International Child Abduction, Report, Brussels, 29 March 2000.

[5] See the bibliography on the Convention on the Hague Conference website at: http://www.hcch.net.

There are now more non-governmental organisations with a special interest in international child abduction.[6] A number of international judicial seminars/ conferences have been held at which aspects of the operation of the Convention have been reviewed.[7] The operation of the Convention has also generated a good deal of publicity in several States, as well as a certain degree of political activity in some.[8]

DRAFT AGENDA FOR THE SPECIAL COMMISSION

3 The proposal of the Permanent Bureau to convene a fourth Special Commission[9] was accepted unanimously by the Special Commission on general affairs and policy of the Conference in May 2000.[10] That Special Commission agreed that the agenda of the Special Commission in March 2001 should concentrate on those aspects of the operation of the 1980 Convention which experience has shown are key to its successful operation, especially those in respect of which there are significant difficulties or differences of approach among States Parties. The following draft agenda was considered and its broad structure agreed to:

[6] For example, the European Network on Parental Child Abduction which includes Reunite (UK), Bortrovade Barns Forening (Sweden), Com. of Missing Children (Germany), Fondation Pour l'Enfance (France), Missing Children International (Belgium), Child Focus (Belgium), CSMEE (France), ICPAC (Ireland), SOS International Child Kidnapping (France). The Network's first conference was held in London on 15 April 1999, and the International Centre for Missing and Exploited Children (ICMEC), launched in Washington, DC, in April 1999.

[7] For example, the Seminar for Judges on the International Protection of Children, held at De Ruwenberg in the Netherlands, 22-25 June 1998 ("De Ruwenberg I"), organised by the Hague Conference, with the support of the Grotius Programme of the European Union, involving 35 judges from 26 States Parties to the 1980 Convention; the Seminar for Judges on the International Protection of Children, held at De Ruwenberg from 3-6 June 2000 ("De Ruwenberg II"), organised by the Hague Conference at the request of the French and German Ministries of Justice, involving nearly 40 judges from France, Germany, Italy and the Netherlands; the Common Law Judicial Conference on International Child Custody, held at Washington, DC, from 17-21 September 2000, organised by the State Department, involving judges, practitioners and Central Authority personnel from the United States, England and Wales, Scotland, Canada, Australia, New Zealand and Ireland, as well as observers from 24 other States; the United Kingdom-Germany Judicial Conference on Family Law, held in Edinburgh 26-28 September 2000 (the third in a series of United Kingdom-Germany judicial conferences).

[8] See for example, *Déclaration Commune des Ministres Français et Allemand de la Justice sur les Conflits Familiaux des Couples Mixtes Franco-Allemand, Avignon, le 6 mai 1998*; Government Resolution by the House of Representatives (the Senate concurring) Urging Compliance with the Hague Convention on the Civil Aspects of Child Abduction, 23 March 2000, 106th Congress, 2nd Session, H.Con.Res.293; Seminar on the application of the Hague Convention on the Civil Aspects of Child Abduction, organised by the Belgian Senate, 29 March 2000.

[9] See Preliminary Document No 6 of April 2000, Note "Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction - Preparations for a fourth Special Commission meeting to review the operation of the Convention and a description of the work currently undertaken by the Permanent Bureau in support of the Convention". (See Hague Conference website at: http://www.hcch.net.)

[10] See Preliminary Document No 10 of June 2000, Conclusions of the Special Commission of May 2000 on general affairs and policy of the Conference, at p. 19. (See Hague Conference website at: http://www.hcch.net.)

(1) The role and functioning of Central Authorities

a resources and capacities;
b the role played by Central Authorities at different stages in the Hague process;
c information and statistics.

(2) Judicial proceedings, including appeals and enforcement issues, and questions of interpretation

a courts organisation;
b provision of legal representation;
c speed of Hague procedures, including appeals;
d manner of taking evidence, especially in relation to the Article 13 defences;
e procedures for hearing the child and determining whether the child objects to return;
f methods and speed of enforcement;
g interpretation of key concepts such as habitual residence, rights of custody, acquiescence, etc.

(3) Issues surrounding the safe and prompt return of the child (and the custodial parent, where relevant)

a safe harbour orders, mirror orders and undertakings, including questions of international jurisdiction and the enforcement of orders;
b criminal proceedings and immigration issues;
c direct judicial communications – their feasibility and limits;
(*d* the role of Central Authorities. See Item 1 above.).

(4) Procedures for securing cross-frontier access/contact between parent and child

a the role of Central Authorities and other intermediaries;
b promoting agreement by mediation, etc;
c jurisdiction, recognition and enforcement in respect of cross-frontier contact.

(5) Securing State compliance with Convention obligations

a the accession process;
b monitoring/reviewing State practice;
c frequency and form of Special Commissions.

(6) Miscellaneous and general

a the role of the Permanent Bureau;
b the International Child Abduction Database (INCADAT);
c judicial (and other) training and networking;
d encouraging further ratifications and accessions;
e non-Hague States and bilateral arrangements.

It should be emphasised that this agenda remains in draft form. There are a number of factors which will influence its final shape and content, in particular the responses received by the Permanent Bureau to this document, including the Questionnaire. It may also be necessary to change the order of some of the items on the agenda. However, the broad idea of discussing first items of particular concern to Central Authorities and subsequently matters relating to the judicial process and enforcement (although clearly these matters cannot be entirely separated) will as far as possible be respected.

PARTICIPATION IN THE SPECIAL COMMISSION

4 All Member States of the Hague Conference and States Parties to the 1980 Convention, have been invited to attend the Special Commission. In addition certain intergovernmental organisations and non-governmental international organisations have been invited to send representatives as observers. It is hoped that delegations will, as usual, include Central Authority personnel and other relevant practitioners. In addition it is expected that there will be greater judicial involvement in the fourth Special Commission, particularly in the discussions concerning the judicial process and judicial co-operation/communications.

PART B - QUESTIONNAIRE CONCERNING THE PRACTICAL OPERATION OF THE CONVENTION AND VIEWS ON POSSIBLE RECOMMENDATIONS

INTRODUCTION TO THE QUESTIONNAIRE

5 The questionnaire which appears below is addressed in the first place to States Parties to the 1980 Convention. It has three broad objectives:

a to seek information concerning significant developments since 1997 in law or practice surrounding the Convention in the different Contracting States;

b to identify current difficulties experienced in the practical operation of the Convention; and

c to test opinion in respect of certain possible recommendations.

6 With respect to *a* and *b* above, it should be emphasised that respondents are also invited to identify and comment upon matters concerning the practical operation of the Convention which are not addressed specifically in the Questionnaire.

7 With respect to *c* above, the Special Commission on general affairs in May 2000 broadly supported the idea that the Special Commission of March 2001 should, subject to the necessary consensus, attempt to arrive at recommendations to improve the practical operation of the Convention. With this in view, and in order to begin to determine in what areas a consensus may exist, the Questionnaire seeks the initial reaction of respondents to a number of possible draft recommendations. It is recognised that some States may not be in a position to comment on all of the recommendations at this stage. Also the right of delegations, alone or in combination, to make alternative or additional recommendations, should be emphasised. In this regard, it would add to the efficiency of proceedings if States could as far as possible give advance notification to the Permanent Bureau of any proposed recommendations, preferably in conjunction with their responses to the Questionnaire.

8 The Questionnaire is also being sent to non-Party Member States invited to attend the Special Commission, as well as intergovernmental organisations and non-governmental international organisations invited to attend. All of these are invited to make such submissions in response to the Questionnaire as they deem to be appropriate. In addition, this document will be posted on the Hague Conference website (www.hcch.net).

9 The Permanent Bureau would be grateful if responses to the Questionnaire could be sent to the Permanent Bureau, if possible in electronic form, ***by 19 January 2001***.

Questionnaire concerning the practical operation of the Convention and views on possible recommendations

(1) The role and functioning of Central Authorities[11]

- ***General questions:***

1 Have any difficulties arisen in practice in achieving effective communication or co-operation with other Central Authorities in accordance with Article 7 of the Convention? If so, please specify.

Communication is a problem with certain countries, making involvement of Australian Embassies necessary. This is an unreasonable imposition on their time and resources of the Embassy. See examples below.

2 Have any of the duties of Central Authorities, as set out in Article 7, raised any problems in practice?

1. **Lack of information or response from Central Authorities (Art 7 i):**
Some Central Authorities take many months to respond to communications regardless of whether they concern an application to or from those countries, or a simple query. Even when the communication is translated into in the language of the other country, these faxes too are often ignored. In certain cases, we have sought intervention by the nearest Australian Embassy to obtain a response but that may also be unsuccessful. (Argentina, Hungary, Portugal, Romania, South Africa, Croatia, Serbia and Montenegro, and Macedonia; Chile).

2. **Lack of assistance to locate a child (Art 7 a):**
The Spanish Central Authority has advised it cannot action those cases where the location of an abducted child is uncertain, and will not look for children as required under Article 7(a) of the Convention. Apart from this, the Central Authority seldom responds to communications from us. As a result, applications to Spain are either referred to a Spanish lawyer or we seek the assistance of the Australian Embassy in Madrid. If an applicant wants private legal representation, and the application has been referred to the Spanish Central Authority, it must be withdrawn from the CA before the lawyer can file the application in the Spanish Court.

3. **Lack of resources to keep each other informed (Art 7 i):**

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[11] Conclusion IV of the first Special Commission called upon States to:

"… give their Central Authorities adequate powers to play a dynamic role, as well as the qualified personnel and resources, including modern means of communication, needed in order expeditiously to handle requests for return of children or for access". (Overall Conclusions of the Special Commission of October 1989 on the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, February 1990, Conclusion IV at p. 45.)

Conclusion 3 of the second Special Commission to review the operation of the Convention was as follows:

"The Central Authorities designated by the States Parties play a key role in making the Convention function. They should act dynamically and should be provided with the staff and other resources needed in order to carry out their functions effectively." (Report of the second Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, June 1993, Conclusion 3 at p. 16.)

Until recently, all correspondence to Italy had to be communicated via the Australian Embassy in Rome as it was impossible to communicate with the Italian Central Authority by fax machines. While this did not cause any significant delay, it is an undesirable imposition on the Australian Embassy. (Italy, Chile)

4. **Lack of legal or administrative framework to implement the Convention (Art 7 f):**

Although Mauritius and Fiji have acceded to the Convention, to our knowledge they have not passed implementing legislation. Therefore they cannot accept any applications under the Convention. (Mauritius and Fiji)

5. **Lack of Legal aid in access cases (Art 7 g):**

Refusal of Legal Aid in England for some access cases causes injustice to some applicants..

- ***Particular questions:***

3 What measures are taken by your Central Authority or others to secure the voluntary return of a child or to bring about an amicable resolution of the issues (Article 7 *c)*)? Do these measures lead to delay?

The requirements of Art 7 c are reflected in Australia's legislation at Reg 13(4) of the Family Law (Child Abduction Convention) Regulations. Reg 13(4) specifies action that must be taken by the Commonwealth Central Authority, which includes seeking:

(a) an amicable resolution of the differences between the applicant and the person opposing return of the child in relation to the removal or retention of the child; and
(b) the voluntary return of the child;

In practice, a decision is made at the time of receipt of the application whether or not it is an appropriate case for voluntary return. Sometimes the applicant also requests that a voluntary return be sought before other action is taken. This process does not usually cause significant delay and will in fact save considerable time in the end if lengthy court proceedings can be avoided. It is usually apparent quite early if the taking parent is using voluntary return negotiations as a delaying tactic, in which case negotiations may be terminated and legal proceedings commenced.

In most cases, including voluntary returns, the Central Authority in Australia will file the Hague application in court in order to obtain ex parte orders to prevent the further removal of the child from Australia, the surrender of passports and similar restrictions. If a voluntary return is negotiated after obtaining these orders, the matter is resolved by consent orders for return. In Queensland, the State Central Authority is more inclined to pursue a voluntary return before filing the application or obtaining holding orders.

In an application for return of a child to England, the abducting parent appealed against an Australian court order for return on the grounds that the Central Authority had not sought an amicable resolution as required by the statute and the Convention. The mother was under police protection because the father had threatened to kill her (*Potier and Director General, DOCS, unreported decision of Ellis, Coleman & Flohm JJ, 26*

May 2000, Sydney).

4 What measures does your Central Authority take to provide or facilitate the provision of legal aid and advice in Hague proceedings, including the participation of legal counsel and advisors (Article 7 *g)*)? Do these measures result in delays in your own jurisdiction or, where cases originate in your country, in any of the requested jurisdictions?

As Australia did not make a reservation under Article 26 of the Convention, applicants seeking the return of a child from Australia under the Convention will not incur any legal costs if the Central Authority conducts the legal proceedings on behalf of the applicant. Furthermore, there are no eligibility requirements for legal representation or assistance for applicants (usually left behind parents, but occasionally an institution). Legal costs will not be paid for applicants who seek the return of a child from Australia under the Convention without the involvement of the Central Authority.

In appropriate cases, other costs associated with the legal proceedings, such as separate legal representation for the child, psychologists' reports, translations, will be met by the Central Authority or the federal legal aid system.

The Australian system is also unusual in offering government funded financial assistance to parents in Australia whose children have been removed from Australia. This financial assistance is means and merit tested, and may cover the cost of legal representation in other countries, travel costs for a child ordered to return to Australia by a foreign court, and travel and related costs for a left behind parent to travel to the requested country to bring an abducted child back to Australia. The scheme does not cover the return travel costs of children wrongfully brought to Australia. This arrangement has sometimes resulted in delays for the Australian parent waiting for approval for financial assistance. For example, the foreign legal representative of the Australian parent usually will not proceed with the application or file it in court until the initial retainer is paid. This is a particular problem in the USA and Israel.

Lack of legal aid and experienced legal representation are the biggest problem faced by parents where children are taken to the USA. Although the NCMEC is extremely helpful in resolving cases and the US system has vastly improved since NCMEC took over incoming cases, major obstacles to a satisfactory resolution of cases remain. California is the exception, and the involvement of the state Attorney General brings a level of speed, efficiency and expertise which is lacking in other states.

5 Does your Central Authority represent applicant parents in Hague proceedings? If so, has this role given rise to any difficulties or conflicts, for example with respect to other functions carried out by your Central Authority?

In Australia, legal proceedings are conducted by the Central Authority and the Central Authority is the applicant in court in return applications. Although it is the State Central Authority which always initiates proceedings, it does so essentially on behalf of the Commonwealth Australian Central Authority. The Commonwealth Central

Authority is therefore bound by the rules given by ministerial directions, which require the Commonwealth to act as a model litigant. For this reason, the Central Authority lawyers do not take instructions directly from the left behind parent in relation to the conduct of the case, but the views and wishes of the left behind parent will naturally be taken into account. The Central Authority lawyers have a duty to the courts as well as a duty to the Central Authority (the client).

This occasionally causes problems for the left behind parent, especially when their case is weak or their evidence lacks credibility. However, in most cases, the system works very well, as the aims of the Central Authority and the left behind parent are identical, ie. to have the child in Australia returned to the requesting country.

