International Parental Child Abduction proposed amendments - Discussion Paper

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Introduction

1. Recently there has been increased public interest in strengthening offences relating to international parental child abduction, including the wrongful removal and retention of a child, and any additional assistance that the Government can provide to locate abducted children and have them returned to Australia.

2. In November 2010, the former Attorney-General, the Hon Robert McClelland MP, requested that the Family Law Council examine the issue of international parental child abduction. The Council provided a letter of advice on 14 March 2011, including a number of recommendations to strengthen Australia's response to international parental child abduction. The proposed amendments are in response to these recommendations, as well as further recommendations provided by the Council in relation to this issue and its relationship to child support or maintenance on 5 August 2011.

3. On 19 September 2011, the former Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon. Jenny Macklin MP, announced the Australian Government's intention to introduce new measures to strengthen Australia's laws that deal with international parental child abduction (Media Release attached). The Government intends to amend the *Family Law Act 1975* (and possibly other legislation such as the *Child Support (Assessment) Act 1989*) to strengthen responses to, and management of, international parental child abduction. The proposed amendments aim to address the wrongful removal or retention of children regardless of the intended country of destination or the country of retention, and are expected to decrease the number of children wrongfully removed from, or retained outside, Australia, and increase the number of children returned to Australia.

4. The proposed amendments:

- introduce new criminal offences into the Family Law Act to make it an offence to wrongfully retain a child outside Australia; extend the coverage of the existing and proposed offences to provide that in determining whether a criminal offence under the Act has been committed, family law proceedings commence where a parent attends, or has been invited to attend, family dispute resolution or where the Commonwealth Central Authority (CCA) has received and accepted a valid application for the return of the child under a specified

international treaty; and add defences to the current and proposed offences, including fleeing from violence and protecting children from imminent harm

- provide the Commonwealth Director of Public Prosecutions with the ability to give an undertaking that prosecution will not be pursued if a child is returned to Australia
- enable the Australian Family Law Courts to suspend child support payments for parents who abduct their children overseas, where it is in the best interests of the child, and
- enable the Australian Family Law Courts to require individuals or entities to provide information to the CCA to assist in locating children wrongfully removed from, or retained outside, Australia.

5. The proposed approach to implementing these changes is outlined below. The Attorney-General's Department welcomes comments on the proposed approach, in particular in answer to the questions set out throughout the document. Most of the questions are set out at the end of the relevant section.

Background

6. The Hague *Convention on the Civil Aspects of International Child Abduction* (the Convention) was signed in The Hague on 25 October 1980 and ratified in Australia on 29 October 1986. In Australia the Convention is implemented through section 111B of the Family Law Act and the Family Law (Child Abduction Convention) Regulations 1986 (the Regulations).

7. The Convention came into force in Australia on 1 January 1987, the day upon which the Regulations came into effect. The Regulations are made under the power contained in, and give effect to, section 111B of the Family Law Act. Section 111B of the Act (inserted in 1983) is constitutionally valid by virtue of the external affairs power of section 51(xxix) of the Australian Constitution.

8. The principal objects of the Convention are to secure the prompt return of a child who has been wrongfully removed from one convention country to another, or who has been wrongfully retained in a convention country, to his or her country of habitual residence, as well as to have reciprocity of respect for the legal systems of convention countries in relation to children's matters. This is based upon the premise that all signatory states to the Convention (convention countries) accept that the interests of children are of paramount importance and that, to protect children internationally from the harmful effects of their wrongful removal or retention, resolution of disputes regarding children are best determined in the country with which the child has the most obvious and substantial connection (Preamble and Article 1, Convention). This connection is commonly referred to as the child's 'country of habitual residence', although this term is not defined in the Convention.[1]

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[1] The term 'country of habitual residence' is a term commonly associated with the Convention. However, the use of the term in this discussion paper has broader application and describes the country to which a child has

9. It is not the purpose of the Convention to determine what may or may not be in the best interests of a child in terms of their living arrangements. This determination is best made by the court in the child's country of habitual residence, once this has been determined.

10. The Regulations make 'provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the Convention...' (section 111B, Family Law Act). They provide for the prompt return of a child who has been wrongfully removed to, or retained in, either Australia from another convention country or another convention country from Australia. They compel an Australian court to order the return of a child to his or her country of habitual residence unless certain specific and exceptional circumstances exist (Regulation 16).

11. The Regulations establish the Secretary of the Attorney-General's Department as the CCA with responsibility for coordinating the implementation of the Convention in Australia and undertaking the formal procedures for the return of a child under the Regulations. There are also several State and Territory Central Authorities in Australia.

12. The Attorney-Generals' Department is aware that, on average, two to three children are wrongfully removed from or retained outside of Australia each week by one of their parents to a convention country. However, not all children removed from, or retained outside of, Australia are taken to convention countries. The issue of international parental child abduction is therefore broader that matters arising under the Convention.

13. Currently there are 86 signatory states to the Convention, including Australia, and the Convention is in force between Australia and 78 of them[2]. Australia also has bi-lateral agreements with Lebanon and Egypt, who are not signatories to the Convention, regarding cooperation on protecting the welfare of children.

14. Although introduced into the Family Law Act prior to Australia ratifying the Convention, sections 65Y and 65Z of the Family Law Act support the objects of the Convention by providing offences for removing a child from Australia where parenting orders have been made or proceedings for the making of such orders are pending. As a result, these sections work beyond the Convention and apply irrespective of whether the country to which the child has been removed or retained is a convention country.

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the most obvious and substantial connection, irrespective of whether the matter in question is a Convention matter.

[2] Note: The Convention is not in force between Australia and all other signatory countries to the Convention. Convention countries need to accept the accession of other convention countries to the Convention before it can be in force between the two countries. Australia has not accepted the accession of all other signatories to the Convention.

Note also: Hong Kong and Macau are special administrative regions, signatories to the Convention, but China is the member state.

Part 1: Criminal offences for the wrongful retention of a child

15. The criminal offences in the Family Law Act in relation to international parental child abduction are a domestic measure aimed at deterring parents from removing a child from Australia to a foreign country. The existing criminal offences in the Family Law Act only relate to the wrongful removal of a child where parenting orders are in force (section 65Y) or pending (section 65Z). However, the current offences do not address the wrongful retention of children. It is proposed that new criminal offences will be inserted into the Family Law Act in relation to the wrongful retention overseas of a child where there are parenting orders in place or where proceedings for the making of parenting orders are pending. The new offences are likely to be located within Subdivision E, Division 6, Part VII of the Family Law Act – *Obligations under parenting orders relating to taking or sending children from Australia*.

16. The current offences also do not address the wrongful removal of children before proceedings in the court have commenced. As it is possible for formal engagement with the family law system to occur prior to the commencement of proceedings in the court (ie through family dispute resolution), it is proposed that, for the offence in section 65Z of the Family Law Act and the proposed new offence of wrongful retention where proceedings are pending, proceedings will be taken to commence where a parent attends, or has been invited to attend, family dispute resolution, or where the CCA has received and accepted a valid application for the return of the child under a specified international treaty, in addition to where an application for a parenting order has been filed with the family law courts. This is discussed further in paragraphs 61-83.

Definitions

17. According to Article 3 of the Convention and the Regulations, the retention of a child is considered wrongful where the retention is in breach of 'rights of custody' (which are being, or would have been, exercised but for the retention) and the child was habitually resident in a convention country immediately before his or her retention. Australian law does not use the term 'rights of custody' with regard to children; the Family Law Act defines 'rights of custody' for the purposes of the Convention as including parental responsibility, living with a child, and responsibility for the day-to-day or long-term care, welfare and development of the child (subsection 111B(4)).

18. The House of Lords has made it clear that a 'retention' occurs where a child has been lawfully taken from one country to another and there has been a failure to return the child (*Re H (Minors)* [1991] 2 AC 476). The word 'retention' is not defined in the Family Law Act or the Regulations, so it is given its ordinary or common meaning.

19. A child is defined in the Family Law Act (section 4) for the purposes of Subdivision E of Division 6 of Part VII of the Act (that is, for the current offence provisions) as a person who is under 18 years of age (including a person who is an adopted child); Article 1 of the United Nations Convention on the Rights of the Child also defines a 'child' as a person under the age of 18. However, in the Convention (Article 4) and the Regulations (Subregulation 16(1A)) a child is defined as a person under the age of 16. It is proposed that the definition of a child in the Family Law Act apply to the proposed new offences.

20. The decision to define a child as a person under 18 years of age is based on the fact that the new offences will be located in the Family Law Act, not the Regulations, and should be applied in line with Australian law, rather than an International Convention to which Australia is a signatory. In addition, the new offences will cover all children wrongfully retained overseas, irrespective of whether the country in which they are retained is a convention country, and not merely cases to which the Convention applies.

