



FAMILY LAW COUNCIL

PARENTAL CHILD ABDUCTION

**A REPORT TO THE ATTORNEY-GENERAL
PREPARED BY THE FAMILY LAW COUNCIL**

JANUARY 1998

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THE FAMILY LAW COUNCIL

The Family Law Council is a statutory authority which was established by section 115 of the *Family Law Act 1975*. The functions of the Council are set out in sub-section 115(3) of the *Family Law Act* which states:

It is the function of the Council to advise and make recommendations to the Attorney-General, either of its own motion or upon request made to it by the Attorney-General, concerning -

- (a) the working of this Act and other legislation relating to family law;
- (b) the working of legal aid in relation to family law; and
- (c) any other matters relating to family law.

SUMMARY OF RECOMMENDATIONS AND BRIEF ANSWERS TO ATTORNEY-GENERAL'S QUESTIONS

RECOMMENDATION 1 (para 2.18)

There is a need to improve the data collected on child abduction and it is therefore recommended that:

- (a) Detailed data should continue to be collected by the International Civil Procedures Unit of the Attorney-General's Department in relation to international child abduction to Hague Convention countries and non-Hague Convention countries;
- (b) The data collected in relation to international parental child abductions should include the sex of the alleged perpetrator, the number of children involved, the ages of those children and the nationality of the abductor; and
- (c) The Australian Federal Police and State and Territory Police should not be required to collect similar data in relation to child abductions within Australia. A body such as the Australian Institute of Criminology, could be commissioned to collect such data as required from time to time if, and when, this is considered necessary.

RECOMMENDATION 2 (para 4.23)

- (a) That arrangements be made for requests from non police sources (ie child welfare authorities and Hague Abduction Convention Central Authorities) to locate children abducted from Australia be channelled to the National Central Bureau (NCB), either directly or via State and Territory Police Missing Persons Bureaus.
- (b) That a protocol be drawn up between the NCB and the Australian Hague Convention Central Authority (the International Civil Procedures Unit of the Commonwealth Attorney-General's Department) setting out arrangements which will enable the Central Authority to refer cases directly to the NCB.

RECOMMENDATION 3 (para 4.34)

Parental child abduction, whether at the international level or within Australia, should not be criminalised and alternative means of improving the recovery rate of abducted children should be explored.

RECOMMENDATION 4 (para 4.35)

That a broad discretionary power be given to the courts to make reparation, from the property of persons responsible for international child abductions, to the Commonwealth, or other bodies associated with the recovery of the child, of the costs associated with the recovery of those abducted children.

RECOMMENDATION 5 (para 4.45)

That the Attorney-General's Department and the Department of Finance and Administration give consideration to how more resources can be made available to the Australian Federal Police for the recovery of abducted children.

RECOMMENDATION 6 (para 5.50)

If the Government does not accept the Council's recommendation that parental child abduction should not be criminalised and proposes to proceed with legislation giving effect to such a proposal, the Council's answers to the consequential questions raised in the terms of reference are as follows:

- (a) Should any such offence apply to parental abduction regardless of the age of the child or should it be confined to persons under the age of 18 years?

The offence should apply to the abduction of a child under 16 years of age. However, it should be possible for an exception where, in the opinion of the court, such a child was capable of making a reasoned consent to the action.

- (b) What exceptions or defences should apply in relation to any such offence?

The following exceptions and defences should apply -

- fleeing from violence (Section 112AC of the *Family Law Act* is an example of this defence);
- sudden, extraordinary emergency;
- protecting the child from danger of imminent harm;
- reasonable excuse within the meaning of the *Family Law Act 1975*;
- the consent of the child involved. Consent could be given by a child who is over the age of 16 years, or, if under 16 years of age, where the age and maturity of the child are such that s/he was able, in the opinion of the court, to make a reasoned judgment in the circumstances of the case.

- (c) Should the consent of the Attorney-General or the DPP be required before the commencement of a prosecution?

The Attorney-General's approval should be necessary before commencing prosecution.

- (d) Should the general prosecution policy of the Commonwealth apply to the institution of such prosecutions?

There should be a special prosecution policy for such cases.

- (e) Should any offence provisions be in the Family Law Act 1975 or in some other legislation?

The offence should be in the Commonwealth Criminal Code with a cross reference to the *Family Law Act*.

- (f) Should any offence be tried in the Family Court or some other court?

Almost all prosecutions for offences under Commonwealth law are conducted before State and Territory courts exercising federal jurisdiction pursuant to sections 39 and 68 of the *Judiciary Act* 1903. The offence should be tried in the same court as most other Commonwealth offences; that is, State and Territory courts exercising federal jurisdiction.

- (g) Should police have powers to intercept telephone communications and use listening devices to locate a child who has been removed or retained by a person in breach of any such offence?

The Council notes that the strict privacy based policy on which the existing legislation is based would not allow an extension of such powers in relation to parental child abduction. The Council appreciates the arguments under which invasions of personal privacy, such as telephone interception and use of listening devices, are confined to the more serious criminal offences. Notwithstanding this, Council considers that, irrespective of whether parental child abduction is criminalised, police should have power to intercept telephone communications and use listening devices in cases where a child has been abducted and such interception or use would assist in the recovery of the child.

BRIEF ANSWERS TO THE ATTORNEY-GENERAL'S SPECIFIC QUESTIONS

The Council has considered each of the specific questions asked by the Attorney-General. Those questions are set out below together with the Council's brief answer to each question. More detailed reasons for the Council's answers are given in the body of the report:

Q1. Should it be a criminal offence for a person with parental responsibility for a child to remove the child from Australia, or retain the child in a foreign country, in breach of the custody, guardianship or access rights of another person?

A No.

Q2. Should it be a criminal offence for a person with parental responsibility for a child to remove a child from his or her country of habitual residence to Australia, or to retain the child in Australia, in breach of the custody, guardianship or access rights of another person?

A No.

Q3. Should it be a criminal offence for a person with parental responsibility for a child to do the following within Australia:

- to remove the child from the care of a person, or
- to refuse or fail to deliver or return a child to a person

with intent to prevent the exercise or performance of any of the powers, duties or responsibilities of another person who has parental responsibility for the child?

A No. However, see Recommendations 4, 5 and 6.

Q4. Should it be an offence to aid or abet the commission of any such offence?

A If, contrary to the Council's recommendation, it is decided to criminalise parental child abduction, it would be incongruous not to make it an offence to aid and abet a person who abducts his or her own child.

Q5. Should any such offence apply to parental abduction regardless of the age of the child?

A If it is decided to criminalise parental child abduction it should be an offence to abduct a child up to age 16 years. However, Council would suggest that the court should have some discretion in determining

whether a child, who was competent to do so, had given consent to the action of the parent.

Q6. What exceptions or defences should apply in relation to any such offence?

A If it is decided to criminalise parental child abduction Council is of the view that the following exceptions and defences should apply:

- **fleeing from violence (Section 112AC of the *Family Law Act* is an example of this defence);**
- **sudden, extraordinary emergency;**
- **protecting the child from danger of imminent harm;**
- **reasonable excuse within the meaning of the *Family Law Act 1975*;**
- **the consent of the “child”. “Child” would be defined as a person who has attained the age of 16 years, or a person who is under 16 years of age but whose age and maturity are such that s/he was able, in the opinion of the court, to make a reasoned judgment in the circumstances of the case.**

Q7. Should the consent of the Attorney-General be required for the commencement of a prosecution for parental child abduction?

A If it is decided to criminalise parental child abduction the consent of the Attorney-General should be necessary before commencing prosecution action.

Q8. Should the prosecution policy of the Commonwealth apply to the institution of such prosecutions?

A If it is decided to criminalise parental child abduction a special prosecution policy should be developed for such cases.

Q9. Should any such offence provisions be in the *Family Law Act 1975* or in some other legislation?

A If it is decided to criminalise parental child abduction the offence should be in the Commonwealth Criminal Code with a cross reference to the *Family Law Act* .

Q10. Should any such offences be tried in the Family Court or some other court?

A Almost all prosecutions for offences under Commonwealth law are conducted before State and Territory courts exercising federal jurisdiction pursuant to sections 39 and 68 of the *Judiciary Act 1903*. The offence should be tried in the same court as most other

Commonwealth offences; that is, State and Territory courts exercising federal jurisdiction.

Q11. Should police have powers to intercept telephone communications and use listening devices to locate a child who has been removed or retained by a person in breach of any such offences?

A The Council appreciates the arguments under which invasions of personal privacy, such as telephone interception and use of listening devices, are confined to the more serious criminal offences. Notwithstanding this, Council considers that, irrespective of whether parental child abduction is criminalised, police should have power to intercept telephone communications and use listening devices in cases where a child has been abducted.

Q12. Should proceeds of crime legislation apply to any such offences?

A The Council considers that, irrespective of whether parental child abduction is criminalised, the courts should have a broad power to make reparation, from the property of persons responsible for abducting children, to the Commonwealth of the costs associated with the recovery of those abducted children.

1. INTRODUCTION

Terms of reference¹

1.01 In a letter dated 9 September 1996 the Attorney-General requested the Family Law Council to investigate the following matters:

1. Should it be a criminal offence for a person with parental responsibility for a child to remove the child from Australia, or retain the child in a foreign country, in breach of the custody, guardianship or access rights of another person?
2. Should it be a criminal offence for a person with parental responsibility for a child to remove a child from his or her country of habitual residence to Australia, or to retain the child in Australia, in breach of the custody, guardianship or access rights of another person?
3. Should it be a criminal offence for a person with parental responsibility for a child to do the following within Australia:
 - to remove the child from the care of a person, or
 - to refuse or fail to deliver or return a child to a personwith intent to prevent the exercise or performance of any of the powers, duties or responsibilities of another person who has parental responsibility for the child?
4. Should it be an offence to aid or abet the commission of any such offence?
5. Should any such offence apply to parental abduction regardless of the age of the child?
6. What exceptions or defences should apply in relation to any such offence?
7. Should the consent of the Attorney-General be required for the commencement of a prosecution for parental child abduction?
8. Should the prosecution policy of the Commonwealth apply to the institution of such prosecutions?

¹ The terms of reference used the terminology of custody, access and guardianship because it is the terminology of the Hague Convention on the Civil Aspects of International Child Abduction. The *Family Law Reform Act* 1995 changed that terminology and its associated possessory concepts domestically but provided compatibility with the Hague Convention for international abduction situations.

9. Should any such offence provisions be in the *Family Law Act 1975* or in some other legislation?
 10. Should any such offences be tried in the Family Court or some other court?
 11. Should police have powers to intercept telephone communications and use listening devices to locate a child who has been removed or retained by a person in breach of any such offences?
 12. Should proceeds of crime legislation apply to any such offences?
- 1.02 The Attorney-General added:

I would be grateful if the Council would make recommendations to me on these questions and any other issues it considers relevant.

The Child Abduction Committee

1.03 At its meeting on 16 October 1996 the Council appointed a committee to look into the questions raised by the Attorney-General. At the completion of the project the members of the committee were:

Mr Richard Morgan *	<i>Convenor</i>
Dr Carole Brown	<i>Family Court Counselling Service</i>
Mr John Hodgins **	<i>Director of Legal Aid - Queensland</i>
The Hon Justice J V Kay **	<i>Family Court of Australia</i>
Mr Geoff McDonald	<i>Senior Adviser, Criminal Law Reform</i>
Mr John McGinness	<i>International Civil Procedures Unit</i>
Sgt. Gerold Knight	<i>Aust Bureau of Criminal Investigation</i>
Sgt. John Gralton	<i>Aust Bureau of Criminal Investigation</i>
Mr Bill Hughes	<i>Director of Research</i>

* FLC Member

** Former FLC Member

1.04 The Chairperson of Council, Mrs Jennifer Boland, joined the committee during the final drafting stages of the report.

Composition of the Family Law Council

1.05 Members of the Family Law Council at the time of the production of this report were:

Mrs Jennifer Boland *Chairperson*
Ms Elaine Atkinson
Ms Dale Bagshaw
Mr Stephen Bourke
Mr Rod Burr
The Hon Justice Michael Hannon
Ms Annemaree Lanteri
Mr Richard Morgan
Mr Des Semple

Public consultation

1.06 In late February 1997 the Council released a discussion paper setting out the background and issues and seeking public comment on a number of questions. The time for making submissions was extended to enable interested persons to express their views. The discussion paper was sent to over 1,000 persons and organisations on the Council's mailing list and also to a number of others whom the Council considered, because of their work or expertise, might wish to make submissions. There were 29 submissions made in response to the discussion paper. A list of the persons and organisations making submissions is at Appendix A.

1.07 In general, the Council found that the submissions put forward a range of relevant and helpful views on the issues being examined and, as a result, the Council wishes to thank those persons and organisations who made submissions. Those submissions have been of significant assistance in the drafting of this report.

1.08 One submission was from a woman whose experience included domestic violence and child abduction. Another was from a woman whose children had been abducted and have not been returned. These submissions were particularly valuable in that they offered many insights into the issue of criminalisation, provided relevant personal views on the effects of abduction on the adults and children concerned and offered other insightful comments. A number of other submissions put forward a range of personal views on the issues raised in the discussion paper.

