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## Family Law Council

5 August 2011

The Hon Robert McClelland MP  
Attorney-General  
Parliament House  
CANBERRA ACT 2600

The Hon Jenny Macklin MP  
Minister for Families, Housing, Community Services and Indigenous Affairs  
Parliament House  
CANBERRA ACT 2600

Dear Attorney-General  
Dear Minister

### **TERMS OF REFERENCE**

On 1 August 2011, you wrote to the Family Law Council requesting that Council consider and advise you urgently on the following issues in relation to the requirement for left behind parents in Australia to pay child support or maintenance where their child has been wrongfully removed from or retained outside Australia:

- i. whether the Australian Family Law Courts should be able to suspend the requirement for left behind parents to pay child support or maintenance where the court has found a child to be wrongfully removed from or retained outside Australia; and
- ii. where removed by the court, what circumstances should apply to subsequently reinstate the obligation to pay child support or maintenance.

In your letter, you noted that the Family Law Council should have regard to the *Hague Convention on the Civil Aspects of International Child Abduction* in considering

the above, and any benefits or risks to Australia in meeting its obligations under the Hague Convention. Your letter also noted:

- that existing child support legislation continues the requirement for left behind parents to pay child support or maintenance, and the ability of parents who have wrongfully removed or retained a child overseas to apply for child support or maintenance in Australia, and
- the general principle that child support is paid in the best interest of the child, and that parents should pay child support regardless of whether or not they have access to their children, but that (unlike domestic matters) when children are wrongfully removed from or retained outside Australia, the left behind parent is unable to access the Australian legal system or the Australian courts to determine issues of care and protection for their children.

Council's views and recommendations are set out below.

## **BACKGROUND**

The Hague *Convention on the Civil Aspects of International Child Abduction* (the Convention) came into effect in Australia on 1 January 1987. The main aims of the Convention are to discourage parental child abduction and, where abduction has occurred, to ensure that children who are wrongfully removed to, or retained in, another Convention country will be returned as quickly as possible to their country of habitual residence.

In Australia, the Convention is implemented through section 111B of the *Family Law Act 1975* (the Act) and the *Family Law (Child Abduction Convention) Regulations 1986* (the Regulations). The Regulations establish the Secretary of the Attorney-General's Department as the Commonwealth Central Authority with responsibility for coordinating the implementation of the Convention in Australia.

International law generally, and the Convention specifically, recognises that it is in the best interests of children to be protected from the harmful effects of wrongful removal or retention, and that matters relating to their long term care and protection should be determined before the courts of their country of habitual residence.

Abducting children from Australia actively undermines the authority and jurisdiction of the Australian courts and removes not only a left behind parent's rights of access to justice, but also those of the child, to be able to seek to have matters relating to the care and protection of the child appropriately heard and determined by the Australian courts.

Existing child support and maintenance legislation does not remove the requirement for left behind parents to continue to pay child support or maintenance, or the ability

of parents who have wrongfully removed or retained a child overseas to apply for child support or maintenance in Australia, even where the country in which they are now resident is not a reciprocating jurisdiction for child support or maintenance.

The wrongful removal from or retention outside Australia of a child also does not have any impact on the ability of the taking parent to apply for and be granted an administrative assessment under child support legislation.

The Child Support Registrar is required under child support law to accept an application that has been properly made. A parent may make a proper application for child support, so long as the parent liable for child support is a resident of Australia, and the child is an Australian citizen. There is no flexibility under child support law for the Registrar to refuse to accept an application that has been properly made, or refuse to assess a parent on acceptance of their application.

Section 23 of the *Child Support (Assessment) Act 1989* (the CSA Act) provides that an application for an administrative assessment of child support is properly made if it complies with the CSA Act.

Section 24 of the CSA Act provides that an application for an administrative assessment of child support may be made in relation to 'eligible children', that is, the children are under 18 years of age, are not a member of a couple, are Australian citizens and their parents separated after 1 October 1989.

Section 25 of the CSA Act provides that a person may apply to the Registrar for an administrative assessment of child support if they apply for both parents to be assessed in respect of the costs of the child and if they are not living together.

If the person applying for child support is not a resident of Australia on the day on which the application is made, the application has to meet the requirements of section 29A and 29B of the CSA Act.

**Should the Australian Family Law Courts be able to suspend the requirement for left behind parents to pay child support or maintenance where the court has found a child to be wrongfully removed from or retained outside Australia?**

Currently the Australian Family Law Courts are able to make a finding that a child has been wrongfully removed from or retained outside Australia where an application under the Convention has been made for the return of a child to Australia to an overseas Central Authority. This is specifically considered in the Convention under Article 15, and is implemented in Australia in regulation 17 of the Regulations.