This role was explained by Nicholson CJ and Kay J in Laing v Central Authority (1999) FLC 92-849 (Full Court). Kay J supported the view of the Central Authority as an 'honest broker' and likened the Central Authority's role to that of "the Crown Prosecutor who is required to put before the Court matters which might assist the accused as well as matters which might lead to a conviction." He also said that "The Central Authority's role is not to secure the return of the child but to implement the requirements of the Convention".

There is potential for a possible conflict of interest if the Central Authority deals with a parent first as a left behind parent, and later deals with the same parent as a taking or retaining parent. For example, in a recent case in Australia, a father made an application seeking the return of his three children from New Zealand in 1999. He had frequent dealings with the State Central Authority in Queensland. The return application failed on the grounds of acquiescence but the children subsequently came to Queensland for a period of six months. The father did not return the children as agreed with the mother. The mother then applied for the return of the children to New Zealand.

The father objected to the involvement in the mother's application of a Central Authority officer who had dealt with his case for the return of the children from New Zealand, claiming there was a "conflict of interest" as that officer was aware of personal information which could now be used against him, as the Central Authority was now acting on behalf of the mother.

The case gives rise to issues where the Central Authority is on one hand the person's "best friend" and then on the other, something analogous to the prosecuting body against them. However, if the relationship between a left behind parent seeking the return of the children overseas and the Central Authority remains one of member of the public/public servant carrying out their statutory duty, there should not be any conflict of interest.

The limits of the role of government lawyers, in enforcing private rights of individuals in access cases, is also a matter that may require further exploration.

6 What obligations does your Central Authority have, and what measures does it take, to ensure that a child returned to your country from abroad receives appropriate protection, especially where issues

of (alleged) abuse or violence have arisen?[12]

In legislative amendments, which came into effect on 27 December 2000, the *Family Law Act* authorises a Central Authority in Australia to make arrangements to place a child, who is returned to Australia under the Convention, with an appropriate person, institution or other body to secure the welfare of the child pending proceedings in the Family Court to make orders relating to the care, welfare or development of the child. This is a more specific power to take certain action compared to that which already exists in subregulation 5(1)(c) of the Family Law (Child Abduction Convention) Regulations.

[12] Respondents are reminded of the discussions which took place during the third Special Commission (see Report of the third Special Commission, *op. cit.* footnote 3, especially paragraphs 57 to 64 and Annexes I to III). The synthesis of that discussion, as drawn up by the Permanent Bureau (see Annex III), was as follows:

"1 To the extent permitted by the powers of their Central Authority and by the legal and social welfare systems of their country, Contracting States accept that Central Authorities have an obligation under Article 7 *h* to ensure appropriate child protection bodies are alerted so they may act to protect the welfare of children upon return until the jurisdiction of the appropriate court has been effectively invoked, in certain cases.

2 It is recognised that, in most cases, a consideration of the child's best interests requires that both parents have the opportunity to participate and be heard in custody proceedings. Central Authorities should therefore co-operate to the fullest extent possible to provide information respecting, legal, financial, protection and other resources in the requesting State, and facilitate contact with these bodies in appropriate cases.

[3 The measures which may be taken in fulfillment of the obligation under Article 7 *h* to take or cause to be taken an action to protect the welfare of children may include, for example:

a) alerting the appropriate protection agencies or judicial authorities in the requesting State of the return of a child who may be in danger;

b) advising the requested State, upon request, of the protective measures and services available in the requesting State to secure the safe return of a particular child;

[c) providing the requested State with a report on the welfare of the child;]

d) encouraging the use of Article 21 of the Convention to secure the effective exercise of access or visitation rights.]"

The new provisions state:

> A Central Authority within the meaning of the regulations may arrange to place a child, who has been returned to Australia under the Convention, with an appropriate person, institution or other body to secure the child's welfare until a court exercising jurisdiction under this Act makes an order (including an interim order) for the child's care, welfare or development [Family Law Act, section 111B(1C)].
>
> A Central Authority may do so despite any orders made by a court before the child's return to Australia. [Family Law Act, section 111B(1D)]

Regulation 5(1)(c) of the Family Law (Child Abduction Convention) Regulations already imposes a statutory obligation on Commonwealth and State Central Authorities to do everything necessary or appropriate under the Convention to protect the welfare of a child returned to Australia. Subsequently State and Territory Central Authorities have sought orders from the court in a number cases to protect returning children (eg. by putting the child into temporary foster care pending a custody decision by the Family Court).

In addition, Central Authorities in Australia have accepted that they should do what they can to protect children upon return and may be asked to advise a returning parent on access to services such as social security, legal aid, emergency accommodation, domestic violence protection in the State or Territory to which he/she returns. An information sheet with contact details for these services is sent with every new application to a foreign Central Authority.

In particular, does your Central Authority:

a **ensure that appropriate child protection bodies are alerted;**

Yes

b **provide information to either parent in respect of legal, financial, protection and other resources in your State;**

An information sheet with contact details of agencies providing legal, financial and welfare support is provided for every taking parent by the Australian Central Authority as part of the application for return of a child to Australia under the Convention. A copy of the sheet is at Attachment 1.

The Australian Central Authority has also compiled booklets for parents: One for left behind parents entitled *Information for parents of abducted children* and one for taking parents entitled *Information for parents who bring a child to Australia*, which are available on our website (www.law.gov.au/childabduction) or upon request.

c **facilitate contact with bodies providing such resources;**

The Australian Central Authority will facilitate contact between the returning parent and the bodies providing assistance, where possible. For example, where a returning mother and child require accommodation in a women's refuge because of allegations of violence from the husband, the Australian Central Authority will assist with the accommodation arrangements.

d **assist in providing any necessary care for the child pending custody proceedings;**

Yes, the legislation referred to above empowers the Australian Central Authority to take this action

e **provide any other support, advice or information to a parent who accompanies the child on return;**

The Australian Central Authority will assist a returning parent and child if requested or required to do so. For example, if there have been allegations of violence against the mother or child, the Australian Central Authority may arrange for the parent and child to be met at the airport by police and conducted to a safe house.

f provide any assistance in ensuring that undertakings attached to a return order are respected.

The Australian Central Authority would in the first instance try to ensure that any undertakings given to a foreign court by the left behind parent had been made enforceable in Australia by the left behind parent through mirror orders, undertakings or consent orders given to the Australian Court.

If the undertakings were not enforceable, and the Australian Central Authority is aware that a parent has breached a foreign undertaking in Australia, the Australian Central Authority can advise or assist either parent to the extent permitted by its powers and functions.

To my knowledge, the Australian Central Authority's powers to protect the welfare of returning children in Reg 5 have not been used to obtain orders in similar terms to the foreign undertakings, and to do so on matters not concerned with welfare of returning children would be outside the ambit of the Australian Central Authorities powers.

The legislative amendments of the 27 December 2000 have also made provision for the registration of certain foreign Hague Convention orders in Australia, and vice versa. A new section 70F of the *Family Law Act* now includes an order made under the *Child Abduction Convention* as an "overseas child order". This means a convention order made in a "prescribed overseas jurisdiction can be registered in Australia. A new subsection 70M(1) in the *Family Law Act* allows an Australian Hague Convention order to be registered in a "prescribed overseas jurisdiction". The effect of these two provisions is that orders with conditions, or undertakings, can now be registered and enforced in Australia and in "prescribed overseas jurisdictions". At present these jurisdictions are: New Zealand, Austria, Switzerland, Papua New Guinea, and most states of the USA.

7 What arrangements does your Central Authority make for organising or securing the effective exercise of rights of access (Article 7 *f*)?

For more details of access arrangements in Australia see answers to Part 4 onwards.

The Australian Central Authority's powers to organise or secure effective rights of access are set out in Regs 24 and 25 of the Family Law (Child Abduction Convention) Regulations. Reg 25 deals with access applications sent to Australia and states:

(1) A Central Authority may apply to a court for an order that is necessary or appropriate to organise or secure the effective exercise of rights of access to a child in Australia by a person, an institution or another body having rights of access to the child, being:

(a) an order for the issue of a warrant for the apprehension or detention of the child authorising a person named or described in the warrant, with such assistance as is necessary and reasonable and if necessary and reasonable by force, to:

(i) stop, enter and search any vehicle, vessel or aircraft; or

(ii) enter and search premises;

if the person reasonably believes that:

(iii) the child is in or on the vehicle, vessel, aircraft or premises, as the case may be; and

(iv) the entry and search is made in circumstances of such seriousness or urgency as to justify search and entry under the warrant; or

(b) any other order that the Central Authority considers to be appropriate to give effect to the Convention.

(2) A court may, in respect of:

(a) an application made under subregulation (1); or

(b) an answer, or an answer and a cross application, made under subregulation (3);

"make any order in relation to rights of access to a child that the court considers appropriate to give effect to the Convention."

Following the judgment of the Full Court of the Family Court in *Police Commissioner of South Australia v Castell* (1997) FLC 92-752 and its interpretation therein of the access provisions of Australia's implementing legislation, the Family Court of Australia has required, in all Hague access applications to Australia that: (i) the applicant must have a right of access arising from court order or statute; (ii) the right of access must be conferred in another Convention country (ie not Australia); and (iii) there must be a breach of those rights.

As a result of the decision in *Castell*, there were a number of cases where the lack of an access order caused considerable injustice to a foreign applicant. For example, where contact was sought with a child who was not returned after a wrongful removal to Australia, but the left behind parent had no access order. To remedy this situation, the legislative amendments of 27 December 2000 have made provision for Hague access

applications to Australia to be made without a foreign court order or other right of access. It is expected that the necessary regulations will be in place by the time of the Special Commission in March 2001.

In particular, in the case of an applicant from abroad,[13] does your Central Authority:

a **provide information or advice;**

Yes.

b **facilitate the provision of legal aid or advice;**

Yes.

c **initiate or assist in the institution of proceedings, where appropriate, on behalf of the applicant;**

In Australia, the same arrangements for legal representation for foreign applicants apply to access applications as apply to return applications (see answer to Q5 above). However, the legislation in Australia has been interpreted by the court (in *Castell, Reissner* and others) to mean that the rights of access in reg 25 are those already established in another Convention country, that reg 25 does not confer standing on the Central Authority to establish those rights; and there must be a breach of those rights. This had led the Australian Central Authority to reject a number of access applications because they did not meet the legal requirements in Australia.

There have also been difficulties in a small number of cases where the left behind parent or non-custodial parent had a right of custody by court order but not a right of access. The court in Australia did not accept the arguments of the Australian Central Authority that a right of custody was a larger bundle of rights, which must, by its very nature, incorporate a right of access. *(Director General, NSW Department of Community Services v Odierna, unreported decision of Lawrie J, Sydney, 17 March 2000)*

To remedy this situation, the legislative amendments of 27 December 2000 have made provision for Hague access applications to be made without a foreign court order or other right of access. It is expected that the necessary regulations will be in place by the time of the Special Commission in March 2001.

As can be seen from the regulations, the Australian Court is empowered (but not obliged) to make substantive access orders under the regulations which implement the Convention, rather than under the normal domestic law provisions dealing with contact

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[13] In answering these questions please distinguish where appropriate between:

a applications pending return proceedings;

b applications following a refusal to return a child;

c applications not made in connection with other proceedings; and

d applications to modify existing access orders.

Please note also that the term "access" should be read as including all forms of contact.

arrangements with children. This sets Australia apart from many other State Parties to the Convention, where the terms of the Convention itself are implemented into the internal law of the Country and Article 21 has been interpreted as only requiring and empowering a Central Authority to assist an applicant to make a contact/access application under domestic law provisions dealing with these matters, i.e. Article 21 does not empower the making of substantive orders. The Australian regulations therefore give "added teeth" to the organising and securing of rights of access in cases which do meet the criteria set out in the regulations.

d **assist in ensuring that the terms or conditions on which access has been ordered or agreed are respected;**

In Australia, the leading authority on the Convention access provisions is the 1999 case of *Director General, Department of Family Youth and Community Care v Reissner* [1999] FamCA 1238; (1999) FLC 92-862 . In that case an American grandmother had an American court order for contact with her grandson in Australia. As the American order had been made recently and in contemplation of the child's move from USA to Australia, the court in Australia had no hesitation in making orders to uphold and enforce the terms of the American order.

The case is now back in court in Australia as the applicant claims the custodial parent is in breach of the Australian court orders by obstructing contact. The Australian Central Authority has not previously had to seek enforcement of orders it obtained under an earlier Hague access application so there are some novel challenges in this matter. The Australian Central Authority does not intend to file a new Hague access application, as this would leave it open to the court to vary the existing orders. Instead, the Australian Central Authority will rely on the "enforcement of orders" provision in the Family Law Act to enforce existing orders.

e **assist in cases where modification of existing access provisions is being sought.**

Yes, the Australian Central Authority will assist in bringing an access application to modify or vary existing foreign orders. However, there has been no consistent legal authority in Australia on Hague access matters to define the powers of the court to deal with foreign orders. The leading case of *Castell* concluded that foreign access orders need to be "respected" and the decision in *Reissner* put this into effect by essentially making Australian orders in similar terms to the foreign orders, with some variation for changed circumstances since the making of the foreign orders.

In an interesting case involving an access application to Australia from France, the father had a court order for contact with the children in Australia. After the application was filed in court in Australia, the father won an appeal in France against the decision allowing the mother to take the children to Australia, and he was awarded custody. In view of the difficulties described in (c) above, the basis of the Hague access application was arguably the original access order. The matter was resolved by consent orders between the parents. The consent orders were rather different to the father's French contact orders.

As the legislative amendments of 27 December 2000 will permit the court to make contact orders where none existed before, the problems of the past described here should no longer affect access applications.

8 Please comment on any developments in relation to the maintenance of statistics concerning the operations of your Central Authority. Has your Central Authority been able to return to the Permanent Bureau annual statistics in accordance with the Hague standard forms? If not, please explain why?

Australian statistics are collected on a financial year basis ie. 1 July to 30 June. Following the statistical survey of Professor Lowe, Australia now has in place a procedure for reporting our statistics to the Permanent Bureau on a calendar year basis. This should make it easier in future to comply with Hague requirements.

It appears from our records that statistics have been sent in some years but not others. This may have been due to the lack of a clear management and procedural policy in the past, but we expect that the problem has now been rectified.

9 Can you affirm or reaffirm, as the case may be, support for the conclusions reached by the first, second and third Special Commissions, as set out in footnotes 11 and 12?

Australia reaffirms its full support for the conclusions of the first, second and third Special commissions set out in footnotes 11 and 12.

10 Would you support any other recommendations in respect of the particular functions which Central Authorities do or might carry out, especially with regard to the matters raised in questions 6 and 7 above?

Recommendations to give some meaningful effect to the obligation in Article 7h to protect the welfare of returning children are:

(i) Contracting States should encourage the use of "mirror orders" in their respective jurisdictions to give some protection to the welfare and rights of a returning parent and child. Each Contracting States should prepare an Explanatory Document for the benefit of other countries to explain how the "mirror orders" can be made and enforced in the Contracting State.

(ii) Contracting States should provide a summary of the details of child protection and welfare agencies in their country and the Central Authority should send it with every application for return of a child. The Australian model is one example of such a summary.

Recommendations to give some meaningful effect to the obligation in Article 21 in relation to access:

(i) Contracting States should consider a protocol to the Convention to alter the word "may" to "must" in the 3rd paragraph of Article 21, thereby imposing a binding obligation on Central Authorities to initiate legal proceedings for access where necessary.