1.09 Submissions were received from groups in the following categories:

Judges/Magistrates	3
Prosecuting authorities	2
Legal practitioner groups	4
Legal aid bodies	3
Women's support groups	5

Men's support groups	1
Grandparents' support groups	1
Government agencies	4
Private citizens*	4
Child abduction parent support groups	1
Family Court of Australia	1

* One woman and 3 men.

1.10 Within each of these groups there were divided views on whether parental child abduction should be a criminal offence. Although women's groups were generally opposed to criminalisation of parental child abduction, one group favoured it in relation to international abductions. Judges, Magistrates and prosecution authorities were generally in favour of an offence. Legal practitioner groups and legal aid bodies were divided.

The Family Law Act 1975

1.11 From 1976, when the *Family Law Act 1975* commenced to operate, it provided that it was an offence to remove a child who was the subject of a custody order from the person who had care and control of the child. Further offences were created in 1983 to deal with removal or attempted removal of a child from Australia to an overseas country in contravention of a court order², or where proceedings are pending³.

1.12 The Family Court also has the same powers to punish contempts of its power and authority as the High Court of Australia.⁴ Under section 112AP of the *Family Law Act* the Family Court, or any court having jurisdiction under the Act, may punish a contempt by committal to prison or fine or both.

1.13 Where a person contravenes a residence, contact or specific issues order⁵ section 112AD of the Act empowers the court to impose a penalty on the person. The penalty may include a sentence of imprisonment or a fine, require the person to enter into a recognisance in accordance with section 112AF or order the sequestration of some or all of the person's property.

1.14 Where a child is abducted to a place within Australia, the *Family Law Act* provides for court ordered location and recovery of the child. A person who has a residence order, contact order or specific issues order in relation to a child or a person

²Section 65Y(1) of the *Family Law Act 1975*.

³Section 65Z(1) of the *Family Law Act 1975*.

⁴Section 35 of the *Family Law Act 1975*.

⁵"Residence order", "contact order" and "specific issues order" are defined in sub-section (3), (4) and (6) respectively of section 64B of the *Family Law Act 1975*.

concerned with the care, welfare or development of the child may apply for a “location order”⁶ when a child has been abducted. A location order requires a person to provide to the Registrar of the court information that the person has or obtains about the child’s whereabouts.

1.15 When a child is located a “recovery order”⁷ will enable authorities to recover and return the child to the person seeking his or her recovery without exposing the abductor to possible violence at the hands of the person applying for the order. In deciding whether to make a recovery order in relation to a child, a court must regard the best interests of the child as the paramount consideration⁸. The Act provides a range of powers to assist in the recovery of the child, including power to stop and search a vessel, vehicle, aircraft, premises or place⁹ as well as a range of powers such as arrest and removing or taking possession of the child as set out in section 67Q of the Act.

Commonwealth Constitutional powers

1.16 The Council received on 7 January 1997 a legal opinion from the Special Counsel of the Attorney-General’s Department which suggests that, with some limited exceptions, the Commonwealth has the power to enact laws creating offences of the type contemplated in the terms of reference. It is clear that the Commonwealth’s powers extend to situations involving abductions of children to or from Australia. The limitations mainly relate to ex nuptial children in Western Australia and children who are in the care of a person pursuant to child welfare laws.

1.17 Western Australia has not referred to the Commonwealth its relevant powers in relation to ex nuptial children. Legal opinion is that while the Commonwealth would have power to legislate in respect of conduct relating to international and interstate abductions of such ex nuptial children, it could not do so in respect of such children where the abduction occurs within Western Australia. However, the Council is of the view that if the Western Australian legislation covers such children the range of possibilities would be covered satisfactorily.

1.18 In respect of the identified current limitations, if criminalisation of parental child abduction is proposed, consideration would need to be given to children subject to State and Territory child welfare legislation to see whether, and to what extent, the proposed legislation might need to also cover such children. In considering that issue consultation with State and Territory officials would be necessary to develop options

⁶“Location order” is defined in section 67J(1) of the *Family Law Act 1975*.

⁷“Recovery order” is defined in section 67Q of the *Family Law Act 1975*. Section 67P of the Act provides for severe penalties for disclosure of information about the location of a person in a range of situations.

⁸ Section 67V, *Family Law Act 1975*.

⁹Section 67S of the *Family Law Act 1975*.

for dealing with any restrictions to bringing such children within the scope of the proposed legislation.

The Hague Convention

1.19 Australia's ratification of the *Hague Convention on the Civil Aspects of International Child Abduction* on 29 October 1986 came into effect from 1 January 1987. Throughout this report reference is made to this Convention as "The Hague Convention". A brief outline of the operation of the Hague Convention is set out at Appendix B.

1.20 The stated aims of the Convention are to secure the prompt return to their habitual residence of children wrongfully removed to, or retained in, any jurisdiction bound by the Convention; that is, in contravention of the custodial rights of the parent seeking the child's return and to ensure that the rights of custody and access under the law of Convention countries are respected¹⁰.

1.21 The Convention is only relevant where a child has been removed to, or retained in, an overseas country which has ratified the Convention. There are currently 49 countries which have ratified the Hague Convention. These are listed in Appendix C.

Non signatory countries

1.22 Where a child is removed to a non signatory country, it is usually necessary for the child's parent to begin custody proceedings in that country to recover the child. With some countries the existence of an extradition treaty may be another avenue for action. However, the absence of a general criminal provision in Australian law on parental child abduction is usually a barrier to this course of action on the basis that such countries do not allow prosecution of abductors or their extradition to countries where parental child abduction is not a criminal offence.

Change in terminology

1.23 From 11 June 1996, when the *Family Law Reform Act 1995*, came into operation, the custody-access model no longer applies under the *Family Law Act*, having been replaced by a system of shared parenting based on parental responsibility. Terms such as "custody" and "access" have, from 11 June 1996, been replaced and the legislation now refers to the child's "residence" (that is, with whom the child lives) and persons with whom the child has "contact".

¹⁰See Footnote 1 in relation to the terminology of the Hague Convention.

1.24 Words such as “custody” and “access” are still used in the Hague Convention on the Civil Aspects of Child Abduction, which is discussed in chapter 2 of this paper. The *Family Law Reform Act* 1995, therefore, contains provisions which make it clear that although the Australian terminology has changed the provisions of the Hague Convention still apply to Australian parents.

1.25 To this end, subsection 111B(4) of the *Family Law Reform Act* states:

- (4) For the purposes of the Convention:
 - (a) each of the parents of a child should, subject to any order of a court for the time being in force, be regarded as having custody of the child; and
 - (b) a person who has a residence order in relation to a child should be regarded as having custody of the child; and
 - (c) a person who, under a specific issues order, is responsible for day-to-day care, welfare and development of a child should be regarded as having custody of the child; and
 - (d) a person who has a contact order in relation to a child should be regarded as having a right of access to the child.

1.26 With these factors in mind this report only uses the terms “custody” and “access” in relation to the Hague Convention provisions. In the remainder of the paper the terminology introduced in the *Family Law Reform Act* 1995 is used.

Family and domestic violence

Section 60D of the *Family Law Act* defines “family violence” as “conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that, or any other member of the person’s family to fear for, or to be apprehensive about, his or her personal well being or safety”.

“Family violence”, for the purposes of the Act, includes what is commonly called “domestic violence”. Some respondents to Council’s discussion paper stressed that State legislation generally uses the term “domestic violence” and those respondents regarded “domestic violence” as the more appropriate term to use. In the circumstances this report sometimes uses the term “domestic violence” to convey the same meaning of the term as it is used in the submissions.

Both terms are used throughout this report on the basis that domestic violence is an aspect of family violence, as defined under the *Family Law Act*.

Joint Select Committee on Family Law (1992)

1.27 In its report *The Family Law Act 1975 - Aspects of its Operation and Interpretation* (November 1992) the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act (the JSC) referred to the problem of child abduction and made a number of recommendations in relation to the role of the Family Court and the Australian Federal Police¹¹. Those recommendations related to the development of an on-line data base of court orders relating to children which is accessible to police, additional police powers to take temporary custody of a child in danger of abduction and to arrest abductors or persons attempting abductions and the issue of Family Court orders and warrants in child abduction cases. The recommendations of the JSC have been considered by Government. They do not traverse the grounds covered by this report. However, the Council has taken into account the comments of the Joint Select Committee on the general issue of child abduction.

Outline of this report

1.28 This report discusses the issues raised in the discussion paper under the following main headings:

- Parental child abduction
- Current law and practice
- Criminalisation of parental child abduction
- Supplementary issues
 - Statutory basis for change
 - Court of jurisdiction
 - Exceptions and defences
 - Age of the child
 - Police powers
 - Related issues

¹¹Australian Parliament. Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, *The Family Law Act 1975 - Aspects of its Operation and Interpretation*, November 1992, paragraphs 7.90 - 7.108 at pages 186-191.

2. PARENTAL CHILD ABDUCTION

Introduction

2.01 “Parental child abduction” mainly involves the wrongful removal or retention of a child by one parent in breach of the rights of the child to have contact, on a regular basis, with both parents. In this paper the term is also used to include other relatives (such as grandparents) who may have parental responsibilities in respect of a child and who wrongfully remove or retain that child in breach of the rights of another person with parental responsibilities. It is also used to include a parent who has no parental responsibility under the *Family Law Act* who removes a child from a parent or person who does have such a responsibility.

Statistics on parental child abduction

2.02 In its discussion paper the Council provided available statistics on (a) international abductions to Hague Convention countries and (b) abductions of children within Australia (“internal” abductions). The discussion paper suggested that there were 80 - 100 child abductions a year to or from Australia to Hague Convention countries and that internal abductions could be as high as 500 a year. The discussion paper mentioned that there were abductions to and from non-Hague Convention countries but no satisfactory statistics of this type of abductions were available.

2.03 The NSW Department of Community Services added in relation to internal abductions:

The Department has no statistics on the number of children within NSW who are abducted by a parent, nor what percentage of those cases result in the child/ren remaining with the abducting parent. However, the Department is able to indicate from its general child protection work that it is frequently called upon to intervene in the Family Court or take child protection action where one parent is seeking to justify denying the custody and access rights of the other parent because of some concern over the welfare of the child/ren involved. Any or all of these cases could potentially be classified as “parent abduction” cases, as indeed they are under the Convention in an international sense.

2.04 *Accuracy of statistics.* Although most submissions went straight to the issues and did not express concerns about the data on abductions in the discussion paper, data relating to international and internal abductions was questioned in some submissions.

2.05 Although the data in relation to “internal” abductions and international abductions where the Hague Convention does not operate are clearly inadequate, the Council is satisfied that the data in relation to Hague Convention countries is accurate and useful in relation to such countries. Steps are being taken to improve the situation in relation to the collection of data on international abductions to non-Convention countries.

2.06 In the past, as in the present instance, the Family Law Council has had difficulty in obtaining reliable statistics in relations to issues it is examining. Council has drawn attention to this problem in past reports. In the present instance, those problems particularly related to obtaining reliable statistics on internal abductions. Available statistics on internal abductions only provide a very general view without much of the required detail. In particular, it does not give data on the circumstances in which “abductions” are occurring.

2.07 The main issues raised in submissions on the availability of statistics generally, and Council’s comments on each of those issues, are set out below:

- ... whilst the total number of cases has increased since the Convention first commenced operation in Australia in 1988 there has also been a significant increase in the number of Convention countries over the same period. A greater awareness both in Australia and overseas may also explain any increases in numbers in individual countries.¹²

Comment: The International Civil Procedures Unit of the Attorney-General’s Department disagrees with the suggestion of extended coverage and advises that the increase has mainly been in relation to the UK, USA and New Zealand. The number of abductions to and from other countries is quite small and has been relatively stable.

- ... it is often the case that two or more children are abducted by the one parent. Hence the number of abducting parents is substantially less than might appear from the number of children involved...¹³

Comment: The figures quoted in the discussion paper were the number of abductions. If the figures were to give the number of children they would be considerably higher; that is, the opposite of what is suggested by the writer.

- It appears that the figure quoted [as many as 500 cases of internal abductions a year] is based on warrants issued by the Family Court for the return of children ... If the figure is based on those warrants, then the

¹² Submission No 24

¹³ Submission No 24

usefulness of those figures in assessing the extent of the problem is questionable.¹⁴

Comment: The Council understands that the collection of this data varies from one State to another and it is probable that in some areas the figures may be based on the number of warrants. Council agrees that data based solely on warrants is not accurate. This is an indication of the difficulty in getting accurate data in relation to abductions within Australia.

2.08 ***Motivation of the abducting parent*** A number of submissions claimed that domestic violence was a factor in a major proportion of abductions. Because a number of submissions made certain assumptions about the motivation of abducting parents who wrongfully removed or retained children overseas, the International Civil Procedures Unit of the Attorney-General's Department examined all Hague Convention files opened during the period 1 July 1996 to 30 June 1997.