New criminal offences

21. Two new criminal offences are proposed for the wrongful retention of a child outside Australia: for retention of a child where parenting orders exist; and for retention of a child where proceedings for the making of parenting orders are pending.

- *Existing Parenting Orders*

22. A new offence is proposed where a child, who is the subject of current family court orders, has been taken out of Australia with the consent of both parents or persons with parental responsibility, or in accordance with an order of the court, but who has been retained beyond the period consented to or authorised, and without the further consent of both parents/persons with parental responsibility or authorisation of the court.

23. This new offence will be the wrongful retention equivalent of existing section 65Y of the Family Law Act which relates to the wrongful removal of a child who is the subject of an existing parenting order.

- *Proceedings for the making of parenting orders are pending*

24. A new offence is also proposed where a child, who is the subject of current family law proceedings under Part VII of the Family Law Act, has been taken out of Australia with the consent of both parents or persons with parental responsibility or in accordance with an order of the court, but who has been retained beyond the period consented to or authorised, and without the further consent of both parents/persons with parental responsibility or authorisation of the court.

25. This new offence will be the wrongful retention equivalent of existing section 65Z of the Family Law Act which relates to the wrongful removal of a child who is the subject of existing family law proceedings.

Elements of the offences: Physical and Fault elements, attempts and criminal liability

26. An offence will be committed where the child:

- has been retained outside Australia by one of the parents or persons with parental responsibility, or by a person acting on the parent's/person's behalf
- without consent or authorisation, or where there is a breach of consent or authorisation (a breach of consent or authorisation will occur from the point at which the intention to retain the child beyond the period of consent or authorisation has been formed and action

has been taken to effect the wrongful retention of the child (see paragraphs 31-32 below)), and

- where there is a parenting order in place or proceedings for the making of such an order are pending.

27. In line with the current offences in the Family Law Act, it is intended that the default fault elements supplied by section 5.6 of the *Criminal Code Act 1995* (intention or recklessness, depending on the physical element of the offence) will apply and that the ancillary offence provisions of the Criminal Code (Part 2.4), including section 11.1 (attempts), apply in relation to the new offences.

28. It is proposed that the person retaining the child will be the person to whom the offence applies. However, Part 2.4 of the Criminal Code will apply to extend criminal liability to persons who may not directly or individually commit the new offences where they:

- attempt to commit one of the offences (section 11.1)
- are accomplices to the commission of one of the offences (section 11.2)
- jointly commit one of the offences (section 11.2A)
- procure the commission of one of the offences by an agent (section 11.3)
- incite the commission of one of the offences (section 11.4), or
- conspire with another person to commit one of the offences (section 11.5).

29. Therefore, where a child has been wrongfully retained outside Australia by a person acting on a parent's/person with parental responsibility's behalf, the parent/person on whose behalf they are acting will also be a person to whom the offence applies through the ancillary offence provisions of the Criminal Code.

Are there issues with the default fault elements supplied by section 5.6 of the Criminal Code (refer to paragraph 27 above) applying to the proposed new offences? Are there issues with the ancillary offence provisions of the Criminal Code (Part 2.4) (refer to paragraphs 28-29 above) applying to the proposed new offences?

- *consent*

30. For the purposes of the current offences in sections 65Y and 65Z of the Family Law Act, consent must be in writing and authenticated as prescribed in regulation 13 of the Family Law Regulations 1984 (further discussed under *Exceptions*). Consent would be expected to include an agreed timeframe for being out of the country and associated arrangements for the child.

31. It is proposed that an offence will be committed where consent or authorisation is breached. A breach of consent or authorisation will occur from the point at which the intention to retain the child beyond the period of consent or authorisation has been formed and action has been taken to

effect the wrongful retention of the child. In this situation, the intention need not be communicated to the other parent/person with parental responsibility; however action needs to have been taken which proves the intent to breach the consent or authorisation, such as cancelling travel arrangements, applying for permanent residency/citizenship for the child, enrolling the child in schooling long-term or moving house to an area with appropriate schooling.

32. This policy could be seen to be in contrast to the decision in *Director-General, Department of Families and BW* (2003) FLC 93-150; [2003] FamCA 335 in which the court was asked to consider whether regulation 3(2) of the Regulations operated so that the child was wrongfully retained from the date that the mother notified the father that she would not return the child, or from the date when the child should have been returned to the father. The court found that, despite the mother's earlier threats, she was entitled to retain the child until the day the parents had previously agreed and there was therefore no wrongful retention until the day after the period of consent expired. However, given that the proposed new offences will apply to all cases of wrongful retention and not only those where the child is retained under the Convention, this precedent need not apply to the proposed offences.

33. It is not proposed that an offence can be brought about by a revocation of consent or authorisation. It would be unjust for an agreed period of consent or authorisation to be revoked and thus unilaterally cause the person with the child to wrongfully retain the child outside Australia. A person who has consent or authorisation to have a child with them outside Australia for a pre-determined period of time should be able to rely on that consent or authorisation (this does not prevent the person from breaching that consent or authorisation themselves).

34. Nothing outlined above prevents an application under the Convention being made for the return of a child according to the Regulations.

Should a person be subject to an offence of wrongful retention where consent or authorisation has been breached?

What about where consent or authorisation has been revoked?

Penalty

35. *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (July 2011) (the Guide) produced by the Attorney-General's Department states that fixed penalties should be avoided for numerous reasons. The Guide also states that penalties should be consistent with penalties for existing offences 'within the legislative scheme and other comparable offences in Commonwealth legislation...'.

36. The current offences in the Family Law Act for the wrongful removal of a child carry a penalty of 'imprisonment for 3 years'. These penalties should not be read as fixed penalties but rather as maximum penalties, in line with the penalties set out throughout the Criminal Code which have been drafted in the same format.

37. Given that the proposed new offences are seeking to address a gap in the current legislation, it is proposed that the new offences carry a maximum penalty of imprisonment for three (3) years, in line with the current penalties in the Family Law Act.

38. Section 4B of the *Crimes Act 1914* provides a ratio for determining a maximum fine where an offence specifies a penalty of imprisonment only, where it is determined to be appropriate to do so by the court. There are no reasons to specify a departure from this rule. Given the current value of a penalty unit ($110) and that five (5) penalty units are equivalent to one (1) months imprisonment, a fine of $19,800 could be imposed for the current offences and the proposed new offences. There is no intention to increase the available fine from the default ratio outlined in the Crimes Act.

39. It is not intended that the offence of wrongful retention will be a continuing or multiple offence under section 4K of the Crimes Act.

Is the penalty of three (3) years' imprisonment for the current offences appropriate?   Are the proposed penalties of a maximum of three (3) years' imprisonment appropriate for the proposed new offences?   Should there be a departure from the application of section 4B of the Crimes Act to the proposed new offences? If so, why?

Geographical jurisdiction (extraterritoriality)

40. The general presumption about extraterritoriality in relation to an offence is that, unless the contrary intention is shown, an offence will not apply outside Australia. Given that the proposed new offences will occur wholly outside Australia (the child will be legally outside Australia before an offence of wrongful retention can be committed), there will need to be a clear statement in the Family Law Act that there is an intention that the proposed new offences will have extended extraterritorial application.

41. The Commonwealth has constitutional competence to create criminal offences with extraterritorial effect. The 'geographically external' aspect of the external affairs power (section 51(xxix) of the Constitution) provides the head of power to enact such legislation. The Criminal Code provides four alternatives for extended extraterritorial application of offences (Categories A-D, Division 15, Part 2.7):

- Category A: provides for an offence to extend to conduct by an Australian citizen or body corporate outside Australia (section 15.1, Criminal Code)
- Category B: provides for an offence to further extend to conduct by an Australian resident outside Australia if there is an equivalent offence in the law of the local jurisdiction (section 15.2, Criminal Code)

- Category C: provides for an offence to further extend to conduct by any other person outside Australia if there is an equivalent offence in the law of the local jurisdiction (section 15.3, Criminal Code)
- Category D: provides for an offence to further extend to conduct by any person outside Australia even if there is no equivalent offence in the law of the local jurisdiction (section 15.4, Criminal Code).

42. The gravity of the effects of wrongful retention on a child's wellbeing, irrespective of who commits the offence or in which country the child is retained, can be devastating and long-lasting. The proposed new offences are intended to be a deterrent to the wrongful retention of a child. The intention is to cover all situations in all countries, including where a non-citizen, non-resident relative lawfully takes a child overseas for a pre-determined period of time and then intentionally does not return the child to Australia within the period of consent or authorisation. The policy position is based on the consideration that whether or not an offence has been committed should not be dependent on whether there is an equivalent offence in the country the child is being retained in (although equivalent offences are important for extradition purposes and are discussed further below)[3].