(2) Judicial proceedings, including appeals and enforcement issues, and questions of interpretation[14]

1 How many courts and how many judges potentially have jurisdiction to hear an application for the return of a child? If there is more than one level of jurisdiction at first instance, please specify the number of courts and judges for each level.

Australia is a federation consisting of the Federal government, the governments of the six States and the governments of the Australian Capital Territory and Northern Territory. Both the Federal government, and the governments of the various States and Territories exercise distinct judicial power.

The judicial power of the Commonwealth is exercised by the High Court, which sits at the apex of all of the court systems in Australia, and is equivalent to the United States Supreme Court and the United Kingdom House of Lords, and by federal or state courts. Relevantly, within the federal system there exists the Family Court of Australia and, as and from July 1 2000, the Federal Magistrates Service. Within the state systems for these purposes there exists the Family Court of Western Australia and the Magistrates Courts of the various States and Territories.

Jurisdiction to deal with proceedings instituted under the Convention Regulations is invested in the Family Court of Australia, in the Federal Magistrates Service, in the Family Court of Western Australia and in the various courts of summary jurisdiction. As a matter of practice Convention applications are not dealt with by courts of summary jurisdiction.

The Family Court of Australia has original jurisdiction throughout Australia (other than in the State of Western Australia) and appellate jurisdiction throughout Australia. Including the judges of the Family Court of Western Australia who hold a dual commission, there are approximately 54 judges, including the Chief Justice.

The judicial power of the Family Court of Australia in Convention applications may also be exercised by 7 Judicial Registrars, who do not hold the equivalent permanent appointment of a judge. Accordingly, they exercise the delegated power of the judges and their decisions are subject to an automatic rehearing if either of the parties seek same. Whilst the Judicial Registrars have the power to make orders in Convention cases, the jurisdiction is generally exercised by the Judges rather than the Judicial Registrars.

The Federal Magistrates Service has been operating for six months since it began hearing cases on 3 July 2000. The Service operates in every capital city and some regional centres. To date 15 federal magistrates have been appointed including the Chief Federal Magistrate. Federal magistrates are appointed as judicial officers under Chapter III of the Constitution and can exercise judicial power within their jurisdiction.

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[14] Delay in legal proceedings has long been identified as a major cause of difficulties in the operation of the Convention. For example, the second Special Commission called upon States Parties to make "all possible efforts … to expedite such proceedings.") (Report of the second Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction, June 1993, Conclusion 7 at p. 18.)

The magistrates can transfer matters of complexity to the Family Court, and, apart from making preliminary holding orders, it is likely that a magistrate will not hear a Hague Convention application where a Family Court judge is readily available to do so.

The State of Western Australia has its own Family Court. The five judges of that Court hold dual Federal and State commissions. There are magistrates of the Family Court of Western Australia, and whilst they have jurisdiction to deal with Hague cases, their situation is not unlike the Federal Magistrates in that they may make holding orders but where there is a judge of the Family Court of Western Australia available to hear the Hague matter then the matter would be heard by that judge.

2 Do you have any special arrangements whereby jurisdiction to hear return applications is concentrated in a limited number of courts? Are such arrangements being contemplated?

Whilst jurisdiction to deal with proceedings instituted under the Convention Regulations is invested in the Family Court of Australia and the Family Court of Western Australia as well as the various courts of summary jurisdiction, as a matter of practice Convention applications are not dealt with by courts of summary jurisdiction.

In practice, jurisdiction is already restricted to the Family Court of Australia and the Family Court of Western Australia.

3 What measures exist to ensure that Hague applications are dealt with promptly (Article 7) and expeditiously (Article 11)?

The obligation to act promptly and expeditiously is reflected in Subregulations 15(2) and (4) of the Family Law (Child Abduction Convention) Regulations. Subregulation 15(2) provides that a court must, so far as practicable, give to an application such priority as will ensure that the application is dealt with as quickly as a proper consideration of each matter relating to the application allows.

Regulation 15(4) provides:

> (4) If an application made under regulation 14 is not determined by a court within the period of 42 days commencing on the day on which the application is made:
>
> (a) the responsible Central Authority who made the application may request the Registrar of the court to state in writing the reasons for the application not having been determined within that period; and
>
> (b) as soon as practicable after a request is made, the Registrar must give the statement to the responsible Central Authority."

In turn, Regulation 14 provides for the making of applications to the court for the following orders:

"(1) In relation to a child who is removed from a convention country to, or retained in, Australia, the responsible Central Authority may apply to a court in accordance with Form 2 for:

(a) an order for the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention; or

(b) an order for the issue of a warrant for the apprehension or detention of the child authorising a person named or described in the warrant, with such assistance as is necessary and reasonable and if necessary and reasonable by force, to:

(i) stop, enter and search any vehicle, vessel or aircraft; or

(ii) enter and search premises;

if the person reasonably believes that:

(iii) the child is in or on the vehicle, vessel, aircraft or premises, as the case may be; and

(iv) the entry and search is made in circumstances of such seriousness or urgency as to justify search and entry under the warrant; or

(c) an order directing that the child not to be removed from a place specified in the order and that members of the Australian Federal Police are to prevent removal of the child from that place; or

(d) an order requiring such arrangements to be made as are necessary for the purpose of placing the child with an appropriate person, institution or other body to secure the welfare of the child pending the determination of an application under regulation 13; or

(e) any other order that the responsible Central Authority considers to be appropriate to give effect to the Convention."

Because of the small number of Judicial Officers involved and the high profile nature of Convention proceedings, the Court is extremely conscious of the urgency issues involved in Hague proceedings and generally endeavours to provide to such

proceedings as much priority as the court lists will allow and as the due process requirements can tolerate.

Generally, it means that holding orders can be made on the same day the application is made and that a hearing for return can be fully determined within 2 or 3 weeks of the parties both first appearing before the court.

If an appeal is then instituted, every endeavour is made to obtain the earliest possible hearing date, which, subject to the logistics of the preparation of the necessary documents for the appeal books, could be as early as one week after the appeal has been filed, but would generally likely to be within one or two months of that time. Depending then on the complexity of the issues raised and other pressures on the members of the appeal court, a judgment can either be delivered on an ex tempore basis immediately upon the conclusion of the hearing or within several days after the matter has been heard. In some cases, however, because of complexity, as well as other obligations of the judicial officers involved, the delivery of judgment is delayed for several weeks or, on rare occasion, a few months. Unfortunately, appeals to the High Court are more time consuming. The cumulative delays, sometimes coupled with the fact that proceedings can be brought up to a year after the abduction, often dramatically cool down the hot pursuit nature of the Convention.

In particular:

a **is it possible for the application to be determined on the basis of documentary evidence alone?**

It is usual for applications in Australia to be determined on the basis of documentary evidence alone.

Evidence in the Family Court of Australia is generally by way of affidavit with a right of cross-examination in certain limited circumstances. In addition, the application and answer and cross-application utilised in proceedings are sworn documents and as such the matters of fact contained in them can be used as evidence.

Decisions in both the High Court of Australia and the Family Court of Australia have recognised that in most cases, cross-examination is not appropriate and is rarely allowed (see *Gazi v. Gazi* (1993) FLC 92-341, *Hanbury-Brown* (1996) FLC 92-671, *Director-General, Department of Families, Youth and Community Care v. Bennett* [2000] FamCA 253, *DeL v. Director-General, New South Wales Department of Community Services* (1996) FLC 92-706). It is therefore extremely unusual for the left behind to be required to attend the hearing of the matter. Attendance would only be required where there is a need to cross examine them to resolve inconsistencies or contradictions contained in affidavit evidence.

b what special measures/rules exist to control or limit the evidence (particularly the oral evidence) which may be admitted in Hague proceedings?

Regulation 29 of the Convention Regulations provides for the admissibility of an application, attachments to, and other documents forwarded in support of, that application as evidence of the facts stated in the application or document. In addition, affidavits of witnesses outside Australia are admissible despite non-attendance for cross-examination.

In *Regino and Regino*(1995) FLC 92-587, Lindenmayer J commented on the difficulty the court faced in Hague matters in deciding matters on the documents alone. He said:

> 39. The resolution of the crucial factual issue in this case, which I have earlier identified, essentially involves a determination by me of the relative credibility of the parties' conflicting accounts of the events immediately preceding the wife's departure from the United States with M on 25 November, 1993...
>
> 40. Before attempting that resolution, it is appropriate to acknowledge that it is particularly difficult for any court to resolve contested issues of fact on the basis of affidavit evidence only where the court does not have the opportunity, which the taking of viva voce evidence provides, of seeing and hearing the witnesses give their evidence and thus being able to assess their credibility in the light of their demeanour and general consistency, particularly when subjected to a searching cross-examination in the forensic context. Nevertheless, in a case such as this, where, by the very nature of the proceedings, one of the parties resides overseas, and it is therefore impracticable to secure his or her attendance before the court to give oral testimony, the court must necessarily undertake that difficult task and do the best it can to resolve the factual issues upon the material which is before it. In doing so, I believe that the court must be cautious not to unfairly disadvantage the absent party by presumptively giving greater credit to the testimony of the other party who happens to be within the jurisdiction and before the court.

The Full Court in *Hanbury-Brown and Hanbury-Brown,* (1996) FLC 92-671 at 82,947 was critical of the fact that "everyone involved in those proceedings lost sight of the intended summary nature of the proceedings and both the husband and the wife (the latter of whom attended the hearing from the United States) were subjected to quite substantial cross-examination, as indeed were the deponents to two other affidavits read in the proceedings. As a consequence, the hearing extended over 2 full sitting days of the Court. This Court has said previously (e.g. in *Gazi & Gazi* (1993) FLC 92-341 at 79,623) that in most cases arising under the Convention, cross-examination of deponents to affidavits is not appropriate. The Courts of the United Kingdom have adopted a similar approach: see In *Re F* (minor: abduction: rights of custody abroad) [1995] 3 All ER 641 at 647-8, per Butler-Sloss, LJ, citing In Re F [1992] 1 FLR 548 at 553-4. We do not regard this case as having warranted such a substantial departure from that general rule as in fact occurred."

c who exercises control over the procedures following the filing of the application with the court and prior to the court proceedings, and how is that control exercised?

In Australian legal proceedings conducted by the Central Authority, it is the State or Territory Central Authority which is the applicant to the proceedings in court. Where the Australian Central Authority receives and accepts an application it is forwarded to the Central Authority of the State or Territory where the child is thought to be. The State Central Authority usually briefs its Crown Law Office to conduct the proceedings, although it may also brief a barrister or counsel experienced in Hague matters.

The State/Territory Central Authority liaises closely with the (Commonwealth) Australian Central Authority over the conduct of the proceedings. The Australian Central Authority is generally responsible for liaison with the foreign Central Authority to obtain the evidence and necessary documents of the foreign parent for the proceedings.

d what appeal is possible from the grant or refusal of a return application, within what time limits do appeals operate, on what grounds and subject to what limitations?

Appeals from a Judge of the Family Court of Western Australia or the Family Court of Australia or from a magistrate in the Federal Magistrates Service are heard by the Full Court of the Family Court of Australia. Including the Chief Justice, there are seven judges who comprise the Appeal Division of the Family Court of Australia. The powers of the Full Court are normally exercised by three judges sitting together. The appeal bench must have at least two members of the Appeal Division on it.

The Full Court sits throughout Australia, with sittings taking place somewhere in Australia approximately on a fortnightly basis.

The appeal is not a hearing de novo and further evidence may only be admitted by leave of the court. The powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error.

The time limit for making an appeal to the Full Court is set out in the Family Law Rules as being one month after the day on which the decree appealed from was made. An application to appeal "out of time" may also be made to a Judge of a court having jurisdiction under the Family Law Act.

Appeals from the Full Court of the Family Court of Australia are heard by the High Court, either by special leave of the High Court or by a certificate from the Family Court of Australia that the matter involves an important question of law or of public interest. There has only ever been one certificate granted by the Family Court in respect of a Hague matter, and the High Court has granted special leave in respect of two other Hague matters.

4 In what circumstances, and by what procedures/methods, will a determination be made as to whether a child objects to being returned?'

Where a party has raised the child's objections as an issue in proceedings the Court will usually require a report to determine the child's views. Regulation 26 of the Convention Regulations provides that the Court may direct a family and child counsellor or a welfare officer to report on any matter relevant to the proceedings and may adjourn the proceedings until that report is made. Until recently a separate representative has also usually been appointed for the objecting child, but following the legislative amendments of 27 December 2000, a separate representative can now only be appointed in "exceptional circumstances". This is an attempt to minimise the unnecessary delay which has been experienced by the routine involvement of a child's separate representative in Hague cases. The Queensland State Central Authority has successfully avoided the appointment of a child's representative in the vast majority of cases where a child's objection is the only basis for the appointment of a separate representative, upon the basis that a report is sufficient.

The judge may interview the child in chambers.

The weight given to a child's objection to returning to their country of habitual residence will depend on the age and maturity of the child and the nature of the child's objection. For example, the court held that a child aged 6 is not of an age at which it is appropriate for the court to take account of her views: *Re Bassi* (1994) FLC 92-465.

Where a mature child objects to return, and the court is satisfied that the child objects, the court may nevertheless order the child to return to uphold the purpose of the Convention. In those cases, counselling has been provided to assist the child to accept the decision of the court to order the child's return: *Turnbull v Director General, NSW Department of Community Service*s, unreported decision of Justice Boland, 5 October 2000, Sydney [child of 12 objected violently to return to USA]; *Director General, Department of Families, Youth and Community Care Queensland v Lutzenkirchen (deceased)*, unreported decision of Justice Warnick, 21 September 2000, Brisbane [child of 15 whose taking parent/custodial parent died in Australia, objected to return to Germany] ; *Director General, NSW Department of Community Services v Straub*, unreported decision of Justice Moss, 12 November 1999, Sydney [one of 2 children was of an age and maturity to object to a return to Germany but the other was not].

In what circumstances in practice will the objections of the child be held to justify a refusal to return? (Please indicate the statutory basis, if any.)

The phrase "objects to being returned" in Regulation 16(3)(c) was considered by the High Court in *De L v Director-General New South Wales Department of Community Services* (1996-97) 187 CLR 640. The majority in that case took the view that the policy of the Convention is not compromised by hearing what children have to say and by taking a literal view of the term "objection" because it remains for the Court to make the critical further assessments as to the child's age, maturity and whether in the circumstances of the case the discretion to refuse return, on the basis of the child's

objection, should be exercised.

In *De L* the rule in the English case of *Re R* that a strength of feeling or more than a mere preference was required in an objection was not followed. The recent amendments to the Family Law Act of 27 December 2000, will ameliorate the effect of the decision in *De L* and the higher standard for the meaning of "objects" in *Re R* will be restored. The new legislation provides that:

> The regulations made for the purposes of this section must not allow an objection by a child to return under the Convention to be taken into account in proceedings unless the objection imports a strength of feeling beyond the mere expression of a preference or of ordinary wishes. [Family Law Act, section 111B(1B)]

The objection must be an objection to being returned to the country of the children's habitual residence, not to living with a particular parent, although children need not articulate their objection in this manner: *De Lewinski v Director of Community Services* (1997) FLC 92-737 at 83,939,

Circumstances in which an objecting child has nor been returned include:

- 13 and 6 year old not returned-The wishes of eldest child were respected not to return-because of the extreme violence from father, psychological harm would be caused to the if 6 year old if he returned alone (Bassi (1994) FLC 92-465)
- a 13 year old displayed suicidal tendencies at the prospect of return to the requesting parent and this with other factors contributed to a finding that he had the appropriate age and maturity*: Director General, Department of Community Services NSW v Odierna* (unreported decision of Rose J, 5 March 1999, Sydney).

