Questionnaire concerning the practical operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*

(Including questions on implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*)

The role and functions of Central Authorities

1. Have any difficulties arisen in practice in achieving effective communication with other Central Authorities? In particular, how are "modern rapid means of communication,"[1] used by your Central Authority in order to expedite communications, bearing in mind the requirements of confidentiality?

E-mail is commonly used in communicating with other Central Authorities and is a quick and effective means of communication. Documents are often sent by facsimile and originals are then sent by airmail.

Communication is a problem with certain countries, making involvement of Australian Embassies necessary. This is an unreasonable imposition on their time and resources of the Embassies. Translation delays can also impede timely responses.

2. Are there any other problems of co-operation with other Central Authorities to which you wish to draw attention?

(a) Lack of legal or administrative framework to implement the Convention (Art 7f)

Although Fiji has acceded to the Convention, to our knowledge, it is yet to pass implementing legislation. However, Australia has sent two cases to Fiji to be dealt with under domestic legislation. In one, a return order was made and we are awaiting the outcome of the other.

(b) Lack of resources to keep each other informed (Art 7i)

Some Central Authorities take many months to respond to communications regardless of whether they concern an application to or from those countries, or a simply query. Even when the communication is translated into the language of the other country, these emails/faxes too are often ignored. In certain cases, we have sought intervention by the nearest Australian Embassy to obtain a response, but they may also be unsuccessful (China-Macau, Colombia, Cyprus, Spain, Portugal, South Africa, Mexico, Guatamala and Croatia).

(c) Limited implementation of the Access Limb of the Convention (Art 7f)

Scotland asserts that domestic case law means that it can only implement the Access limb of the Convention in a limited fashion. In short, foreign access applications to Scotland are only considered where no modification to the order is required and where the action is brought almost immediately. The practical effect of advice from Scotland is that all foreign access applications will need to be litigated domestically, rather than through the Convention. This creates two issues: increased expenses for the person whose access rights have been breached and the effective closure of the 'access application' avenue between Scotland and Australia.

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[1] See the Guide to Good Practice – Part I on Central Authority Practice, Chapter 1.3.3.

(d) Lack of notice to Central Authority of case hearing (Art 7i)

In some cases little notice is given of a hearing. For example, in one case in Malta the applicant father in Australia was not contacted and the paternal grandfather in Malta was asked to participate in the hearing on short notice. In this case, the court refused to order the return of the child.

(d) Lack of legal aid in access cases (Art 7g)

Refusal of Legal Aid in England for some access cases causes injustice to some applicants.

(e) American Legal Assistance Questionnaire (Art 7g)

While it is open to Australian applicants to complete the American Questionnaire, the reality is that, should they qualify for an American pro bono or reduced fee attorney, the likelihood is that one cannot be found.

3. Does your Central Authority maintain a website and / or a brochure / information pack? (Please provide the web address or check if the information on the Hague Conference website is accurate, see < www.hcch.net > → Child Abduction Section → Links to related websites). If so, does the website and / or brochure / information pack contain the following information as recommended by the Special Commission of 2001:

International Child Abduction Website: http://www.ag.gov.au/childabduction

"a) *the other Contracting States in relation to whom the Convention is in effect;* ***YES***

b) *the means by which a missing child may be located;* ***YES***

c) *the designation and contact details for the Central Authority;* ***YES***

d) *application procedures (for return and access), documentary requirements, any standard forms employed and any language requirements;* ***YES***

e) *details, where applicable, of how to apply for legal aid or otherwise for the provision of legal service;* ***YES***

f) *the judicial procedures, including appeals procedures, which apply to return applications;* ***NO, although parents are advised to consider whether they have any grounds for opposing return and that if they think they may have grounds, consult a lawyer or legal aid body***

g) *enforcement options and procedures for return and access orders;* ***There is information about procedures for return and access orders***

h) *any special requirements which may arise in the course of the proceedings (*e.g. *with regard to matters of evidence);* ***NO***

i) *information concerning the services applicable for the protection of a returning child (and accompanying parent, where relevant), and concerning applications for legal aid for, or the provision of legal services to, the accompanying parent on return;* ***YES***

j) *information, if applicable, concerning liaison judges"?* ***No***

4. What measures does your Central Authority undertake to encourage voluntary returns and amicable resolutions, and how do you seek to ensure that these negotiations do not lead to undue delay in return proceedings? [Note: Questions 20-22 deal with the subject of mediation.]

The requirements of Art 7c are reflected in Australia's legislation at Reg 13(4) of the Family Law (Child Abduction Convention) Regulations. Reg 13(4) specifies action that must be taken by the Australian Central Authority, which includes seeking:

(a) an amicable resolution of the differences between the applicant and the person opposing return of the child in relation to the removal or retention of the child; and
(b) the voluntary return of the child;

In practice, a decision is made at the time of receipt of the application whether or not it is an appropriate case for voluntary return. Sometimes the applicant also requests that a voluntary return be sought before other action is taken. This process does not usually cause significant delay and will in fact save considerable time in the end if lengthy court proceedings can be avoided. It is usually apparent quite early if the taking parent is using voluntary return negotiations as a delaying tactic, in which case negotiations may be terminated and legal proceedings commenced.