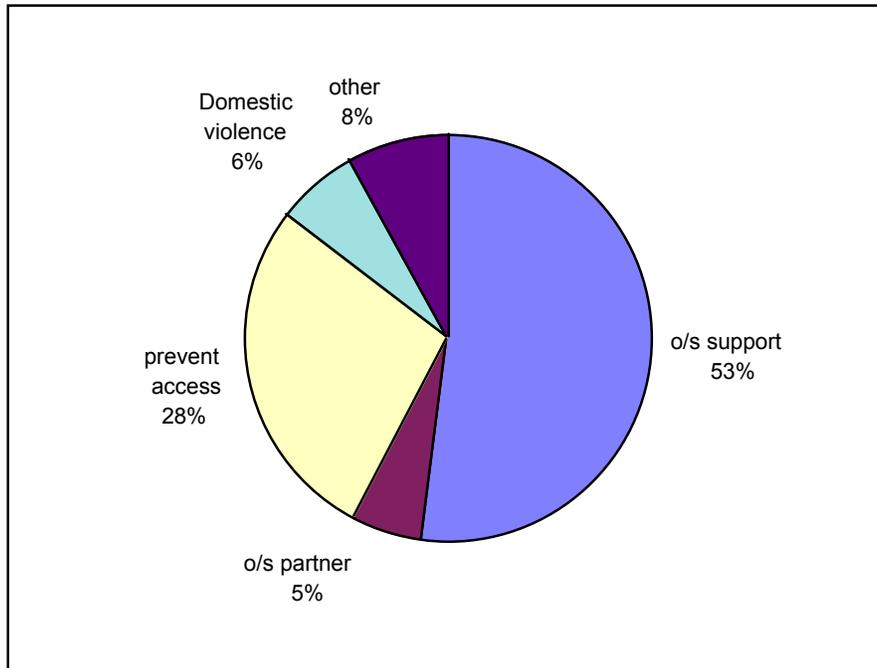
2.09 Contrary to the claim made in those submissions, the data indicates that domestic violence was given as a reason for the wrongful removal or retention of children to or from Hague Convention countries in only 8 (6 percent) of the 115 files opened in 1996/97. In one case it was the father who claimed domestic violence¹⁵ at the hands of the mother.

2.10 In most cases the relevant departmental file contains information on the reasons given by the abducting parent for the abduction. This information has been extracted from the files and is set out in the graph below in respect of the 115 files opened in 1996-97.

Abductor's Motivation : Hague Convention - All cases opened 1996/97

¹⁴ Submission No 24

¹⁵ The *Family Law Act* 1975 uses the term "family violence" to include domestic violence. Some respondents to Council's discussion paper stressed that State legislation generally uses the term "domestic violence" and those respondents regarded "domestic violence" as the more appropriate term to use in relation to this situation. In the circumstances this report departs from the term used in the Commonwealth legislation on the basis that "domestic violence" is the issue specifically raised in submissions.



This chart identifies the motivation of parents who wrongfully removed or retained children to or from Hague Convention countries in 1996/97. The reasons given for the wrongful removal or retention were:

<u>o/s support:</u>	a parent desiring to return to live with or obtain the support of family/friends overseas following breakdown of a marriage;
<u>o/s partner:</u>	a parent desiring to move to a country where a new partner lives;
<u>prevent access:</u>	a parent desiring to prevent the other parent having access to a child;
<u>Domestic violence:</u>	a parent desiring to escape domestic violence
<u>other:</u>	the motivation of a parent could not be identified

2.11 Some of the comments made in submissions in relation to the motivation of parents who wrongfully remove or retain children were:

- The 80 - 100 cases per year may have arisen from a delay from a scheduled return from a holiday, a woman fleeing violence with the children and going “home”, that is returning to her parents or country of origin, or a man taking the children in order to continue his abuse and control over the mother and the children. Each of these situations is different ...¹⁶

Comment: The main reasons for international child abductions are given in the chart above and the information extracted in relation to the 115 cases involved does not support this viewpoint.

- The statistics quoted in the discussion paper do not mention domestic violence. It is our prediction that should details have been collected and a thorough analysis have been undertaken of the cases of parental child

¹⁶ Submission No 19

abduction cited statistically, that domestic violence would appear in a significant number of cases.¹⁷

Comment: The 1996/97 statistics in relation to Hague Convention countries do not support the view that domestic violence is involved in “a significant number of cases”. The data suggests that the proportion of Hague Convention cases in which domestic violence is involved is around 6 percent. However, similar data is not available in relation to internal abductions but if they were, the prediction on anecdotal claims, may be supportable.

Data collection

2.12 One submission made the following comment about the current lack of data on child abduction:

It greatly concerns me that statistics about child abduction are currently kept in an ad hoc manner and, in my view, one of the Council’s first recommendations should be that this be remedied.¹⁸

2.13 Council is satisfied that statistics in relation to Hague Convention countries have not been kept in an “ad hoc manner”. Council agrees, however, that in addition to data on child abductions to Hague Convention countries which are presently collected by the International Civil Procedures Unit in the (Commonwealth) Attorney-General’s Department it is desirable that there should also be data collected in relation to child abductions to countries other than Hague Convention countries and also internal abductions.

2.14 Council has been advised that from July 1997 the International Civil Procedures Unit in the (Commonwealth) Attorney-General’s Department commenced collecting data from the Department of Foreign Affairs and Trade and from State Authorities on international child abductions to or from non-Convention countries. In future, therefore, that Unit will be able to provide data in relation to most international child abductions. However, although this will lead to considerable improvements in the available statistics there may still be some cases (eg. where a parent briefs a solicitor and no government assistance is sought) which will not be included in the statistics collected. Council suggests that an approach be made by government to bodies such as Law Societies and Police seeking their assistance in recording such cases.

¹⁷ Submission No 21

¹⁸ Submission No 16

2.15 The appropriate body to collect data in relation to internal abductions is possibly the Australian Federal Police in cooperation with State and Territory Police.

2.16 It is the Council's view that the data collected on all child abductions should include details of the sex of the offender and the number of children involved. The age and sex of the child are also relevant. The Council is also of the view that the nationality of the abductor is a relevant factor and that such data would be helpful in developing future preventative action.

2.17 The collection of data in relation to international abductions is considered necessary by the Attorney-General's Department to meet its obligations under the Hague Convention and for other purposes, such as resource allocation. However, the Council is not convinced that it is necessary for police to maintain ongoing statistics on "internal" abductions. Such data is desirable when a project, such as the present one, is being undertaken but it is unlikely that the use to which such data would be put on an ongoing basis warrants the significant resources that would be necessary to collect that data continuously. The Council has concluded, therefore, that if and when such data is needed it should be collected at the time it is required. A body such as the Australian Institute of Criminology would be an appropriate body to commission to do this.

RECOMMENDATION 1

2.18 There is a need to improve the data collected on child abduction and it is therefore recommended that:

- (a) Detailed data should continue to be collected by the International Civil Procedures Unit of the Attorney-General's Department in relation to international child abduction to Hague Convention countries and non-Hague Convention countries;**
- (b) The data collected in relation to international parental child abductions should include the sex of the alleged perpetrator, the number of children involved, the ages of those children and the nationality of the abductor; and**
- (c) The Australian Federal Police and State and Territory Police should not be required to collect similar data in relation to child abductions within Australia. A body such as the Australian Institute of Criminology, could be commissioned to collect such data as required from time to time if, and when, this is considered necessary.**

The effects of abduction on the child

2.19 In its discussion paper the Council quoted an extract from the work of Persia Woolley¹⁹. One submission made the following comment in respect of that quote:

I would be more than interested in the psychological studies into the abilities of infants and children to delineate between a lawful snatching and an unlawful snatching, which is in essence what you are proposing children are capable of.²⁰

2.20 The Council stated in its discussion paper that “the effects of abduction on the child can be dramatic and long lasting”²¹. This is not suggesting that the child is necessarily capable of recognising that he or she has been “abducted”. It is referring to the effects of abduction on the child. The effects of abductions can be traumatic for the child for several reasons. In particular, the child will generally feel the effects of being removed from familiar surroundings, family and friends. In some circumstances, especially with very young children, this can have quite a detrimental effect.

2.21 The effects of abduction on the child are often due to a lack of understanding of what is happening. For example, strangers are sometimes involved in child abduction. The abduction sometimes involves hiding the child in circumstances which can be quite frightening, particularly for very young children. Abduction can often involve taking the child to unfamiliar or isolated surroundings where the child may not know anyone, other than the abductor, and may not even speak the language. Young children can be very disturbed by being completely removed from contact with a parent who has been their sole or primary carer. Quite often children, after recovery are fearful of further abduction, which obviously would be traumatic for a child.

2.22 It is clearly the circumstances of the abduction which can be damaging to the child. Experiences of some of those involved in abductions support this view. For example, in her book, *The Custody Handbook*, Persia Woolley²² discusses a number of child abduction cases she had investigated. Speaking of a case in which the children involved had been abducted previously and there was fear of further abduction, she writes:

... the children must be constantly aware of the fact that any stranger may be a kidnapper paid to whisk them away again. This sense of fear and apprehension pervades the snatched child’s life, and often continues even after he or she is grown....²³

2.23 At a general level she observes:

¹⁹ Family Law Council, *Parental Child Abduction*, Discussion Paper, February 1997, para 1.06, page 2.

²⁰ Submission No 8

²¹ Family Law Council, 1997, *Parental Child Abduction*, Discussion Paper, para 1.06, page 2

²² Woolley, Persia, 1979, *The Custody Handbook*, Summit Books, New York

²³ *Ibid*, page 215

Nightmares, recurrent terrors and general trauma run through the stories of both snatched and snatchers²⁴

2.24 She also quotes the experience of a victim who had been abducted as a schoolboy. He said:

I used to have nightmares for the first three years or so, but those have more or less gone away, although I still can't stand anything like a blanket over my head. Sometimes I get angry, though usually I just feel sad ... but mostly I keep thinking, 'No child should have to go through that.'²⁵

2.25 A parent whose children were abducted advised the Council:

I am still unable to talk about [the abduction]. It is enough to say that it became a black nightmare and I had no way of knowing whether I would ever see our ... children again. The experience still affects me ... years later, and in revisiting it even now, I find I am shaking. At the time I could not believe the extent of my husband's venom ...²⁶

2.26 Another submission said:

In cases involving the abduction of children to other countries, the removal represents a high order of potential dislocation and psychological harm to the child in question. Hence, the consequences for such removal can result in a variety of losses for the child, including loss of his/her friends, culture, extended family and the typical routine of their original country...²⁷

2.27 A recent UK Working Party on Child Abduction stated:

The main sufferers of abductions of this type are the children themselves. They endure the trauma of being kidnapped and often the continuing nightmare of an upbringing dominated by a parent that has violated their right to maintain contact with a mother or father. The harm which a child suffers as a result of an abduction cannot be underestimated, however high-minded the motive of the abductor...²⁸

²⁴ *Ibid*, pages 216-217

²⁵ *Ibid*, page 216

²⁶ Submission No 16

²⁷ Submission No 22.

²⁸ UK, The Parliamentary Working Party on Child Abduction, 1992, *Home and Away: Child Abduction in the Nineties*, Reunite: National Council for Abducted Children All Party Group of MPs on Child Abduction, PO Box 4, London WC1X8XY.

2.28 The Empty Arms Network²⁹ submission reported the comments of a number of children who had been abducted. Some of those comments were:

It hurts too much to remember mummy so I used to pretend she was dead. (Girl aged 9).

It's a time of life that I didn't live. (Boy aged 18).

I didn't know what to do. I didn't know who I could tell, I was very frightened. (Girl aged 12).

2.29 In light of this evidence the Council confirms its view made in its discussion paper that "the effects of abduction on the child can be dramatic and long lasting"³⁰.

2.30 Child abduction is a serious issue, and, in the Council's view, it is incorrect to assume that even when the abduction is arranged or carried out by a parent that children do not suffer as a result of abduction. It is therefore relevant to consider whether the existing laws and practices are adequate to deal with the problem. Those matters are considered in the next chapter.

Criminalisation and domestic violence

2.31 In light of comments made in some submissions to Council it is necessary to stress, at the outset, the significance of domestic violence in relation to parental child abduction and the pervasiveness of its influence on children. As pointed out in the discussion paper, where a child's parent moves out of the family home to escape domestic violence, and takes a child, the parent could technically be regarded as having removed the child from a person with parental responsibility.

2.32 The first suggested exception listed in the discussion paper was "fleeing from violence"³¹ The "fleeing from violence" cases raise special problems which need to be stressed. These are:

- For many victims of domestic violence, fleeing the home is an act of last resort and it often occurs at a stage where there is a real fear that their lives or the lives of their children are in danger.
- For many victims of violence, particularly those who have been subject to prolonged abuse, leaving the home without their spouse or partner being aware is the only real means of escape.

²⁹ Submission No 28

³⁰ Family Law Council, *Parental Child Abduction*, Discussion Paper, February 1997, para 1.06, page 2.

³¹ *Ibid*, para 4.18, page 23.

- There would be obvious problems in many cases if a victim of violence were to be required to prove violence in advance of fleeing the home. For example, where domestic violence has been kept within the family it will often be difficult for the victim to prove violence, particularly where there is no medical evidence and the victim has not previously taken out a domestic violence order. In such circumstances it would be unreasonable, and often dangerous, to expect the victim to remain in the home.
- The possibility of legal actions or cross-actions against the parent fleeing from domestic violence for vindictive reasons, to exercise control over that parent or as a means of locating that parent. Experience indicates that the perpetrators of violence are often very skilled in using the legal system to their advantage. The safety of the fleeing parent is, of course, important.
- The position of persons and organisations who assist persons fleeing from domestic violence needs to be considered. In the absence of special provisions, persons assisting the victims of violence could be regarded as aiding and abetting child abduction.