5 Where the person opposing return raises any other defences under Article 13 or Article 20, what are the procedural consequences? What burden of proof rests on the defendant? Does the raising of defences under Articles 13 or 20 in practice lead to delay? What measures, if any, exist to reduce such delay to a minimum?

In relation to the defences to return in Articles 13 and 20, the Australian legislation places the onus of proof on the person opposing return. The burden of proof required to be proved is the civil standard of proof, that is, on the balance of probabilities.

The raising of defences to return frequently leads to delays prior to the hearing of the matter in court. After the defendant files a response to the application for return. outlining his/her defences for return, the Australian Central Authority has encountered any number of the following difficulties which cause delays:

(1) the left behind parent must respond to the defendant's arguments opposing return. The court must allow a reasonable period of time for this process.

(2) The left behind parent may not speak English and all documents need to be translated into the language of the left behind parent;

(3) The left behind parent who has no legal adviser in the requesting country may lack the education to respond appropriately to the allegations, in a form acceptable to the

court (ie. by sworn statement).

(4) The left behind parent may not be contactable by fax or email and so documents from Australia to the requesting Central Authority have to be sent and returned by post in the requesting country.

(5) The left behind parent may not respond adequately to the allegations and an adjournment may be necessary while additional material is obtained;

(6) If the defendant is late in filing a response, the left behind parent may have insufficient time to respond and an adjournment is necessary;

(7) In Australia, as the Central Authority represents the left behind parent, the Central Authority will be criticised by the Court for inadequate documentation in the application. It will also be criticised for any protracted delays in the legal proceedings.

An recent example of delay arising from the assertion of the grave risk defence has occurred in the case of *P and Commonwealth Central Authority* (Nicholson CJ, Buckley and Kay JJ, 19/5/00)

The mother brought the child from Greece to Australia in December 1998 and the father applied for the return of the child on 4 June 1999. Following confirmation of the abducting mother's whereabouts, the application was referred to the Northern Territory's Central Authority on 5 July 1999 with a request for a possible voluntary return. The application was filed in the Family Court of Australia at Darwin on 4 August 1999, and the exparte orders made on 6 August 1999.

Following failure of the voluntary return negotiations, the application came before the Family Court on 21 September 1999, but adjourned to 7 October 1999 because the Judge examining the application queried the father's rights of custody at the time of the child's removal from Greece. The matter was further adjourned to 18 November pending the arrival of additional evidence from Greece. The additional evidence was filed on 15 November 1999.

The mother opposed return on the basis that: the removal was not wrongful as the father was not exercising custody; and there was a grave risk of psychological harm to the child who is autistic and benefiting from treatment in Australia. In considering his decision following the 18 November hearing, the Judge in question asked for draft orders that provided for certain undertakings from the father, which he agreed to, to be drawn up. On 23 December 1999 the child was ordered returned to Greece, and the reasons for judgment given. . The mother appealed.

A notice of appeal was filed on 11 January 2000. On 13 January 2000, the mother's application for a stay of the return orders pending the outcome of the appeal was granted. The appeal to the Full Court of Australia was listed for hearing on 9 February 2000. The Full Court reserved its decision, seeking additional submissions on the exercise of the discretion to return if it was found that the mother had established an exception to return. On 19 May 2000 the appeal was dismissed. The mother made an immediate application for a stay of the orders. Reasons for judgment were provided on 29 May 2000. On 16 June 2000 the mother filed application for Special Leave to appeal to the High Court of Australia. The Special Leave application was listed for 24

November 2000, and granted that day. An appeal must now be filed in the High Court before a date can be set for the hearing. However, it is likely that it will be at least another 6 months before the matter is resolved, after 2 years and 1 month from the date of removal.

6 Please specify the procedures in place in your jurisdiction to ensure that return orders are enforced promptly and effectively? Are there circumstances (apart from pending appeals) in which execution of a return order may not be effected. Do return orders require separate enforcement proceedings? Is there appeal from such proceedings? Are such enforcement procedures routinely invoked, and are they successful in achieving the enforcement of return orders?

In proceedings for the return of a child from Australia, the Convention Regulations refer to numerous orders that a Central Authority can seek from a court, including the ability to seek "…any other order that the responsible Central Authority considers to be appropriate to give effect to the Convention…" (Reg. 14(1)(e)).

Initial holding orders obtained by the Central Authority include orders to surrender passports or an order for the issue of a warrant for the apprehension and detention of the child. Warrants are executed by the Australian Federal Police and by the police of the various State police forces. The Australian Federal Police has special officers designated to look after family law matters. They are generally very diligent and take their task seriously. There have been a few highly publicised cases where through very persistent police work the whereabouts of missing children has been discovered after many months. Police can be authorised to have access to various Commonwealth and State data bases to assist in the search for any missing children.

Before or after a return order has been made by the Court, if there is a fear that a parent may abscond, the Court may direct the parent to report daily to the police, or direct that the child be taken into protective care.

Return orders are usually very specific, and may include such details as flight time and number, date, departure point, how and when passports are to be returned.

At the time of departure, a person from the Central Authority or the Australian Federal Police will, if necessary, escort a parent and child to the airport to hand over passports or to ensure that they board the prescribed flight.

Execution of a return order may not be effected immediately or at all if:

- following a drawn out appeal process, orders for return have been made but by that time the requesting parent has either lost interest or is unable to comply with any conditions which may have been imposed on the return;
- the requesting parent has not complied with undertakings; if the requesting parent has indicated a change of mind about enforcing return; or
- if the requesting parent cannot be located.

There is a general tendency to allow a stay of orders pending appeal on the basis that

the subject matter of the appeal needs to be preserved and the failure to grant a stay may render the appeal process nugatory.

Separate enforcement proceedings for return orders are not necessary if there is a warrant to take possession of the child, and the court or Central Authority holds the passports of the parent and child. The usual procedure is for detailed orders to facilitate the return to be sought at the same time as the return order itself. The return orders usually permit the Central Authority to return to court at short notice for further orders if necessary.

One particular difficulty faced by the Australian Central Authority arises when the requesting parent is unable or unwilling to fund the return trip of the child and the taking parent. Airfares to and from Australia can be expensive. If neither parent can pay for the return of the child once a return order has been made by the court, the order is in a practical sense unenforceable, unless the requesting country provides the necessary funds.

7 Would you support any of the following recommendations?

a **calling upon States Parties to consider the considerable advantages to be gained from a concentration of jurisdiction in a limited number of courts.** [15]

Yes – the English system of concentration of jurisdiction is a model of efficiency, well suited to a small geographic area. The Australian model, of concentration of jurisdiction in one federal court, is well suited to a federated State with a large geographic area.

b **underscoring the obligation of States Parties to process return applications expeditiously, and making it clear that this obligation extends also to appeal procedures.**[16]

Yes. But there must be recognition of the fact that the ability of a requested country to process an application quickly may be adversely affected by poor or inadequate applications and supporting documents sent by the requesting country.

c **calling upon trial and appellate courts to set and adhere to timetables that ensure the speedy determination of return applications.**[17]

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[15] See, for example, Conclusion No 4 of the "De Ruwenberg II" Judicial Seminar (footnote 7, above):

"It is recognised that, in cases involving the international protection of children, considerable advantages are to be gained from a concentration of jurisdiction in a limited number of courts/tribunals. These advantages include the accumulation of experience among the Judges and practitioners concerned and the development of greater mutual confidence between legal systems."

This conclusion was supported by the judges present at the Washington Judicial Conference (footnote 7, above).

[16] See, for example, Conclusion No 2 of the Washington Judicial Conference:

"Prompt decision-making under the Hague Child Abduction Convention serves the best interests of children. It is the responsibility of the judiciary at both the trial and appellate levels firmly to manage the progress of return cases under the Convention. Trial and appellate courts should set and adhere to timetables that ensure the expeditious determination of Hague applications."

[17] See above, footnote 16.

Yes

d calling for firm judicial management, both at trial and appellate levels, of the progress of return applications.[18]

Yes

e calling upon States Parties to enforce return orders promptly and effectively.[19]

Yes

f recommending that the "grave risk" defence under Article 13 should be narrowly construed.[20]

Yes

g proposing any other measures (please specify) to improve the efficiency and speed with which applications are processed and orders enforced.

If Central Authorities provided more assistance in having documents translated, some applicants would not be disadvantaged by both the cost and delay in having to arrange privately for translations to be done, or by having translations of such poor quality that they must be redone.

8 Please indicate any important developments since 1996 in your jurisdiction in the interpretation of Convention concepts, in particular the following:

- **rights of custody (Article 3 *a* and Article 5 *a*);**

Secretary, Attorney-General's Department v Stanton (Unrep, Nicholson CJ, 18 December 2000, Hobart)

Child, of four months, was removed from New Zealand by the mother, in January 1999. The parents were not married and were not living together at the time of the birth, hence the father had no statutory right of custody. Legal proceedings had commenced when the mother brought the child to Australia.

The court in Australia held that rights of custody could reside in a court. This had not previously been decided in Australia, although it is accepted law in England, NZ and Canada.

P and Commonwealth Central Authority (Nicholson CJ, Buckley and Kay JJ, 19/5/00)

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[18] See above, footnote 16.

[19] See, for example, Conclusion No 4 of the Washington Judicial Conference (footnote 7, above):

"It is recommended that State parties ensure that there are simple and effective mechanisms to enforce orders for the return of children."

[20] See, for example, Conclusion No 5 of the Washington Judicial Conference (footnote 7, above):

"The Article 13 *b* 'grave risk' defense has generally been narrowly construed by courts in member states. It is in keeping with the objectives of the Hague Child Abduction Convention to construe the Article 13 *b* grave risk defense narrowly."

The mother brought the child from Greece to Australia in December 1998. Although the mother had an interim residence order in Greece, the order also prohibited the child's removal from Greece. The court endorsed the view, in the Canadian case of *Thomson v Thomson* [1994] 3 SCR 551, that a removal prohibition order could amount to a right of custody. Therefore in this case, as the father had not lost the right to determine the child's place of residence, the mother's unilateral removal was a breach of the father's rights.

- **habitual residence (Article 3 *a* and Article 4);**

Potier and Director General, DOCS (Ellis, Coleman & Flohm JJ) 26 May 2000

A child was wrongfully removed from England to Australia by Mr Malcolm Potier .

The trial judge found that the child was habitually resident in Scotland at the time of removal. The Full Court found that the Central Authority of Australia was entitled to commence proceedings for the return of the child to the UK pursuant to the request made by the Central Authority for England and Wales, because the United Kingdom was the Contracting State.

- **rights of access (Article 5 *b*);**

Police Commissioner of South Australia v Castell (1997) FLC 92-752

The Full Court of the Family Court in this case gave its interpretation of the access provisions of Australia's implementing legislation. The Family Court of Australia required, in all Hague access applications to Australia, that:

(i) the applicant must have a right of access arising from court order or statute;

(ii) the right of access must be conferred in another Convention country (ie not Australia); and

(iii) there must be a breach of those rights. In *Castell*, the Full Court accepted that in access cases, the relevant purpose of the Convention was to ensure that foreign access rights are respected..

In legislative amendments of 27 December 2000 in the Family Law Amendment Act, the effect of this decision is reversed, allowing Australia to accept access applications without requiring an existing access order.

Director General, NSW Department of Community Services v Odierna, (unreported decision of Lawrie J, Sydney, 17 March 2000)

This was an access application from a father in Italy seeking contact with his 13 year old son in Australia. The father had a right of custody according to the Italian Civil code, upon which he based his return application. The father did not have a contact or access order.

It was the Central Authority's submission that the father had the larger "right of custody" which by its nature must encompass a "right of access" and was therefore a

sufficient basis for a Hague access application. There was reliance on the New Zealand Court of Appeal decision of *Gross v Boda* which ruled that "rights of custody" and "rights of access" are not mutually exclusive. That approach was rejected and the judge took a narrow view of the Convention, stating that "there is no inclusion of the right of access within the rights of custody in the Convention." The judge followed the decision in *Castell* that there must be an access order from the requesting country and dismissed the application, and advised the father to obtain "an order for access in Italy which he may then consider asking to have enforced under the Convention." A costs order was made against the Central Authority for asserting powers or functions outside the scope of "what was necessary to give effect to the Convention."

- **the actual exercise (of rights of custody) (Article 3 *b* and Article 13 *a*);**

Director General NSW DOCS and Crowe 1996 FLC 92-717

The Full Court said that the mother was exercising rights of custody by arranging for the grandparents to discharge her duty to care for the child, in doing so she had not abandoned or conferred her rights of custody on the grandparents.

- **the settlement of the child in its new environment (Article 12);**

Secretary, Attorney-General's Department v Stanton (Unrep, Nicholson CJ, 18 December 2000, Hobart)

The Chief Justice rejected the proposition, based on US authorities, that a very young child could not be treated as settled in his new environment.

Director General, Department of Community Services v M and C and the Child Representative (1998) FLC 92-829

This decision established that the test to be applied to determine if a child is settled, is whether the child has settled in its new environment, without any additional gloss on the meaning of those words. In effect this meant that the test as formulated in *Graziano* did not represent the law in Australia.

Townsend and Director General, Department of Families Youth and Community Care (199) FLC 92-842.

The Full court confirmed that the formulation in *Graziano v Daniels* (1991) Fam LR 697 in determining whether the children were settled in their new environment, insofar as Graziano suggests that the test for whether a child is "settled in his or her new environment" requires a degree of settlement which is more than mere adjustment to surroundings, or that the word "settled" has two constituent elements, a physical element and an emotional constituent, it represents a gloss on the legislation and should not be regarded as accurately stating the law.

- **consent or acquiescence to the removal or retention of the child (Article 13 *a*);**
-
- **grave risk (Article 13 *b*);**

P and Commonwealth Central Authority (Nicholson CJ, Buckley and Kay JJ) [2000] FamCA 461

This case concerned grave risk of harm arising from the alleged lack of medical facilities available for a disabled child.

In relation to grave risk, the approach endorsed by the Full Court was: "To ensure that the child is adequately protected, the Art 13b enquiry must encompass some evaluation of the people and circumstances awaiting that child in the country of his habitual residence." It supported the view that the person opposing return must establish the "risk", not the certainty of harm.

The court extensively reviewed cases where a grave risk had been established. In view of the details in these cases, the court considered that the "assertion of grave risk on the basis of apparent unavailability of appropriate treatment and care for the child's autism" in Greece was not made out.

The court considered that the Commonwealth Central Authority should have investigated more fully the facilities available in Greece, and in future should make its own enquiries rather than rely on the onus placed on the person opposing return.