Where the Court has made such a finding, consideration could be given to extending that authority to include the ability to suspend the requirement for child support or

maintenance to be paid by left behind parents where the Court has found a child to be wrongfully removed from or retained outside Australia.

Providing the Courts with the authority to suspend the requirement for a left behind parent to pay child support or maintenance in these circumstances may encourage taking parents to return to Australia to make arrangements for their child(ren)'s long term care and protection under the jurisdiction of the Australian Courts and legal system. It is in the best interests of children to be protected from the harmful effects of wrongful removal or retention and to have issues relating to their care and protection determined in their country of habitual residence.

It would be appropriate to exercise this authority only in cases where a child has been wrongfully removed from or retained outside Australia. This authority should not apply where a child has relocated within Australia and a paying parent may be having difficulty exercising access with their child, as a parent in this situation would have the option of seeking enforcement through the Australian Family Law Courts and assistance generally through the Australian family law system.

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. There may be merit in extending this authority to situations where children have been removed to or retained in non-Convention countries, or where the situation does not otherwise fall under the Convention, as in those circumstances left behind parents may be unable to access legal avenues in the overseas country to arrange for the return of their child or obtain access to their child.

Where a decision has been made by a court to suspend an obligation to pay child support or maintenance, Council is of the view that this should remove any obligation to pay child support or maintenance by the left behind parent for the time that any such suspension is in force. Any obligation to pay such support should not accrue in the interim period prior to any such obligation being reinstated.

**Recommendation 1: Authority should be given to the Australian Family Law Courts to be able to suspend the requirement for left behind parents to pay child support or maintenance where the court has found a child to be wrongfully removed from or retained outside Australia. This should apply to both Convention and non-Convention countries. Any obligation to pay such support should not accrue in the interim period prior to any such obligation being reinstated.**

**If the Attorney-General and Minister consider that it would be appropriate for the Australian Family Law Courts to be able to suspend the requirement for left behind parents to pay child support or maintenance where the court has found a child to be wrongfully removed from or retained outside Australia, what defences or exceptions should apply?**

Article 13 of the Convention provides that the judicial or administrative authority may refuse to order a child's return under the Convention if a person opposing the return establishes one or more of the following:

- the person seeking the return of the child was not actually exercising rights of custody to the child at the time of the child's removal to or retention in Australia;
- the person seeking the return of the child consented or subsequently acquiesced to the child being removed to or retained in Australia;
- there is a grave risk that the return of the child would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation; or
- the child objects to being returned, 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 to take account of his or her views.

It would be appropriate to incorporate these considerations in legislation conferring on the Courts the ability to declare the removal or retention of a child wrongful and subsequently consider suspending the requirement for a left behind parent to pay child support or maintenance.

Specifically, where a Court has found that the left behind parent was not actually exercising rights of custody in relation to the child at the time of the child's removal or retention, or where the left behind parent consented to or subsequently acquiesced to the removal or retention of the child, the removal or retention could not be declared wrongful.

In determining whether the removal or retention is wrongful, the Court should also have regard to whether the taking parent was fleeing from violence, whether the child objects to returning to Australia, and any other factors it considers relevant.

**Recommendation 2: A range of exceptions should apply to the discretion of the Courts to suspend the requirement for left behind parents to pay child support or maintenance where the court has found a child to be wrongfully removed from or retained outside Australia.**

**Where the person applying to the Family Law Courts 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, the removal or retention should not be deemed wrongful.**

**When determining whether the removal or retention is wrongful, the Court should also have regard to whether the taking parent was fleeing from violence, whether the child objects to returning to Australia, and any other factors it considers relevant.**

**Where the obligation to pay child support or maintenance is suspended by a court, what circumstances should apply to subsequently reinstate the obligation to pay child support or maintenance?**

The suspension of an obligation to pay child support or maintenance would ideally be a temporary measure to encourage the return of a child to Australia where arrangements for their long term care and protection can be appropriately determined by the Australian Family Law Courts, or to encourage parents to otherwise come to an agreement in relation to the long term care and welfare of their child. Suspension should act to terminate the obligation to pay child support or maintenance until the obligation is formally reinstated. The obligation to pay child support or maintenance should 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 options recognise that in some cases the return of a child to Australia may not necessarily be the most appropriate outcome.

**Recommendation 3: The obligation to pay child support or maintenance should 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.**

I am, of course, happy to discuss any of the issues raised in this letter of advice with you at your convenience.

Yours sincerely

Justice Garry Watts