In most cases, including voluntary returns, the Australian Central Authority will file the Hague application in court in order to obtain ex parte orders to prevent the further removal of the child from Australia, the surrender of passports and similar restrictions. If a voluntary return is negotiated after obtaining these orders, the matter is resolved by consent orders for return. In Queensland, the State Central Authority is more inclined to pursue a voluntary return before filing the application or obtaining holding orders.

5. In accordance with the Guide to Good Practice – Part I on Central Authority Practice, has your Central Authority shared its expertise with another Central Authority or benefited from another Central Authority sharing its expertise with your Central Authority?[2]

The Central Authority has participated in a number of conferences and summits on International Abduction. For example, the Central Authority attended the conference in Malaysia in 2005.

This year the Central Authority travelled to Papua New Guinea to encourage Papua New Guinea to consider joining the Convention and discuss Australia's experience. Australia also arranged for delegates from Papua New Guinea to travel to Australia.

The Central Authority holds a biennial conference on Child Abduction to which other Central Authorities are invited. At this year's conference to be held in October, New Zealand will be participating. State Central Authorities carry out Australia's Convention obligations in each State and Territory. The State Central Authorities attend the biennial conference with the Commonwealth Central Authority and share information and experiences.

[2] See, in particular, Chapter 6.5 on twinning arrangements.

Court proceedings[3]

6. Do you have any special arrangements whereby jurisdiction to hear return applications is concentrated in a limited number of courts or judges? Are such arrangements being contemplated?

Whilst jurisdiction to deal with proceedings instituted under the Convention Regulations is invested in the Family Court of Australia and the Family Court of Western Australia as well as the various courts of summary jurisdiction, as a matter of practice Convention applications are not dealt with by courts of summary jurisdiction.

In practice, jurisdiction is already restricted to the Family Court of Australia and the Family Court of Western Australia.

7. What measures exist to ensure that Hague applications are dealt with promptly (Article 7) and expeditiously (Article 11)?

The obligation to act promptly and expeditiously is reflected in Subregulations 15(2) and (4) of the Family Law (Child Abduction Convention) Regulations. Subregulation 15(2) provides that a court must, so far as practicable, give to an application such priority as will ensure that the application is dealt with as quickly as a proper consideration of each matter relating to the application allows.

Regulation 15(4) provides:

> (4) If an application made under regulation 14 is not determined by a court within the period of 42 days commencing on the day on which the application is made:
>
> (a) the responsible Central Authority who made the application may request the Registrar of the court to state in writing the reasons for the application not having been determined within that period; and
>
> (b) as soon as practicable after a request is made, the Registrar must give the statement to the responsible Central Authority."

In turn, Regulation 14 provides for the making of applications to the court for the following orders:

> "(1) In relation to a child who is removed from a convention country to, or retained in, Australia, the responsible Central Authority may apply to a court in accordance with Form 2 for:
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> (a) an order for the return of the child to the country in which he or she habitually resided immediately before his or her removal or retention; or
>
> (b) an order for the issue of a warrant for the apprehension or detention of the child authorising a person named or described in the warrant, with such assistance as is necessary and reasonable and if necessary and reasonable by force, to:

[3] See Guide to Good Practice – Part II on Implementing Measures, Chapters 5 – 7.

(i) stop, enter and search any vehicle, vessel or aircraft; or

(ii) enter and search premises;

if the person reasonably believes that:

(iii) the child is in or on the vehicle, vessel, aircraft or premises, as the case may be; and

(iv) the entry and search is made in circumstances of such seriousness or urgency as to justify search and entry under the warrant; or

(c) an order directing that the child not to be removed from a place specified in the order and that members of the Australian Federal Police are to prevent removal of the child from that place; or

(d) an order requiring such arrangements to be made as are necessary for the purpose of placing the child with an appropriate person, institution or other body to secure the welfare of the child pending the determination of an application under regulation 13; or

(e) any other order that the responsible Central Authority considers to be appropriate to give effect to the Convention."

In particular:

a) Are there set timetables at both trial and appellate level to ensure the speedy determination of return applications?

Because of the small number of Judicial Officers involved and the high profile nature of Convention proceedings, the Court is extremely conscious of the urgency issues involved in Hague proceedings and generally endeavours to provide to such proceedings as much priority as the court lists will allow and as the due process requirements can tolerate.

Generally, it means that holding orders can be made on the same day the application is made and that a hearing for return can be fully determined within 2 or 3 weeks of the parties both first appearing before the court.

If an appeal is then instituted, every endeavour is made to obtain the earliest possible hearing date, which, subject to the logistics of the preparation of the necessary documents for the appeal books, could be as early as one week after the appeal has been filed, but would generally likely to be within one or two months of that time. Depending then on the complexity of the issues raised and other pressures on the members of the appeal court, a judgment can either be delivered on an ex tempore basis immediately upon the conclusion of the hearing or within several days after the matter has been heard. In some cases, however, because of complexity, as well as other obligations of the judicial officers involved, the delivery of judgment is delayed for several weeks or, on rare occasion, a few months. Unfortunately, appeals to the High Court are more time consuming. The cumulative delays, sometimes coupled with the fact that proceedings can be brought up to a year after the abduction, often dramatically cool down the hot

pursuit nature of the Convention.

b) What special measures / rules exist to control or limit the evidence (particularly oral evidence) which may be admitted in Hague proceedings?