43. For the above reasons, it is proposed that the wrongful retention offences should apply to any person (regardless of whether they have Australian citizenship or residency) who wrongfully retains a child, irrespective of whether there is an equivalent offence in the law of the local jurisdiction where the child is being retained. It is therefore proposed that the option for extended geographical jurisdiction under the Criminal Code that applies to the proposed new offences should be Category D (section 15.4). Section 141.1 of the Criminal Code provides an example of the use of section 15.4 for an offence.

Is a Category D extension of extraterritorial application of the proposed new offences appropriate?

Should one of the other Categories be considered? If so, why?

44. As the offence of wrongful retention will occur wholly in a foreign country, the Attorney-General's written consent will be required to commence proceedings if the person alleged to have committed the offence is not an Australian citizen (section 16.1, Criminal Code).

45. Enforcement of the offences will be difficult and will not be possible while the alleged offender is not in Australia. It may be possible to get the alleged offender returned to Australia to face the charges through extradition. However, the availability of extradition will depend on the terms of any extradition treaties or arrangements between Australia and the country concerned (which usually require the conduct to be an offence in the other country as well) and may only be available for relatively serious offences carrying a penalty of at least one (1) year's imprisonment.

[3] Note: Currently the United States, Mexico, Israel and Poland have criminalised child retention.

46. Given that the proposed new offences are intended to carry a three (3) year imprisonment, they should be deemed to be serious offences for the purposes of any extradition process.

Defences

47. The existing offences at sections 65Y and 65Z of the Family Law Act are subject to the general defence provisions of the Criminal Code: duress (section 10.2), sudden or extraordinary emergency (section 10.3), self-defence (section 10.4) and lawful authority (section 10.5). These defence provisions will also apply automatically to the proposed new offences.

48. The general defence provision of mistake of fact (section 9.2) of the Criminal Code does not apply to the existing offences; it only applies when the offence has a physical element for which strict liability applies (ie there is no fault element attached to the physical element). This defence provision will also not apply to the proposed new offences.

49. It is also proposed that a person will not be found guilty of a criminal offence for the wrongful removal or retention of a child outside of Australia (ie the current and proposed offences) where:

- the retention is undertaken as a result of the parent/person with parental responsibility fleeing from 'family violence' as defined in the Family Law Act; or
- the retention is undertaken to protect the child from danger of imminent harm.

50. These defences are in keeping with the Government's policy to protect children and families from harm, including the recent amendments to the Family Law Act passed by Parliament on 24 November 2011 in the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Family Violence Act)[4].

51. It is possible to argue that the defence of self-defence outlined in the Criminal Code (section 10.4) covers the above two defences:

> **10.4 Self-defence**
>
> (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.
>
> (2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:
>
> (a) to defend himself or herself or another person; or
>
> (b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; ...

[4] The Family Violence Act received the Royal Assent on 7 December 2011 and the provisions of the Act will commence on 7 June 2012.

and the conduct is a reasonable response in the circumstances as he or she perceives them.

...

52. However, despite the apparent coverage of the proposed defences by the above defence of self-defence from the Criminal Code, the Family Law Council, in their advice of 14 March 2011, was of the opinion that the proposed defences should be explicitly included in the Family Law Act to avoid any question as to their existence. The Council was also of the opinion that these defences should be available for the existing offences in the Family Law Act.

53. The Family Law Council also proposed a further defence of 'reasonable excuse' to cover the retention of a child where there is a reasonable excuse for not being able to return the child within the period of consent or authorisation. Examples where this defence might be used could include airline strikes, terrorism, erupting volcanoes, or hospitalisation of the child or the person accompanying the child.

54. However, according to the Guide, the defence of 'reasonable excuse' is too vague and open-ended and should generally be avoided unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences. The general defences do not cover the examples mentioned above and it is unlikely to be possible to design a more specific defence to cover the above circumstances. However, in the examples above, it is envisaged that the person with the child intends to return the child but is prevented from doing so due to circumstances beyond their control. There is no intent to commit the offence and the retention is, therefore, unlikely to be wrongful. A defence of 'reasonable excuse' is therefore not required.

55. The new defences will act in conjunction with the amended definitions of 'family violence' and 'abuse' in the Family Violence Act.

Are the above defences appropriate? Should they be explicit in the Family Law Act? Should the defence of 'reasonable excuse' be available for the existing and proposed offences? Should there be any other defences to the criminal offences of wrongful removal or retention?

Exceptions

56. It is proposed that the retention of a child outside of Australia will not be unlawful where:

- the retention is done with the consent in writing of each person who has parental responsibility under the court order and is authenticated by a person qualified to do so under section 8 of the *Statutory Declarations Act 1959* (Regulation 13, Family Law Regulations)[5], or

[5] Section 8 of the Statutory Declarations Act states that a statutory declaration must be in the prescribed form; and be made before a prescribed person. The Form prescribed is set out in Schedule 1 to the Statutory

- the retention is done in accordance with an order of the court made at the time of, or after, the parenting order of the court has been made.

57. Current sections 65Y and 65Z of the Family Law Act contain similar exception provisions, which are listed separately from the main offence, and the defendant bears the evidential burden in relation to these matters.

58. In relation to the proposed offences, neither 'exception' would be matters peculiarly within the defendant's mind. It is likely that the prosecution could readily determine that the retention was wrongful on the basis of the existence or otherwise of court orders or the written consent of parents authorising the retention of the child. On this basis, it is proposed that the 'exceptions' will be inbuilt within the elements of the offence rather than being 'exceptions' to the offence. It is proposed to reframe the existing offences in sections 65Y and 65Z in the same way.

Should the exceptions be listed (in line with the wording of the current offences in the Family Law Act) or should they form part of the offence? Another way of asking: Should consent or authorisation be expressly stated as exceptions, given that they are an integral part of determining if the retention is wrongful? Are these the appropriate exceptions? Should there be other exceptions to the criminal offences of wrongful removal or retention?

Evidential burden

59. In relation to the proposed offences the prosecution should be required to prove in the negative. It is proposed that the defendant should not bear the burden of proof in relation to those matters which are set out above as 'exceptions'. These matters are not peculiarly within the knowledge of the defendant. The other parent/person with parental authority (the person alleging the retention/offence) would be able to advise investigative authorities of any written consent and the court would have record of any parenting orders in force. This would be the same for the current offences in sections 65Y and 65Z if they are reframed to build the exceptions into the elements of the offence.

60. With regard to the defences, it is proposed that the defendant bear an evidential burden of proof in relation to these. The defences go to matters that are peculiarly within the knowledge of the defendant and would be hard for the prosecution to prove or are not available to the prosecution.

Declarations Regulations 1993 (Regulation 3). Persons before whom a statutory declaration may be made are listed in Schedule 2 to the Regulations.

Should the evidential burden of proof be placed on the defendant for the exceptions to the existing and proposed criminal offences? Is it appropriate to change the evidential burden of proof for the exceptions to the current offences? Is it appropriate for the evidential burden of proof for the defences to be placed on the defendant?

Definition of 'commencement of proceedings' where proceedings are pending

61. As outlined below, there are some further gaps in the legislation where children may be removed from, or retained outside, Australia before proceedings have been filed in the family courts. To protect children from wrongful removal or retention during this period it is proposed that, for the current criminal offence contained in the Family Law Act at section 65Z, and the new offence of wrongful retention where proceedings are pending, proceedings for the making of a parenting order will be taken to commence:

- where a parent attends, or has been invited to attend, family dispute resolution (FDR); or
- from the time the CCA has received and accepted a valid application for the return of the child under a specified international treaty.

62. These proposed changes will be in addition to where an application for parenting orders has been filed with the family law courts.

Are there concerns with defining the 'commencement of proceedings' in this way?

- *family dispute resolution*

63. Currently it is not an offence to remove a child from Australia before proceedings are filed in a family law court. Due to existing measures to encourage and assist families to resolve family disputes outside of the court process (FDR), there is often a delay between when a family dispute arises and when a matter is filed in court, if proceedings are filed at all. However, families should not have to apply to court for the deterrence of criminal sanctions against international parental child abduction to take effect.

64. To deal with this gap in the legislation, it is proposed that, for the current criminal offence set out in section 65Z of the Family Law Act, and the new offence of wrongful retention where proceedings are pending, proceedings for the making of a parenting order will be taken to commence where a parent attends, or has been invited to attend, FDR. This will be in addition to expanding the scope of the provision to cover where the CCA has received and accepted a valid application for the return of the child under a specified international treaty and where an application for parenting orders has been filed with the family law courts.

65. It is a general principle that, where a child's habitual residence is Australia, the child should remain in Australia for the dispute to be resolved. The process of resolution should not be defeated by the child being wrongfully removed from, or retained outside of, Australia. Extending the 'commencement of proceedings' to include the FDR process is intended to cover situations where the parents should be aware that there is a family law dispute on foot and, therefore, they should be aware that there is 'an obligation to adhere to legislative requirements governing their children's future care' (Family Law Council letter of advice, 14 March 2011).