Director General Department of Community Services v MARQUEZ (Full Court: Ellis, Coleman, Joske JJ 30 November 2000)

The grave risk of harm arose from the mother's threat of suicide if she was ordered to return the child to Mexico. The Full Court reviewed the evidence of the mother's suicide threat as causing the grave risk of harm to the child. It held that there was no evidence that the effect of an order returning the child to Mexico, as opposed to the child being returned to the father, would be a worsening of the mother's medical condition, or that medical treatment was not available for the mother in Mexico.

- **exposure to physical or psychological harm (Article 13 *b*);**
- **intolerable situation (Article 13 *b*);**

Director Genera, Department of Family, Youth and Community Care and Bennett (2000) 26 FLR 71

Judgment was given at first instance that a boy of 5 not be returned to England on the following grounds: that the mother was suffering from anxiety and depression and her condition would deteriorate if she was required to return to England; that if she could not personally prosecute her case in England because of her health that would have the effect of placing the child in an intolerable situation; that the child was of Torres Strait Island origin and the English court was not required to take into account his culture and heritage. The Central Authority appealed the decision and the appeal was upheld.

The Appeal Court found that the medical evidence for the mother was based on the false premise that she would be required to return to the husband to live. The court said: "the nature of the proceedings before the court envisage a return of the child to the United

Kingdom. It did not envisage a return of the child to the husband, nor did it envisage a return of the wife to the husband." However, "it may be open to a court in an appropriate case to refuse to order the return of a child where the personal circumstances of either parent prohibit that parent from returning to the country where it is sought to send the child."

The 'intolerable situation' defence was not succesful, the Court said that this case was not "a suitable vehicle for defining the limitations on the *Ardito* principle." (In a decision dated 29 October 1997 the Family Court refused to order the return of a child to the USA because the US Government had refused to issue a visa so that the abducting parent could accompany the child to the USA and contest custody in the US courts, and this amounted to an intolerable situation: *State Central Authority VIC and Ardito* unreported, Joske J, 1997*).*

- **fundamental principles relating to the protection of human rights and fundamental freedoms (Article 20).**

Director Genera, Department of Family, Youth and Community Care and Bennett (2000) 26 FLR 71

Judgment was given that a boy of 5 not be returned to England, inter alia, on the grounds that the child was of Torres Strait Island origin and the English court was not required to take into account his culture and heritage. The Central Authority appealed the decision and the appeal was upheld.

The Torres Strait Islander issue did not have to be determined in this case: "The return of a child of Aboriginal or Torres Strait islander heritage to a foreign country is not per se in breach of any fundamental principle of Australia relating to the protection of human rights and fundamental freedoms. The ability of a foreign court to give proper consideration to such heritage would only arise if an exception to mandatory return was otherwise established."

(3) Issues surrounding the safe and prompt return of the child (and the custodial parent, where relevant)[21]

1 To what extent are your courts, when considering a return application, entitled and prepared to employ "undertakings" (*i.e.* promises offered by, or required of the applicant) as a means of overcoming obstacles to the prompt return of a child? Please describe the subject-matter of undertakings required/requested. At what point in return proceedings are possible undertakings first raised, and how?

Regulation 15(1) of Australia's Hague Convention Regulations provides that, in making an order in relation to the return of a child from Australia, the court may include in its order a condition that the court considers appropriate to give effect to the Convention. This provision reverses the effect of the 1993 decision in *Police Commissioner of SA v Temple* (1993) FLC 92-424 that conditions cannot be placed on the return of child.

It is now accepted in Australia that the Court has a discretion whether or not to impose conditions or undertakings, but if it does so, they must be purposefully related to the Convention's objects of facilitating return of the child. A finding of "grave risk" by the Australian court ordering return is not necessary.

Undertakings are regularly sought by the Australian Central Authority when an abducting parent claims that the child faces a grave risk of harm if returned. Where the court or the Central Authority or the parent is concerned that the returning parent may be homeless, destitute, or at risk of violence, undertakings may also be sought to address the welfare of the returning parent. In recent cases, undertakings have been given by the left behind parent that:

1. The parent will not enforce a temporary or interim or ex parte custody order until the matter is brought back before the courts of the habitual residence country;
2. Pending such hearing before the court, the parent will not attempt to remove the child from the mother except for periods of visitation as agreed between the parties or as ordered by the court;
3. The parent will provide maintenance and accommodation to the mother and child until any further order of the court in the requesting country;
4. The parent will provide one way air tickets for the respondent and child to return to the requesting country
5. The parent will not institute or support any criminal or civil charges associated with the removal;

Undertakings are usually raised in discussion or negotiation with the taking parent prior to the final hearing, if the parent has expressed fears for the welfare and safety of her

[21] The context of these questions is the experience of several States that the majority of return applications now concern (alleged) abduction by the child's primary caretaker, and that these cases often give rise to concerns about supports available for, or even the protection of, the returning child and accompanying parent within the country to which the child is to be returned. The role played by Central Authorities in this context is covered by question 6 of section 1 of the Questionnaire.

child and herself on return. If the Central Authority is satisfied that the parent's fears are genuine, certain undertakings will be sought from the requesting parent, to be incorporated in the final orders for return. The Australian Central Authority will also ask that the undertakings be made enforceable in the requesting country.

2 Will your courts/authorities enforce or assist in implementing such under-takings in respect of a child returned to your jurisdiction? Is a differentiation made between undertakings by agreement among the parties and those made at the request of the court?

Experience with undertakings required by overseas courts to facilitate the return of a child to Australia is that generally these undertakings are not entered into lightly and compliance is reasonably good. Unfortunately there have been a number of cases where the requesting parent has reneged on his or her undertakings.

As is well known, the undertakings given by a left behind parent to a foreign court are not enforceable in the requesting country. This is also the case in Australia. The power of the court to assist in this situation would depend on the Central Authority seeking orders to protect the welfare of the returning child, under Regulation 5 of the Convention Regulations. The Central Authority could not enforce the foreign undertakings by this mechanism, but orders under Regulation 5 may be sought in similar terms to any undertakings related to the welfare of the returning child.

If a parent was to breach an undertaking, whether that was an undertaking required of them by the overseas court or the result of an agreement with the other parent, it would be open for the Family Court, in further proceedings relating to the child to take that breach of undertaking into account in determining where and with whom the child should live.

Furthermore, the amendments to the Family Law Act of 27 December 2000 provide that an order made under the *Child Abduction Convention* is an "overseas child order" (section 70). This means a Convention order made in a "prescribed overseas jurisdiction" can be registered in Australia. Similarly, an Australian Hague Convention order can be registered in a "prescribed overseas jurisdiction" (section 70M). The effect of these two provisions is that orders with conditions, or undertakings, can now be registered and enforced in "prescribed overseas jurisdictions". At present these are limited to New Zealand, Switzerland, Papua New Guinea and most states of the USA.

3 To what extent are your courts entitled and prepared to seek or require, or as the case may be to grant, safe harbour orders or mirror orders (advance protective orders made in the country to which the child is to be returned) to overcome obstacles to the prompt return of a child?

The Full Court of the Family Court of Australia has required undertakings to be lodged in the jurisdiction to which a child was being returned. The recent first instance Family Court of Australia decision by Lindenmayer J in *Director-General Department of Families, Youth and Hobbs* (2000)FLC 93 - 007 is the only reported illustration of the use of mirror orders by an Australian court in ordering the return of a child under the

Convention.

The father consented to those undertakings being incorporated into "mirror orders" to be granted by both the Family Court of Australia and the High Court of South Africa. Lindenmayer J made orders for the return of the child which would become operative *"conditional upon"* the father first filing the undertakings in the South African court and then filing in the Family Court of Australia an affidavit attesting to his having done so.

The amendments to the Family Law Act of 27 December 2000 referred to above will facilitate the use of mirror orders for Australia. Where an overseas child order is registered in an Australian court, it is enforceable until registration is cancelled and "has the same force and effect as if it were an order made by that court under this Part."

4 **Is consideration being given to the possible advantages of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, in providing a jurisdictional basis for protective measures associated with return orders (Article 7), in providing for their recognition by operation of law (Article 23), and in communicating information relevant to the protection of the child (Article 34)?**

Yes. Australia also has legislation to provide for the recognition of custody and access orders as between certain overseas jurisdictions thereby creating another avenue for mirror orders to be established by registration. For the purposes of registration in Australia, "prescribed overseas jurisdictions" are limited to New Zealand, Papua New Guinea, Austria, Switzerland and a number of States in the United States of America. No other countries are prescribed. Another limitation of this regime is that the Australian provisions for registration do not apply to interim or *ex parte* orders.

The legislative amendments of 27 December 2000 outlined in Question 3(2) will also provide protective measures with return orders.

5 Have you experience of cases in which questions have arisen as to the right of the child and/or the abducting parent to re-enter the country from which the child was abducted or unlawfully retained? If so, how have such issues been resolved?

One issue related to the welfare of the returning child and parent is the ability of the abducting parent to take part effectively in custody proceedings in the jurisdiction of habitual residence. The Australian Central Authority and the Family Court take the view that it is a fundamental objective of the Convention to return abducted children so that issues of custody and other matters related to the child's best interests are decided in the country of habitual residence.

There have been some difficulties for non-citizen parents wishing to return with their children to the US to contest custody. Usually the non-citizen parent's right to enter and remain in the US is dependent on their status as spouse of a US citizen. This issue arose in the matter of *State Central Authority v Ardito,* (unreported decision of Joske J, 29 October 1997, Melbourne) and the so-called "visa defence" was the basis for the

non-return of the child because the parent could not get the required visa.

There has also been 1 case seeking return of a child to Australia from the United Kingdom in which the taking parent, in Australia at the time on a temporary residence visa and awaiting a permanent residence visa, left Australia in breach of visa restrictions. Consequently there was no category of visa to allow re-entry to Australia. The Australian Central Authority is planning discussions with the Australian Department of Immigration and Multicultural Affairs regarding a new category of visa to resolve this problem.

6 Please comment on any issues that arise, and how these are resolved, when criminal charges are pending against the abducting parent in the country to which the child is to be returned.

While criminal proceedings are pending against the abducting parent in the country of habitual residence the Australian courts may be reluctant to order the return of the child.

Where criminal charges exist, this is usually the subject of negotiations between the Australian Central Authority and the overseas Central Authority in order that the welfare of the returning parent and child are not adversely affected by the existence of any such charges.

It is often a condition attached to a return order that the requesting parent agrees not to institute any criminal proceedings against the returning parent. However, whether or not the court will make such an order depends on the circumstances. For example, in *Director General, Department of Community Services v Attanasio* (unreported, Cohen J, 24/3/00, Sydney), the Judge was critical of many of the orders sought by the Central Authority and of the many conditions imposed by the mother for her return. The Judge refused to make the order requiring the father's undertaking not to institute criminal proceedings against the mother in Italy. He said such orders "tend to defeat the purpose of being a signatory to the Convention…It must also be recognised that, as under the criminal law of Australia, certain acts will result in legal consequences where the best interests of a child of the perpetrator are irrelevant." The child was ordered to return. *(Note: The mother subsequently appealed this decision. Before the Appeal Court had handed down its decision, the father withdrew the application. The Court then allowed the mother's appeal.)*

On the other hand, in the first instance Family Court of Australia decision by Lindenmayer J in *Director-General Department of Families, Youth and Hobbs (2000) FLC 93 -007*, the father, who had initiated the Convention proceedings in respect of his daughter, was permitted by his Honour to file an affidavit that contained a range of undertakings, including that the father not institute or support any criminal or civil charges against the mother associated with the removal. These orders were to be filed as mirror orders in the habitual residence country.

7 **Please comment on any experience, as a requesting or as a requested State, of cases in which the deciding judge has, before determining an application for return, communicated with a judge or other authority in the requesting State and, if so, for what purposes. What procedural safeguards surround such communications?**

The concept of judicial co-operation, as understood in the Hague context, is foreign to most Australian judges and is not an accepted part of the Australian legal system. This view is no doubt influenced by the High Court decision in *Re JRL; Ex parte CJL* [(1986) 10 Fam LR 917] where the court upheld the fundamental principle "that a judge must not hear evidence or receive representations from one side behind the back of the other". Gibbs CJ said:

> *"the principle which forbids a judge to receive representations in private, is not confined to representations made by a party or the legal adviser or witness of a party. It is equally true that a judge should not, in the absence of the parties or their legal representatives, allow any person to communicate to him or her any views of opinions concerning a case which he or she is hearing, with a view to influencing the conduct of the case. Indeed, any interference with a judge, by private communication or otherwise, for the purpose of influencing his or her decision in a case is a serious contempt of court."*

However, in the Hague Convention context, it is now evident from reported decision, writings and Hague meetings that judicial co-operation is one way to ensure that the Hague Convention operates more effectively. This view is being disseminated in Australia. There have only been a small number of judicial co-operation cases and the purpose and procedures of such co-operation are being clarified.

In a 1993 case, in which there were serious allegations of sexual abuse of the children and violence towards the mother, after judgment was entered, Chief Justice Nicholson contacted Justice Mahony in New Zealand to ensure an expedited hearing for the mother upon her return*: Murray v Director of Family Services ACT* (1993) FLC 92-416

In a 1997 application for return of a child from the US, the American judge, hearing the application (Colorado District Court Judge Tim Simmons) indicated that he would like to discuss jurisdictional matters with the original Australian presiding Family Court Judge in relation to custody of the children. In particular, to discuss whether or not Australia should relinquish jurisdiction to Colorado, or whether Australia should retain jurisdiction. A telephone conference between the Judges occurred on 1 September 1999. As a result the Family Court of Australia provided a declaration under Articles 15 and 17 of the Convention that the retention of the children in the United States was wrongful. On 30 June 2000, the children were ordered to return to Australia.

In a 1997 case, Justice Kay contacted the US. Judge with a view to ensuring expedition of the case when the child was returned to Arkansas. However, ex parte custody orders were made 2 days before child returned, and without the knowledge of court in Australia.

A 2000 case concerned an application from the mother for return of one of two children from New Zealand, with a concurrent application from the father for the return of the other child from Australia. In that case there were, pending in Australia, residence proceedings concerning both children and Hague Convention proceedings concerning

the youngest child and, pending in New Zealand, residence proceedings concerning the oldest child and a Hague Convention application concerning the oldest child.

Justice Kay indicated to the parties (the Victorian State Central Authority and the mother) in open court that he would be willing to discuss the matter with Judge Mahony, the Principal Family Court Judge of New Zealand if all the parties had no objection to him doing so (including the father in New Zealand whose consent was sought and granted). He advised the parties that he would limit the discussion with Judge Mahony to matters concerning procedure and would not discuss any matters of substance and would diarise the discussion, giving copies to all the parties.

All of the parties agreed and Justice Kay discussed the matter with Judge Mahony. Justice Kay then outlined in a memo, that was made available to the parties, the results of that conversation, being that Judge Mahony would endeavour to ensure that the New Zealand proceedings would take place within a specified period in order that the proceedings could be disposed of expeditiously.

It seems that the key to legitimacy of judicial cooperation, absent clear statutory authority, has to be the consent of the parties. It would therefore be wise for judicial decision-makers to create a record of all the communications and to keep the parties informed of the nature of those communications. It would also be prudent to have the outcome of the communications confirmed in writing, either via fax or email, and copies provided to all parties affected by them.