2.33 In relation to domestic violence being an act of last resort³², one domestic violence worker commented:

Some of my clients on leaving a violent relationship have disappeared to or from interstate with their children ... This has given them a few months to stabilise themselves emotionally before being required by the Family Court to address residency and visitation issues. Many abusive men have controlled the woman and children to such an extent that the victims have developed a hostage mentality ... Having a period free from abuse allows them to “deprogramme” and develop a sense of their own identity.

It is generally a great sacrifice for woman and children to leave the supports of their community to travel elsewhere, but it has been my observation that these people appear to have better outcomes regarding emotional well-being than those women and children in violent relationships who stay to face the ongoing harassment.

It has been my experience that the Family Court system has been ... unsuccessful in protecting children when there is one parent determined to alienate the children against the other. Repeatedly I have observed a parent who has perpetrated spouse abuse, and continues this abuse when his wife leaves by manipulating the children ...³³

³² Submission No 21.

³³ Submission No 20.

2.34 A number of submissions expressed serious concerns about the effect of criminalisation on the victims of domestic violence. The vulnerability of domestic violence victims was stressed by one agency working in the domestic violence field in light of cases it deals with:

In our experience, men who are perpetrators of violence, are often very skilled in using the legal system to their advantage. Often they have financial security which would enable them to make frequent applications in the Family Court, thus further perpetuating the abuse on their partners.³⁴

2.35 A number of submissions felt that the significance of domestic violence could not be understated. One submission put the main point quite forcefully:

Domestic violence is a crime and therefore it should not be a crime to escape such a situation with one's children, particularly when there is so much documentation now on the effects of domestic violence on children...³⁵

2.36 One submission, which opposed criminalisation on several grounds, also stressed the significance of domestic violence in relation to the issue of criminalisation:

... Sometimes the child is taken by a non-custodial father for reasons of proprietorship, cultural values, or sheer determination that "she" shall not have them or to make "her" suffer. In that case, perhaps, one could concede an argument for criminalisation. But very often, if not mostly, the child is taken by the mother who has been the primary caretaker since birth. Again it is possible she has acted out of spite, but more often than not she may have acted to protect herself and the children from violence. It is that type of father who more likely than not is going to press charges or badger the Attorney-General or DPP, and it is that type of mother, economically and socially weak, who is likely to be convicted.³⁶

2.37 The Council thinks it most unlikely that a court would convict a mother in these circumstances, but nevertheless the main point the writer is making is appreciated. However, a woman whose husband had abducted their children expressed the following view, which tends to add weight to the above statement:

I am mindful in advocating criminalising of parental child abduction that I might have been compelled to defend myself against such a charge when I fled my husband ... At the time there were no Family Court Orders in existence and indeed, I had no idea that I might have been doing anything wrong by fleeing ... My defence was domestic violence, and a fear for my life. I do wonder whether

³⁴ Submission No 13.

³⁵ Submission No 10

³⁶ Submission No 5.

the defence would have been successful, given the limited definitions of family violence...³⁷

2.38 One submission distinguished “abduction” by a woman fleeing domestic violence from other forms of abduction in the following way:

One can agree that abduction may be traumatic with long lasting serious effects upon a child. However, if a child is travelling with its primary carer, that child is not being abducted in a criminal sense and will not suffer the kind of trauma associated with forcible abductions as a result of its movements.³⁸

2.39 Another submission referred to the possible effect of criminalisation for the victims of violence in the following terms:

If it is seen as a criminal offence to remove a child, notwithstanding an order is not in existence, this effectively would ensure women could not leave an abusive partner with the children.³⁹

2.40 The arguments against criminalisation of parental child abduction on the basis that it would penalise women who are fleeing violent situations are clearly relevant and important. However, the Council considers that those arguments would possibly lose a good deal of their strength if women who flee violent situations are adequately protected under legislation. For example, there is an assumption in some of the submissions that an abusive male would be able to institute criminal action against a wife who flees his violence and takes their children with her. In genuine cases of domestic violence this would not be the case if prosecutions were to require the approval of the DPP or the Attorney-General. In addition, the Council’s discussion paper drew attention to the provisions commonly included in overseas legislation on parental child abduction allowing a defence of reasonable apprehension of violence.

2.41 Other questions do remain a concern however. For example, some submissions have pointed out that the courts have not been fully successful in protecting women from violence and the possibility of legislation (of the type proposed) adding to this problem needs to be taken into consideration.

³⁷ Submission No 16.

³⁸ Submission No 19.

³⁹ Submission No 15.

3. CURRENT LAW AND PRACTICE

3.01 This chapter provides a brief outline of relevant Australian legislation which is presently in operation and administrative practice.

“Criminal” offences and family law

3.02 An offence is said to be “criminal” if it carries a penalty of imprisonment or where there is potential for imprisonment. Section 4G of the *Crimes Act 1914* defines an indictable offence as an offence against a law of the Commonwealth which is punishable by imprisonment for a period of 12 months or more, unless the contrary intention appears.

3.03 Under the *Family Law Act 1975* a party to proceedings or a person acting on their behalf or at their request is liable to be imprisoned for up to 3 years if that person takes or sends a child, or attempts to do so, outside Australia in breach of a residence, contact or care order of the court.⁴⁰ A similar penalty can be imposed where the removal occurs when proceedings for a residence, contact or care order are pending before the court.⁴¹

3.04 Despite the existing provisions of the *Family Law Act* the number of children being unlawfully removed from, or retained outside, Australia has not decreased. Section 65Y of the *Family Law Act 1975* is limited to cases in which court orders are in force or proceedings are pending. The International Civil Procedures Unit of the (Commonwealth) Attorney-General's Department advises that in the majority of Hague Convention cases involving abductions from Australia, there are no court orders or proceedings pending. In addition, section 65Y has no application to the common situation where there are no orders or proceedings pending and a parent takes a child abroad with the consent of the other parent (eg on holiday or to visit relatives) and then retains the child overseas. Wrongful retention may be as damaging to a child as wrongful removal.

3.05 In relation to internal abductions, in a majority of cases the parent from whom the child is taken has no order of the court and the abducting parent has not committed a criminal offence in removing the child. As a result, the other parent needs to seek orders from a court exercising jurisdiction under the *Family Law Act* to locate⁴² and recover the child.⁴³

⁴⁰Section 65Y of the *Family Law Act 1975*.

⁴¹Section 65Z of the *Family Law Act 1975*.

⁴²Section 68B of the *Family Law Act 1975*.

⁴³Section 68C of the *Family Law Act 1975*.

3.06 In relation to the abduction of a child from Australia to another country, criminal procedures are usually not available. The assistance of civil authorities can be sought if the child has been taken to an overseas country which is a party to the Hague Convention. However, civil procedures are sometimes ineffective in locating or returning children. Countries which have a criminal offence of parental abduction can make use of Interpol, extradition and mutual assistance procedures to recover children⁴⁴. These procedures are generally unavailable to Australian parents because there is no relevant criminal offence applicable. Requests for assistance cannot be made through Interpol because such assistance is confined to criminal offences.

3.07 In relation to internal abductions, police are understandably reluctant to assist in circumstances where the events do not constitute a criminal offence. A parent can obtain a recovery order from the Family Court which authorises the police to search for, and apprehend, an abducted child. However, while parental abduction remains solely a civil matter, it will not attract priority in police resources nor the advanced detection procedures (eg telephone interception, listening devices) that apply in the investigation of criminal offences.

3.08 Criminalising child abduction may mean that greater resources become available to ensure the speedy return of abducted children. There are arguments both for and against “criminalising” parental child abduction and a number of these are set out in chapter 4 of this report.

3.09 To date the use of criminal sanctions in Australia to deal with parental abduction has not been an issue which has attracted much public debate nor one which has frequently been before the courts. However the courts clearly regard parental abduction as a serious matter. They are not to be regarded as mere disputes between a husband and wife but have a very strong public element involving the rights of children⁴⁵.

3.10 ***State laws.*** In Australia, at both Federal and State levels, laws currently exist which are potentially relevant to criminal prosecution of parental child abduction. Under State laws, offences include child stealing and abducting a child under the age of 16 years. None of the State offences were specifically designed to cover parental child abduction. However, Council has been advised that there may be provisions in the legislation of some of the States (eg. Queensland) in relation to child abduction generally which may be applicable in cases of parental child abduction.

The (Commonwealth) Criminal Code Act 1995.

⁴⁴ See Prietsch, “Interpol - its role in International Parental Kidnappings”, *Police Chief*, October 1995, pages 69-72

⁴⁵ *R v Constantine* (1991) 25 NSWLR 431, 438; *Khan v Khan* (1989) FLC 92-035).

3.11 The *Criminal Code Act 1995* (the criminal code) received Royal Assent on 15 March 1995 and came into operation from 1 January 1997. The provisions of the criminal code do not yet extend to offences which are not in the code, but new legislation will apply the code's general principles. The *Criminal Code Act 1995* mirrors the Model Criminal Code chapter on general principles and will reflect other chapters as they are developed between the Commonwealth and the States and Territories.

3.12 The criminal code is a State-based model which the Commonwealth is implementing by replacing offences in the (Commonwealth) *Crimes Act 1914* in so far as they are applicable to Commonwealth jurisdiction.

3.13 Proposed clauses for the Model Criminal Code relating to child abduction have been drafted and circulated in a discussion paper.⁴⁶ It recommends that the Model Code should specifically exclude parental child abduction from the child abduction offence but not from kidnapping.

3.14 The child abduction provisions of the Model Code are included in Division 27 which relates to kidnapping, child abduction and unlawful detention. Section 27.2 (kidnapping) has been extended to cover the situation where a person takes or detains another person "without their consent ... with the intention of taking or sending that person out of the jurisdiction ..." A person who takes or detains a child is deemed to be acting without the child's consent. It is a defence if the person removing a child is that child's lawful custodian or acts with the consent of that custodian. The penalty for the offence is 20 years imprisonment

3.15 Section 27.3 of the Model Criminal Code creates an offence of a person who takes or detains a child with the intention of removing or keeping that child from the lawful control of any parent without the consent of that parent. It is not a defence that the child consented unless the person who took or detained the child is that child's spouse and the child is over 14 years of age. It is a defence if the person who took or detained the child is a "parent", which is defined to include any person who is responsible at law for the maintenance of the child.

The Commonwealth *Crimes Act 1914*

3.16 It should be noted that while a number of the *Crimes Act 1914* provisions will be replaced by the Model Criminal Code, sentencing and reparation will remain in the *Crimes Act*.

⁴⁶ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Chapter 5: Non Fatal Offences Against the Person - Discussion Paper*, August 1996.

3.17 Where an offence is a criminal offence the provisions of the Commonwealth *Crimes Act* 1914 are relevant because a number of provisions in that Act operate to expand upon the effects of the provisions in the legislation involved. The main factors involved relate to sentencing flexibility, reparation and aiding and abetting.

3.18 ***Flexibility in sentencing.*** Flexibility in sentencing is important in family law principally because of the dilemma which often confronts the court. Whereas the merits of the case may suggest a severe penalty for non-compliance with court orders, the court's concern for the child may indicate a lesser sentence. Imprisoning one of the child's parents is clearly likely to have serious consequences for the well-being of the child.

3.19 Section 4B(2) of the *Crimes Act* 1914 provides:

Where a natural person is convicted of an offence against a law of the Commonwealth punishable by imprisonment only, the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty ...

3.20 The provision goes on to set out a formula for determining the maximum level of the fine based on the term of imprisonment contained in the relevant provision. Consequently, where a penalty is expressed as a term of imprisonment only, the *Crimes Act* provides for a fine which is calculated by using the formula. This applies to existing penalty provisions of the *Family Law Act* such as sections 65Y and 65Z.

3.21 The *Crimes Act* 1914 also sets out a range of matters which the court must take into account "in addition to any other matters" prescribed in the relevant Act in determining the appropriate sentence where an offence occurs. Section 16A(2) of the *Crimes Act* lists those matters as:

- (a) the nature and circumstances of the offence;
- (b) other offences (if any) that are required or permitted to be taken into account;
- (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character - that course of conduct;
- (d) the personal circumstances of any victim of the offence;
- (e) any injury, loss or damage resulting from the offence;
- (f) the degree to which the person has shown contrition for the offence;
 - (i) by taking action to make reparation for an injury, loss or damage resulting from the offence; or
 - (ii) in any other manner;

- (g) if the person has pleaded guilty to the charge in respect of the offence - that fact;
- (h) the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences;
- (j) the deterrent effect that any sentence or order under consideration may have on the person;
- (k) the need to ensure that the person is adequately punished for the offence;
- (m) the character, antecedents, cultural background, age, means and physical or mental condition of the person;
- (n) the prospect of rehabilitation of the person;
- (p) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

3.22 Where the *Crimes Act 1914* is relevant, therefore, there is already provision for a high degree of flexibility in relation to the sentencing of offenders.

3.23 **Reparation.** A further provision of the *Crimes Act* of relevance relates to reparation for offences. Under section 21B of the *Crimes Act 1914* the court may, in addition to any penalty imposed on the person, order the offender to make reparation for any loss suffered or any expense incurred by reason of the offence.