66. FDR is defined in section 10F of the Family Law Act:

> ***Family dispute resolution*** is a process (other than a judicial process):
>
> (a) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other; and
>
> (b) in which the practitioner is independent of all of the parties involved in the process.

67. It is proposed that extension of the commencement of proceedings for the making of a parenting order to a person attending or being invited to attend FDR is to be restricted to parents or persons with parental responsibility. Section 61C of the Family Law Act states that, subject to any court order, each parent has parental responsibility for their children, irrespective of the nature of their relationship with the other parent. As only parents have parental responsibility for their children where there are no court orders in place, it should only be parents who can instigate the obligation for the other parent not to remove or retain their child without consent or authorisation where there are no court orders in place.

68. Where there are court orders in place which provide other persons with parental responsibility (such as grandparents or aunts/uncles raising children in the absence of their parents), section 65Y of the Family Law Act and the proposed new offence of retention where parenting orders exist operate to provide the same obligation not to remove or retain their child outside of Australia without consent or authorisation. This does not alter the persons who can commence proceedings in the family law courts for parenting orders, who are: either parent, the child, a grandparent of the child, or any other person concerned with the care, welfare or development of the child (section 65C of the Family Law Act).

69. The question as to what constitutes a parent 'attending' FDR can have several interpretations. The Family Law Council, in their letter of advice of 14 March 2011, stated that:

> the following dates in relation to the use of Family Dispute Resolution are relevant identifiable dates, after which an offence of taking a child away may be considered to have been committed:
>
> - For the person initiating Family Dispute Resolution, the date of first contact with the Family Dispute Resolution service;
> - For the other parent, the date of receipt of an invitation to participate in Family Dispute Resolution.

70. However, the Council's recommendation in relation to this issues states:

> Recommendation 2: The Act should not be amended to include a criminal offence of child abduction in circumstances where Court orders have been neither sought nor granted unless the parents have engaged in, or the taking parent has been invited to engage in, Family Dispute Resolution with a Family Dispute Resolution practitioner in relation to a dispute about a child.

71. In practice, the first contact with a FDR service for the parent initiating FDR is likely to be a phone call to a receptionist stating that they would like to attend FDR. It is possible that there may be quite some time before there is then a formal 'intake' meeting between the person seeking to attend FDR and the FDR service, which may not be with an accredited FDR practitioner, and, by which time, circumstances may have changed. It is also likely that the formal 'intake' meeting with the other party may not occur at the same time as the initiating person's intake session.

72. It is proposed that the process of 'attending' or 'engaging in' FDR for the initiating person commences at the conclusion of the first formal intake meeting with an accredited FDR practitioner, given it is their role to determine suitability of FDR and confidentiality and inadmissibility obligations apply. It is at this formal intake meeting that the initiating person can fully comprehend the meaning of attending FDR with the other parent/person with parental responsibility and the process for contacting the other person to attend FDR will commence. It is also proposed that the person be provided at this stage with information regarding the obligation not to remove or retain their child outside of Australia without the other parent's/person with parental responsibility's consent or a court's authorisation.

73. For the responding parent/person with parental responsibility, it is proposed that the relevant date for the commencement of proceedings for the making of a parenting order will be the date of receipt of a formal written invitation in the form of a registered letter to participate in FDR (from an accredited FDR practitioner) or attendance at a formal 'intake' session, whichever comes first. It is proposed that at either of these stages, that the person be provided with information regarding the obligation not to remove or retain their child outside of Australia without the other parent's/person with parental responsibility's consent or a court's authorisation.

74. The Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (FDR Regulations) made under the Family Law Act outline the accreditation process for, and obligations of, FDR practitioners. Subregulation 26(4) of the FDR Regulations provides that an FDR practitioner, or a person acting on their behalf, is required to contact a party at least twice, with at least one contact being in writing, before they can issue a certificate of non-attendance under paragraph 60I(8)(a) of the Act. The written 'invitation' must provide certain information, including a description of the possible ramifications of non-attendance at FDR. It is proposed that this written 'invitation' will be the point at which the second person is subject to the obligations not to remove or retain the child outside Australia without the relevant consent or authorisation. It is proposed that the written invitation is a registered letter, signed by an accredited FDR practitioner, so that receipt of the letter can be recorded and subsequently used as evidence, if required.

75. If the above approach is adopted, amendments to the FDR Regulations will be required.

Are the current processes inviting parties to participate in FDR suitable for adaptation to implement the above proposal?

Should there be more formality to the written invitation required under Subregulation 26(4) of the FDR Regulations? That is, should it be a requirement that it the written invitation is signed by an accredited FDR practitioner?

Does any requirement for the FDRP to sign the letter make it a better process overall (ie for consistency an invitation and the intake would be conducted/come from the FDRP) or does it add to the administrative burden to the FDRP for no benefit?

Is the proposed approach suitable for dealing with instances where family violence may subsequently be raised after the issuing of the invitation?

Are there any implications for the integrity of any subsequent FDR session where a party has received a letter inviting them to attend FDR which includes information about criminal offences of wrongful removal and retention, where in many cases this is likely to be irrelevant?

If the written invitation does not include information about potential criminal offences, is it significant that the parent may not know they are under an obligation to only travel overseas with their child with consent or authorisation?

Regulation 28 of the FDR Regulations lists information to be given to the parties before FDR. Should information regarding the obligations of parents not to remove or retain their child outside of Australia without the other parent's consent or a court's authorisation be listed in this Regulation?

- *valid application under a specified international treaty*

76. Currently, where a child has been abducted to, or retained in, Australia, the CCA must seek court orders to prevent a child's further abduction to another country. This is the case even where a valid application for the return of the child has been received and accepted by the CCA.

77. An abductor is notified by the CCA that they are subject to a valid application under a specified international treaty that has been accepted by the CCA, and asked to agree to voluntarily return. If the abductor cannot be contacted, or refuses to return voluntarily, the matter is filed in court.

78. In order to prevent a child who has been wrongfully brought into, or retained in, Australia being further abducted to another country (either by wrongful removal or retention), it is proposed that section 65Z of the Family Law Act (wrongful removal) and the proposed new offence of wrongful retention will apply from the time the CCA has received and accepted a valid application for the return of the child under a specified international treaty. A specified international treaty includes the Convention or a bi-lateral agreement which Australia has entered into for the care and protection of children (currently Australia has bi-lateral agreements with Egypt and Lebanon) or the Convention on *Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of*

Parental Responsibility and Measures for the Protection of Children (the Child Protection Convention) signed at the Hague on 19 October 1996.

79. This will only apply to valid incoming applications received and accepted by the CCA and not outgoing applications.

80. This change will lead to faster, more efficient management of Hague Convention matters, a potential greater use of mediation, and a reduction in cost and time for the CCA and courts.

Ceasing of the obligations where proceedings for the making of parenting orders are pending

81. Currently, the obligations on parties under section 65Z of the Act cease once an order has been made by the court (in which case, the obligations under section 65Y of the Act may apply) or proceedings have otherwise ceased in the court. However, the FDR process does not always lead to a formal conclusion. It is possible for parents to reach an agreement during FDR but never seek to have the agreement formalised as consent orders. It is also possible that where a certificate is issued under section 60I of the Family Law Act to enable parents/persons with parental responsibility to attend court, the parties never attend, or seek to attend, court.

82. As the FDR process may have no formal end point, the wrongful removal and retention offences may be applicable to parents/persons with parental responsibility until the child reaches 18 years of age. In order to provide certainty for parents/persons with parental responsibility, their obligation to seek the other person's consent or authorisation from the court every time they wish to travel overseas with the child until that child attains the age of 18 should be limited.

83. Subregulation 26(1) of the FDR Regulations, for the purposes of subsection 60I(7) of the Family Law Act, requires an applicant to file a subsection 60I(8) certificate within 12 months after the latest FDR or attempted FDR. In keeping with this Regulation, it is proposed that parents/persons with parental responsibility remain subject to the obligations imposed by attending or being invited to attend FDR for the current (section 65Z of the Family Law Act) and proposed new offence where proceedings are pending for 12 months after the latest FDR or attempted FDR, where there is no intervening event, such as consent orders or court proceedings (which would instigate their own obligations). The purpose is to prevent the wrongful removal or retention of a child where it is known there is a dispute about children and there has been formal engagement with the family law system.

Is it appropriate to limit the obligations on parties under the current and new offences in this way?

Is 12 months an appropriate time period for the obligations to apply, if there is no intervening event?

When should the obligations cease where there has been a valid application under a specified international treaty?

Application

84. It is proposed that the new criminal offences should only apply prospectively. Offences should not impose retrospective criminal liability except in exceptional circumstances. The Parliament and successive governments have only endorsed retrospective criminal offences in very limited circumstances. Exceptions have normally been made only where there has been a strong need to address a gap in existing offences, and moral culpability of those involved means there is no substantive injustice in retrospectivity (The Guide).

