Family Law Council

The Hon Nicola Roxon MP
Attorney-General
Minister for Emergency Management
Parliament House
CANBERRA ACT 2600

6 June 2012

Dear Attorney-General

**International Parental Child Abduction proposed amendments – discussion paper**

Thank you for the opportunity to comment on the discussion paper which was provided to the Family Law Council ('Council') at the Council meeting on 23 February 2012, and which was then circulated to Council for comment on 27 February 2012.

I confirm that Council considered the discussion paper drafted by your Department at a teleconference held on 13 March 2012.

Council notes that the Government intends to amend the *Family Law Act 1975* and relevant child support legislation 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 reduce the number of children wrongfully removed from, or retained outside, Australia, and increase the number of children returned to Australia.

Council further notes that 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 (FDR) 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.

Council provides the comments below in relation to the specific questions raised in the discussion paper.

## Part 1: Criminal Offences

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

*Question 1: Are there issues with the default elements supplied by section 5.6 of the Criminal Code applying to the proposed new offences?*

*Question 2: Are there issues with the ancillary offence provisions of the Criminal Code (Part 2.4) applying to the proposed new offences?*

The discussion paper proposes that the default fault elements supplied by section 5.6 of the *Criminal Code Act 1995* and the ancillary offence provisions of the Criminal Code (Part 2.4), including section 11.1 (attempts), apply to the proposed new offences.

Council notes that there is no reason why the default fault and ancillary elements should not apply and that it would be inadvisable to depart from the Criminal Code. Council agrees that the default fault elements and the ancillary offence provisions of the Criminal Code should apply to the proposed new offences.

### *Consent*

*Question 3: Should a person be subject to an offence of wrongful retention where consent or authorisation has been breached?*

*Question 4: What about where consent or authorisation has been revoked?*

The discussion paper proposes that an offence will be committed under the proposed new offences where consent or authorisation is breached. The paper notes that 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. It is not proposed, however, that an offence can be brought about by a revocation of consent or authorisation, where properly given.

Council agrees with the position outlined in the paper that an offence can be committed under the proposed new offences where a child is retained beyond the period of consent or authorisation and where consent or authorisation is breached.

Where a person revokes their consent or authorisation for a person to remove a child from Australia prior to the child leaving Australia, Council considers that an offence is unlikely to

be committed under the proposed new offences. The person seeking to remove the child from Australia would not yet have acted upon the consent and authorisation. Where a person revokes their consent or authorisation for a party to remove a child from Australia **after** a person has acted in accordance with that consent or authorisation, Council considers that no offence will be committed unless the child is retained beyond the original period of consent or authorisation.

***Penalty***

*Question 5: Is the penalty of three (3) years' imprisonment for the current offences appropriate?*

*Question 6: Are the proposed penalties of a maximum of three (3) years' imprisonment appropriate for the proposed new offences?*

*Question 7: Should there be a departure from the application of section 4B of the Crimes Act to the proposed new offences? If so, why?*

The discussion paper proposes that the proposed new offences for the wrongful retention of a child should carry a maximum penalty of imprisonment for three years, in line with penalties for the existing offence provisions for the wrongful removal of a child in the Family Law Act.

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.

Council supports the position outlined in the discussion paper and agrees that the proposed new offences for the wrongful retention of a child should carry a maximum penalty of imprisonment for three years and that there are no reasons to specify a departure from the default ratio outlined in section 4B of the Crimes Act.

***Geographical jurisdiction (extraterritoriality)***

*Question 8: Is a Category D extension of extraterritorial application of the proposed new offences appropriate?*

*Question 9: Should one of the other Categories be considered? If so, why?*

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.

The discussion paper proposes that Category D (section 15.4) of the Criminal Code apply to the proposed new offences to provide for the offences to extend to conduct by any person outside Australia even if there is no equivalent offence in the law of the local jurisdiction.

Council agrees with the proposal that Category D of the Criminal Code apply to the proposed new offences and notes that this would be on par with the extended geographical jurisdiction that applies to child sex offences.

***Defences***

*Question 10: Are the above defences appropriate? Should they be explicit in the Family Law Act?*

*Question 11: Should the defence of 'reasonable excuse' be available for the existing and proposed offences?*

*Question 12: Should there be any other defences to the criminal offences of wrongful removal or retention?*

The discussion paper proposes that the general defence provisions of the Criminal Code apply automatically to the proposed new offences, except for the general defence provision of mistake of fact (which only applies when the offence has a physical element for which strict liability applies).

The discussion paper also proposes the inclusion of two new defences for both the current offence provision in the Family Law Act and the proposed new offences: 'fleeing from violence' and 'protecting the child from imminent harm'.