Regulation 29 of the Convention Regulations provides for the admissibility of an application, attachments to, and other documents forwarded in support of, that application as evidence of the facts stated in the application or document. In addition, affidavits of witnesses outside Australia are admissible despite non-attendance for cross-examination.

In *Regino and Regino*(1995) FLC 92-587, Lindenmayer J commented on the difficulty the court faced in Hague matters in deciding matters on the documents alone. He said:

> The resolution of the crucial factual issue in this case, which I have earlier identified, essentially involves a determination by me of the relative credibility of the parties' conflicting accounts of the events immediately preceding the wife's departure from the United States with M on 25 November, 1993...
>
> Before attempting that resolution, it is appropriate to acknowledge that it is particularly difficult for any court to resolve contested issues of fact on the basis of affidavit evidence only where the court does not have the opportunity, which the taking of viva voce evidence provides, of seeing and hearing the witnesses give their evidence and thus being able to assess their credibility in the light of their demeanour and general consistency, particularly when subjected to a searching cross-examination in the forensic context. Nevertheless, in a case such as this, where, by the very nature of the proceedings, one of the parties resides overseas, and it is therefore impracticable to secure his or her attendance before the court to give oral testimony, the court must necessarily undertake that difficult task and do the best it can to resolve the factual issues upon the material which is before it. In doing so, I believe that the court must be cautious not to unfairly disadvantage the absent party by presumptively giving greater credit to the testimony of the other party who happens to be within the jurisdiction and before the court.

The Full Court in *Hanbury-Brown and Hanbury-Brown,* (1996) FLC 92-671 at 82,947 was critical of the fact that "everyone involved in those proceedings lost sight of the intended summary nature of the proceedings and both the husband and the wife (the latter of whom attended the hearing from the United States) were subjected to quite substantial cross-examination, as indeed were the deponents to two other affidavits read in the proceedings. As a consequence, the hearing extended over 2 full sitting days of the Court. This Court has said previously (e.g. in *Gazi & Gazi* (1993) FLC 92-341 at 79,623) that in most cases arising under the Convention, cross-examination of deponents to affidavits is not appropriate. The Courts of the United Kingdom have adopted a similar approach: see In *Re F* (minor: abduction: rights of custody abroad) [1995] 3 All ER 641 at 647-8, per Butler-Sloss, LJ, citing In Re F [1992] 1 FLR 548 at 553-4. We do not regard this case as having warranted such a substantial departure from that general rule as in fact occurred."

8. What measures exist to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers? Do such measures lead to delays?

As Australia did not make a reservation under Article 26 of the Convention, applicants seeking the return of a child from Australia under the Convention will not incur any legal costs if the Central Authority conducts the legal proceedings on behalf of the applicant.

Furthermore, there are no eligibility requirements for legal representation or assistance for applicants (usually left behind parents, but occasionally an institution). Legal costs will not be paid for applicants who seek the return of a child from Australia under the Convention without the involvement of the Central Authority.

In appropriate cases, other costs associated with the legal proceedings, such as separate legal representation for the child, psychologists' reports, translations, will be met by the Central Authority or the federal legal aid system.

The Australian system is also unusual in offering government funded financial assistance to parents in Australia whose children have been removed from Australia. This financial assistance is means and merit tested, and may cover the cost of legal representation in other countries, travel costs for a child ordered to return to Australia by a foreign court, and travel and related costs for a left behind parent to travel to the requested country to bring an abducted child back to Australia. The scheme does not cover the return travel costs of children wrongfully brought to Australia. This arrangement has sometimes resulted in delays for the Australian parent waiting for approval for financial assistance. For example, the foreign legal representative of the Australian parent usually will not proceed with the application or file it in court until the initial retainer is paid. This is a particular problem in the USA and Germany.

Lack of legal aid and experienced legal representation are the biggest problem faced by parents where children are taken to the USA. Although the NCMEC is extremely helpful in resolving cases, and the US system has vastly improved since NCMEC took over incoming cases, major obstacles to a satisfactory resolution of cases remain. California is the exception, and the involvement of the state Attorney General brings a level of speed, efficiency and expertise which is lacking in other States.

9. In what circumstances and by what procedures / methods are children heard in Hague proceedings? In particular how will a determination be made as to whether a child objects to return, and in what circumstances might judges refuse to return a child based on his or her objections?

Where appropriate, if a child who is the subject of proceedings objects to return the court will order an independent assessment be done, known as a 'Family Report'. This allows for the child to be interviewed by a court counsellor who reports back to the court on what the child's views are and whether the child objects. It is not accepted practice of the Australian courts to interview children as part of Hague proceedings.

10. How has Article 20 of the Convention been applied in your State? Are you aware of an increase in the use of this Article, bearing in mind that the Statistical Survey of all cases in 1999 found no case in which this exception to return was successfully invoked?