85. Although the proposed offences address a gap in existing offences, given that those involved and likely to be prosecuted under these new offences are the parents or those with parental responsibility for the children they remove or retain (or those acting on behalf of the aforementioned people) there is likely to be substantive injustice in retrospectivity.

86. It is proposed that any legislative amendments commence on a date to be fixed by proclamation, with sufficient time allowed to put appropriate processes in place.

Are there concerns with only applying the proposed new criminal offences prospectively? Are there concerns with fixing a commencement date by proclamation for the legislative amendments? What would be an appropriate commencement period and how should it be effected in legislation?

Jurisdiction

87. Subsection 68(2) of the *Judiciary Act 1903* confers Commonwealth jurisdiction in relation to criminal cases (i.e. in relation to summary conviction, committals, and trial and conviction on indictment) on State and Territory courts which have like jurisdiction under State and Territory laws. State and Territory courts with the appropriate jurisdiction would therefore continue to hear prosecutions of offences against sections 65Y or 65Z of the Family Law Act, and the proposed offences.

88. The Family Court does not have jurisdiction to hear offences against sections 65Y and 65Z of the Act or the proposed offences, despite the operation of section 69H of the Act. There is no intention to change the jurisdiction of the courts in relation to these offences.

89. It is proposed to put this matter beyond doubt by excluding sections 65Y and 65Z and the new offences from the definition of 'matters arising under this Part' in section 69G, which is located in Subdivision C of Division 12, Part VII of the Family Law Act, dealing with jurisdiction of the courts.

Should the Family Court of Australia and/or the Federal Magistrates Court have jurisdiction to hear these cases? If so, why?

Part 2: Removing Barriers to the return of children to Australia (CDPP undertaking)

90. The key object of the Convention is to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence. However, there is an increasing trend that indicates courts are reluctant to order the return of a child to their state of habitual residence where the abducting parent faces the prospect, or risk, of incarceration on their return.

91. In order to ensure there is no impediment to children being returned to Australia, the Government has announced that the Commonwealth Director of Public Prosecutions (CDPP) will have a discretionary power to provide an undertaking not to prosecute individuals under the criminal offences contained in sections 65Y and 65Z of the Family Law Act and the proposed new offences, which each carry a maximum penalty of three (3) years' imprisonment. In order for the undertaking to achieve its intended purpose, any undertaking would need to extinguish all avenues of prosecution including private prosecutions.

92. The starting point in international parental child abduction matters under the Convention is that the child should be returned to their country of habitual residence. However, Article 13 of the Convention outlines a number of exceptions to be established by the person opposed to the court being required to order a child to return to the country from which they were abducted, even if the court has found that country to be the child's habitual residence. One such exception is that of grave risk. If the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, the court in the requested country is not bound to order the return of the child.

93. There is a growing trend, particularly in Europe, of relying on an analysis of the best interests of the child as a determining factor in whether or not a child should be returned to their country of habitual residence. However, international parental child abduction matters are meant to be heard quickly; they are not intended to be full investigations of the best interests of the child.

94. The recent European Court of Human Rights case of *Neulinger and Shuruk v. Switzerland* [2011] 1 FLR 122 is instructive in determining grave risk in association with the best interests of the child. In that matter it was determined that the child should remain in Switzerland, in part because the mother was facing the prospect of incarceration on return to Israel. In this instance, it was determined that the child would be exposed to grave risk.

95. Some Convention countries in the past have not seen the prospect of incarceration of the abducting parent, once returned, as coming within the auspice of grave risk (see *Re L* [1999] 1 Fam LR (Eng) 433). However, such (English) case law would now have to be viewed in light of the *Neulinger* decision and that it is likely that this case would be decided differently in the post-*Neulinger* era. In Australia, the prospect of incarceration, among other factors, has been found to be a serious risk to the children (*State Central Authority & Papastavrou* [2008] FamCA 1120).

96. As noted above, the Government has announced that the CDPP will have the power to provide an undertaking not to prosecute an offence contained in sections 65Y and 65Z of the Family Law Act or the proposed new offences. As outlined in subsection 6(2) of the *Director of Public Prosecutions Act 1983* (Cth), the authority for providing such an undertaking can be conferred on the CDPP through Commonwealth legislation. It is proposed that the authority be in the

Family Law Act, located with the wrongful removal and retention offence provisions (sections 65Y and 65Z) in Subdivision E, Division 6 of Part VII of the Family Law Act.

97. It is proposed that only the CCA will be able to seek such an undertaking from the CDPP; and that the undertaking not to prosecute individuals will only be sought where a request has been received by the CCA from a relevant overseas authority, where providing the undertaking would facilitate the return of wrongfully removed or retained children to Australia.

98. As the offence of wrongful retention can only occur wholly in a foreign country, the Attorney-General's written consent will be required to commence proceedings if the person alleged to have committed the offence is not an Australian citizen (section 16.1, Criminal Code). In this circumstance, an undertaking from the CDPP will not be required.

99. As noted above, the undertaking will only be effective if it allows a person to return to Australia without the fear of prosecution for the offences in sections 65Y and 65Z of Family Law Act and the proposed new offences. As such, it is proposed that the undertaking will prevent prosecution of the person in any civil or criminal proceedings in a federal court or in a court of a State or Territory in relation to the offences contained in sections 65Y and 65Z of the Family Law Act and the proposed new offences.

100. In addition to the offences contained in sections 65Y and 65Z of the Family Law Act and the proposed new offences, a person who has wrongfully removed or retained a child from Australia may have committed other Commonwealth or State offences. In relation to other Commonwealth offences, the CDPP will still act within its existing prosecution policy. However, the CDPP has no power to control prosecutions committed against State legislation. State or Territory public prosecutors' authority will continue to cover those prosecutions.

101. It is envisaged that the legislation dealing with the function to give an undertaking not to prosecute will list the criteria to be considered in making that decision, including a recommendation from the CCA relating to the offence in light of Australia's obligations under the Hague Child Abduction Convention. Such criteria could include:

- the seriousness of the offence
- a recommendation from the CCA relating to the offence in light of Australia's obligations under the Convention, and
- the public interest.

What other criteria should the CDPP take into account in considering a request not to prosecute?

102. On 31 October 2011, the Senate Legal and Constitutional Affairs Reference Committee tabled its report, *International parental child abduction to and from Australia*. Among other things, the report recommended that the Australian Government develop a specific prosecution policy for international parental child abduction offences.

103. The Government will develop a specific investigation policy for international parental child abduction offences under the Family Law Act. This investigation policy will operate in conjunction with the *Prosecution Policy of the Commonwealth* which will remain as the primary policy for prosecuting Commonwealth offences, including those relating to international parental child abduction. The offences will be used in very few circumstances as they are specific in nature and only apply in certain circumstances. As such, it would be inappropriate to incorporate such a policy into the CDPP's Prosecution Policy of the Commonwealth, which gets tabled in Parliament and is a general policy document.

Are there other legislative amendments which should be made or processes which should be put in place to remove barriers to the return of children to Australia?

Part 3: Supporting the return of abducted children to Australia (Child Support)

104. The Australian Government abides by a general principle that child support is paid in the best interests of the child, and that parents should pay child support regardless of whether or not they have access to their child/ren. However, unlike in domestic matters where parents can access the Australian legal system to resolve their disputes, in international parental child abduction matters where a child has been removed from, or retained outside of, Australia, the left-behind parent is unable to fully access the Australian legal system or the Australian courts to determine issues of care and protection for their child/ren, due to the absence of the child/ren from the jurisdiction.

105. Where there are child support or maintenance arrangements in place, nothing in existing legislation terminates the left-behind parent's liability to continue to pay child support or maintenance for children who are Australian citizens or where the payee is in a reciprocating jurisdiction for child support or maintenance[6]. This is true even where it has been determined by a court that a child has been wrongfully removed from, or retained outside of, Australia. This is not the case where the child is not an Australian citizen and the payee is now resident in a non-reciprocating jurisdiction.

106. There is also nothing in existing legislation to prevent parents or non-parent carers[7] who have wrongfully removed or retained a child overseas (even where this is determined by a court) to apply for child support or maintenance in Australia. This is the case even where the country in which they are now resident is not a reciprocating jurisdiction for child support or maintenance (provided the child is an Australian citizen).

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[6]According to subsection 4(1) of the *Child Support (Registration and Collection) Act 1988*, ***reciprocating jurisdiction*** means: (a) a foreign country; or (b) a part of a foreign country; that is prescribed by the regulations to be a reciprocating jurisdiction. The list of reciprocating jurisdictions appears at Schedule 2 of the Child Support (Registration and Collection) Regulations 1988 (prescribed under Regulation 3A).

[7] A 'non-parent carer' is a term used in the *Child Support (Assessment) Act 1989*. Section 5 of the Act defines a 'non-parent carer' of a child as 'an eligible carer of the child who is not a parent of the child'.