Council agrees with the application of the general defence provisions of the Criminal Code and the addition of the two new defences for both the current offences and the proposed new offences, as recommended by Council in its letter of advice of 14 March 2011.

Council also accepts the reasoning outlined in the discussion paper as to why a defence of 'reasonable excuse', as recommended by Council in its letter of advice of 14 March 2011, is not required.

***Exceptions***

*Question 13: 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?*

*Question 14: Are these the appropriate exceptions?*

*Question 15: Should there be other exceptions to the criminal offences of wrongful removal or retention?*

Current sections 65Y and 65Z of the Family Law Act contain exception provisions relating to consent and authorisation. The discussion paper proposes similar exception provisions for the proposed new offences. These exception provisions are currently listed separately from the main offence provisions but the discussion paper proposes that the exceptions be inbuilt within the elements of the offence, rather than being 'exceptions' to the offence. It is also proposed to reframe the existing offence provisions in sections 65Y and 65Z of the Family Law Act in the same way.

Council recommends keeping the current offence provisions as they are, with the exception provisions separately listed. It should be possible for the exceptions to be able to be used as a defence. Council also recommends framing the proposed new offences in the same way, with the exception provisions separately listed.

***Evidential burden***

*Question 16: Should the evidential burden of proof be placed on the defendant for the exceptions to the existing and proposed criminal offences?*

*Question 17: Is it appropriate to change the evidential burden of proof for the exceptions to the current offences?*

*Question 18: Is it appropriate for the evidential burden of proof for the defences to be placed on the defendant?*

For the current offence provisions outlined in the Family Law Act, the defendant bears the evidential burden in relation to the exception provisions. However, the discussion paper proposes that the defendant should not bear the burden of proof for the exceptions for either the current offences in the Family Law Act or the proposed new offences, given that the matters listed in the exceptions are not matters peculiarly within the knowledge of the defendant.

Council recommends that the burden of proof should remain on the defendant for the exception provisions, but it should not be to a criminal standard. This is similar to the provisions of section 70NAE and section 70NAF(2) of the Family Law Act and the way "reasonable excuse" has been dealt with under section 112AD(1) of the Family Law Act; see *Sutcliffe and Sutcliffe* (1989) FLC 92-004; (1988) 12 FamLR 794.

***Definition of 'commencement of proceedings' where proceedings are pending***

The discussion paper proposes that, for the current criminal offence contained in section 65Z of the Family Law Act, and the proposed 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.

*Question 19: Are there concerns with defining the 'commencement of proceedings' in this way?*

Council recommends that, rather than trying to define 'commencement of proceedings' to include the FDR process and the application process under a specified international treaty, there should be separate statutory offences for situations where a person attends, or has been invited to attend, FDR for both wrongful removal and wrongful retention, as well as for where a valid application under a specified international treaty has been received and accepted by the CCA for both wrongful removal or wrongful retention.

***Family dispute resolution***

*Question 20: Are the current processes inviting parties to participate in FDR suitable for adaptation to implement the above proposal?*

*Question 21: 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 [sic] the written invitation is signed by an accredited FDR practitioner?*

*Question 22: 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?*

*Question 23: Is the proposed approach suitable for dealing with instances where family violence may subsequently be raised after the issuing of the invitation?*

*Question 24: 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?*

*Question 25: 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?*

*Question 26: 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?*

The discussion paper proposes that the extension of the offences to a person attending, or being invited to attend, FDR be restricted to parents. The process of 'attending' FDR for the initiating parent is proposed to commence at the conclusion of the first formal intake meeting with an accredited FDR practitioner, where the parent will be provided with information regarding the obligation not to remove or retain their child outside of Australia without the other parent's consent or a court's authorisation.

For the responding parent, the relevant date for being 'invited to attend' FDR is proposed to be the date of receipt of a formal written invitation in the form of a registered letter, signed by an accredited FDR practitioner, to participate in FDR. Alternatively, the obligations are proposed to apply from the date of 'attending' FDR, as defined above, if this occurs before an invitation to attend FDR is sent. The discussion paper proposes that at either of these stages, the parent be provided with information regarding the obligation not to remove or retain their child outside of Australia without the other parent's consent or a court's authorisation.

Subregulation 26(4) of the Family Law (Family Dispute Resolution Practitioners) Regulations 2008 (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 Family Law Act. Proposed amendments to this subregulation would require this written contact to be a registered letter, signed by an FDR practitioner.