3.24 A reparation order under section 21B may be made against a person who has either been convicted of an offence or against whom an order under section 19B⁴⁷ of the *Crimes Act* has been made. The relevant provisions of section 21B of the *Crimes Act* state:

21B Where:

- (a) a person is convicted of an offence against a law of the Commonwealth; or
- (b) an order is made under section 19B in relation to a federal offence committed by a person;

the court may, in addition to the penalty, if any, imposed upon the person, order the offender:

- (c) to make reparation to the Commonwealth or to a public authority under the Commonwealth, by way of money payment or otherwise, in respect of any loss suffered, or any expense incurred, by the Commonwealth or the authority, as the case may be, by reason of the offence; or
- (d) to make reparation to any person, by way of money payment or otherwise, in respect of any loss suffered by the person as a direct result of the offence.

⁴⁷ Section 19B of the *Crimes Act 1914* sets out the circumstances in which the court may discharge an offender, where the court is satisfied that the charges have been proven, without proceeding to a conviction.

3.25 The Office of the Commonwealth Director of Public Prosecutions⁴⁸ has expressed the view that the costs incurred in investigating an offence are too remote from the offence to be recoverable under paragraph 21B(1)(c). The DPP said that if the legislature had intended to confer a general power authorising the recovery of investigation costs it would have so provided in clear and unambiguous terms. The DPP further drew attention to section 91 of the *Australian Securities Commission Act* 1989 where provision has, in fact, been made for the recovery of the expenses of an investigation conducted by the Australian Securities Commission.

3.26 One submission which strongly opposed criminalisation made the following comment:

Any actual costs incurred in recovering the child, such as legal costs, location expenses, travel and accommodation should be recoverable, whether abduction is criminalised or not. The court should have a wide discretion to order the same and it should not be dependent on conviction for any offence...”⁴⁹

3.27 The Council is of the view that there should be a broad power which would enable agencies to recover their costs from a person responsible for abducting a child, irrespective of whether the abduction was within Australia or to an overseas country. This would have two main effects:

- It would give more resources to Australian police services involved in recovering abducted children; and
- It would act as a distinct deterrent for persons abducting children by making it clear that there is at least a financial cost for persons taking the law into their own hands.

The Commonwealth *Proceeds of Crime Act* 1987

3.28 Section 19 of the *Proceeds of Crime Act* 1987 enables the DPP to apply to the court for an order of forfeiture in respect of “tainted property”. Section 4(1) of the Act defines “tainted property” in relation to an offence as (a) property used in, or in connection with, the commission of the offence or (b) proceeds of the offence. In the DPP’s view the “proceeds of the offence” relates to any property that is derived or realised, directly or indirectly, by any person from the commission of the offence.

3.29 The DPP is of the view that it is unlikely that a court would accept an argument that the money a person receives from selling the story of their crime is money derived from the commission of the crime. The DPP says that “ a criminal

⁴⁸ Submission No 2.

⁴⁹ Submission No 5.

who sells their story will be paid because they have sold the story, not because they committed the initial crime” and that while there is clearly a connection between a child abduction and money paid for the story about the kidnapping “the connection is not sufficiently close to provide for recovery action under the current provisions of the ... Act.”⁵⁰

3.30 The DPP sees no reason, in principle, why a person who profits from a crime by selling his or her story should not be made to forfeit the proceeds, but that as it presently stands the Act will not allow for recovery of such proceeds.

3.31 The Council considers that the inclusion in the Family Law Act of a power which would enable recovery of the costs of locating and returning abducted children is all that is required and that amendment of the *Proceeds of Crime Act 1987* is not necessary.

Extradition and mutual assistance

3.32 The relevance of extradition and mutual assistance was raised in the discussion paper in relation to situations where a child is removed to a non-signatory country. The relevant Australian legislation is the *Extradition Act 1988* and the *Mutual Assistance in Criminal Matters Act 1987*.

3.33 Extradition is the process used to bring an alleged offender from a foreign country for the purposes of criminal proceedings in Australia. Mutual assistance is the process by which evidence and witnesses can be obtained from overseas for the purpose of criminal proceedings.

3.34 If parental child abduction were to be criminalised both processes could have some relevance in relation to the abductor, but neither could be used to bring children back to Australia. When a law enforcement agency locates a parent who is wanted for prosecution it will usually also locate the abducted child. That information can be passed to the other parent for the purposes of recovery of the child. These effects are, of course, incidental to the prosecution process.

Aiding and abetting/Complicity

3.35 Subsection 5(1) of the (Commonwealth) *Crimes Act 1914* states:

5(1) Any person who aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against any law of the Commonwealth, whether

⁵⁰ Submission No 3.

passed before or after the commencement of this Act, shall be deemed to have committed that offence and shall be punished accordingly.⁵¹

3.36 The views of most⁵² respondents to the discussion paper who addressed this issue were summed up by the DPP which said:

Clearly, it would be absurd that persons who aided, abetted etc. the commission of the proposed offences would themselves commit no offence.⁵³

3.37 Council agrees with this view.

⁵¹ Section 11.2(1) of the *Criminal Code Act* 1995 contains a similar provision.

⁵² Half of the submissions did not address this issue. Of those who did, 84% (all but 2) were of the clear view that a person who aids and abets should be guilty of an offence.

⁵³ Submission No 2.

4. CRIMINALISATION OF PARENTAL CHILD ABDUCTION

“Criminalisation” of child abduction

4.01 The main options in relation to “criminalisation” would appear to be:

- Make no change on the basis that the negative effects outweigh the benefits;
- Retain the existing provisions of the *Family Law Act 1975* but also make parental child abduction a criminal offence generally; or
- Replace all existing provisions relating to parental child abduction with a comprehensive provision, similar to say the UK legislation, which “criminalises” parental child abduction.

4.02 *Arguments in favour of criminalisation.* The arguments in favour of making it a criminal offence for a parent to abduct his or her child include:

- The adverse effects parental child abduction may have on the children, and the parents. The Law Institute of Victoria⁵⁴ questioned how criminalisation would counteract the effects of abduction. The aim of criminalisation is to reduce the incidence of parental child abduction. There is no suggestion that it will neutralise the effects of abduction;
- The present law in relation to parental child abduction is not entirely clear. A statutory offence would make clear the precise circumstances in which the taking of a child by his or her parent would be regarded as criminal;
- Civil procedures are often ineffective in obtaining the return of an abducted child. Criminalisation could facilitate the search process and may, as a consequence, combat parental child abduction. The existence of a criminal offence would attract the priority in police resources and the advanced procedures (eg telephone interception, listening devices) that apply in the investigation of criminal offences. Internationally the assistance of Interpol and overseas police would become available to locate abducted children. Extradition and mutual assistance procedures would also become available.
- The recovery of abducted children is extremely costly to the Australian taxpayer. Any proposal which has a deterrent effect and which reduces costs deserves close consideration;

⁵⁴ Submission No 23.

- The deterrent and educative effect of criminalisation. The Family Court⁵⁵ suggested that the deterrent effect could be specific, by deterring an offending parent from doing it again, or general, by deterring parents in general from abducting their children; and
- Criminalisation would bring parental child abduction into line with State laws relating to child abduction. However, the fact that a parent is involved and the *Family Law Act* 1975 as amended by the *Family Law Reform Act* 1995 now enables each parent to exercise powers in relation to his or her child tends to distinguish parental child abduction from other forms of child abduction.

4.03 Some submissions received by Council strongly supported criminalisation of parental child abduction. The National Children's and Youth Law Centre (NCYLC) said in its submission:

The NCYLC believes that child abduction is a violation of the rights of the child and for this reason alone, abducting a child from Australia, to Australia and within Australia should be criminalised.

For the NCYLC the motives behind criminalisation are a mixture of punishment (for a wrong done against a child) and deterrence. In this way it is hoped that the criminalisation of parental child abduction shows parents, and those aiding parents, that they do not have a property right in a child and that taking advantage of a child's vulnerability will not be tolerated...⁵⁶

4.04 A woman whose children had been abducted by her husband wrote in support of her recommendation for criminalisation:

... Parental child abduction violates the respectful recognition of the selfhood of a child, and has its roots in notions of "ownership" and exclusive "rights" to a child, rather than shared responsibilities.⁵⁷

4.05 The Empty Arms Network⁵⁸ said that American research has shown that in 85% of all child abductions the motivating factor is anger or revenge.

4.06 An important point made in the Family Court's submission was that if it is decided to criminalise parental child abduction it will be necessary to be quite specific about what will constitute a criminal offence. The court suggested that in Austria, France and Netherlands the offence appears to be limited to the taking of the child by a

⁵⁵ Submission No 27.

⁵⁶ Submission No 12.

⁵⁷ Submission No 16.

⁵⁸ Submission No 28. At the time of writing the Council had not had the opportunity to examine the research findings.

person who does not have parental responsibility for the child. In New Zealand the offence is limited to the removal of a child from the country. However, the Council notes that in other countries with legal systems comparable to Australia, such as the USA, United Kingdom and Canada, the offence usually extends to people with parental responsibility.

4.07 ***Arguments against criminalisation.*** There are also arguments against such a course of action. These include:

- The existing provisions in the *Family Law Act 1975* are adequate to cope with the problem;
- The possibility of “criminalisation” forcing abductors to go into hiding as they seek to avoid the criminal consequences of their actions, with the consequent impact on the child of being kept in hiding⁵⁹;
- The affect on the child of a parent being imprisoned. It was suggested to Council that jailing of a parent following action by the other parent could destroy the relationship between the child and the parent taking the action which resulted in the jailing⁶⁰. On the other hand, it was also put to the Council that the consequences could also be educative for the child by informing their understanding of right and wrong and of responsible and irresponsible behaviour. The writer added that it was far more serious for a child to observe patently illegal behaviour of a parent going without penalty.⁶¹ Council is of the view that if parental child abduction were to be criminalised, penalties other than imprisonment are more likely in most cases and, therefore, this argument may not be as strong as it first appears.
- The abductor, being the child’s parent, has a right, or believes s/he has a right, to the care and/or control of the child. One submission said: “I regard stealing your own youngsters as an oxymoron, how can you steal your own child?”⁶²;
- The consequences of an offence being “criminal” can be quite severe; for example, apart from the penalties imposed, the person acquires a criminal record and this can also affect his or her employment prospects;
- In some circumstances the abductor considers that s/he is merely correcting a wrong, such as denial of reasonable contact with the child, or is saving the

⁵⁹ Submission No 24. Submissions No 5 and 27 also considered that criminalisation could prove to be counter-productive.

⁶⁰ Submission No 5.

⁶¹ Submission No 16. It should be noted, however, that another submission (No 8) pointed out, in another context, that children may not generally be aware of whether an act is legal or illegal.

⁶² Submission No 8.

child from a perceived danger, such as child abuse. However, one submission commented that “vigilante behaviour in righting a wrong is not condoned by any other jurisdiction”⁶³;

- In some cases the parent is fleeing alleged acts or threats of violence, or otherwise escaping an intolerable situation; and
- To make parental child abduction a criminal offence is an undue intrusion by the State into the domain of the family. Council notes, however, that the state has intervened in the family domain in relation to such matters as child abuse and neglect.

4.08 Australia is one of the Convention countries which takes action to locate missing children at government expense. Many other countries require the applicant to meet the costs involved. The *Convention on Civil Aspects of International Child Abduction* provides that a contracting state may make a reservation declaring that it will not be bound to meet certain costs associated with the recovery of abducted children⁶⁴. A significant number of Convention countries have made such a reservation. Australia has not. It also appears that in many cases some countries offer little or no help in locating the child whose whereabouts are not already known to the parent. In the circumstances a number of submissions questioned whether criminalisation would result in any significant improvement in the present situation⁶⁵.

4.09 The Family Court’s submission⁶⁶ made the following observation:

It seems likely that taking a child out of the jurisdiction in breach of a court order, or where the child is the subject of court proceedings and the effect of taking the child will be to frustrate the law, will be widely seen as wrongful. People who do not know the law would not be surprised to learn that it was an offence, or a breach carrying a penalty of some kind. It is less obvious perhaps that people would consider non-violent parent removal in the same way. It may be wise to be cautious in extending the criminal law to criminalise behaviour not widely or easily seen as wrongful.

4.10 The Council considers this a strong argument and accepts that there will be situations in which the general community may not regard parental child removal as wrongful.

4.11 One submission expressed grave reservations about using the criminal law to solve social problems:

⁶³ Submission No 16.

⁶⁴ Article 26, paragraph 3, *Convention on the Civil Aspects of International Child Abduction*.

⁶⁵ Submission No 24 specifically raised the issue in this context but other submissions were pessimistic about the value of criminalisation. See, for example, Submissions No 5, 7, 8, 17, and 19.

⁶⁶ Submission No 27.

... It is a very blunt instrument, which may catch some but allows many to escape the net, and often hits those who are weak economically and socially. It is also very much open to question whether it will be an effective deterrent in child welfare cases where emotions are so greatly involved and there is the risk that the problem of abduction will be worsened by forcing the party taking the child to go underground with terrible consequences for the child, emotionally, socially and educationally.⁶⁷

4.12 Another submission expressed similar concerns:

... if child abduction were to be criminalised there would be the added risk of the parent abducting the child, removing the child and never to be found. The ‘criminal’ label may result in people hiding very well and the abductor taking the whole process serious enough never to be found...⁶⁸

4.13 National Legal Aid⁶⁹ (NLA) was concerned that at present some abductors can be persuaded to return the child to Australia voluntarily. If the person were facing criminal charges NLA felt that s/he would be less likely to return voluntarily, given the possible serious consequences.