107. Further, there is no flexibility under current legislation for the Child Support Registrar (Registrar) to refuse to accept an application that has been properly made, or refuse to assess a parent or non-parent carer on acceptance of their application. Section 30 of the *Child Support (Assessment) Act 1989* (the Assessment Act) states that the Registrar must accept an application for administrative assessment of child support for a child that has been properly made. Section 23 of the Assessment Act states that an application to the Registrar for an administrative assessment of child support for a child is properly made if it complies with the provisions describing:

- the children in relation to whom applications may be made (section 24 of the Assessment Act, which states, amongst other requirements, that the child must be an 'eligible child' under 18 and not a member of a couple)
- the parents who may apply (section 25 of the Assessment Act)
- the non-parent carers who may apply (section 25A of the Assessment Act. Section 25A states that a non-parent carer must be an eligible carer. Section 7B of the Act describes an eligible carer as a person who has at least shared care of the child. Subsection 5(3) of the Act defines shared care as between 35-65% of care for the child), and
- the manner in which the application for assessment must be made (section 27 of the Assessment Act).

108. If a parent of the child about whom the assessment is to be made is not a resident of Australia on the day on which the application is made, the application has to meet the requirements of sections 29A[8] and 29B[9] of the Assessment Act in relation to reciprocating jurisdictions.

109. These existing arrangements are a cause of concern for many Australian parents who have children habitually resident in Australia, particularly as these payments may aid the other parent or a non-parent carer to continue the wrongful removal or retention of the child outside Australia and evade the child's lawful return to Australia, where, as the country of habitual residence, the issues relating to the child's long-term care and protection can best be determined.

110. Therefore the Government has announced that the Australian family law courts (those courts conferred with jurisdiction under section 69H of the Family Law Act[10]) will have the authority to suspend the requirement for child support or maintenance to be paid by left behind parents. It is proposed that a suspension may be granted by a court where the court has firstly found a child to have been wrongfully removed from, or retained outside of, Australia, irrespective of whether the country is a convention or non-convention country (and whether the country is a reciprocating

[8] Section 29A outlines that the persons by whom child support is payable must be an Australian resident or resident of a reciprocating jurisdiction.

[9] Section 29B outlines how an application must be made by a person or authority from a reciprocating jurisdiction.

[10] The Family Court of Australia, State Family Courts, Northern Territory Supreme Court and Federal Magistrates Court

jurisdiction or not). The court will only be able to suspend an obligation to pay child support or maintenance where it is in the best interests of the child to do so.

111. While removing the obligation to pay child support or maintenance in cases of wrongful removal or retention could have some impact on the interests of a child, the policy position is based on the consideration that it is in the best interests of the child to encourage their lawful return to Australia and not to provide financial support to encourage their continued wrongful removal or retention from Australia. This policy is consistent with the objects of the Convention.

112. The suspension of child support is intended to be a temporary measure to encourage the return of a child to Australia, where arrangements can be appropriately determined by the Australian family law courts, or to encourage parents (and/or non-parent carers) to otherwise come to an agreement in relation to the long term care and welfare of their child/ren.

113. It is proposed that the obligation to pay child support or maintenance will be reinstated upon agreement between the parties; by the return of the child to Australia; or by declaration of the Family Law Courts upon application by either party, including in circumstances where an order is subsequently made permitting a parent to relocate the child to another country (these are discussed below in more detail). It is proposed that the obligation to pay child support will not accrue in any interim period prior to the obligation being reinstated.

114. Given that there are provisions in Australia for parents to seek access to children or the enforcement of parenting orders within the Australian family law system, the authority of the courts to suspend child support or maintenance payments will not be available for cases of relocation, lack of access, or parental child abduction within Australia.

Declaration of wrongful removal or retention (step one)

115. Before an application for the suspension of a child support or maintenance obligation/requirement can be considered by a court, it is proposed that the court must first make a declaration that a child has been wrongfully removed from, or retained outside of, Australia.

116. The authority of the courts to make a declaration that a removal or retention of a child is wrongful is currently limited to convention countries. The Regulations contain a provision in subregulation 17(1) which enables a court, upon application, to declare by an order that the removal of a child from Australia to a convention country or the retention of a child in a convention country was wrongful within the meaning of Article 3 of the Convention. This implements Article 15 of the Convention. There is currently no limit as to who may apply for a declaration. However, generally it is usually the CCA which makes the application on request of an overseas court/authority.

117. It is therefore proposed that the Australian family law courts be provided with the authority to make such a declaration where it determines that a child has been wrongfully removed from, or retained outside of, Australia, irrespective of whether the country the child has been removed to or retained in is a convention or a non-convention country.

118. If adopted, the proposed new power will be the equivalent of subregulation 17(1) for both convention and non-convention countries and is likely to be contained in the Family Law Act,

possibly in Division 2 of Part XIIIAA of the Act (*International child abduction*); it would not be limited in its effect. It is proposed that current terminology outlined in Part VII of the Family Law Act in relation to 'parental responsibility' will be used rather than the term 'rights of custody'[11]. It is proposed that the declaration will be provided based on a finding of fact as to the child's country of habitual residence and the parent's rights of parental responsibility (civil test).

119. It is also intended that this declaration will satisfy the requirements for an Article 15 declaration as outlined in regulation 17 of the Regulations.

120. With regard to the interaction of a declaration of wrongful removal or retention with any related criminal proceedings, it is envisaged that this declaration may be used as evidence of a wrongful removal or retention which can be tested in the criminal proceedings and against which defences may be raised.

121. As mentioned earlier at paragraph 19, for the purposes of the Convention a child is defined as a person under the age of 16 (Article 4 of the Convention and subregulation 16(1A) of the Regulations). In contrast, the Assessment Act sets out that an application for child support may be made for a child under 18 years of age[12]. The Family Law Act also defines a child as being under 18 years of age[13]. It is proposed that the declaration to suspend the requirement to pay child support or maintenance will have broad application and not be limited to where a child has been removed to, or retained in, a convention country. In this context it would not be appropriate to use the definition of a child established for the purposes of the Convention. It is therefore proposed that the definition of a child for the purposes of a wrongful removal or retention declaration made under the Family Law Act be a child under 18 years of age.

122. As a civil matter, it is proposed that it will be the responsibility of the left-behind parent who is paying child support or maintenance, or is liable to pay child support or maintenance, to file an application with the courts for this declaration.

123. Generally, a declaration may be sought through private means and thus privately financed. However, if an application has been accepted under the Convention it is envisaged that the CCA would pay for the application to the court.

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[11] As discussed in paragraph 17, 'rights of custody' is terminology used in the Convention; Australian law uses the term 'parental responsibility' in relation to children's matters and does not refer to 'rights of custody'.

[12] section 24, Assessment Act

[13] section 4, Family Law Act

Does this proposed power of the courts provide an appropriate incentive/disincentive for the return of children?

Should the persons able to apply for a suspension of child support be limited to the paying parent only, to either parent or any person with parental responsibility (if someone else abducts the child on one of the party's behalf), or to the same persons as those who can apply for parenting orders (very broad)? Should a Registrar also be able to apply?

Is it appropriate for the declaration to satisfy the requirements for an Article 15 declaration?

Should the declaration be able to be used as evidence in any related criminal proceedings?

124. It is proposed that a left-behind parent would be able to make an application to suspend their requirement/obligation to pay child support or maintenance where:

- there is an existing liability to pay child support or maintenance
- the taking parent/non-parent carer puts in an application for an administrative assessment of child support or registration of a maintenance liability, or
- the left-behind parent is making an application to court for other orders related to the removal or retention of their child – for example, location/recovery orders, etc.

Should the courts have the ability to suspend the requirement for child support or maintenance to be paid where an application for child support has not yet been lodged (ie there is no requirement to pay yet) or only where there is an existing child support liability?

Are the above situations the appropriate situations for when an application to suspend an obligation/requirement to pay child support or maintenance can be made?

125. Although the application is likely to be ex parte, the other party should be served, where their location is known, to enable them to respond to the application and raise any defences.

What should happen if the location of the other party is not known and they cannot be served?

- *Considerations the court should take into account*

126. As the declaration may be used as an Article 15 declaration, and for consistency with the Convention and the Regulations, the court should have regard to similar considerations to those outlined in the Convention at Article 3 when considering an application for a declaration of wrongful removal or retention.

127. In line with Article 3 of the Convention, it is proposed that the removal or retention of a child will be considered wrongful where:

- the child was habitually resident in Australia immediately before the removal or retention, and
- the removal or retention is in breach of the applying person's 'rights of custody'[14] (which were being, or would have been, exercised but for the removal or retention) under Australian law. As outlined earlier, subsection 111B(4) of the Family Law Act already defines 'rights of custody' for this purpose and it is proposed that current terminology consistent with Part VII of the Family Law Act will be used for this section.