Council understands that it is not uncommon for people to avoid receiving the letter of invitation to attend FDR or to claim that they did not receive it. Council notes that the timing of the commencement of the obligation not to remove or retain the child outside of Australia is an important issue. Council supports the proposal for criminal offences to apply from when the first parent attends their intake session and from when the second parent attends an intake session or has been 'invited' to attend FDR, whichever occurs first.

In relation to the question as to the significance of whether or not a person receives written information about potential criminal offences, the Department should obtain legal advice as to whether or not parties are presumed to know the law. If it is not thought to be necessary or prudent, Council does not support information about the offences being contained in the letter inviting them to FDR. Council notes that parents/parties with parental responsibility are not currently informed of the offences relating to wrongful removal of a child when filing in court or, until recently, when they are provided with court orders. It is understood that the family law courts are currently reviewing the document entitled "Parenting orders – obligations, consequences and who can help" issued pursuant to section 65DA(2) of the Family Law Act so that it provides particulars of the obligations arising from section 65Y of the Family Law Act which the making of the order creates. The Council recommends that parties are informed of their obligations in an intake session where it is possible to explain the context and effects of the new criminal offences.

Council notes that section 12G of the Family Law Act relating to the provision of information to parties by FDR practitioners will also need to be amended to include information about the proposed new offences. If new information provisions are included, then, the provision of information should be required when applications or responses are filed (as is now the case when a court makes a parenting order).

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

*Question 27: Is it appropriate to limit the obligations on parties under the current and new offences in this way?*

*Question 28: Is 12 months an appropriate time period for the obligations to apply, if there is no intervening event?*

*Question 29: When should the obligations cease where there has been a valid application under a specified international treaty?*

Given that the FDR process does not always have a formal conclusion, the discussion paper proposes ceasing the obligation to seek the other parent's consent, or authorisation from the court 12 months after the last FDR session, or attempted FDR session, where there is no intervening event, such as a consent order or court proceedings (which would activate their own obligations). This is in line with subregulation 26(1) of the FDR Regulations, which requires an applicant to file a subsection 60I(8) certificate under the Family Law Act within 12 months after the latest FDR or attempted FDR.

Council supports this proposal.

***Application***

*Question 30: Are there concerns with only applying the proposed new criminal offences prospectively?*

*Question 31: Are there concerns with fixing a commencement date by proclamation for the legislative amendments?*

*Question 32: What would be an appropriate commencement period and how should it be effected in legislation?*

It is proposed that the new criminal offences should only apply prospectively and that the legislative amendments proposed would commence on a date to be fixed by proclamation, with sufficient time to put appropriate processes in place.

Council agrees that the new criminal offences cannot apply retrospectively and has no concerns about the amendments commencing on a date to be fixed by proclamation.

***Jurisdiction***

*Question 33: Should the Family Court of Australia and/or the Federal Magistrates Court have jurisdiction to hear these cases? If so, why?*

Neither the Family Court nor the Federal Magistrates Court has jurisdiction to hear offences under sections 65Y and 65Z of the Family Law Act and will not have the jurisdiction to hear offences under the proposed new offence provisions. It is proposed to put this matter beyond doubt by excluding sections 65Y and 65Z and the proposed new offence provisions 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 the jurisdiction of the courts.

Council agrees that courts exercising jurisdiction generally under the Family Law Act should not have this jurisdiction and the prosecution for these criminal offences should be brought by the Commonwealth Director of Public Prosecutions (CDPP) in the normal way in the courts which ordinarily deal with criminal matters.

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

*Question 34: What other criteria should the CDPP take into account in considering a request not to prosecute?*

*Question 35: 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?*

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.

In order to ensure there is no impediment to children being returned to Australia, the Government has announced that the 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. 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.

It is proposed that the legislation dealing with an undertaking not to prosecute will list the criteria to be considered in making that decision, including: 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.

Council recommends including two other criteria to be considered in making a decision whether to give an undertaking not to prosecute, namely: the wishes of the left behind parent, and the likely effect of prosecution on the child.

Council has no further recommendations, apart from those already mentioned, as to 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)***

**Declaration of wrongful removal or retention (step one)**

*Question 36: Does this proposed power of the courts provide an appropriate incentive/disincentive for the return of children?*

*Question 37: 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?*

*Question 38: Is it appropriate for the declaration to satisfy the requirements for an Article 15 declaration?*

*Question 39: Should the declaration be able to be used as evidence in any related criminal proceedings?*

*Question 40: 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?*

*Question 41: 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?*

*Question 42: What should happen if the location of the other party is not known and they cannot be served?*

Nothing in existing legislation terminates a 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, where there are child support or maintenance arrangements in place. There is also nothing in existing legislation to prevent parents or non-parent carers who have wrongfully removed or retained a child overseas applying for child support or maintenance in Australia. 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.