Australian legislation places the onus of proof of Article 20 on the person opposing the return. The burden of proof is the civil standard of proof, that is, on the balance of probabilities.

The raising of the Article 20 defence to return frequently leads to delays prior to the hearing of the matter in court. After the defendant files a response to the application for return outlining his/her defences for return, the Australian Central Authority has encountered any number of the following difficulties which cause delays:

- the left behind parent must respond to the defendant's arguments opposing return. The court must allow a reasonable time for this process.
- the left behind parent may not speak English and all documents need to be translated into the language of the left behind parent.
- the left behind parent who has no legal adviser in the requesting country may lack the education to respond appropriately to the allegations, in a form acceptable to

the court (ie by sworn statement).

- the left behind parent may not be contactable by fax or email and so documents from the Australian Central Authority have to be sent and returned by post in the requesting country.
- the left behind parent may not respond adequately to the allegation and an adjournment may be necessary while additional material is obtained.
- if the defendant is late in filing a response the left behind parent may have insufficient time to respond and an adjournment is necessary.

In Australia, as the Central Authority represents the left behind parent, the Central Authority will be criticised by the Court for inadequate documentation in the application. It will also be criticised for any protracted delays in the legal proceedings.

The Article 20 defence has been raised in several cases but none successfully. For example, Director-General, Department of Family, Youth and Community Care and Bennett (2000) 26 FLR 71. Judgment was given that a boy of 5 not to be returned to England, inter alia, on the grounds that the child was of Torres Strait Island origin, and the English Court was not required to take into account his culture and heritage. The Central Authority appealed the decision and the appeal was upheld. The Torres Strait Islander issue did not have to be determined in this case: "The return of a child of Aboriginal or Torres Strait Islander heritage to a foreign country is not per se in breach of any fundamental principle of Australia relating to the protection of human rights and fundamental freedoms. The ability of a foreign court to give proper consideration to such heritage would only arise if an exception to mandatory return was otherwise established.

Legal issues and interpretation of key concepts

11. Please comment on any Constitutional procedures or principles which make it difficult to implement the Hague Convention fully.

There are none.

12. Are there any important developments in legislation, case law or procedural law relevant to the operation of the 1980 Convention to which you wish to draw attention? Please could you provide us with an electronic copy of relevant legislation if possible?

Amendments to the Child Abduction Regulations

Amendments to the *Family Law (Child Abduction) Regulations 1986* were made in 2004. The most significant amendment was to specifically provide that an application for orders for the return of a child may be made by an individual as well as by the Central Authority. This overcomes the effects of the decision of the Full Court of the Family Court in *"A" (by her next friend)(unreported decision of Finn, May and Carmody JJ, 20 July 2004)* which ruled that an individual could not apply to a court under these regulations.

Amendments to the Family Law Act

Significant amendments to the *Family Law Act 1975* were recently made by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (the Shared Parenting Act). The changes aim to bring about a cultural shift in how family separation is managed: away from litigation and towards cooperation parenting. The key amendments in the Shared Parenting Act are as follows:

- introduce a new presumption of equal shared parental responsibility. This means that both parents have an equal role in making decisions about major long-term issues such as where a child goes to school or major health issues

- require the court to consider whether a child spending equal time with both parents is reasonably practical and in the best interests of the child. If it is not appropriate, the court must consider substantial and significant time (including day to day routine – not just weekends or holidays)
- make the right of the child to know their parents and be protected from harm the primary factors when deciding the best interests of the child
- require parents to attend family dispute resolution and make a genuine effort to resolve their dispute before taking a parenting matter to court (this requirement does not apply where there is family violence or abuse)
- strengthen the existing enforcement regime by giving the courts a wider range of powers (including 'make up' time and compensation) to deal with people who breach parenting orders
- require the court to take into account parents who fail to fulfil their major responsibilities (for example, failure to pay child support or turn up for contact handover)
- amend the existing definition of family violence to make clear a fear or apprehension of violence must be 'reasonable'
- provide for a less adversarial approach in all child-related proceedings
- increase the emphasis on parenting plans to encourage parents, where possible, to come to suitable agreements outside the court system, and
- better recognise the interests of the child in spending time with grandparents and other relatives.

However, in terms of the Convention, the most relevant amendments relate to terminology and parental responsibility. In short, the amendments to the Family Law Act remove references to the terms 'residence' and 'contact' in favour of 'lives with' and 'spends time with' in order to eliminate any sense of ownership of children. While the effect of this is minimal, it may have some impact on the understanding of Australian orders by other countries that use 'custody' and 'access' or other terminology in their own orders.

The amendments to the Family Law Act do not change the definition of parental responsibility. Section 61B states that parental responsibility 'in relation to a child, means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'. However, there are a number of changes to parental responsibility provisions set out below that reflect the key amendments discussed previously. These provisions also reflect an intention of the amendments to provide better guidance to readers of the Family Law Act and clarity as to the meaning of particular provisions. Section 111C also uses the updated terminology.