8 Has an appointment been made in your country of a judge or other person competent to act as a focus or channel for communication between judges at the international level in child abduction/access cases?[22]

Justice Kay, by virtue of his extensive involvement in Hague Convention matters, has become the natural contact for judicial communication issues in Australia. The Chief Justice has formally nominated Justice Kay as the Hague Convention liaison judge. This nomination does not preclude other Judges from making their own arrangements to communicate with judges in other jurisdictions to co-operate on matters that have arisen in their court.

9 Where a child is returned to your Country, what provisions for legal aid and advice exist to assist the accompanying parent in any subsequent legal proceedings concerning the custody or protection of the child?

The Commonwealth Government, along with the State and Territory governments, administer a system whereby legal services are made available to those who cannot afford the services of a private lawyer. Legal aid is provided by legal aid commissions which are independent statutory bodies established under State or Territory legislation. There is a legal aid commission in each Australian State and Territory.

In order to be eligible for a grant of legal aid, Australian and foreign nationals must

[22] See footnote 23, below.

meet the means test, the merits test where it is applied and the relevant Commonwealth or State and Territory guidelines. Commonwealth guidelines apply in respect of Commonwealth law matters and State and Territory guidelines apply in respect of matters that arise under State and Territory law. It is the responsibility of legal aid commissions to apply those guidelines to applications for legal aid, along with means and merits tests, to determine whether to grant assistance.

Free legal advice (but not legal representation) may also be sought from Community Legal Centres, Welfare Rights Centres and Women's Legal Centres.

10 Where a custody order has been granted in the jurisdiction of, and in favour of, the left behind parent, is the order subject to review if the child is returned, upon application of the abducting parent?

Yes, under Australian law – either party can seek to have an order varied or set aside, or seek to have a new order to be made, if the circumstances of the parties have changed since the original order was made.

11 Would you support any of the following recommendations?

a **that Contracting States should consider ratification of or accession to the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, to provide a basis for jurisdiction, recognition and enforcement, and co-operation in respect of measures of protection of a child which are attached to return orders.**

Yes. Nevertheless, it should be noted that some federations like Australia face certain obstacles or delays in developing an integrated regime for ratifying and implementing this Convention. In Australia the Federal Government regulates matters of custody and access relating to children of a marriage. The States and Territories regulate child protection and child welfare issues.

b **that Contracting States should provide swift and accessible procedures for obtaining, in the jurisdiction to which the child is to be returned, any necessary protective measures prior to the return of the child.**

Yes

c **that Contracting States should take measures to ensure that, save in exceptional cases, the abducting parent will be permitted to enter the Country to which the child is returned for the purpose of taking part in legal proceedings concerning custody or protection of the child.**

Yes. The Australian Central Authority is planning discussions with the Australian Department of Immigration and Multicultural Affairs regarding a new category of visa for the purposes outlined in this recommendation.

d **that Contracting States should provide a rapid procedure for the review of any criminal charges arising out of a child's**

abduction/unlawful retention by a parent in cases where the return of the child is to be effected by judicial order or by agreement.

Yes

e **that Contracting States should nominate a judge or other person or authority with responsibility to facilitate at the international level communications between judges or between a judge and another authority.[23]**

Yes

f **that the Permanent Bureau of the Hague Conference on Private International Law should continue to explore practical mechanisms for facilitating direct judicial communications, taking into account the administrative and legal aspects of this development.**

Yes

[23] See, for example, Conclusion No 1 of the "De Ruwenberg I" Judicial Seminar (footnote 7, above):

"The recommendation was made that, following the example of Australia, judges attending the seminar should raise with the relevant authorities in their jurisdictions (e.g., court presidents or other officials, as appropriate within the different legal cultures) the potential usefulness of designating one or more members of the judiciary to act as a channel of communication and liaison with their national Central Authorities, with other judges within their own jurisdictions and with judges in other states, in respect, at least initially, of issues relevant to the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction."

This recommendation was endorsed in Conclusion No 5 of the "De Ruwenberg II" Judicial Seminar (footnote 7, above), as follows:

"The need for more effective methods of international judicial co-operation in respect of child protection is emphasised, as well as the necessity for direct communication between Judges in different jurisdictions in certain cases. The idea of the appointment of liaison Judges in the different jurisdictions, to act as channels of communication in international cases, is supported. Further exploration of the administrative and legal aspects of this concept should be carried out. The continued development of an international network of Judges in the field of international child protection to promote personal contacts and the exchange of information is also supported."

This conclusion was in turn endorsed at the Washington Judicial Conference (footnote 7, above).

Liaison judges have already been appointed for England and Wales, Australia, New Zealand, Hong Kong and Cyprus.

(4) Procedures for securing cross-frontier access/contact between parent and child[24]

1 What provisions for legal aid/advice/representation in respect of a foreign applicant for an access order exist in your jurisdiction?

In Australia, the same arrangements for legal representation for foreign applicants apply to access applications as apply to return applications (see answer to Q1 (5) above). Applicants seeking contact with a child in Australia under the Convention will not incur any legal costs if the Central Authority conducts the legal proceedings on behalf of the applicant. Furthermore, there are no eligibility requirements for legal representation or assistance for applicants.

In Australia, legal proceedings are conducted by the Central Authority, and it is the Central Authority which is the applicant to the proceedings in court, and not the left behind parent. Although it is the State Central Authority which always initiates proceedings, it does so essentially on behalf of the Commonwealth Australian Central Authority. The Commonwealth Central Authority is therefore bound by the rules given by ministerial directions, which require the Commonwealth to act as a model litigant. For this reason, the Central Authority lawyers do not take instructions directly from the left behind parent in relation to the conduct of the case, but the views and wishes of the left behind parent will naturally be taken into account. The Central Authority lawyers have a duty to the courts as well as a duty to the Central Authority (the client).

2 On what basis do your courts at present exercise jurisdiction to:

a grant and
b modify access/contact orders?

(a) Following the judgment of the Full Court of the Family Court in *Police Commissioner of South Australia v Castell* (1997) FLC 92-752 and its interpretation therein of the access provisions of Australia's implementing legislation, the Family Court of Australia has required, in all Hague access applications to Australia that: (i) the applicant must have a right of access arising from court order or statute; (ii) the right of access must be conferred in another Convention country (ie not Australia); and (iii) there must be a breach of those rights. In *Castell*, the Full Court accepted that in access cases, the relevant purpose of the Convention was to ensure that foreign access rights are respected.

There have been difficulties in a small number of cases where the left behind parent or

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[24] The role played by Central Authorities in this context is covered by question 7 of section 1 of the Questionnaire. In answering these questions please distinguish where appropriate between:

a applications pending return proceedings;

b applications following a refusal to return a child;

c applications not made in connection with other proceedings; and

d applications to modify existing access orders.

Please note also that the term "access" should be read as including all forms of contact.

non-custodial parent had a right of custody by court order but not a right of access. The court in Australia did not accept the arguments of the Australian Central Authority that a right of custody was a larger bundle of rights which must by its very nature incorporate a right of access (*Director General, NSW Department of Community Services v Odierna*, unreported, Sydney, 17 March 2000 Lawrie, J).

In an interesting case involving an access application to Australia from France, the father had a court order for contact with the children in Australia. After the application was filed in court, the father won an appeal in France against the decision allowing the mother to take the children to Australia, and he was awarded custody. In view of the difficulties described above, the basis of the Hague access application was arguably the original access order. The matter was resolved by consent orders between the parents. The consent orders were rather different to the father's French contact orders.

(b) In Australia, the leading authority on the jurisdiction of the Court in Convention access matters is the 1999 case of *Director General, Department of Family Youth and Community Care v Reissner* [1999] FamCA 1238. In that case an American grandmother had an American court order for contact with her grandson in Australia. As the American order had been made recently and in contemplation of the child's move from USA to Australia, the court in Australia had no hesitation in making orders which respected the terms of the American order. The judgment is also important for its acceptance and support of the principle enunciated in *Castell* that the underlying purpose of the Convention is a significant, if not the most important factor in exercising the court's discretion to make contact orders under the Regulations.

In summary, the Australian Central Authority will assist in bringing an access application to modify or vary existing foreign orders. However, there is no consistent legal authority in Australia on Hague access matters to define the powers of the court to deal with orders. Occasionally the court has said that it can only enforce existing foreign orders, but not vary them.

As the legislative amendments of 27 December 2000 will permit the court to make contact orders where none existed before, the problems of the past described here should no longer affect access applications.

3 What provisions exist for the recognition and enforcement in your jurisdiction of foreign access orders, in particular where the order has been made by a court or other authority of the country of the child's habitual residence? In this context is consideration being given to implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*?

The Family Law Act and the Regulations (subordinate legislation) made under that Act make provision for the registration and enforcement in Australia of foreign custody and access orders from countries with which Australia has reciprocal arrangements for such registration and enforcement. The arrangements do not include interim or ex parte orders. The only countries covered by these statutory or legislative reciprocal arrangements are Austria, Switzerland, Papua New Guinea, and most states of the USA. Hence this regime has considerable limitations at present.

For countries not covered by these statutory reciprocal arrangements, it is common practice for parents to file "mirror orders" in the Family Court of Australia.

In relation to the Protection of Children Convention, Australia is in the process of preparing its legislative and administrative framework to enable ratification of this Convention.

4 What, if any, provision exists to ensure that cross-frontier access applications (including appeals) are processed expeditiously?

The Australian legislation, the Family Law (Child Abduction Convention) Regulations, were amended in 1995 to reinforce the requirement to act expeditiously in Article 1. The Regulations now state as follows:

Reg 5(3): Speedy performance of powers etc

> 5(3) The Commonwealth Central Authority must perform its functions and exercise its powers as quickly as a proper consideration of each matter relating to the performance of a function or the exercise of a power allows.

The Explanatory Statement for the 1995 Regulations states that this subregulation was inserted to ensure consistency with Art 11.

Other Regulations (Reg 15(2) and (4)) requiring the Court to give priority to abduction matters do not apply to the access provisions. The absence of such provisions means that Hague access applications are not always given the same priority or dealt with in such tight timeframes as abduction matters. It must also be recognised that given the intractable nature of some contact cases, the lack of cooperation between some parents, and the need for agreement between parents to make the contact work satisfactorily, it is not possible to resolve access applications as expeditiously as abduction applications.

5 What facilities/procedures are in place to promote agreement between parents in international access/contact cases?

The procedures differ slightly for access applications compared to abduction matters. When an access application is received from another Convention country, the Australian Central Authority will always instruct the State Central Authority (in the State where the child resides) to inform the residence parent by letter of the application and of the role of the Central Authority in Hague matters. The letter should also ascertain the residence parent's attitude to contact with the other parent. The residence parent is invited to discuss the matter with the Central Authority and to negotiate the issue of access, based on the proposals for access made by the other parent in the application.

The Central Authority will always seek agreement between the parents for contact, as an agreed outcome has a greater chance of success. If the residence parent does not reply to the initial letter, or if no agreement or compromise can be reached between the parents, legal proceedings may be commenced by the Central Authority.

In a small number of cases, an older child has refused to have contact with the applicant

parent. This creates some difficulties in seeking court orders under the Convention, as the court is unlikely to make an order contrary to the child's wishes. Counselling of the child has be sought in some cases, but the court cannot force an older child to have contact with the other parent.

In some difficult cases, the Australian Central Authority has:

- arranged and funded supervised access if the requesting parent is in Australia;
- arranged and funded telephone access where the requesting parent claims the residence parent in Australia refuses to cooperate or influences what the child says to the requesting parent;
- acted as a postbox for letters sent by the requesting parent if the child's address is not to be disclosed, perhaps due to past violence.

6 Do your courts in practice accept a presumption in favour of allowing access/contact to the non-custodial parent?

No, there is no presumption in Australian law to allow contact with the non-custodial parent. The Family Court of Australia has ruled in *Brown v Pedersen* (15 Fam LR 173 at page 183) that a parent in Australia has no inherent right of access to his or her child. The court indicated that it is the making of access orders which creates a right of access, and that "until such an order is made no "right of access" exists..."

Since *Brown*, there have been extensive legislative amendments in this area. Section 60B(2) of the Family Law Act now provides

> "…except when it is or would be contrary to a child's best interests:
>
> (a) children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
>
> (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development;…"

7 What conditions are likely to be imposed on access in respect of a non-custodial abducting parent?

One of the most difficult access cases in Australia concerned a non-custodial abducting parent. The details of the case are set out in the judgment of 24 December 1999 of Judicial Registrar Johnston in *Director General of the Department of Community Services on behalf of Nicola de Martino v Andretti*. During a period of contact with the child in Australia in 1995, the father used a false passport to remove the child from Australia. After 9 months, the Italian Court ordered the return of the child to Australia in accordance with the Convention. However the mother in Australia was then fearful of allowing access in Italy as ordered by the Italian Court, as she feared the child would not be returned and that the father may take the child to live in a non-Convention country. The father refused to come to Australia for contact as he faced criminal charges for the passport offences. Although the Judicial Registrar's decision was overturned on review, on technical grounds, no adverse finding was made against the

orders made by the Judicial Registrar.

So while the orders made by Johnston JR were not implemented, they do illustrate the types of conditions that may be imposed : (i) that the father deposit a large sum of money in a trust account in Australia as a bond or surety against the return of the child following contact; (ii) that the passports of the father and child be surrendered to police in Italy; (iii) that the child be accompanied to Italy by a chaperone; (iv) if practicable, the contact should be supervised (but it was not practicable in this case and so not ordered).

Other conditions that would be warranted in these circumstances are: (i) that contact should only occur in the child's habitual residence country; (ii) that if the contact is to occur in the requesting country, mirror orders reflecting the conditions for access should be made there; (iii) that the requesting parent report regularly to the police during the period of the contact (if contact is not supervised); (iv) that the requesting parent provide to the custodial parent a detailed itinerary of locations and contact details for the child during the period of contact; (iv) that the date, place and other arrangements for the return of the child to the custodial parent must be specified in the orders.

8 What information concerning services and what other facilities are available to overseas applicants for access/contact orders?

As the Australian Central Authority conducts the application (either in negotiations or in court proceedings) on behalf of the overseas applicant, any services or facilities required in the particular case are discussed with the requesting Central Authority and the applicant on an ongoing basis.

9 What problems have you experienced and what procedures exist in your country as regards co-operation with other jurisdictions in respect of:

***a* the effective exercise of rights of access in your/in the other jurisdiction;**

Following receipt of an access application, Family Court orders have been made in Australia providing for access for an applicant abroad. In several cases however, the child concerned has refused to have contact with the requesting parent, despite counselling, resulting in non-compliance with the order.

Problems are experienced in other jurisdictions when the child is not made available for pre-arranged contact after the Australian parent has travelled overseas for the contact visit.

***b* the granting or maintaining of access rights to a parent residing abroad/in your jurisdiction;**

A number of access applications to Australia were rejected because the foreign parent did not have a right of access by court order or statute, in accordance with the Australian decision in *Castell* as previously discussed.

Delays occur when the foreign parent does not specify the type of access sought and

related arrangements.

In intractable access cases, the Central Authority has difficulty maintaining the effective exercise of access rights of the foreign parent because of persistent breaches of the orders, especially orders for telephone contact, by the custodial parent in Australia. The situation also happens in reverse to the Australian non-custodial parent.

