



*Fourth Biennial Conference for State and  
Commonwealth Central Authorities,  
6-7 December 2001*

The fourth biennial conference for State and Commonwealth Central Authorities took place on 6-7 December 2001 in Melbourne, Victoria.

Representatives from the Central Authorities of the Commonwealth and each of the States and Territories attended the meeting. The Family Court was represented by Justice Kay and his Associate, Geneieve Haw and by Danny Sandor, Associate to the Chief Justice. A number of barristers and solicitors specialising in Hague Convention work also attended, as did representatives from States' Crown Solicitor's Offices.

There was a strong New Zealand representation including Mary O'Dwyer and Colin Pidgeon QC of the New Zealand Bar and Heather Tavassoli, from the New Zealand Central Authority.

We were fortunate to have Kathy Ruckman, from the United States National Centre for Missing and Exploited Children (NCMEC), and Anne-Marie Hutchinson, from Reunite, in attendance as well as a number of parents. Representatives of the Department of Foreign Affairs, the Department of Immigration and Indigenous Affairs and Professor Shinichiro Hayakawa of the University of Tohoku in Japan attended.

Copies of papers from each of the sessions are available from the Commonwealth Central Authority.

*Thursday 6 December 2001 Morning Session*

The Conference opened with a report on the work of the 4th Hague Special Commission meeting in March 2001, presented by **Jennifer Degeling**. This was followed by a paper by **Danny Sandor** of the Family Court on **Safe Return Orders** outlining the proposal, which was put by the Australian Delegation to the Special Commission and commenting on the

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various views put by the parties in attendance, resulting in the recommendation at paragraph 5.1 of the conclusions and recommendations that:

Contracting States should consider the provision of procedures for obtaining, in the jurisdiction to which the child is to be returned, any necessary provisional protective measures prior to the return of the child.

This was followed by a discussion on the implications of the High Court's decision in *DP v Commonwealth Central Authority and JLM v Director-General, NSW Department of Community Services* (2001) 27 Fam.L.R 569 (DP and JLM).

**Murray Green** of Queensland Crown Law presented the first of the two papers, which formed the basis of the discussion. He argued that the Regulations could no longer be interpreted on the basis that the purpose of the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) is to achieve a return of the child to the home jurisdiction. He noted that the Applicant Central Authority will need to establish what effect a return to home jurisdiction will have on the child.

The paper also dealt with the following issues in the light of the decision: undertakings; the "narrow construction" of the grave risk defence; the presumption in *Murray v Director, Family Services. ACT (1993)* FLC ¶92-416 and the onus of proof under regulation 16(3).

**Colin Pidgeon QC** of the New Zealand Bar presented a view of DP and JLM from across the Tasman. He commented that New Zealand Courts are likely to ignore DP and JLM. He noted that DP and JLM went close to moving towards a 'best interests test'. New Zealand interprets the grave risk defence in a narrow sense and places the onus of proof always on the party seeking to oppose the return. There is also a strong presumption that even if a defence is established the Court may well have an obligation to order the return. He noted that the New Zealand Court does not draw any adverse inferences from a failure to cross-examine in Hague Convention matters.

**Draft amendments to the Child Abduction Regulations** were discussed and the comments of the State

Central Authorities and other delegates were noted. The comments made at the Conference are being incorporated into the amendments to the Regulations.

**Anne-Marie Hutchinson** of **Reunite**, a charity based in the United Kingdom, which is involved in international abduction matters, spoke outlining the work of Reunite. Reunite's focus is on the child and it will support and advise both the left- behind parent and the abducting parent. It deals not only with Hague Convention cases but also non-Hague Convention cases.

Reunite provides consular training and runs a 24-hour advice hotline. The organisation will make applications to Duty Judges, if necessary and then hand matters over to the Central Authority. Reunite also has a policy role in providing advice to Government and is involved in police training as well as judicial training at both Magistrates Court level and County Court level.