FAMILY LAW ACT 1975- SECTION 61C
Each parent has parental responsibility (subject to court orders)

(1) Each of the parents of a child who is not 18 has parental responsibility for the child.

Note 1: This section states the legal position that prevails in relation to parental responsibility to the extent to which it is not displaced by a parenting order made by the court. See subsection (3) of this section and subsection 61D(2) for the effect of a parenting order.

Note 2: This section does not establish a presumption to be applied by the court when making a parenting order. See section 61DA for the presumption that the court does apply when making a parenting order.

Note 3: Under section 63C, the parents of a child may make a parenting plan that deals with the allocation of parental responsibility for the child.

(2) Subsection (1) has effect despite any changes in the nature of the relationships of the child's parents. It is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying.

(3) Subsection (1) has effect subject to any order of a court for the time being in force (whether or not made under this Act and whether made before or after the commencement of this section).

Note: Section 111CS may affect the attribution of parental responsibility for a child.

FAMILY LAW ACT 1975- SECTION 61D
Parenting orders and parental responsibility

(1) A parenting order confers parental responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child.

(2) A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any):

(a) expressly provided for in the order; or

(b) necessary to give effect to the order.

FAMILY LAW ACT 1975- SECTION 111B
Convention on the Civil Aspects of International Child Abduction

(4) For the purposes of the Convention:

(a) each of the parents of a child should be regarded as having rights of custody in respect of the child unless the parent has no parental responsibility for the child because of any order of a court for the time being in force; and

(b) subject to any order of a court for the time being in force, a person:

(i) with whom a child is to live under a parenting order; or
(ii) who has parental responsibility for a child under a parenting order;
(iii) should be regarded as having rights of custody in respect of the child; and

(c) subject to any order of a court for the time being in force, a person who has parental responsibility for a child because of the operation of this Act or another Australian law and is responsible for the day-to-day or long-term care, welfare and development of the child should be regarded as having rights of custody in respect of the child; and

(d) subject to any order of a court for the time being in force, a person:

(i) with whom a child is to spend time under a parenting order; or
(ii) with whom a child is to communicate under a parenting order;
should be regarded as having a right of access to the child.

Note: The references in paragraphs (b) and (d) to parenting orders also cover provisions of parenting agreements registered under section 63E (see section 63F, in particular subsection (3)).

A full copy of the Amendment Act is available at <http://www.ag.gov.au>.

13. Please indicate any important developments since the Special Commission of 2001 in your jurisdiction in the interpretation of Convention concepts, in particular the following:

a) rights of custody (Articles 3 *a)* and 5 *a)*);

State Central Authority v Keenan [2004] FamCA 724

This matter concerned a five year old child who was removed by his mother to Australia from the United States (US). The main issue in this matter was whether the removal of the child was a removal within the meaning of the Australian Child Abduction Regulations, that is, whether it was in breach of a right of custody in the father. It is noted that certain matters were common ground in this matter. It was not disputed that prior to his removal the child was habitually resident in the US and that the father had been exercising normal parental rights and obligations.

The parents in this matter met over the internet in 1998. The child was conceived in the same year, when the mother, an Australia citizen, travelled to the US to visit the father. The mother then returned to Australia where the child was born. In 1999, the mother obtained court orders granting her residence and sole responsibility for the care, welfare and development of the child. The father's contact was reserved.

In 2000, the mother and child moved to the US to live with the father. The parties married in December that year, residing together in the State of Virginia until October 2002, when the mother, without notice to the father, removed the child to Australia.

On 20 December 2002, a request was forwarded to the Australian Central Authority to issue proceedings for the child's return. The father, in the meantime, filed a complaint in a Virginia state court seeking custody and return of the child. The Australian proceedings were adjourned to await the outcome of the US proceedings. The Virginian court held it had no jurisdiction to grant relief as the child had been resident in the state for less than six months before the application was made, and Virginia was not, therefore, the 'home state' of the child. A direction was made however, that the matter remain on the court docket.

The return proceedings in Australia were eventually heard on 22 July 2004. The return was ordered. The removal was wrongful having breached rights of custody held by the father.

The trial Judge noted that under the Uniform Child Custody (Jurisdiction and Enforcement) Act of the Code of Virginia, a child custody order of a foreign state is general enforceable as if it were an order of the State of the US. This suggested that the Australian orders granting the mother residence would have full force in the State of Virginia and the father had no rights of custody under State law.

An issue arose however as to whether the parties' subsequent marriage nullified the effect of those orders in Virginia. The trial Judge heard conflicting expert evidence on this issue, ultimately preferring the evidence of the father's expert. He argued that although there was no authority in Virginia on this issue, there was authority in other states that a Virginian court would find persuasive that the effect of a remarriage was to nullify a prior custody order. The fact that the parties' had subsequently married rather than remarried was a 'distinction without difference'.

Alternatively, the trial Judge was willing to find that the term 'rights of custody' was sufficiently wide to encompass the inchoate or de facto rights of custody exercised by the father prior to the child's removal.