For an Australian applicant, the granting of access rights in the UK is delayed because of the lengthy time it takes for the application for UK Legal Aid to be considered. Moreover, when the application for legal aid is not successful, it invariably means that the application does not proceed due to the fact that the applicant is unable to pay the UK legal costs.

For an Australian applicant, the cost of litigation for access rights in USA is prohibitive and no Australian government financial assistance is available for access applications as there is for return applications. The cost is compounded when further court proceedings are necessary to maintain or enforce access rights which may be breached on a regular basis (eg with telephone contact) or annually (child not sent for access visit).

A major problem with some courts of the USA is a lack of understanding of the basic requirements of the Convention by insisting that the requesting parent in Australia provide proof of rights of custody when what is sought is access to the child.

For an Australian applicant who travels to the foreign country for a contact visit, the difficulties they face when breaches of contact orders occur can be particularly frustrating and disappointing. The Australian parent had to pay a large amount of money for travel and accommodation costs to make the overseas visit. The uncooperative custodial parent can quickly exhaust the financial and emotional resources of the visiting parent.

c the restriction or termination of access rights to a parent residing abroad / in your jurisdiction.

As a result of a decision by the Full Court of the Family Court of Australia in *Police Commissioner of South Australia v Castell* (1997) FLC 92-752 access rights to a parent residing abroad have been restricted in this jurisdiction. This decision provides that unless there is an access right, established in the requesting jurisdiction, which has been breached, the Family Court of Australia will not entertain an application for access made under the Hague Convention.

As the legislative amendments of 27 December 2000 will permit the court to make contact orders where none existed before, the problems of the past described here should no longer affect access applications.

10 What, if any, measures are available to your courts to help guarantee adherence by parents to access conditions (*e.g.* financial guarantees, surrender of passports)?

If access is to occur in Australia, the following measures are available to the Australian courts to guarantee adherence to conditions:

(i) the deposit of a large sum of money in a trust account in Australia as a bond or surety against the return of the child following contact;
(ii) the passports of the parent and child be surrendered to an appropriate authority
(iii) the contact should be supervised if appropriate and necessary
(iv) contact should only occur in Australia if necessary;
(v) orders can be made that the child is prohibited from leaving Australia and the child's name is added to the airport watch list;
(vi) the requesting parent must report regularly to the police during the period of the contact;
(vii) the requesting parent provide to the Central Authority and the custodial parent a detailed itinerary of locations and contact details for the child during the period of contact.

If access it to occur outside Australia, some of the above measures could not be enforced. However, if necessary and feasible, certain mirror orders or consent orders could be made in the requesting jurisdiction to facilitate access occurring in that jurisdiction.

11 How in practice are access orders enforced?

If access orders are to be made pursuant to a Hague access application, and it is obvious from the negotiations between parents that there is a risk of non-compliance by either parent, the Australian Central Authority will try to ensure that the risk is covered in the orders. For example, if a regime of telephone contact is to be put in place and the custodial parent appears uncooperative, the orders may make provision for the telephone contact to take place in the Central Authority's offices or to be supervised by a social worker if the non-custodial parent informs the Central Authority of a breach of the orders.

When orders are made for a child in Australia to travel overseas for a contact visit, the Australian Central Authority will ensure that departure details are included in the order if possible. A Central Authority staff member or police will accompany the child to the airport if necessary. In any event, the orders sought by the Central Authority usually include a "safety net" order that the Central Authority may apply to the Court for further orders at short notice.

In the case of orders previously obtained under a Hague access application, where a breach occurs some time later, a non-custodial parent may request the assistance of the Central Authority to enforce the orders. This situation has arisen recently and the Central Authority intends to use for the first time a number of sanctions now available to it in the amendments to the Family Law Act of 27 December 2000. Section 112AD provides:

> (2) The sanctions that are available to be imposed by the court are:
>
> (a) to require the person to enter into a bond in accordance with section 112AF; or

(b) to impose a sentence on the person, or make an order directed to the person, in accordance with section 112AG; or

(c) to fine the person not more than 60 penalty units; or

(d) subject to subsection (2A), to impose a sentence of imprisonment on the person in accordance with section 112AE.

(2A) The court must not impose a sentence of imprisonment on the person under paragraph (2)(d) in respect of a contravention of a maintenance order unless the court is satisfied that the contravention was intentional or fraudulent.

12 Would you support recommendations in respect of any of the particular issues raised in the preceding questions? If so, please specify.

(5) Securing State compliance with Convention obligations

1 Please comment upon any serious problems of non-compliance with Convention obligations of which your authorities have knowledge or experience and which have affected the proper functioning of the Convention.

Articles 7(1) and 11: No communication on new applications: no expeditious action

Croatia: On 18 July 2000 a new application for the return of a child from Croatia was sent to the Australian Embassy in Zagreb for forwarding to the Croatian Central Authority (Karjakovich). The application was sent to the Croatian Ministry of Justice on 18 August 2000. On 21 November our Embassy was able to ascertain from an Administrative Officer at the Ministry of Justice that the case had been forwarded to the Municipal Court in Osijek and the Central Authority for issues relating to custody of minors in Croatia. To date, we have had no communication from the Croatian Central Authority about this case, nor any confirmation that the case is progressing at all, which is a breach of Article 7(i).

Chile:It is our experience that the Chilean Central Authority continues to treat Hague applications will little urgency, and in breach of Article 1(a). Past experience with the Chilean Central Authority shows that: applications are not acknowledged; there are no progress reports; there are no replies to any communications; applications have been lost. Because of these problems, all Australian applications and all communication to the Chilean Central Authority are now transmitted through the Australian Embassy in Santiago. The Embassy then send them to a local lawyer. Without the cooperation of the Embassy, the situation with Chile would be impossible. However, this breach of all the obligations of Article 7 by Chile imposes burdens on the staff of the Embassy that it is not resourced to deal with.

The judiciary in Chile and continue to treat Hague applications as custody cases.

Article 7(a): Refusal to assist in locating a child.

The Spanish Central Authority has advised it cannot process those applications where the location of an abducted child is uncertain, and cannot look for children as required under Article 7(a) of the Convention. The Spanish Central Authority stated that it is almost impossible to locate a child in a country like Spain, with 40 million inhabitants and a tourist traffic of more than 60 million a year.

Article 7(b): Inability to prevent the removal of child after return order made and before hand over.

Hungary: The situation described below appears to be in breach of Article 7 b. The difficulty seems to lie in the domestic law of Hungary.

Following the making of a return order, the date and place of the handing over of the child is determined by the court and this is usually several weeks after the return order is made. Most of the time the taking parent is obliged to hand over the child to the

applicant's attorney, or to return a child to a requesting State by a certain date. Under Hungarian law, the passports cannot be removed unless criminal proceedings are underway, and criminal action can only be taken if the abduction is in breach of an existing custody order. Therefore, in a large number of cases, the Hungarian authorities have no means to prevent the removal of a child from Hungary prior to the handover date. In two cases, the taking parent did not hand the child over on the appointed date. In one case the taking parent went into hiding with the children for nearly two years. In the other case, following threats to take the child to a non Convention country, an agreement was finally reached between the parties which resulted in the taking parent returning to Australia with the child.

Articles 1 and 3: Inability to secure prompt return; rights of custody in habitual residence country not accepted.

Greece: - Most Australian applications to Greece do not result in an order for return and in those cases where return order is made, the children invariably remain in Greece with the taking parent. Although we do not have a clear understanding of Greek procedure, it does appear that the Civil Code of Greece conflicts with the requirements of the Convention. For example, in cases where a child is exnuptial and of Greek born parents but habitually resident in Australia, an applicant father must make an act of voluntary recognition in Greece in order to proceed with the return application.

It is also apparent that custody issues are considered during the return hearing in breach of Articles 1, 3 and 12, and that a child's wishes following a return order are also considered. In one case, the Court of Pireaus ordered the return of two children to Australia on 27 August 1998 following a return application made by the father on 10 March 1998. As the father was in Greece at the time, the Court ordered him to collect the children from the mother. It is our understanding that the mother refused to give the children to him.

The mother subsequently appealed the decision to return the children to Australia, and made an application for custody. It appears an interim custody order was made in favour of the mother pending the outcome of the appeal application. We were advised by the father that the interim custody order was granted because of the childrens' protests at returning to him. On 28 May 1999, the Greek Central Authority advised that the appeal application was dismissed. However, to this date the children remain in Greece and, information provided by the Greek Central Authority on 5 June 2000 suggests that provisions of the Greek Civil Code continue to prevent the return of the children to Australia in accordance with the return order. The father now considers that a return to Australia may not be in the childrens' best interests. However, at this stage, he has not withdrawn his application.

We are also concerned at the length of time it takes to receive written decisions following oral decisions of the Greek Courts not to return a child. In one case, the written decision was given 15 months, in another 12 months after the oral decision. If an appeal can only be based on the reasons in the written judgement, this delay is effectively preventing any chance of a successful appeal.

2 What measures, if any, do your authorities take, before deciding

whether or not to accept a new accession (under Article 38), to satisfy themselves that the newly acceding State is in a position to comply with Convention obligations?

Early decisions of the Family Court of Australia highlighted the fact that decisions by the Australian government to accept an accession to the Convention assist in justifying the assumption that the Court and welfare systems of the other Country are appropriately equipped to make suitable arrangements for the child's welfare upon return. While this approach has been revived in a recent case, the general trend of cases considering the "grave risk" exceptions has been away from this presumption towards making an inquiry to evaluate the people and circumstances awaiting the child in the country of his habitual residence. *P v. Commonwealth Central Authority* [2000] FamCA 461 at paragraph 85 It is possible that if the Courts became aware of a more formal procedure on Australia's part to review the legal and social frameworks of child protection in the acceding countries, that the Courts may be more readily prepared to make the assumption, thus alleviating the necessity to provide evidence about the availability of services and the legal framework for deciding disputes upon return.

Neither the Australian Central Authority nor the Australian Department of Foreign Affairs and Trade (as the Department responsible for treaty action) have in the past taken any investigative action prior to accepting a new accession. However, in view of the difficulties experienced with certain countries with a poor or non-existent framework for Convention implementation, not least of which is the false hope of return given to parents whose children are taken to such countries, the policy of automatic acceptance of accessions will be reviewed.

3 Would you favour the drawing up of a standard questionnaire to be submitted by Contracting States to each newly acceding State with a view to assisting them to decide whether or not to accept the accession? What questions would you include?

This is quite a good idea but it needs some refinement. One difficulty I foresee with this approach is that if a standard questionnaire is drawn up for each Contracting State to send individually to the newly acceding country, the latter country may "fail" the standard of the Contracting State in the first questionnaire and subsequent questionnaires will have to be sent to find out if the standard has improved. This places the onus on the Contracting State to continually enquire about standards and is time consuming for all parties. On the other had it has the advantage that the acceding state is aware of the number of enquiries from other countries and the possible lack of acceptances of its accession.

But if the acceding country has not set up a proper administrative and legislative framework for the operation of the Convention in that country (and I believe this is the matter to be addressed by such a questionnaire) then would it really care about a lack of acceptances of its accession. The country may have only joined the Convention for "window dressing" and has no commitment to its proper implementation.

A solution might be to seek a recommendation or resolution from the Special Commission that the questionnaire be drawn up and each new country (ratifying or acceding) be requested to complete the questionnaire and submit it to the Permanent

Bureau at the time of lodging its instrument of ratification/accession. When the Permanent Bureau sends out to other Contracting States a notification of the new ratification/accession, the completed questionnaire can also be sent.

The important questions to ask in such a questionnaire are:

Central Authority

(i) What is the name and address of your Central Authority?
(ii) What human resources in your Central Authority are devoted to Hague Abduction matters?
(iii) What are the powers of your Central Authority to take action under the Convention?
(iv) Does your Central Authority have fax, email and telephone contact?

Legislation

(v) Is implementing legislation required in your country to bring the Convention into operation?
(vi) Is that implementing legislation in force?

Procedures

(vii) What procedures are in place in your country to deal with an application for return of a child to a requesting Convention country?
(viii) What assistance is available from other agencies in your country to assist in locating, protecting and returning a child who is the subject of a Hague return application?
(ix) What procedures are in place in your country to assist in organising and securing rights of access to a child in your country?
(x) Are there any other administrative or legal obstacles which will affect the proper implementation of the Convention in your country

4 Are you in favour of an increase in the number of Special Commissions[25] (or similar meetings) to review the practical operation of the Convention? Would you also favour the idea that additional Special Commissions should review particular aspects of the operation of the Convention (for example, the problems surrounding the protection of rights of access, or the issues that arise when allegations of abuse or domestic violence are raised in return proceedings or the practical and procedural issues surrounding direct communications between judges at the international level, or the enforcement of return orders by Contracting States)?

Australia does not favour any change to the four yearly pattern of Special Commissions to review the practical operation of the Convention. The reasons for this view are:

(i) the improvements we seek are not likely to result from an increase in the frequency of those Special Commissions;
(ii) the amount of preparation for Special Commissions by the Australian Central

[25] All other things being equal, the approximate additional expenses arising for the annual budget of the Hague Conference would amount to Dfl. 30,000 (for an additional Commission of 3 days every 2 years), or Dfl. 20,000 (every 3 years).

Authority (and presumably by the Permanent Bureau and other Central Authorities) is a considerable additional burden of work which we would not wish to deal with more frequently;

(iii) the cost of, and time needed, to travel from this part of the world is greater than for European countries.

(iv) acceptance of change is an evolutionary process, especially in an international forum. Ideas for change or different interpretations of the Convention which initially met with resistance have had wider acceptance after a period of years. A good example of this is the US attitude to undertakings and welfare issues.

However, Australia does favour the idea that additional Special Commissions should be held on an occasional basis only, to review particular aspects of the operation of the Convention. This arrangement will allow more time to focus on particular problems, and to put forward a more considered set of recommendations

5 Are there any other measures or mechanisms which you would recommend:

a **to improve the monitoring of the operation of the Convention;**

See B and c below

b **to assist States in meeting their Convention obligations;**

(i) Some regional conferences suggested in Q.6(4) should be held in underperforming states.

(ii) Scholarly articles and other useful documents should be translated into the language of the underperforming states to overcome lack of understanding of Convention principles.

(iii) A specific report on underperformance should be compiled from complaints surfacing in the Questionnaires and circulated to all Contracting States.

(iv) The twinning proposal put forward by Scotland at Washington II should be considered further.

c **to evaluate whether serious violations of Convention obligations have occurred?**

(i) It is necessary first to agree and define what is a “serious violation” eg. by resolution of the Special Commission meeting.

(ii) (ii) the Permanent Bureau should then create a survey form or standard complaint form to register “serious violations”.

(iii) Request Contracting States to lodge an annual report on serious violations at the same time as lodging their statistics.

(iv) Recurring (as opposed to one off) violations with particular countries can then be identified more readily and suggestions in (b) can be used in part to address the problem.

(6) Miscellaneous and general

1 Have you any comments or suggestions concerning the activities in which the Permanent Bureau engages to assist in the effective functioning of the Convention, and on the funding of such activities?[26]

Australia endorses the suggestion of New Zealand that meetings could be held in other countries. It may be possible for some countries to then finance the cost of the meeting thereby providing savings for the Permanent Bureau.