Ms Hutchinson has provided the Commonwealth Central Authority with a video outlining the role and functions of Reunite. Copies of this video are available to be borrowed from the Commonwealth Central Authority.

After Ms Hutchinson's report there was a general discussion on establishing a similar parent support network in Australia. The parent representatives at the meeting actively contributed to that debate.

#### **Thursday 6 December 2001 Afternoon Session**

**Lydia Makiv** of the South Australian Crown Solicitor's office reported on her visit to the Greek and Italian Central Authorities. A copy of her paper was published in the September 2001 edition of the Child Abduction Newsletter.

Each of the States and Territories then presented short reports on interesting cases and developments. Copies of these reports and of all the papers presented at the conference are available from the Commonwealth Central Authority.

#### **Friday 7 December 2001 Morning Session**

Four papers were delivered on **access/contact orders**.

**Murray Green's** paper provided an update on developments in Hague Access matters and also



highlighted the ambiguous role of the Central Authority in such applications. Mr Green concluded that "perhaps the time is right for a reconsideration of the whole question of the way in which Australia implements the access provisions of the Convention into domestic law."

The next paper was presented by **Vicki Hartstein** of the Victorian bar, and was entitled "*Enforcement of Access/Contact Orders made pursuant to Regulation 25 of the Family Law (Convention) Regulations*". She referred to the preliminary report of the Permanent Bureau prepared by Professor Duncan for the 4th Special Commission on the Hague Convention on the Civil Aspects of International Child Abduction.

Ms Hartstein noted that contact problems "tend to be chronic and to rely on the goodwill of parties for their resolution." She canvassed the options for enforcement and discussed their efficacy. She concluded her paper by noting that "the enforcement of contact orders is an area beset by problems both domestically and internationally".

**Sally Nicholes** and **Lara Ruddle**, of the Melbourne firm Middleton Lawyers, presented the third paper on access. This was a Chilean case study, which attempts to circumvent *Police Commissioner of South Australia and Castell (1997)* FLC 92-752. The application is trying to establish rights of access by operation of law. The argument turns on whether the right of personal care constitutes a right of access.

The last paper on access was presented **Colin Pigeon QC**. The title of his paper was "*Access Applications: Role of Central Authority in New Zealand*". Mr Pigeon highlighted the different approach taken by the New Zealand Court in access cases. He noted that the New Zealand approach was in accordance with the English approach in *Re G (A Minor) (Enforcement of Access Abroad)*[1993]3AllER 657 (CA). The relevant New Zealand case setting out the New Zealand approach is *Gumbrell v Jones (2001)* 20FRNZ 304.

In New Zealand applications for access are brought under section 15 of the *Guardianship Act 1968*, which is the same provisions used for domestic access applications. Mr Pigeon noted that the New Zealand court would take into account the terms of any access orders in foreign

jurisdictions but is not bound to make orders identical. However, in practice, the New Zealand courts generally follow the terms of the overseas access order.

His Honour **Justice Kay** outlined the workings of the **International Network of Liaison Judges**. His Honour noted that in the 18 months since he had been appointed as the Australian Liaison Judge there had been three cases involving contemporaneous proceedings occurring in Australia and New Zealand. These cases had required logistical cooperation between the Courts. His Honour then outlined the role that he played in each of those cases.

**Mary O'Dwyer** of the New Zealand bar presented a paper entitled "*Care and Protection Issues: New Zealand Experience*". This paper looked at undertakings and conditional orders and noted that in New Zealand "the Court can not impose conditions on the return of a child in the absence of the establishment of an article XIII defence."

New Zealand's "experience with undertakings is reflected in the findings of research undertaken by Reunite, which is that undertakings are only successful in a minority of cases. They are unenforceable in most cases and rely entirely on the goodwill of the left behind parent."

The New Zealand paper outlined a cooperative attitude, which has developed between Australia and New Zealand and referred in particular to the case of *Halligan and Corbert* (Family Court at Lower Hutt FP368/00). The Judge hearing the Hague Proceedings in New Zealand, adjourned them for a period of 4 weeks in order to allow a legal structure around the children to be set up in Australia prior to ordering a return.