Brooke v Department of Community Services [2002] FamCA 258

The parents of a child born in July 1999 separated in Canada in March 2001. After separation the child remained in her mother's care. On 27 April 2001 the mother applied to the Supreme Court of British Columbia (BC) seeking orders for the sole custody of the child and permission to take the child to live in Australia. On 14 May 2001 the mother's application was adjourned until 22 May 2001 and an order was made that the child not be removed from the jurisdiction of the BC court 'for a period of one week or until the hearing on the merits of the parties' respective applications'. At some date prior to 21 May 2001 the mother left BC, together with the child. The trial judge ordered that the child be returned to BC.

The mother appealed this decision to the Full Court of the Family Court of Australia on the basis that overseas authorities were not applicable because the term 'rights of custody' in the Australian Child Abduction Regulations was to be construed in terms of Australian law and not jurisprudence in relation to the Convention.

There was no dispute that the child had been habitually residence in British Columbia (BC) immediately before her removal to Australia. The sole issue in the appeal was whether the Supreme Court of BC was a body that had rights of custody in relation to the child in the context of the Australian Abduction Regulations when the child was taken from BC to Australia by her mother.

In dismissing the mother's appeal, the Full Court held:

* At the time the child was removed by the mother from BC, the Supreme Court of BC had the right to determine the place of residence of the child and had 'rights of custody' over the child.

* The words of the Australian Child Abduction Regulations are 'clear and unambiguous'. There was a removal of a child in breach of the rights of custody of a body that had the right to determine the place of residence of the child. At the time of remove, those rights were actually being exercised. Those rights of custody arose by operation of law and by reason of a judicial decision.

* In the Full Court's view, the evidence clearly disclosed that at the time the child was removed by her mother from BC, the Supreme Court of BC had the right to determine the place of residence of the child and that the removal of the child was in breach of that right.

b) habitual residence (Articles 3 *a)* and 4);

Kellie Dally-Watkins v Director-General, Department of Child Safety

This case was an appeal to the Full Court of the Family Court of Australia. In this case, the mother is an Australian citizen who met the child's father in the USA in May 2003. The child was conceived in the USA in August 2003. After some period or periods of co habitation with the father, the mother returned to Australia on 13 February 2004 and remained there until the child's birth on 25 May 2004. On 13 July 2004 the mother and child returned to the USA on a one-way ticket provided by the parents of the father. The child travelled to the USA on an Australian passport with a 90 day visitor's visa for the USA. At that time the mother apparently has permanent resident status in the USA but on a conditional basis. On their arrival in the United States in July 2004 the mother and child moved into the father's home where they remained until 2 October 2004. The mother and child returned to Australian on 4 October 2004. An application for the return of a child under the Hague Convention was initiated in July 2005, and orders were handed down in October 2005 for the return of the child to the USA. The mother appealed the decision.

The appeal rested on statements by the mother that she and the child initially travelled

to the USA so the mother could “see how things “worked out”” with the father and whether the child was habitually resident. The court relied on previous case law that held that habitual residence of the child is that of the parents with a settled purpose in that country. The court held that it would be wrong to conclude that a person who has taken up residence in a particular country to see how a relationship with a resident of the country would “work out” either had a settled intention to take up long term residence in that country or have adopted an abode in that country for settled purposes as part of the regular order of his or her life, and was accordingly “habitually resident” in that country. The court found that there was no shared intention on the part of the parents of the child in question habitual residence refers to the parents’ habitual abode in a country, which they have adopted voluntarily and for a settled purpose. It was held that there was no settled intention of the part of the parents of the child that the USA was to be their habitual residence. Therefore the child was not habitually resident in the USA immediately prior to the departure from the USA.

This case, although may be seen as denying the child the benefit of the Convention, is an example of how the interests of the child can be affected if courts are too willing to find that “the parent of a child who attempts a reconciliation in a foreign country with the other parent in order to try to create for the child a family consisting of both its parents, has, together with the child, become “habitually resident” in that foreign country”.

c) rights of access (Article 5 *b)*);

MQ and A v Director of Community Services [2005] FamCA 843

The application related to a child born in the United States in July 2001. Her parents were married and had joint rights of custody. The child lived in the United States until she was unilaterally taken to Australia by her mother in March 2004. The mother also took a daughter from a previous marriage, who was aged 12. The father issued a return application in April 2004.

The mother did not challenge the father's standing to make the return application himself and on 6 May the Family Court of Australia issued a return order.

On 26 May the 12 year old step-sister, through her maternal grandmother applied for leave to intervene in the proceedings in order to stay the return order. This was granted the next day.

The step-sister argued that the father had no standing to make the return application in the light of the terms of the regulations implementing the Convention in Australia. She further sought to argue that in making the return order no account had been made of her human rights.

On 10 June the step-sister's application was dismissed by the Family Court of Australia.

On 22 October the Full Court of the Family Court of Australia allowed an appeal by the step-sister, finding that under Australian law the father, as an individual, had no standing to make a return application in his own right. Permission was nevertheless granted for a new return application to be made by the Commonwealth Central Authority. The step-sister argued that her application for contact should have paramountcy over the orders requiring the return of her half sister to the United States. This ground of appeal was rejected by the Full Court which held that the issue of contact could only be considered once the issue of return was adjudicated upon. Moreover the issue of contact would also depend on the outcome of any proceedings in the United States as to custody. Consequently it would be appropriate to decline the step-sister's application to review, out of time, the decision reached in the abduction proceedings.