2 Are there any additional ways in which the Permanent Bureau might provide assistance? Do you favour the preparation of a list of potential Permanent Bureau functions and tasks that could only be performed if the Permanent Bureau were to receive additional financial and human resources either through approval of an increased budget or through voluntary contributions to accounts set aside for that purpose?

Yes.

3 Would you favour a recommendation that States Parties should, on a regular annual basis, make returns of statistics concerning the operation of the Convention on the standard forms established by the Permanent Bureau, and that these statistics should be collated and made public (for example on the Hague Conference website) on an annual basis?

Yes.

4 Would you favour a recommendation supporting the holding of more judicial and other seminars, both national and international, on the subject-matter of the Convention?

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[26] The present activities of the Permanent Bureau fall into the following categories:

a assisting in the maintenance of good communications between Central Authorities, by inter alia seeking and disseminating (through the Hague Conference website and other means) reliable contact data;

b giving informal advice and assistance to Central Authorities and others on matters of interpretation and procedure under the Convention;

c drawing the attention of States Parties to, and offering advice about, situations in which obstacles have arisen to the proper functioning of the Convention;

d offering advice of a general nature and referrals in individual cases;

e advising Contracting States in relation to implementation of the Convention;

f organising and supporting training conferences and seminars for judges, Central Authority personnel and practitioners;

g gathering and evaluating statistics;

h maintaining INCADAT (the international child abduction database of judicial decisions, available at: www.incadat.com);

i undertaking preparation and research for the regular periodic reviews of the Convention;

j the publication of a judicial newsletter as a step towards building an international judicial network;

k encouraging wider ratification of the Convention.

With respect to many of these activities, no provision is made in the regular budget of the Hague Conference. They therefore depend largely or entirely on extra budgetary funding.

Yes. But support should be given to more regional conferences and seminars.

5 Are there any particular measures which you would favour to promote further ratifications of and accessions to the Convention?

6 Please provide information concerning any bilateral arrangements made with non-Hague States with a view to achieving all or any of the objectives set out in Article 1 of the Convention.

Australia has recently concluded an Agreement on Child Welfare with Egypt. (Copy attached).

A similar agreement is being developed with Lebanon.

7 Do you have any comments on the following proposition:

"*Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Hague Child Abduction Convention was drafted. Courts should be aware that highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention.*"[27]

Australia supports the proposition. However, less restriction on relocation should go hand in hand with improved access provisions in the Convention. There should not be total reliance on the Protection of Children Convention to deal with the shortcomings of the Abduction Convention in access matters as not all countries will be parties to both conventions.

[27] Conclusion No 9 of the Washington Judicial Conference (footnote 7, above). A "relocation" case is one in which a custodial parent applies to a court for permission to move permanently, together with the child, to a new country.

6 Are there any other measures or mechanisms which you would recommend:

a **to improve the monitoring of the operation of the Convention;**

Australia supports the suggestion of a model code of practice.

See b and c below

b **to assist States in meeting their Convention obligations;**

(v) Some regional conferences suggested in Q.6(4) should be held in underperforming states.
(vi) Scholarly articles and other useful documents should be translated into the language of the underperforming states to overcome lack of understanding of Convention principles.
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8 Are there any additional ways in which the Permanent Bureau might provide assistance? Do you favour the preparation of a list of potential Permanent Bureau functions and tasks that could only be performed if the Permanent Bureau were to receive additional financial and human resources either through approval of an increased budget or through voluntary contributions to accounts set aside for that purpose?

Yes.

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"*Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Hague Child Abduction Convention was drafted. Courts should be aware that highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention.*"[29]

Australia supports the proposition. However, less restriction on relocation should go hand in hand with improved access provisions in the Convention. There should not be total reliance on the Protection of Children Convention to deal with the shortcomings of the Abduction Convention in access matters as not all countries will be jparties to both conventions.

7 Are there any other measures or mechanisms which you would recommend:

a **to improve the monitoring of the operation of the Convention;**
b **to assist States in meeting their Convention obligations;**
c **to evaluate whether serious violations of Convention obligations have occurred?**

[29] Conclusion No 9 of the Washington Judicial Conference (footnote 7, above). A "relocation" case is one in which a custodial parent applies to a court for permission to move permanently, together with the child, to a new country.

(6) Miscellaneous and general

1 Have you any comments or suggestions concerning the activities in which the Permanent Bureau engages to assist in the effective functioning of the Convention, and on the funding of such activities?[30]

14 Are there any additional ways in which the Permanent Bureau might provide assistance? Do you favour the preparation of a list of potential Permanent Bureau functions and tasks that could only be performed if the Permanent Bureau were to receive additional financial and human resources either through approval of an increased budget or through voluntary contributions to accounts set aside for that purpose?

15 Would you favour a recommendation that States Parties should, on a regular annual basis, make returns of statistics concerning the operation of the Convention on the standard forms established by the Permanent Bureau, and that these statistics should be collated and made public (for example on the Hague Conference website) on an annual basis?

16 Would you favour a recommendation supporting the holding of more judicial and other seminars, both national and international, on the subject-matter of the Convention?

17 Are there any particular measures which you would favour to promote further ratifications of and accessions to the Convention?

18 Please provide information concerning any bilateral arrangements made with non-Hague States with a view to achieving all or any of the objectives set out in Article 1 of the Convention.

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[30] The present activities of the Permanent Bureau fall into the following categories:

a assisting in the maintenance of good communications between Central Authorities, by inter alia seeking and disseminating (through the Hague Conference website and other means) reliable contact data;

b giving informal advice and assistance to Central Authorities and others on matters of interpretation and procedure under the Convention;

c drawing the attention of States Parties to, and offering advice about, situations in which obstacles have arisen to the proper functioning of the Convention;

d offering advice of a general nature and referrals in individual cases;

e advising Contracting States in relation to implementation of the Convention;

f organising and supporting training conferences and seminars for judges, Central Authority personnel and practitioners;

g gathering and evaluating statistics;

h maintaining INCADAT (the international child abduction database of judicial decisions, available at: www.incadat.com);

i undertaking preparation and research for the regular periodic reviews of the Convention;

j the publication of a judicial newsletter as a step towards building an international judicial network;

k encouraging wider ratification of the Convention.

With respect to many of these activities, no provision is made in the regular budget of the Hague Conference. They therefore depend largely or entirely on extra budgetary funding.

19 Do you have any comments on the following proposition:

"*Courts take significantly different approaches to relocation cases, which are occurring with a frequency not contemplated in 1980 when the Hague Child Abduction Convention was drafted. Courts should be aware that highly restrictive approaches to relocation can adversely affect the operation of the Hague Child Abduction Convention.*"[31]

[31] Conclusion No 9 of the Washington Judicial Conference (footnote 7, above). A "relocation" case is one in which a custodial parent applies to a court for permission to move permanently, together with the child, to a new country.

Hague Convention on Civil Aspects of International Child Abduction
Information for Parents Returning to Australia

Last updated 15 March 2001

A number of sources of assistance are available to parents returning to Australia with children under the Hague Convention.

Legal Aid: On return to Australia you may wish to seek a custody order or an order from the Family Court allowing you to take your child to live overseas. If you need legal advice or a lawyer to represent you in court proceedings you should contact:

Legal Aid Commission of NSW
323 Castlereagh Street SYDNEY
Telephone (02) 9219 5000

Financial support: If you need financial assistance you should contact the nearest office of Centrelink (formerly the Department of Social Security), telephone 13 1305 or 13 6150 between 8am and 8pm Monday to Friday. Emergency grants of financial assistance are available from the Department. If you wish to seek child support from your former spouse or partner you should contact the nearest office of the Child Support Agency, telephone 131 272.

Accommodation: If you need emergency accommodation, you should telephone Homeless Persons between 9am and 5pm on (02) 9265 9081 or the Family Services Crisis Unit between 9am and midnight and weekends on (02) 9622 0522.

Counselling services: If you need advice on dealing with actual or potential domestic violence, contact the Domestic Violence Advocacy Service on (02) 9637 3741.

Enforcement of Undertakings: Your former spouse or partner may have undertaken to provide you with accommodation and financial support on return to Australia with your child. If this undertaking is not honoured by your former spouse/partner, contact the Commonwealth Attorney-General's Department in Canberra for advice on toll free number 1800 100 480 or call (02) 6250 6724.

Airfares: If you are unable to pay airfares, your former spouse or partner in Australia seeking the return of the children can apply for assistance from the Australian Government to pay airfares for children who are returning to Australia. The assistance may also cover the cost of airfares for an adult accompanying the children. For information contact the Commonwealth Attorney-General's Department on (02) 6250 6724.

Further advice: If for any reason you are unable to obtain assistance you need, you should contact the Commonwealth Attorney-General's Department for further advice on toll free number 1800 100 480. The Department's postal address is: International Family Law Section, Attorney-General’s Department, Robert Garran Offices, National Circuit, Barton, ACT 2600 Australia. If you wish to contact the Attorney-General’s Department whilst overseas, the number you should ring is +61 2 6250 6724.

Agreement Between the Government of Australia and
the Government of the Arab Republic of Egypt
Regarding Cooperation on Protecting the Welfare of Children

(Preamble)

The Government of Australia and the Government of the Arab Republic of Egypt

In support of their mutual relations, and desirous to promote cooperation between their two States to ensure the protection of the welfare of children;

Taking into consideration the provisions of the United Nations Convention on the Rights of the Child, done at New York on 20 November 1989, and in particular the provisions of Article 11 according to which the State Parties, including Australia and the Arab Republic of Egypt, shall take the necessary measures to combat the illicit transfer and non-return of children abroad and to this end, promote the conclusion of bilateral or multilateral agreements in this respect;

Taking into consideration the provisions of the Vienna Convention on Consular Relations, done at Vienna on 24 April 1963, to which Australia and the Arab Republic of Egypt are State Parties, and in particular the provisions of Article 5(e) and (h), according to which consular functions consist, inter alia in helping and assisting nationals of the sending State and in safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of children who are nationals of the sending State;

Recognising that questions relating to personal status matters, including questions of child custody and access, can often represent human tragedies and present a particular challenge to bilateral efforts for a just and humane solution;

Desiring to promote and enhance consular cooperation and judicial co-operation between their two States to deal with these issues;

Have agreed as follows:

Part 1
Application and objects

Article 1

1. The objects of this Agreement include, consistent with the laws of both Parties:

(a) ensuring that the best interests of children are treated as of primary importance in matters relating to parents' rights of custody and access to their children;

(b) ensuring respect for the rights of children who are separated from one or both parents to maintain personal relations and direct access with both parents on a regular basis, except if it is contrary to a child's best interests, as provided for in the United Nations Convention on the Rights of the Child;

(c) ensuring respect for the rights of a parent who is separated from a child to maintain personal relations and direct access with the child on a regular basis as provided for in the United Nations Convention on the Rights of the Child;

(d) assisting a child to recover from any harmful effects suffered in the removal of the child by a parent from the territory of one Party to the territory of the other Party.

Article 2

For the purposes of this Agreement the word child shall include a child of Egyptian or Australian nationality and/or children of dual Australian and Egyptian nationality. In

particular, consular access and assistance shall be made available to children of dual Australian and Egyptian nationality.

Part 2
Joint Consultative Commission

Article 3

1. A Joint Consultative Commission shall be established comprising representatives of the Ministries of Foreign Affairs, Justice and the Interior for the Arab Republic of Egypt and representatives of the Department of Foreign Affairs and Trade and the Attorney-General's Department for Australia.

2. A Party may appoint additional persons to represent other concerned authorities of that Party in respect of cases submitted for consideration by the Commission.

Article 4

The Commission shall be consultative in nature.

Article 5

In accordance with the laws of each Party, the Commission shall:

(a) consider problems related to individual cases with a view to facilitating their resolution;

(b) promote respect for the rights of children who are separated from one or both parents to maintain personal relations and direct access with both parents on a regular

basis, except if it is contrary to a child's best interests, as provided for in the United Nations Convention on the Rights of the Child;

(c) promote respect for the rights of a parent who is separated from a child to maintain personal relations and direct access with the child on a regular basis as provided for in the United Nations Convention on the Rights of the Child;

(d) follow the progress of cases with a view to providing timely status reports to the concerned authorities of both Parties;

(e) promote awareness and cooperation between the concerned authorities of both Parties to achieve the objects of this Agreement with respect to cases brought to the attention of the Commission;

(f) receive and exchange information and documents related to cases and facilitate the transmission of such information and documents to the concerned authorities of either Party as required.

2. The Commission shall not consider matters pertaining to visas or immigration except as provided for in Article 6(e).

Article 6

In particular, either directly or through any intermediary, the Commission may take recommendations to the appropriate authorities to assist in taking all appropriate measures in accordance with the laws of each Party:

(a) to discover the whereabouts of a child who is subject to this Agreement;

(b) to encourage an amicable resolution of the issues in cases in which custody of or access to a child is in dispute;

(c) to assist in finding an amicable resolution of the issues in cases in which a child is removed to or retained in the territory of a Party against the wishes of a parent, including to encourage and facilitate agreement by the parents on access by a parent to the child or return of the child to the territory of the other Party;

(d) to provide information of a general character as to the law of the Party in connection with the application of the Agreement;

(e) to facilitate the making of applications, and expeditious determination of applications, for visas, exit permits and other travel documentation for parents and children;

(f) to keep each other informed with respect to the operation of this Agreement and, as far as possible, to eliminate any obstacles to its implementation.

Article 7

1. Either Party may present, through diplomatic channels, cases to the Commission for consideration.

2. The usual channel of communication between the Parties shall be the diplomatic channel.

Article 8

The Commission shall meet at the request of either Party, on a date arrived at by mutual decision.

Article 9

The conclusions of the Commission are to be put on record. The Commission shall ensure the confidentiality of information regarding specific cases.

Article 10

The Commission shall report to the Ministry of Foreign Affairs for Egypt and the Department of Foreign Affairs and Trade for Australia regarding the operation of this Agreement.

Article 11

1. Nothing in this Agreement is meant to limit or otherwise affect the rights and obligations of each Party arising from other treaties which apply to both Parties, and in particular the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

2. Nothing in this Agreement is meant to replace or preclude any other means of communication and consideration of cases, including their resolution, between the Parties.

3. Nothing in Part 2 of this Agreement is meant to preclude the commencement of any proceedings before the judicial or administrative authority of a Party in respect of a child.

Article 12

For all written communications pursuant to this Agreement, the Parties

shall provide a translation into an official language of the other Party.

Article 13

Any dispute arising out of the interpretation or execution of this Agreement shall be settled by consultation or negotiation through diplomatic channels.

Article 14

This Agreement shall enter into force on the first day of the second month after the date on which the Parties have notified each other that their respective legal requirements for entry into force have been complied with.

Article 15

This Agreement shall apply to cases raised by either party even if the case began before the entry into force of this Agreement.

Article 16

This Agreement shall remain in force until terminated by either Party. Either Party may terminate this Agreement at any time by giving written notice to the other Party to that effect. Termination shall take effect six months after receipt of the notice. Notwithstanding termination, the Commission shall make every effort to finalise cases brought to its attention prior to the giving of the written notice.

In Witness thereof the undersigned, being duly authorized thereto by their respective Governments, have signed this Agreement.

Done at.....

on the .....day of ..... Two Thousand and .....

in two copies, in English and Arabic, each version being equally authentic.

For Australia

For the Arab Republic of Egypt