It is proposed that the Australian family law courts will have the authority to suspend the requirement for child support or maintenance to be paid by left behind parents where the court has found a child to have been wrongfully removed from or retained outside Australia, and secondly where it is in the best interests of the child to do so.

It is proposed that the Australian family law courts be provided with the authority to make a declaration that a removal or retention of a child is wrongful, irrespective of whether the country the child has been removed to or retained in is a convention or a non-convention country; that this declaration will satisfy the requirement for an Article 15 declaration under the Hague *Convention on the Civil Aspects of International Child Abduction* (the Convention); and that it may be used in related criminal proceedings as evidence of a wrongful removal or retention which can be tested in the criminal proceedings and against which a defence may be raised.

It is further proposed that an application to suspend a requirement to pay child support or maintenance can be made where:

- there is an existing liability to pay child support or maintenance
- the taking parent/non-parent carer submits 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.

Council notes that the recommendation in their letter of advice of 5 August 2011 to suspend child support where a child has been wrongfully removed or retained was not aimed at providing an incentive or disincentive for the return of children, but rather at providing the courts with a discretion to make orders withdrawing support for the abducting parent's unlawful conduct.

Council is of the view that the persons able to apply for a suspension of child support should be broad enough to enable anyone exercising parental responsibility to apply. Council has no objections to enabling a Registrar to apply for a suspension of child support, as long as it is an alternative to the paying parent applying.

Council supports the proposal that the declaration satisfies the requirements for an Article 15 declaration but does not support the declaration being used in related criminal proceedings.

Council recommends that an application to suspend a requirement to pay child support or maintenance can only be made where there is an existing assessment and that an order to suspend a requirement to pay child support or maintenance should be able to be made even where the location of the abducting person is not known.

***Considerations the court should take into account***

*Question 43: Are these the appropriate considerations for the court?*

*Question 44: Are there other considerations which should be taken into account?*

It is proposed that 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, specifically that the removal or retention of a child should 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' (which were being, or would have been, exercised but for the removal or retention) under Australian law.

It is also proposed 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.

These considerations are in line with recommendations of Council, in its letter of advice dated 5 August 2011, and with some of the considerations outlined at Article 13 of the Convention. Council agrees with these considerations.

***Suspension of child support or maintenance (step two)***

*Question 45: 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?*

*Question 46: 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?*

*Question 47: Are the above defences and considerations the court should take into account appropriate when considering whether to suspend child support or maintenance payments?*

*Question 48: Are current court processes adequate to enable the proposed changes to take effect?*

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

The discussion paper proposes that the considerations the court should take into account in deciding whether it is in the child's best interests to suspend child support or maintenance,

are the matters set out in section 60CC of the Family Law Act. These considerations are primarily focused upon parenting orders which are not child maintenance orders. The more relevant sections are subsection 117(4) *Child Support (Assessment) Act1989* and section 66H, section 66J and section 66K Family Law Act.

Council, in its letter of advice of 5 August 2011, also suggested several defences to the suspension of child support or maintenance, in keeping with the considerations set out at Article 13 of the Convention, which are included in the discussion paper:

- fleeing from 'family violence'
- protecting the child from danger of imminent harm
- objections by the child to returning to Australia, the objection being beyond mere expression of a preference or of ordinary wishes and the child being of an age and degree of maturity at which it is appropriate for the court to take account of his or her views, or
- any other factors the court considers relevant.

Council supports the proposed defences and considerations that the court should take into account when considering whether to suspend child support or maintenance payments outlined in the discussion paper and believes that current court processes are adequate to enable the proposed changes to take effect.

Council recommends that either the Registrar or a parent should be able to apply to have a requirement to pay child support suspended, and that an application to suspend child support should only be made after an assessment has been issued.

***Order of the court***

*Question 49: 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?*

*Question 50: Should it be left up to the discretion of the court or should the legislation be explicit as to when the suspension dates from?*

*Questions 51: Is it appropriate that any child support or maintenance which has been paid in the interim can be recovered?*

*Question 52: Is this administratively possible?*

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 discussion paper proposes that the suspension will start from the date the order is made unless otherwise specified in the order.

Council agrees with the court being required to make an order, where it has determined that it is in the best interests of the child (given the court has discretion in determining whether it is

in the best interests of the child), and that the court should have the discretion to determine the date from which the suspension takes effect.

Council agrees that recovery of child support or maintenance which has been paid after a suspension date should occur.

***Stay of assessment/payments until matter determined by the court***

*Question 53: 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?*

*Question 54: 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?*

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 maintenance liability, it is proposed that 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.