In its conclusion the Full Court noted that issues of contact between the step-sisters were matters that would be properly considered in the custody proceedings that would be held

in the United States. It also held that in the event of any conflict of interests between the half siblings the focus should be on the best interests of the abducted child

On 29 October the Commonwealth Central Authority served a notice indicating that it would not pursue the application to be substituted in the return application.

On 22 November the Full Court set aside the return order and dismissed the father's application.

On 24 February 2005 the United States Central Authority requested that the Commonwealth Central Authority commence return proceedings.

The step-sister sought to intervene in the proceedings whilst the mother sought to dismiss the Central Authority's application.

On 11 May the step-sister's application was dismissed and an order was made for the return of the child.

On 30 June an application for review made by the mother was dismissed, as was an application on behalf of the step-sister for an extension of time to file an application for review. The mother and the step-sister appealed.

On 8 July 2005 the trial judge refused to order a stay of the return order. The mother appealed against this order to the Full Court of the Family Court of Australia.

On 26 September the same bench of the Full Court which rejected the mother and step-sister's appeals on 5 September rejected the appeal of the refusal to stay the return order: MQ v Director General Department of Community Services (NSW) [2005] FamCA 916. The Full Court held that there was not a substantial prospect of the mother being granted special leave to appeal to the supreme jurisdiction in Australia, the High Court.

d) the actual exercise of rights of custody (Articles 3 *b)* and 13(1) *a)*);

Director-General, Department of Child Safety & R [2005] FamCA 1116

The applicant father was a citizen of the United States residing in New Zealand. The mother was a New Zealand Citizen. The mother and father had a “brief sexual relationship” which resulted in the mother’s pregnancy. The child was born in New Zealand. In April 2005, the mother travelled to Australia with the child with the father’s permission for a one month holiday. The mother retained the child in Australia.

The mother argued in this case that the father had no rights if custody under New Zealand law because she and the father were not living together at the time the child was born. The mother also argued that the father was neither exercising rights of custody nor would have exercised those rights if she had not retained the child.

The Court held that the father did not have rights of custody under New Zealand law. As the Central Authority had failed to discharge the onus upon it to establish that the father had rights of custody at the date of retention, the onus did not shift to mother to establish that the father was not exercising the rights of custody.

e) the settlement of the child in his / her new environment (Article 12(2));

f) the one year period for the purposes of Article 12;

State Central Authority v CR [2005] Fam CA 1050.

The application concerned a young boy, who was born in Australia in October 2003. The Australian mother and American father met via the Internet early in 2002. During their relationship the parties lived in the United States and Australia at various times, returning to the United States five months after the child was born. Six months later, without the father’s knowledge or consent the mother left Arkansas taking the child with

her. She boarded a flight in Los Angeles late on 20 July. The plane did not leave until 21 July and arrived in Melbourne on the morning of 22 July.

The father submitted a return application to the United States State Department in late June 2005. On 21 July a return application was filed in the Family Court of Australia at Melbourne.

The court ordered a return as the removal was wrongful and the exception invoked, Article 12(2), was not applicable.

In deciding whether the application was filed within one year of the child's removal, the Court relied on State Central Authority v Ayob (1997) FLC 92-746 and held that the moment on which time began to run was the time the child was removed from its place of habitual residence rather than the time it was brought to Australia. Considering the precise time of the removal from the United States the court found that this had to be calculated in accordance with local time at the place where the wrongful removal occurred, namely California. Since the plane left on 21 July Californian time the return application had been submitted within the one year time limit and therefore Article 12(2) was not applicable.

g) consent or acquiescence to the removal or retention of the child (Article 13(1) *a)*);

Director General of the Department of Community Services v Mandana Schulz (2002)

In this case the child, Marcel Schulz, was taken to Australia from Germany by his mother in October 2001 and an application for the return of the child under the Hague Convention was initiated by the father. It was the mother's evidence that in February 2000 she decided to move to Australia to live with members of her family and that her children told her their father agreed that they could go to Australia with her. It was the mother's evidence that she secured a note signed by the father, witnessed by a Notary Public dated 28 August 2000 giving permission for the children to migrate to Australia. This note was accepted by the Australian Embassy in Berlin who granted visas for the children to enter Australia. It was submitted by the applicant that the father had been told that mother and children were travelling to the Netherlands for a weekend in mid October 2001. The father denied giving written permission for the children to leave Australia.

The Court noted that it falls to the applicant to satisfy the Court that the father did not consent which is a precondition to a finding of wrongful removal. The Court held that in this case it was not possible to make a positive finding regarding the issue of consent. In arriving at this decision the Court held that evidence about the authority dated 28 August 2000 was unsatisfactory. The Australian authorities had accepted the document as genuine and it was not unambiguously repudiated by the notary. As the applicant had not established that the father did not consent the court refused to order the return of the child.