The next paper was presented by **Ruth Andrew** of the Victorian State Central Authority. Ms Andrews outlined two cases in which the Department of Human Services had been involved and in which child protection issues had arisen in Hague Convention proceedings. Two major issues arose in the second case. The first issue was the effect of the provisions of section 69ZK(1)(b) of the *Family Law Act 1975*. The second issue was the potential conflict of interest for the Secretary of the Victorian Department of Human Services in performing responsibilities arising



under the Child Abduction Regulations and responsibilities as the designated "Child Welfare Officer" for Victoria.

Both cases also demonstrated the cooperation between the New Zealand Central Authority and the Commonwealth Central Authority and the child welfare authorities and courts.

**Kathy Ruckman** of the National Centre for Missing and Exploited Children (NCMEC) delivered the next paper. NCMEC deals with children abducted into the United States.

Ms Ruckman outlined the structure of NCMEC. She outlined the role of NCMEC and highlighted other issues surrounding Hague applications such as choice of Courts, education of the Judiciary, as well as legal and other assistance available to applicants in the United States. Under the latter heading Ms Ruckman spoke particularly of the work of the **Rachael Foundation**, which works closely with NCMEC. This is an organisation dedicated to assisting families with issues surrounding the reunification of abducted children and parents. Ms Ruckman gave a number of examples of cases in which the services of the Rachael Foundation had been used to great effect.

Ms Ruckman outlined the procedure for outgoing cases from the United States. The Office of Children's Issues (OSI) handles these cases. She then discussed warrants of arrest; the US view of undertakings and the development of access cases in the United States. She discussed two leading cases - **Viragh v Foldes**, 612 N.E.2d241 (Mass.1993), and **Bromley v Bromley**, 30E.Supp.857 (E.D.Penn.1998).

The next presentation was by **Sally Nicholes**, a partner at Middleton Lawyers, setting out draft protocols with respect to liaison with the Australian Federal Police (AFP). Ms Nicholes noted that the information provided on applications with respect to the abducting parent was often scant and that it was useful to obtain further information. Ms Nicholes suggested that the Commonwealth Central Authority should approach the AFP to raise the issue of liaison in these matters with a view to establishing a contact person in the AFP in each State.

**Doreen Muirhead**, from the NSW Central Authority, noted that the NSW Central Authority initially makes contact with the AFP after an application has been filed in the Family Court and ex-parte orders that the names of the respondent and the child be placed on the PACE Alert are made. She noted that the AFP would place abducting parent on an Alert List but without the orders they have no power to stop the parent from leaving the country. In recent times the NSW Central Authority has been involved in a number of cases where abducting parents have gone into hiding for several months with the child. In each case the AFP have eventually been able to locate the child.

**Rosa Saladino** of the Australian Central Authority spoke about the use of **Mediation in Hague applications**. Ms Saladino highlighted the recommendations of the Special Commission to Review the Operation of the Hague Convention on the Civil Aspects of Child Abduction held in March of 2001 that mediation be used as an alternative to litigation. **Anne-Marie Hutchinson** made a substantial contribution to the debate outlining the pilot mediation program that is being conducted by Reunite in the United Kingdom.

*Rosa Saladino*

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## Recent Australian Decisions

***Graham Morris as delegate of the Secretary of the Department of Human Services, State Central Authority and Belinda Elissa Jachim***, heard at the Family Court, Melbourne by Smithers J. Judgement delivered 13 November 2001.

### Comment

The major issue in this case was the mother's psychological state. The mother had been sexually abused by the step-grandfather, between the ages of 10 and 12 years. It was not contested that prior to leaving New Zealand the mother had suffered from depression. There were a number of affidavits filed on behalf of the mother including affidavits of expert witnesses.