Council agrees that the court should be able to stay processes until an application for the suspension of child support or maintenance has been decided. Whether there should be amendments to child support legislation and how this policy should be administered is not a matter Council can comment on.

***Operation of a court order – examples***

*Question 55: Are there concerns with the way the court orders are proposed to be administered in the different situations?*

*Question 56: Will these examples work with current administrative processes?*

The discussion paper outlines two examples as to how a court order suspending child support or maintenance payments could operate in practice.

Council does not have any concerns about the way the courts would be called upon to make orders as set out in the examples. In relation to an order to suspend child support being made prior to receipt of an application for child support or maintenance, Council notes that the legislation should be clear that what is being suspended is an obligation or requirement to pay child support or maintenance, should such obligation or requirement arise.

Council is not able to comment on how these examples would work with current administrative processes.

***Reinstatement of obligation to pay child support/maintenance***

*Question 57: Are these appropriate points at which the obligation to pay child support or maintenance should be reinstated?*

*Question 58: 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?*

*Question 59: 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?*

*Question 60: Is it appropriate to leave it up to the court to determine whether the reinstatement of child support or maintenance dates from the date of the court order or from another date?*

*Question 61: Who should be able to apply for a court order to reinstate child support or maintenance?*

As part of the amendments, it is proposed that any requirement to pay 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 a requirement 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.

The discussion paper states that the intention of the proposed reforms is that a suspension of payments be a temporary measure only 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.

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; where there has been agreement between the parties, will be the date outlined in a formal written agreement between the parties, irrespective of whether the child is returned to Australia or not; and where there is an order of the court, will be the date the order is made unless otherwise specified in the order.

Council agrees that these are appropriate points at which the obligation to pay child support or maintenance should be reinstated. However, Council suggests the use of consent orders as an alternative to the complex formalities proposed in the discussion paper for agreement between the parties.

Council agrees that the court should have discretion to determine the date of the reinstatement of child support or maintenance payments, although suggests that the date the child returns to Australia could be an appropriate date for the original suspension order to cease.

Council recommends that the paying parent(s), the receiving party or the Registrar should be able to apply for a court order to reinstate child support or maintenance payments.

## Part 4: Locating abducted children overseas

*Question 62: Is it appropriate for the CCA to apply to the court for an 'information order'?*

*Question 63: Should the legislation list the types of information the CCA may apply for or outline the types of information the CCA may apply for?*

*Question 64: 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?*

*Question 65: Is it appropriate that an information order should stay in force for 12 months in line with location orders?*

Council recommended, in its letter of advice dated 14 March 2011, that consideration could be given to introducing improved information gathering powers to strengthen Australia's response to international parental child abduction and to amending subsection 67K(2) of the Family Law Act to specifically include the Child Abduction Convention. Part of the rationale for this was based on the fact that such powers already exist in relation to location orders, Commonwealth information orders and recovery orders under Part VII of the Family Law Act.

The discussion paper notes that 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 and that the CCA currently has limited mechanisms 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.

Currently, 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 itself. This is particularly an issue where a child has been abducted to a non-convention country and the resources of the Overseas Central Authority are not available to assist the CCA to locate the child.

The discussion paper proposes providing the family law courts with the authority, on application by the CCA only, to make an 'information order' to require entities and individuals within Australia to provide the CCA with information it has requested (e.g. credit or bank card usage, telephone records, e-mail records, social media records, cookies or Internet protocol records, etc). The order would be valid for 12 months. It is not proposed that the orders would seek access to information sources normally reserved for police such as phone tapping.

It is proposed that the order will only be available when the location of the wrongfully removed or retained child is not known and certain requirements are met, including that 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. The discussion paper notes that the Information Privacy Principles and the

Public Service Code of Conduct will guide the Government as to its obligations regarding the information received through such orders.

Council has some concerns about the proposed 'information orders'. Council notes that the proposed orders are quite intrusive and that there therefore needs to be a good argument to introduce such powers into the Family Law Act and there needs to be good safeguards in place, although it also notes that similar powers are already contained in the Act in relation to location orders, Commonwealth information orders and recovery orders.

Council recommends that the Department undertake some more work in relation to this proposal, including clarification as to the Department's role, and perhaps consider limiting the authority of the court to only name one source of information for each 'information order' sought by the CCA.

***Conclusion***

Council supports the work that the Department is undertaking to strengthen Australia's response to international parental child abduction. Council looks forward to seeing the progress of the legislation to implement these proposals.

Yours sincerely

Associate Professor Helen Rhoades
Chairperson