4.14 The Women’s Legal Service (Queensland) raised the question of whether criminalisation might result in the transfer of already inadequate resources away from domestic violence matters with serious social consequences. The Service said:

... from our experience and current research, the police are not well equipped to intervene in domestic violence matters. Their role in parental child abduction could seriously affect the welfare of children.⁷⁰

Interpol

4.15 The submission from the Empty Arms Network outlined its experience in relation to Interpol in the following terms:

The level of Interpol assistance rendered to Australian authorities when a child is abducted from our country is severely hampered by the fact that, at the present time, parental child abduction is not a criminal offence. There is, at the moment, great difficulty in including these cases on Interpol computer databases with any type of high priority notation. For example, a “red notice” on the Interpol computer system allows a high priority law enforcement tracking of an individual

⁶⁷ Submission No 5.

⁶⁸ Submission No 22.

⁶⁹ Submission No 18.

⁷⁰ Submission No 21.

fleeing a criminal warrant deemed to be of a serious nature... If a “red notice” is instituted an abductor may be detained upon entry or exit from a country with an active Interpol force... Criminalisation of parental child abduction would allow an expeditious resolution to a severely traumatic situation for a family and more importantly the abducted child.⁷¹

4.16 According to its constitution the aim of Interpol is to ensure and promote the widest possible mutual assistance between all criminal police authorities. Each member country of Interpol appoints one police department to serve as the country’s National Central Bureau (NCB) and to act as the focal point for international police co-operation.

4.17 The International Civil Procedures Unit of the (Commonwealth) Attorney-General’s Department has obtained information from the General Secretariat of Interpol suggesting that the General Assembly of Interpol has considered international child abduction regularly since 1985. Since that time most member countries of Interpol have made use of their Interpol channels to search for abducting parents. At the request of member countries, the Interpol General Secretariat issues notices to all members aiming at the search and arrest (or search only) of the abducting parent. The location of the abducting parent usually results in the location of the abducted child, and significantly supplements civil procedures for the recovery of children. A recent meeting of 42 countries involved in dealing with the civil aspects of international child abduction concluded that “Experience with Interpol has shown that it will act on the basis of a missing persons report as well as a criminal complaint. In some cases Interpol has played a helpful role in locating the child.”⁷²

4.18 The International Civil Procedures Unit of the (Commonwealth) Attorney-General’s Department advises that in the majority of international abduction cases location is not an issue as the abducting parent’s destination is usually known. However in a small minority of cases (particularly those involving abductions to countries which are not parties to the Hague Abduction Convention) a determined abductor will move from country to country using false identities and bribery of officials in an effort to evade detection. In the absence of assistance from overseas police forces, the searching parent’s chances of locating the child are slim and s/he is left with the costly and often ineffective alternative of employing private investigators.

4.19 The International Civil Procedures Unit of the (Commonwealth) Attorney-General’s Department advises that the Australian Federal Police, as the Interpol National Central Bureau (NCB) for Australia routinely accepts requests from National Central Bureaus from other countries to locate children abducted to Australia. Interpol requests from the USA in particular are regularly acted upon even though in practice prosecutions rarely occur when the child is returned to the USA. Paradoxically the

⁷¹ Submission No 28.

⁷² Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, March 1997.

Australian NCB refuses to transmit requests to other Interpol members to locate children abducted from Australia where those requests are sent to it by the International Civil procedures Unit of the (Commonwealth) Attorney-General's Department, which is the Hague Convention Central Authority in Australia. To date the NCB has justified this refusal on two grounds:

- (a) Interpol is established to provide mutual assistance between police authorities on criminal matters; the NCB therefore feels it is prevented from accepting requests to locate abducted children from non police sources (ie parents, child welfare authorities or Hague Abduction Convention Central Authorities);
- (b) the NCB has made a decision that it will not assist in the location of abducted children in civil matters as its resources are very thinly spread in trying to cover criminal cases; the NCB will not assist unless an offence has been committed, a warrant issued and it is planned to proceed with a prosecution once the abductor has been found. This is the advice given orally to the International Civil Procedures Unit of the (Commonwealth) Attorney-General's Department in September 1996 by Interpol. In its submission, the Australian Federal Police states that the "ANCB does assist to coordinate inquiries for the recovery of children who are abducted from Australia" and that there is "no pre-existing requirement for warrants to be issued or for abductors to be prosecuted before action may be taken by Interpol to assist in the recovery of children wrongfully removed from Australia".

4.20 In view of the fact that the International Civil Procedures Unit of the (Commonwealth) Attorney-General's Department disagrees with the NCB for Australia in relation to what is happening in practice, the Family Law Council suggests that a protocol be drawn up between the two organisations in relation to procedures to apply for the referral of cases from the Australian Hague Convention Central Authority to the NCB for Australia.

4.21 In a small number of international child abduction cases a parent's ability to quickly locate his or her abducted children is essential. The traumatic impact of an abduction is likely to be increased if a child is kept in hiding and is moved from country to country. The refusal of the Australian NCB to involve itself in resolving the small number of parental child abduction cases requiring overseas police assistance⁷³ appears to ignore these consequences and appears to be inconsistent with the practice of Interpol NCBs in other countries.

4.22 The Council has concluded that many of the problems confronting persons and agencies trying to recover children in international child abduction cases would be overcome if the Australian Federal Police, as the Interpol National Central Bureau for

⁷³ The International Civil Procedures Unit of the Attorney-General's Department estimates that the number of cases would probably be less than 10 a year.

Australia (the NCB), were to make arrangements for requests from non police sources (ie child welfare authorities or Hague Convention Central Authorities) to locate children abducted from Australia to be channelled to the NCB, either directly or via State and Territory Police Missing Persons Bureaus.

RECOMMENDATION 2

4.23 (a) That arrangements be made for requests from non police sources (ie child welfare authorities and Hague Abduction Convention Central Authorities) to locate children abducted from Australia be channelled to the National Central Bureau (NCB), either directly or via State and Territory Police Missing Persons Bureaus.

(b) That a protocol be drawn up between the NCB and the Australian Hague Convention Central Authority (the International Civil Procedures Unit of the Commonwealth Attorney-General's Department) setting out arrangements which will enable the Central Authority to refer cases directly to the NCB.

Criminalisation and parental responsibility

4.24 The *Family Law Reform Act* 1995 came into effect from 11 June 1996. The legislation abolished the concepts of custody, access and guardianship, which imply ownership of children by parents, and replaced them with the broader concept of parental responsibility. Unless it specifically says so, a parenting order of the court will no longer change a parent's sharing of the responsibility for his or her child.

4.25 Under the new arrangements, therefore, both parents generally retain the same responsibilities in relation to their children as they did before marriage breakdown. This remains the situation irrespective of whether the child resides with one parent and the other has contact with the child.

4.26 If both parents have parental responsibility, the "abduction" of a child by one parent clearly prevents the other parent from exercising his or her responsibilities in relation to that child. Since 11 June 1996 parental child abduction involves the taking over of all responsibilities for a child's care without regard for the other parent who shares those responsibilities.

4.27 While the legal situation is not substantively altered by the changes made in the *Family Law Reform Act* 1995, Council notes that some parents who now share parental responsibility may feel that this enables them to act with more latitude than previously. This is considered to be a relevant, although not a mitigating, factor in determining whether parental child abduction should be regarded as "criminal".

Conclusions on criminalisation

4.28 The majority of submissions made to Council were against criminalisation of child abduction at both the international level and in relation to internal abductions. While there was a clear majority against criminalisation of international child abduction, the submissions commenting on criminalisation of internal abductions were overwhelmingly against the proposal, with 73 percent opposing the idea.

4.29 It should be mentioned, in relation to criminalisation of the abduction of a child in an overseas country to Australia, doubts were expressed in some submissions about difficulties in rendering criminal, actions substantially connected with a person's country of habitual residence. For example, one submission made the following comments:

... At least one could anticipate practical difficulties in the proof of the necessary matters...⁷⁴

The Council has similar doubts in respect of such cases.

4.30 ***Costs to the taxpayer.*** The cost to the taxpayer of locating abducted children in Australia is significant. The Attorney-General's Department estimates that in a recent case involving the location of a child abducted to Victoria from the USA the cost in police resources, State and Commonwealth public service resources and legal fees was in excess of \$1 million. There is a view that a parent who deliberately conceals a child, knowing that authorities are lawfully attempting to locate the child, should be subject to some sanction if the cost to the community is significant.

4.31 While the Council acknowledges that the cost in government resources arising from parental child abduction is significant, it considered that the detriment flowing from criminalisation of parental child abduction is such that it negates it as a consideration.

4.32 ***Summary of conclusions.*** There are strong arguments both for and against criminalisation of parental child abduction. The Council appreciates the various arguments for criminalisation. For example, parental child abduction can have adverse effects on the child, there are circumstances where the lack of a criminal offence can hinder location and return of an abducted child, child abduction is quite costly for the Australian taxpayer and criminalisation could have deterrent and educative results.

⁷⁴ Submission No 1.

4.33 After considering all of the relevant factors, however, the Family Law Council is opposed to criminalisation of parental child abduction, mainly on the following grounds:

- The Council is not convinced that parental child abduction is generally in the nature of a criminal offence;
- There is no strong evidence that criminalisation is likely to result in any appreciable improvement in the rate of recovery of abducted children. In fact, there are some arguments which tend to support the view that criminalisation may reduce the possibility of some children being returned voluntarily;
- The alternatives to criminalisation, which could achieve the aim of improving the recovery rate of abducted children without having the adverse effects associated with criminalisation, would seem to be a more satisfactory policy option on available evidence;
- There would be a danger that criminalisation could operate to the disadvantage of the economically and socially weaker members of the community;
- The negative effects criminalisation would have on parent-child and parent-parent relationships;
- The Council is concerned that an unintended consequence of criminalisation could be that it might, in some situations, operate to the disadvantage of women fleeing domestic violence.

RECOMMENDATION 3

4.34 Parental child abduction, whether at the international level or within Australia, should not be criminalised and alternative means of improving the recovery rate of abducted children should be explored.

RECOMMENDATION 4

4.35 That a broad discretionary power be given to the courts to make reparation, from the property of persons responsible for international child abductions, to the Commonwealth, or other bodies associated with the recovery of the child, of the costs associated with the recovery of those abducted children.

Alternatives to criminalisation

4.36 Having concluded that it does not favour criminalisation of child abduction either at the international level or within Australia, the Council has considered whether there may be ways of improving the present rate of recovery of abducted children.

4.37 ***Improve existing arrangements.*** A number of submissions opted for retention of the existing legislative framework supplemented by improvements in current administrative arrangements. One submission suggested improvement in the police response to reported missing children and the introduction of a Telephone Interception Order (TIO) system similar to that provided for in the (NSW) *Crimes Act* 1900 for apprehended violence orders when State Police are called to a violent scene. Under the proposal, State or Territory Police would be given the power to list children on the Watch List by themselves applying for the order through a scheme similar to the one provided for TIOs⁷⁵ The proposal relates to abductions from or within Australia and would not assist in relation to international abduction to Australia from an overseas country.

4.38 ***Police priorities.*** A number of submissions considered that the alternatives to criminalisation needed to be further explored. For example, the Law Institute of Victoria suggested:

If the abduction involves an international element it is difficult to argue against the benefit of utilising the assistance of the obvious agencies. The question becomes one of whether it is necessary to criminalise the behaviour to prevail upon those agencies or whether there are other alternatives.

4.39 The Women's Legal Service (Queensland) said:

Undoubtedly, it would be very useful to have the involvement of Interpol in parental child abduction cases. However, given the additional problems created by criminalisation, we consider the benefits would not outweigh the costs. We do, however, recommend that the government explore other avenues of using this expertise without criminalisation.⁷⁶

4.40 The Women's Legal Resources Centre (NSW) made similar comments:

... There are civil laws which empower police to find and return children. Some other policy may be necessary to ensure that the police actually use their present powers and perhaps look at ways to enable the various police services to use greater powers... If the civil law is not sufficient in its present form to locate children overseas, then the civil law should be amended. We do not accept that

⁷⁵ Submission No 19.

⁷⁶ Submission No 21.

lack of police response at present is good enough excuse to criminalise domestic abductions.⁷⁷

4.41 Following the receipt of submissions the Council has examined in more detail the possible alternatives to criminalisation.

4.42 A central issue relates to resources. As indicated in Recommendation 2 the Council considers that the costs of agencies involved in the recovery of abducted children should be recoverable from the person responsible for the abduction.

4.43 The priority given by police to recovery of abducted children is a further issue. The question of the police services giving recovery of abducted children a higher priority inevitably raises the issue of resources. It was suggested to Council that some of the existing problems relating to the recovery of abducted children arise for reasons of cost. For example, the Law Institute of Victoria⁷⁸ related priority and resources in its submission. It said:

We also query that criminalisation would facilitate the search process. There are no guarantees that the resources referred to would become available. A loss of priority may occur if cases are unsuccessfully prosecuted. There may be appropriate exceptions pursuant to the legislation to enable the “abducting” parent to resist the penalty.

4.44 The Council does not have enough information to make a specific recommendation about resources, but it considers that this issue should be further explored with the police services and other interested agencies, including the Attorney-General’s Department and the Department of Finance.