128. The Family Law Council, in their letter of advice dated 5 August 2011, stated that it would be appropriate to include some further considerations in legislation conferring on the courts the ability to declare the removal or retention wrongful. Specifically, they stated that it will not be a wrongful removal or retention where the court finds that the person applying to the court:

- was not actually exercising 'rights of custody' to the child at the time of the child's removal from, or retention outside, Australia, or
- consented or subsequently acquiesced to the child being removed from, or retained outside, Australia.

129. These considerations are consistent with some of the considerations outlined at Article 13 of the Convention for whether or not to order the return of a child.

Are these the appropriate considerations for the court? Are there other considerations which should be taken into account?

Suspension of child support or maintenance (step two)

130. It is proposed that once a court has made a declaration of wrongful removal or retention, it will be open to them to consider, upon application, whether or not the requirement/obligation of the left-behind parent to pay child support or maintenance should be suspended.

131. If adopted, it is proposed that the new power will be contained in child support legislation administered by the Child Support Agency, Department of Human Services (either the Assessment Act or the *Child Support (Registration and Collection) Act 1988*).

- *When suspension can be applied for*

132. It is open to a left-behind parent to apply to have their requirement/obligation to pay child support or maintenance suspended:

- where they have an existing liability, or

[14] See discussion in paragraphs 17 re 'rights of custody' and the Family Law Act.

- when the taking parent/non-parent carer puts in an application for an administrative assessment of child support or registration of a maintenance liability.

133. It is also proposed that the left-behind parent may apply for this suspension, before there is a liability in place or an application is filed, when they apply to court for other orders related to the removal or retention of their child – for example, location/recovery orders, etc[15].

- *Considerations the court should take into account*

134. In deciding whether it is in the child's best interests to suspend child support or maintenance, the court should consider the matters set out in section 60CC of the Family Law Act[16].

135. The Family Law Council, in their letter of advice dated 5 August 2011, suggested several defences to the suspension of child support or maintenance, in keeping with the considerations set out at Article 13 of the Convention. Therefore, where a court determines it is in the best interests of the child to suspend child support (despite making a declaration of wrongful removal or retention), it is proposed that a parent's requirement/obligation/liability to pay child support should not be suspended where:

- the removal or retention was undertaken as a result of the parent/person with parental responsibility fleeing from 'family violence' as defined in the Family Law Act. This defence is in keeping with the Government's policy to protect children and families from harm, including the amendments to the Family Law Act passed by Parliament in the Family Violence Bill
- the removal or retention was undertaken to protect the child from danger of imminent harm. Again, this defence is in keeping with current policy and the objectives of the Family Violence Bill
- the child objects to returning to Australia, the objection is beyond mere expression of a preference or of ordinary wishes and the child has attained an age and degree of maturity at which it is appropriate for the court to take account of his or her views. This is in keeping with the considerations set out at Article 13 of the Convention and paragraph 16(3)(c) of the Regulations, or
- any other factors the court considers relevant.

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[15] Although there is a duty for a parent to maintain their child (section 66C, Family Law Act and section 3, Assessment Act), there is no liability/requirement to do so until a child support agreement is in place.

[16] Section 60CC of the Family Law Act sets out the primary and additional considerations a court must consider when determining what is in a child's best interests.

Should it be up to the left-behind parent to apply to have their requirement/obligation to pay child support or maintenance suspended (ie given they may be in financial hardship)?

Should an application for this suspension be able to be made before there is a child support/maintenance liability in place or an application is filed?

Are the above defences and considerations the court should take into account appropriate when considering whether to suspend child support or maintenance payments?

Are current court processes adequate to enable the proposed changes to take effect?

Order of the court

136. Where a court determines it is in the best interests of the child to suspend child support or maintenance and there are no valid defences to the suspension, it is proposed that the court must make an order for the suspension which outlines the date on which the suspension takes effect. The suspension will start from the date the order is made unless otherwise specified in the order (ie it is up to the discretion of the court to determine whether the suspension dates from the date of the wrongful removal or wrongful retention, from the date of the court order, or from another date).

Is it appropriate that the courts are required to make an order for the suspension where it is in the best interests of the child and there are no defences to the suspension? Should it be left up to the discretion of the court whether to make such an order?

Should it be left up to the discretion of the court or should the legislation be explicit as to when the suspension dates from?

137. Where the suspension starts on the date of the wrongful removal or wrongful retention and child support or maintenance has been paid in the interim, this amount may be recovered under subsection 143(1) of the Assessment Act[17].

Is it appropriate that any child support or maintenance which has been paid in the interim can be recovered?

Is this administratively possible?

Stay of assessment/payments until matter determined by the court

138. Where an application for the suspension of child support or maintenance is made in response to an application for administrative assessment of child support or to register a

[17] Subsection 143(1) If: (a) an amount of child support is paid by a person (the payer) to another person (the payee); and (b) the payer is not liable, or subsequently becomes not liable, to pay the amount to the payee; the amount may be recovered from the payee in a court having jurisdiction under this Act.

maintenance liability, the court should have the power to stay the assessment of the application, the registration of the liability, or the enforcement of any child support or maintenance obligation until the court has determined the application to suspend child support or maintenance to ensure that payments are not recovered during the period between the application being filed and the final order being made.

Does this need to occur under section 111C of the *Child Support (Registration and Collection) Act 1988*? How does this work in relation to section 109 of the Assessment Act? Should there be a similar section to section 107 of the Assessment Act for the purposes of seeking a suspension of child support or maintenance?

Operation of a court order – examples

139. The following examples outline how a court order suspending child support or maintenance payments could operate in practice in different situations.

- *Court order to suspend made prior to receipt of application for child support or maintenance*

140. Where an order is made to suspend the requirement/obligation to pay child support or maintenance before an application for an administrative assessment of child support or to register a maintenance liability is made to the Registrar, any subsequent application should be accepted and assessed, but the liability immediately suspended. The effect being that nothing is payable upon receipt and registration of the application but that the obligation to pay can be reinstated as soon as the suspension ceases, without a new application needing to be made (which would be required if the application is refused). For example, where an application to register an overseas maintenance liability pursuant to section 18A of the *Child Support (Registration and Collection) Act 1988* is received when a suspension order is already in place, the liability should be registered but collection should be immediately suspended.

- *Court order to suspend made after application to register maintenance is received*

141. Where an application to register an overseas maintenance liability pursuant to section 18A of the Child Support (Registration and Collection) Act is received and registered *before* a suspension order is in place, collection should be suspended immediately upon receipt of the suspension order. The suspension order will not be a terminating event.

Are there concerns with the way the court orders are proposed to be administered in the different situations? Will these examples work with current administrative processes?

Reinstatement of obligation to pay child support/maintenance

142. Under these reforms, it is proposed that any obligation to pay such child support or maintenance should not accrue in the interim period between the date of the suspension taking effect and the date when the obligation to pay child support or maintenance is reinstated. Where removed by a court, it is proposed that an obligation to pay child support or maintenance will be able to be reinstated upon:

- agreement between the parties (with or without the return of the child to Australia)
- the return of the child to Australia, or
- declaration of the Australian family law courts upon application by either party.

143. There is no formal process proposed to reinstate the obligation/requirement to pay child support or maintenance. However, the Department of Human Services will need to be advised (and they will have to verify) that one of the above events has occurred before the obligation/requirement will be reinstated.

144. The intention of the proposed reforms is to remove financial support from abducting parents and encourage them to return to Australia with the child so that the issues relating to the child's long-term care and protection can be resolved in the country of habitual residence. It is only to be a suspension of payments until the child is returned to Australia or other arrangements are put in place for the child; it is not to be a termination of any agreement, arrangement or obligation between the parties with regard to child support.

- *Reinstatement upon return of the child to Australia*

145. It is proposed that the date upon which child support or maintenance should be reinstated where a child returns to Australia will be the date that the child arrives back on Australian soil.

- *Reinstatement upon agreement between the parties*

146. It is proposed that the date upon which child support or maintenance should be reinstated where there has been agreement between the parties will be the date outlined in the agreement between the parties. The parties may reach an agreement, irrespective of whether the child is returned to Australia or not.

147. In order to avoid dissent between the parties as to the date of the agreement, it is proposed that the agreement be in writing, signed by both parent(s) and/or the non-parent carer(s) receiving the child support or maintenance, and authenticated by a person qualified to do so under section 8 of the Statutory Declarations Act[18]. These formalities are in keeping with those required for the

[18] Section 8 of the Statutory Declarations Act states that a statutory declaration must be in the prescribed form; and be made before a prescribed person. The Form prescribed is set out in Schedule 1 to the Statutory Declarations Regulations 1993 (Regulation 3). Persons before whom a statutory declaration may be made are listed in Schedule 2 to the Regulations.

exception of consent for the criminal offences of wrongful removal outlined at sections 65Y and 65Z of the Family Law Act and those proposed for wrongful retention.