His Honour formed the view that much of the expert evidence was based on the mother's history. However, because of the consistency of the evidence and the fact that there had been no cross-examination of the mother and the grandmother, he commented "***I accept that it (the history) is at least substantially accurate.***" His Honour did not accept the Central Authority's submissions that the mother's condition could be controlled by medication. His Honour quoted from *DP v Commonwealth Central Authority and JLM and Director-General, NSW Department of Community Services*, 27 Fam.L.R 569 (DP and JLM) in relation to the grave risk defence and in particular commented that the test in *Gsponer* 1989 FLC92, 2001 at page 77,159 was a higher test. His Honour concluded that to return the children to New Zealand would expose them to a grave risk of harm. He then considered whether he should exercise his discretion and return the children notwithstanding the risk. He noted that no submissions were made by the Central Authority with respect to that issue and refused to make a return order.

## Recent Foreign Decisions

***Peter David Turner (by his next friend, The Official Solicitor) and Helen Jane Turner***

Before Mr Justice Wilson in the High Court of Justice Family Division 29 October 2001.

### The Issues

The father was incapacitated after an accident at work. It was not disputed that he was incapable of living independently and that he would require supervision in caring for the child. The mother argued, under Article 13 of the Convention:

- that the father had acquiesced to the removal; and
- that to return the child would expose him to grave risk of physical or psychological harm because of the father's unpredictable and at times violent behaviour.

His Honour found that at ***'all material times [the father] has lacked the capacity to acquiesce'*** (judgement p8 G) and that ***'[t]here has been put in place, a raft of protective measures in Australia to protect the mother and James against the tragically erratic behaviour into which the father's brain damage at times leads him'*** (Judgement p.10 G). These measures included undertakings from the father, a minute of Consent Orders mirroring those undertakings which had been signed by the father's next friend. These orders resulted from proceedings brought by the father in the Dandenong Registry of the Family Court of Australia. His Honour found that the mother had not established that there was a grave risk of harm and ordered that the child be returned to Australia.

His Honour provided a lengthy footnote in which he observed that the most likely scenario was that the mother would be permitted by the Australian Court to relocate with the child to England. He comments, at p14 C/D, ***'I have sometimes wondered...whether some new defence might be introduced into the Convention in circumstances where it was prima facie likely that the ultimate result would be to endorse the life of the child in the country to which he has been removed. But we all know what hard cases make. Such an amendment would strike at the foundation of the Convention and wholly emasculate it.'***

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## Articles & Papers

*Reunite Occasional Papers.* These are a collection of papers in three volumes available from Reunite International Child Abduction Centre. PO box 24875, London E1 6FR, fax +44(0) 20 7375 3442

*Proposal for a Council Regulation on Jurisdiction and the Recognition and enforcement of Judgements in Matters of Parental Responsibility Explanatory memorandum*  
Presented by the European Commission on IFL [2002] IFL 1-54 March 2002 pp24-35

Lowe, Nigel: Article 5(3) of the Draft EU Regulation on Parental Responsibility- Dealing with Child Abduction *International Family Law* [2002] IFL 1-54 March 2002 pp36-41.

Karsten His Honour Judge Ian QC: Article 5(3) of the Draft EU Regulation on Parental Responsibility-A Reply *International Family Law* [2002] IFL 1-54 March 2002 pp42-43.

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The *International Child Abduction News* is a quarterly newsheet, which aims to provide coverage of recent developments in international parental child abduction. The *News* is produced in the International Family Law Section of the Commonwealth Attorney General's Department. The purpose of the *News* is to provide general information and not legal advice. Every care is taken in the preparation of the *News* but readers are advised to check the details of any legislation, cases, or other material in it. All inquiries about the *International Child Abduction News* should be directed to the Principal Legal Officer, International Family Law Section, Family Law Branch, Family Law and Legal Assistance Division, Attorney-General's Department, National Circuit, Barton, ACT 2600. Editor: Amanda Bush. Email: amanda.bush@ag.gov.au

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