RECOMMENDATION 5

4.45 That the Attorney-General’s Department and the Department of Finance and Administration give consideration to how more resources can be made available to the Australian Federal Police for the recovery of abducted children.

A Central Registry

4.46 The Council has considered whether considerably less emotional and financial resources might be expended in relation to parental child abductions if mechanisms were in place which would give “abducting” parents some secure way of

⁷⁷ Submission No 19.

⁷⁸ Submission No 23.

arranging for them to be further contacted without that information being available to the other parent. The purpose of such an arrangement would be to minimise the use of scarce police resources in locating missing children who have been removed from the matrimonial home by one of the parents, particularly where the “abducting” parent wishes, for whatever reason, to make a permanent break with the other parent.

4.47 Such a proposal would involve the establishment of a central registry. Its role would be:

1. To receive information from parents who are leaving the matrimonial home permanently about how the registry can contact and advise them of any application is made to the court by the other parent in relation to a child of the marriage;
2. To take steps to ensure that the information supplied to the registry is completely secure and is not made available to any other person or organisation;

4.48 When a parent leaves the matrimonial home, or within a specified period after leaving, and takes a child or children of the marriage with him or her, that person would be required to notify the central registry of how the registry can contact that person.

4.49 Under the proposal, leaving the matrimonial home and taking a child would not be an offence. However, failure by a parent to advise the central registry of where s/he can be contacted would be an offence, but not a criminal offence. Existing offences in the *Family Law Act* in relation to child abduction would remain.

4.50 Under this arrangement the at-home parent would be able to make an application to the court for location of the child/ren, or for residence or contact orders in relation to such child/ren. The central registry would notify the “abducting” parent of the application. The need for police action to locate the children so removed from the family home would be reduced under the proposal.

4.51 The proposal was not raised in Council’s discussion paper. Council is reluctant to recommend a proposal of this type without appropriate public consultation. Some of the problems with the proposal include:

- The possibility that it would drive some abductors further underground rather than have a positive effect on the recovery of abducted children.
- Concerns about the security of information supplied to the central registry, based on experience with adoption registers.
- Probable resistance from some “abductors”, especially women fleeing from violent situations.

- While the proposal appears sound in theory, Council considers that there would be a number of practical difficulties in putting it into practice.
- Difficulties the proposal would raise for some cultural groups.
- Perceived judicial reluctance to order return under a Hague Convention application because the abductor could be punished and there are implications for the child.

4.52 With these factors in mind, Council does not favour implementation of the proposal at this stage. Should the Government want the proposal to be further examined, Council recommends that there should be consultation with interested bodies, including domestic violence groups and women's refuge workers.

5. OTHER MATTERS ON WHICH THE ATTORNEY-GENERAL SOUGHT COUNCIL'S ADVICE

Introduction

5.01 The matters raised by the Attorney-General and set out in the terms of reference in Chapter 1 of this report a number of issues which anticipated a positive response to the question of whether parental child abduction should be criminalised. Having reached the conclusion that parental child abduction should not be criminalised (items 1, 2 and 3 of the terms of reference), the Council has, however, considered it desirable that those other matters should also be addressed in case the Attorney-General does not accept the Council's advice in relation to criminalisation.

5.02 Some of the issues in question have already been considered in chapters 3 and 4 of this report. They related to aiding and abetting (item 4 on the terms of reference) and the recovery of costs by the Commonwealth of finding and returning abducted children and the proceeds of crime legislation (item 12).

5.03 The following items remain to be considered:

Item 5	The age of the child
Item 6	Exceptions and defences
Items 7 & 8	Discretion to prosecute and prosecution policy
Item 9	Crimes Act or Family Law Act?
Item 10	Jurisdiction
Item 11	Police powers

5.04 These six issues are examined in this chapter.

Age of the child

5.05 The Council was asked to consider whether any offence should apply to parental abduction regardless of the age of the child or should it be confined to persons under 18 years of age?

5.06 For the purposes of the *Family Law Act 1975* and the Model Criminal Code a "child" is a person under 18 years of age. In some State and Commonwealth legislation a "child" is a person under 16 years of age⁷⁹. Under State laws the

⁷⁹ For example, in NSW a person is regarded as having "full capacity" on reaching 16 years of age. A "child" is a person under 16 years of age for the purposes of the (Commonwealth) *Social Security Act 1947* and the (Commonwealth) *Veterans' Entitlement Act 1986*.

definition of “child” provides varying ages for application. This is also the situation in overseas countries. For example, the definition of a “child” for the purposes of child abduction is 16 years in the UK and the USA and 14 years in Canada.

5.07 For the purposes of the Hague Convention a “child” is a person under 16 years of age⁸⁰. In the *UN Convention on the Rights of the Child* a “child” is a person under 18 years of age, unless under the law applicable to the child, majority is attained earlier⁸¹.

5.08 Regulation 16(2)(c) of the Family Law (Child Abduction Convention) Regulations reflects the attitude of the Hague Convention in relation to “child” and provides that a court must refuse to make an order for return of a child where the child has attained the age of 16 years.

5.09 Most of the respondents to the Council’s discussion paper did not specifically address this question. The small number who did mainly opted for a “child” being a person under 18 years of age. One submission considered the age should be 16 years of age and one submission considered the age should be 14 years of age.

5.10 In the Council’s view the age should, in general, be 16 years, which would be consistent with the Hague Convention. However, the Council considers that if there were to be an exception relating to consent by the child, there should be a discretion under which a consent would depend on the individual child’s maturity and capacity to make an informed judgment. This would be consistent with the policy of the *Family Law Act* in relation to children’s decision making generally.

Exceptions and defences

5.11 It is important to note that if parental child abduction is made a criminal offence, a number of defences in the Criminal Code will automatically apply. These include, for example, duress, self defence and sudden and extraordinary emergency. Decisions will need to be taken, however, on whether any additional exceptions or defences should be allowed if parental child abduction is made a criminal offence.

5.12 The following additional exceptions and defences were identified by the Council in its discussion paper:

5.13 ***Fleeing from violence.*** A child’s parent who moves to a refuge (or some other place) to escape a violent spouse or partner, and takes the child, could

⁸⁰ *Hague Convention on Civil Aspects of International Child Abduction*, Article 4.

⁸¹ *UN Convention on the Rights of the Child*, Article 1.

technically be regarded as having removed the child from a person with parental responsibility.

5.14 The *Family Law Act* 1975 contains a definition of “family violence”⁸² which may be a basis on which to develop an exception where a person is fleeing from a violent family situation.

5.15 ***Sudden, extraordinary emergency.*** Section 10.3(1) of the *Criminal Code Act* 1995 provides that a person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.

5.16 ***Protecting the child from danger of imminent harm.*** This defence is available under the provisions of section 285 of the *Criminal Code* (Canada).

5.17 ***Reasonable excuse.*** Some overseas legislation makes an exception in the event of “reasonable and lawful excuse”. Under section 1204 of the (USA) *International Parental Kidnapping Crime Act* 1993 a parent who is due to hand a child over to another parent and who is delayed by circumstances beyond his/her control has a defence available if notification or reasonable attempts at notification are made within 24 hours and the child is returned as soon as possible. Section 112AC of the *Family Law Act* 1975 sets out what constitutes “reasonable excuse” for contravening an order of the court.

5.18 ***Consent.*** The Model Criminal Code discussion paper on the general kidnapping/abduction offences⁸³ proposes that the person taking the child does not commit an offence if the person is acting with the consent of the person who has lawful custody of the child⁸⁴ (s.27.2(3)(b)). The paper proposes the Model Criminal Code should provide that a person is to be treated as acting without the consent of another person if the person obtains the other's consent by force or by deception causing the other person to believe that he or she is under a legal compulsion to consent⁸⁵.

5.19 A mistaken belief about a fact, such as whether the person consented, is dealt with in the general principles of criminal responsibility (s.9.1 of the *Criminal Code Act* 1995). It provides that in determining whether there was a mistaken belief, the magistrate or jury may consider whether the mistaken belief was reasonable in the circumstances.

5.20 While it is appreciated these proposals may be fine-tuned in the Model Criminal Code Officers Committee's final report on these matters, there is no reason

⁸²Section 60D.

⁸³ Officers Committee of the Standing Committee of Attorneys-General, 1996, *Chapter 5: Non Fatal Offences Against the Person - Discussion Paper*, August 1996.

⁸⁴ *Ibid*, draft sections 27.2(3)(b) and 27.3, pages 64-66.

⁸⁵ *Ibid*, draft section 23.3, page 24.

why this general approach to consent in relation to offences against the person should not apply to a parental child abduction offence.

5.21 ***The submissions.*** One submission⁸⁶ considered that the exceptions set out in section 112AC of the *Family Law Act* should be a minimum defence. Section 112AC sets out what constitutes “reasonable excuse” for contravening an order of the Family Court. Reasonable excuse under the provision includes: failure to understand the obligations imposed by the order or where the respondent believed the actions constituting the contravention were necessary to protect the health and safety of the child.

5.22 The Office of the Status of Women considered that a defence similar to that in section 112AC was necessary to protect the person fleeing from violence or the threat of violence⁸⁷.

5.23 Seven of the submissions did not address the question of exceptions and defences. Of those that did, 5 agreed with the list in the discussion paper. A further 3 agreed with that list with some additions. As indicated above, 2 submissions referred to the existing provisions of section 112AC.

5.24 The remaining 8 submissions made a variety of recommendations. For example, the DPP⁸⁸ proposed that the exceptions and defences in the *Criminal Code Act 1995* should apply. It also went on to make some valuable observations in relation to the defences listed in the discussion paper. A number of submissions expressed the need for special care in relation to domestic violence cases. The Law Institute of Victoria proposed that “entrapment” be a defence, but stressed that this would have a different meaning from the criminal concept of entrapment.

5.25 In its submission the DPP said that there should be a requirement that the removal or retention of the child was done with the intention of preventing the exercise or performance of any of the powers, duties or responsibilities by another person who has parental responsibility for the child⁸⁹. Such a requirement would obviate the need for a defence of reasonable and lawful excuse.

5.26 The Council has concluded that if parental child abduction is criminalised there should be a number of exceptions and defences. In general it should be necessary for the abductor to show that s/he did not have an intention of preventing the exercise or performance of any of the powers, duties or responsibilities of a person having parental responsibility for the child. The exceptions and defences should be:

⁸⁶ Submission No 5.

⁸⁷ Submission No 17.

⁸⁸ Submission No 2.

⁸⁹ Submission No 2.

- fleeing from violence (Section 112AC of the *Family Law Act* is an example of this defence);
- sudden, extraordinary emergency;
- protecting the child from danger of imminent harm;
- reasonable excuse within the meaning of the *Family Law Act 1975*;
- the consent of the “child”. “Child” would be defined as a person who has attained the age of 16 years, or a person who is under 16 years of age but whose age and maturity are such that s/he was able, in the opinion of the court, to make a reasoned judgment in the circumstances of the case.

Discretion to prosecute and prosecution policy

5.27 The discussion paper asked whether the consent of the Attorney-General should be required for the commencement of a prosecution for parental child abduction.

5.28 In the absence of a provision to the contrary, there would be no reason why any person could not mount a prosecution for child abduction. This was a matter of particular concern to persons and organisations working in the domestic violence area. For example, one submission said:

The discussion paper refers to instances in the United States where private prosecutions are used in an inappropriate and abusive way. We submit that the entire proposal for criminalisation introduces into family law a whole new concept for abusive and vindictive applications.⁹⁰

5.29 The Queensland Domestic Violence Council said:

Many women fleeing violence utilise the assistance of Domestic Violence Services and Counsellors, Social Workers and Shelter Workers. The potential for the good work these support persons and services provide could be extensively damaged with the advent of such offences.⁹¹

5.30 To allow proper consideration to be given to the factors which may be involved in the abduction of a child and to safeguard the child’s best interests, some discretion as to whether or not to prosecute would be most desirable.

5.31 The discussion paper also asked whether the general prosecution policy of the Commonwealth should apply in relation to such prosecutions. This basically questions whether the prosecution policy of the Director of Public Prosecutions (DPP)

⁹⁰ Submission No 19.

⁹¹ Submission No 13.

is adequate to cover parental child abduction or whether the DPP or the Attorney-General should develop new policies for prosecutions in such cases.

5.32 Of those respondents to the discussion paper who addressed this issue the majority favoured a special prosecution policy or the Attorney-General deciding on whether a person should be prosecuted. However, the number of submissions involved was not large.⁹²

5.33 The Council has not addressed this issue in any detail given that it does not favour criminalisation of parental child abduction. However, a majority of the Council favours a special prosecution policy in view of the special nature of the matter and the rather unique issues raised by parental child abduction, especially those relating to the best interests of the child.

Criminal Code or Family Law Act?

5.34 The discussion paper asked whether any offence of parental child abduction should be contained in the *Family Law Act 1975* or in some other legislation, such as the Commonwealth Criminal Code. The issue of cross referencing between legislation was also raised.

5.35 Of the 15 submissions which addressed this question, only 4 favoured the inclusion of an offence of parental child abduction in the Criminal Code. The remaining 11 considered that it should be in the *Family Law Act*, although 2 suggested that there should be a cross reference to the Criminal Code.

5.36 The Council does not hold strong views on the issue. As a general rule the policy of the Criminal Code is to centralise serious criminal offences. If this policy is to apply to this offence the Council would suggest that the *Family Law Act* should contain a cross reference to the relevant provisions of the Criminal Code.