- *Reinstatement upon order of the court*

148. It is proposed that the date upon which child support or maintenance should be reinstated where there is an order of the court will be the date the order is made unless otherwise specified in the order (ie it is up to the discretion of the court to determine whether the reinstatement of child support or maintenance dates from the date of the court order, or from another date).

149. The court may make an order to reinstate child support or maintenance upon the application of either the paying parent(s), the other parent or any non-parent carer.

Are these appropriate points at which the obligation to pay child support or maintenance should be reinstated? Is there a more appropriate point for reinstatement upon the return of a child to Australia than the date the child arrives back on Australian soil (which should be able to be proved by checking passport records)? Is this able to be administered easily? Is it appropriate that the formalities surrounding reinstatement upon agreement between the parties are in keeping with those required for the exception of consent for the criminal offences? Is it appropriate to leave it up to the discretion of the court to determine whether the reinstatement of child support or maintenance dates from the date of the court order or from another date? Who should be able to apply for a court order to reinstate child support or maintenance payments?

Part 4: Locating abducted children overseas

150. Under Article 7(a) of the Convention, a central authority has a general obligation to discover the whereabouts of a child who has been wrongfully removed or retained. The CCA currently has limited mechanisms (discussed below) to obtain information from entities and individuals within Australia that could be used to assist in locating children wrongfully removed from, or retained outside, Australia. It is important that the CCA be able to access information which would significantly improve the Government's ability to locate children abducted from Australia, both to convention countries and non-convention countries.

151. The CCA currently has some mechanisms for locating children. The Family Law Act provides the framework for a court, with jurisdiction under Part VII or section 111CX, to make orders which seek information as to a child's whereabouts (subsections 67M(2) and 67N(2)). Location orders allow the court to make orders requiring a person to provide to the Registry Manager of the court with information that the person has or obtains about the child's location.[19] A Commonwealth information order, which is a type of information order, requires the Secretary of a Department, or an appropriate authority of a Commonwealth instrumentality, to provide to the Registry Manager of

[19] *Family Law Act 1975*, s67J(1)(a).

the court with information about the child's location that is contained in or comes into the records of the Department or instrumentality.[20]

152. Subsection 67K(1) of the Family Law Act outlines who may apply for a location order. As noted above, the information applied for in either a location order or a Commonwealth information order may only be provided to the Registry Manager of the court. However, in certain circumstances and generally with leave of the court, the Registry Manager may disclose the information to limited persons, including the CCA, but not to the applicant for the location order.[21] As such, the CCA can access the information if a location order or a Commonwealth information order is applied for by another party, but the CCA cannot be provided with the information if it applies for the order.

153. In addition to information sourced through location orders by other parties, the CCA has a number of internal mechanisms for gathering information. In Convention matters, the CCA largely relies on the resources available to Overseas Central Authorities to locate children overseas. In cases involving countries that are not a party to the Convention these resources are not available. An Instrument of Authorisation, made under paragraph 488(2)(b) of the *Migration Act 1958*, enables certain officers within the Attorney-General's Department to read, examine, reproduce, use, or disclose any part of a person's movement records for the purposes of the Family Law Act . This instrument is updated every six months to ensure accuracy is maintained. Further, subparagraph 208(1)(b)(i) of the *Social Security (Administration) Act 1999*, and 168(1)(b)(i) of the *A New Tax System (Family Assistance) (Administration) Act 1999* authorises officers of Centrelink to disclose protected information to the Secretary of the Attorney-General's Department for the purpose of carrying out any of Australia's international family law obligations under any multilateral or bilateral treaty.

154. The information gathered through these sources is useful to determine the intended location of abducted children; however, it is not determinative and is particularly ineffective where a taking parent has taken steps to conceal their location.

155. These mechanisms of information discovery, which are currently available to the CCA, do not facilitate the rapid dissemination and deployment of information to the CCA. This affects the Government's ability to locate children abducted from Australia in a timely manner.

156. It is proposed to address this issue by amending the Family Law Act to provide the CCA with a mechanism to obtain access to information from entities and individuals in Australia which the CCA can use to assist in locating children wrongfully removed from, or retained outside, Australia and to support the CCA's obligations under the Convention.

157. By convention, matters under the Convention are normally heard in the Family Court of Australia. However, subregulation 2(1) of the Regulations sets out, for the purposes of the Regulations, that a court means a court having jurisdiction under paragraph 39(5)(d), 39(5A)(a) or 39(6)(d) of the Family Law Act. That is, each of the following courts has jurisdiction to hear matters

[20] *Family Law Act 1975*, s67J(1)(b).
[21] *Family Law Act 1975*, s 67P and s 111CY.

arising under the Family Law Act in respect of which proceedings are instituted under regulations made for the purposes of section 111B (ie the Convention):

- the Family Court of Australia
- Supreme Court of each State or Territory
- the Federal Magistrates Court
- a State or Territory court of summary jurisdiction.

158. The amendments sought to the Family Law Act will give the family law courts power to make an order for entities and individuals within Australia to provide the CCA with information it has requested under what would be known as an 'information order'. Ensuring that the court makes the order will safeguard against perceptions the Government could use these information-gathering powers improperly.

159. The amendments will also facilitate a more effective means for the CCA to gather information to comply with its obligations under the Convention. Information sought by the CCA may include credit or bank card usage, telephone records, e-mail records, social media records, cookies or Internet protocol records, etc. However, it is not intended that the orders will seek access to information sources normally reserved for police such as phone tapping.

160. Notwithstanding any other legislation, the 'information order' will compel the disclosure of requested information to the CCA. This would abrogate any privileges which may be associated with the information, for example if the information required to be provided may incriminate them to the offence, or if the information is subject to client legal privilege.

161. It is proposed that only the CCA will be able to apply for an 'information order'. The order will only be available when the location of the wrongfully removed or retained child is not known and certain requirements are met. Those requirements will include where the CCA has received a request under the Convention for the return of a wrongfully removed or retained child and the location of the child cannot be determined through the CCA's current mechanisms.

162. Bearing in mind the general obligation on the CCA to locate a child wrongfully removed or retained, Regulation 11 of the Regulations states that a request for the return of a child under the Convention must be in accordance with a Form 1 and in accordance with the Convention. Currently, a request under the Convention is valid if the request meets the following conditions:

- the child is under 16 years old
- the applicant has 'rights of custody' in relation to the child
- the applicant has been exercising rights of custody at the time the child was taken from Australia
- the child was habitually resident in Australia immediately before they were taken overseas

- the child has been taken to or retained in a country which is a party to the Convention, and
- the child must have been wrongfully removed from Australia or wrongfully retained in another Convention country without the applicant's prior consent or without a court order.

163. However, it is envisaged that the application for an 'information order' will not be frustrated on the basis that a request under the Convention does not explicitly state the location of the child. If, once the child has been located using the information obtained through an 'information order', the child is found to be in a Convention country, then the application will proceed under the Convention. If the child is found to be in a non-Convention country, the CCA will be able to provide general advice to the left-behind parent on ways to seek the return of their child through private means.

164. Unlike location orders, the CCA will be the only party with the right to apply for, and obtain information under, an 'information order'. In relation to how the CCA can use the information it obtains under an 'information order', the Information Privacy Principles[22] and the Public Service Code of Conduct will guide the Government as to its obligations.

165. Section 67M of the Family Law Act sets a number of obligations in relation to location orders. These obligations include when the court can make an order, the period the order is in force, the timeframe for providing information by the person to whom the order applies, and compliance with the order. It is appropriate to have similar provisions in relation to an 'information order'.

166. In relation to location orders, section 67L of the Family Law Act sets out that in deciding whether to make a location order a court must regard the best interests of the child as the paramount consideration. However, the aim of the 'information order' is to ensure that the Government has appropriate mechanisms to access information it can use to fulfil its obligations under the Convention. As such, it is not appropriate for the court to regard the best interests of the child as the paramount consideration when making an 'information order', as it does for location orders.

167. For consistency with location orders made under the Family Law Act, it is proposed that an information order should stay in force for 12 months. At the end of this period, if the CCA requires further information, it will need to apply for a new order.

168. If the CCA is applying for information from more than one source, it should not be necessary to apply for a separate order for each person from which the CCA seeks information. This will ensure that legal costs are kept down and the court and Government resources are not wasted.

169. Compliance with an information order will be mandatory. If a party refuses to provide the CCA with the information sought they run the risk of being held in contempt of court.

[22] *Privacy Act 1988.*

Is it appropriate for the CCA to apply to the court for an ‘information order’?

Should the legislation list the types of information the CCA may apply for or outline the types of information the CCA may apply for?

Should there be more legislative requirements than those outlined above, or should the CCA develop an internal policy as to when an ‘information order’ will be sought?

Is it appropriate that an information order should stay in force for 12 months in line with location orders?