Jurisdiction

5.37 In its discussion paper the Council asked which court/s should have jurisdiction if it is decided to criminalise parental child abduction. At present offences under the *Family Law Act* are dealt with by State and Territory courts exercising federal jurisdiction under sections 39 and 68 of the *Judiciary Act 1903*.

⁹² Less than half of respondents addressed the issue. Of these only 3 supported using the DPP and retaining the existing Commonwealth Prosecution Policy.

5.38 About half of the submissions addressed this question. The majority favoured courts exercising jurisdiction under the *Family Law Act* having jurisdiction to try any offence of parental child abduction.

5.39 If parental child abduction is criminalised, Council can see no strong reason for distinguishing such an offence from other “criminal” offences and suggests, therefore, that offences should be tried before State and Federal Courts exercising federal jurisdiction under the *Judiciary Act* 1903.

Police powers

5.40 The discussion paper asked whether police should have the power to intercept telephone communications and use listening devices to locate a child who has been removed or retained by a person in breach of any such offences.

5.41 Most submissions did not answer this question. Of the small number which did, none opposed the police having the powers indicated. Only 2 submissions suggested that there should be restrictions on the use of the powers. One said that the powers should be subject to court approval. The other said that the powers should only apply in “certain circumstances”. The remainder supported police having the powers unreservedly. In the Council’s view these opinions were given in the absence of full details about current legislation on the use of listening devices or the interception of telephone communications.

5.42 The Council has closely examined this issue and is of the view that, as legislation currently stands, it would not be possible to use telephone intercepts or listening devices, even if parental child abduction were to be criminalised.

5.43 The *Australian Federal Police Act* 1979 sets out the conditions under which warrants may be obtained for the use of listening devices⁹³. A requirement for the issue of a warrant authorising officials to use a listening device is that there are reasonable grounds for suspecting that there has been, or is likely to be, the commission of a class 1 or a class 2 general offence. Section 12B of the Act defines a class 1 general offence as including such offences as murder and “kidnapping, or an offence of a kind equivalent to kidnapping”. A class 2 general offence is defined in section 12B as an offence which carries a maximum penalty of at least 7 years.

5.44 The Council has considered whether parental child abduction might be regarded as “an offence of a kind equivalent to kidnapping”. However, for the reasons stated in paragraph 4.33 above, it is clear that parental child abduction is quite distinct from kidnapping.

⁹³ Australian federal Police Act 1979, section 12G.

5.45 The *Telecommunications (Interception) Act 1979* contains similar definitions of class 1 offence (section 5) and class 2 offence (section 5D) as in the *Australian Federal Police Act*. Sections 45 and 46 of the *Telecommunications (Interception) Act* enable a warrant for the interception of telephone communications to be issued in certain circumstances in relation to class 1 or class 2 offences. Neither would apply in relation to parental child abduction.

5.46 Council has also considered whether existing legislation in relation to the use of listening devices and the interception of telephone communications should be amended to enable their use in relation to parental child abduction. It is clear that at present the legislation confines the use of these powers to situations involving very serious criminal activity. This is consistent with the high value placed on privacy by the Australian public.

5.47 Council considers that there are strong grounds for distinguishing parental child abduction from such other situations. In particular, there are situations, in relation to international child abductions, where the police need to act quickly and to be able to take all reasonable steps to recover the child before the abductor gets out of the country.

5.48 Council draws attention to the effects of abduction on the child, which are discussed at paragraphs 2.19 - 2.30 of this report. It is clear that abduction can have long term detrimental effects on the child and it is, therefore, in the best interests of the child that every avenue be available to the police to recover abducted children quickly. Children are the most vulnerable members of society and it is Council's view that special consideration should be given to the protection of children from harm.

5.49 Council considers, therefore, that police should have powers to use listening devices or to intercept telephone communications in cases involving parental child abduction. This view was strongly supported in submissions to Council.

RECOMMENDATION 6

5.50 If the Government does not accept the Council's recommendation that parental child abduction should not be criminalised and proposes to proceed with legislation giving effect to such a proposal, the Council's answers to the consequential questions raised in the terms of reference are as follows:

- (a) Should any such offence apply to parental abduction regardless of the age of the child or should it be confined to persons under the age of 18 years?**

The offence should apply to the abduction of a child under 16 years of age. However, it should be possible for an exception where, in the opinion of the court, such a child was capable of making a reasoned consent to the action.

(b) What exceptions or defences should apply in relation to any such offence?

The following exceptions and defences should apply -

- **fleeing from violence (Section 112AC of the *Family Law Act* is an example of this defence);**
- **sudden, extraordinary emergency;**
- **protecting the child from danger of imminent harm;**
- **reasonable excuse within the meaning of the *Family Law Act 1975*;**
- **the consent of the child involved. Consent could be given by a child who is over the age of 16 years, or, if under 16 years of age, where the age and maturity of the child are such that s/he was able, in the opinion of the court, to make a reasoned judgment in the circumstances of the case.**

(c) Should the consent of the Attorney-General or the DPP be required before the commencement of a prosecution?

The Attorney-General's approval should be necessary before commencing prosecution.

(d) Should the general prosecution policy of the Commonwealth apply to the institution of such prosecutions?

There should be a special prosecution policy for such cases.

(e) Should any offence provisions be in the Family Law Act 1975 or in some other legislation?

The offence should be in the Commonwealth Criminal Code with a cross reference to the *Family Law Act* .

(f) Should any offence be tried in the Family Court or some other court?

Almost all prosecutions for offences under Commonwealth law are conducted before State and Territory courts exercising federal jurisdiction pursuant to sections 39 and 68 of the *Judiciary Act 1903*. The offence should be tried in the same court as most other Commonwealth offences; that is, State and Territory courts exercising federal jurisdiction.

(g) Should police have powers to intercept telephone communications and use listening devices to locate a child who has been removed or retained by a person in breach of any such offence?

The Council notes that the strict privacy based policy on which the existing legislation is based would not allow an extension of such powers in relation to parental child abduction. The Council appreciates the arguments under which invasions of personal privacy, such as telephone interception and use of listening devices, are confined to the more serious criminal offences. Notwithstanding this, Council considers that, irrespective of whether parental child abduction is criminalised, police should have power to intercept telephone communications and use listening devices in cases where a child has been abducted and such interception or use would assist in the recovery of the child.

Legal aid

5.51 In its submission National Legal Aid made the following suggestion:

... an assessment should be made of the legal aid impact of the criminalisation of parental child abduction. Criminalisation is likely to have a significant financial impact on the legal aid system in Australia especially where both parties may be already funded in the family law proceedings, as under the *Dietrich* principle, an indigent accused would be highly likely to receive a grant of legal aid in the associated criminal proceedings.⁹⁴

5.52 There is a requirement that Commonwealth Departments and Statutory Authorities which use (or whose programs affect) legal services provided by the Attorney-General's Department, the Director of Public Prosecutions or Legal Aid Commissions in each State and Territory are required to include a legal services impact statement in submissions containing recommendations or proposals that will entail an increase in demand for legal services, including legal aid, provided by those agencies. This requirement would appear to meet the suggestion made by National Legal Aid.

⁹⁴ Submission No 18.

LIST OF PERSONS AND ORGANISATIONS MAKING SUBMISSIONS

The submission numbers used below are used in footnotes throughout the report to identify the source of material quoted in the report.

Submission Number	Name of person or organisation
1.	The Hon Justice Bernard Warnick
2.	Commonwealth Director of Public Prosecutions
3.	Commonwealth Director of Public Prosecutions (Supplementary Submission)
4.	WA Grandparents Support Group
5.	Dr Peter Nygh
6.	Family Law Practitioners Association of WA
7.	Mr Anthony A Hardy
8.	Mr Bruce Young
9.	The National Council of Single Mothers and their Children
10.	Beenleigh Domestic Violence Assistance Program
11.	Family Law Reform and Assistance Association Inc.
12.	National Children's and Youth Law Centre
13.	Queensland Domestic Violence Council
14.	The Chief Magistrate of the NSW Local Courts
15.	Queensland Domestic Violence Services Network
16.	NAME AND ADDRESS WITHHELD
17.	Office of the Status of Women
18.	National Legal Aid
19.	Women's Legal Resources Centre, Harris Park NSW
20.	Ms Alison Newton (NADA)
21.	Women's Legal Service Inc, Annerley QLD
22.	Mr Norman Goodsell, Family Court Counselling Service, Parramatta, NSW
23.	Law Institute of Victoria
24.	Department of Community Services NSW
25.	The Hon Justice David Anderson
26.	Law Council of Australia (Family Law Section)
27.	Empty Arms Network
28.	Family Court of Australia
29.	Australian Federal Police

THE HAGUE CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

Under the Hague Convention, the courts in the country to which the child has been abducted are responsible only for determining whether the child's immediate return is warranted.

Other issues relating to the ongoing care of the child fall to be determined in the State of habitual residence. By maintaining that the laws of the State of habitual residence should apply to such matters, the Convention ensures that abducting parents cannot benefit from their actions by obtaining a favourable order in the jurisdiction of their choice as occurred previously with the regular instance of forum shopping.

“Rights of custody”

There is no requirement that a formal custody order be in force before a Convention application can be made. A child can be ordered returned to the person with whom the child habitually resides, provided the removal was in violation of an existing custody order.

However, a potential applicant must have “custody rights” which are defined in the Convention as “rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence” (Article 5(a)). The term takes on more specific meaning by reference to the law of the country in which the child habitually resided immediately prior to his or her removal or retention.

The *Family Law Reform Act* 1995 has replaced the traditional notions of custody and access with new concepts of residence, contact and parenting orders to encourage both parents to have an active role in the day to day and long-term decision making in relation to their children. Parents responsibilities for decision making are contained in specific issues orders rather than residence or contact orders. Section 111B of the Act makes it clear that parenting orders confer “custody rights” for the Convention.

Limitation of Convention applicability

There are three limitations on the prosecution of Convention applications. These relate to: the commencement of the Convention in a particular State; the age of the

“child”; and a time limit on applications under the Convention. These three matters are discussed separately below.

Status of Contracting States. The Convention applies only when the removal or retention of the child occurred after the date when the Convention came into effect between the two countries (Article 35).

Children under 16 years. The Convention does not apply in situations where the child has reached 16 years of age (Article 4).

Parents seeking the return of child over 16 years of age have no remedy at all under the Convention. Even if a child is under 16 years of age at the time of removal or retention, the Convention ceases to apply when the child reaches 16 years of age.

One year limitation period. The Convention court is not obliged to order the return of a child when the application for return is commenced more than one year after the removal or retention of the child (Article 12). The limitation period begins to run from the date of abduction and not the date the child is located.

In such situations, a Convention application requires consideration of a further element in determining whether the child should be returned and that is whether they have settled into their new environment.

Exceptions to the return requirement

There are four exceptions to the Convention’s return requirement. These are contained in Articles 13 and 20 of the Convention and are discussed below under the following headings:

- Public policy;
- Exercise of “custody rights”;
- “Grave risk of harm” or “intolerable situation”; and
- The child’s objections.

Public policy. The Convention’s public policy exception allows a court a discretion to refuse the return of the child if this would not be permitted by the fundamental principles of the Requested State relating to the protection of human rights and freedoms (Article 20).

Exercise of “custody rights”. A court may deny an application for the return of a child if the applicant was not actually exercising custody rights at the time of removal or retention, or had acquiesced in the removal or retention (Article 13(a)). Removal occurs when a child is unlawfully taken away from their State of habitual residence.

Retention occurs where a child lawfully removed for a limited period is not returned at the expiration of that period.

“Habitual residence” is not defined and must necessarily be determined as a matter of fact depending on the circumstances of each particular case.

“Grave risk of harm” or “intolerable situation”. A court also has a discretion to refuse the return of a child if there is “a grave risk of harm that return ... would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation” (Article 13(b)).

Child’s objections. A court may refuse a child’s return if the child objects to being returned and the child has attained an age and degree of maturity at which the court can appropriately consider the child’s views (Article 13).

Non-signatory States

While the majority of western countries have signed the Convention, a significant number of other countries, including all the Islamic States and Asian nations have not. (For the purposes of this paper, Israel, which has signed the Convention, is regarded as a western nation.)

APPENDIX C

COUNTRIES WHICH HAVE RATIFIED THE HAGUE CONVENTION

The Hague Convention is currently in force in the following 49 countries:

Europe	North America	South America	Africa & Middle East	Australasia
Austria	Bahamas	Argentina	Burkina Faso	Australia
Bosnia & Herzegovina	Canada	Belize	Israel	Hong Kong
Cyprus	St Kitts and Nevis	Chile	Mauritius	New Zealand
Croatia	USA	Colombia	South Africa	
Denmark		Ecuador	Zimbabwe	
Finland		Honduras		
France		Mexico		
Georgia		Panama		
Germany		Venezuela		
Greece				
Hungary				
Iceland				
Ireland				
Italy				
Luxembourg				
Macedonia (FYR)				
Monaco				
Netherlands				
Norway				
Poland				
Portugal				
Romania				
Serbia & Montenegro (FYR)				
Slovenia				
Spain				
Sweden				
Switzerland				
United Kingdom				

Parental Child Abduction

FYR = Former Yugoslav Republic

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