Director-General, Department of Child Safety v Stratford [2005] Fam CA 1115

This case related to a girl who was 9 months old at the date of the alleged wrongful removal. She was born and lived in England, but had also spent 4 months in Australia. The parents were not married and separated a few months after the birth. On 6 September 2004 the mother unilaterally removed the child to Australia. The father initiated return proceedings.

The mother alleged that the father had consented to the removal and the court turned to consider whether the issue of consent, if established, would be relevant to whether the removal was in fact wrongful. The mother's case that the father had consented to the removal was based on actions of and statements by the father. There was though no independent evidence to support the case of either side.

A key argument for the mother was that in the aftermath of the separation in June 2004 she announced that it was her intention to return to Australia and the father had replied that this could not happen soon enough. The Court held however that this retort had to be considered in the context of the ending of the relationship and fell short of being a clear and unequivocal communication of consent on which the mother could properly rely. In this the trial judge referred by analogy to the comments of Lord Browne-Wilkinson in the English House of Lords' decision *Re H.* (Abduction: Acquiescence) [1998] AC 72

In the light of all the evidence the trial judge concluded that there were no grounds for rejecting the father's testimony and that there were inconsistencies and improbabilities in the mother's evidence. She concluded by stating that even if she had found there to have been consent she would have exercised her discretion to make a return order.

h) grave risk (Article 13(1) *b)*);

Zafiropoulos and the Secretary of the Department of Human Services State Central Authority [2006] FamCA 466

The issue in this case was whether the children should be returned to their habitual residence of Greece and if there was the existence of grave risk of physical or psychological harm to the children on a return to Greece. This case concerned some extreme levels of domestic violence perpetrated by the applicant father.

The mother, father and three children lived in Greece. The mother and the children came to Australia on holiday. The mother informed the father that she was not going to be returning to Greece. Father instituted Hague proceedings for the return of the children to Greece.

The Family Court of Australia held that the purpose of a return order under the Australian regulations is to enable the courts of habitual residence to determine the parenting issues. It would not necessarily follow that the children would be required to permanently reside in Greece or that the Greek Courts would require the children to reside in a situation where they were placed at physical or emotional risk. The court also held that the mother had done nothing to alleviate the risk she alleged by making contact with the appropriate authorities in Greece. Further the mother had not persuaded the trial judge that a return to Greece would raise a grave risk of harm tot eh children or otherwise place them in an intolerable situation. This finding was open to the trial judge. The mother's challenge to the trial judge's failure to rely upon the objection of the eldest child failed. The child was less than eight years old at the time of the hearing.

The court held that the mother had failed to adequately make out the element of grave risk. There was no evidence brought before the court that the Greek authorities would be unable to provide mother and children with appropriate protection upon return to Greece. The children were ordered to return to Greece.

i) exposure to physical or psychological harm (Article 13(1) *b)*);

***DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services* [2001] HCA 39**

In DP v Commonwealth, the case concerned the grave risk of harm arising from the alleged lack of medical facilities available for a disabled child. In relation to grave risk, the approach endorsed by the Full Court was "To ensure that the child is adequately protected, the Art 13b enquiry must encompass some evaluation of the people and circumstances awaiting that child in the country of his habitual residence." It supported the view that the person opposing return must establish the risk and not the certainty of the harm. The Full Court considered that the Commonwealth Central Authority should have investigated more fully the facilities available in the requesting country and in future should make its own enquiries rather than rely on the onus placed on the person opposing return. This case was heard in the High Court of Australia on appeal. The appeal was allowed and the majority of the Full bench of the High Court found that the primary judged erred in two ways. First he wrongly acted upon the speculation of the specialist paediatrician about the availability of services elsewhere in the requesting country, and he asked the wrong legal question about justification for removal rather

than gravity of risk of exposure to harm.

The grave risk of harm arose from the mother's threat of suicide if she was ordered to return the child to Mexico. The Full Court reviewed the evidence of the mother's suicide threat as causing the grave risk of harm to the child. It held that there was no evidence that the effect of an order returning the child to Mexico, as opposed to the child being returned to the father, would be a worsening of the mother's medical condition, opt ther medical treatment was not available for the mother in Mexico. The matter was appealed to the High Court. The majority of the full bench of the High Court held that the Full Court's decision was wrong to hold that there was no evidence which warranted the primary judge reaching the conclusions he did. In the circumstances of the case the High Court held that the Full Court would not say that is was "not open" to the primary judge to make the findings that he did.

j) intolerable situation (Article 13(1) *b)*);

In a recent NSW case the trial judge imposed several conditions that were either immeasurable or imposed a significant burden on the requesting country that was outside the scope of the Convention. In this case the mother and father of the child were married in 2001 in the overseas country. The child was born on 2 November 2004. In early 2005, the mother and child moved out of the matrimonial home and in May 2005, the mother and child left for Australia without the father's knowledge or consent. The father commenced proceedings for the return of his child under the Hague Convention on 13 September 2005. In reply, the mother asserted that there would be a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation if a return order was made due to the father's violent history. In her sworn affidavit, the mother alleged that the father was violent to her during their marriage, including yelling at her, slapping her on the head and threatening to kill himself in front of her. Prior to her and her child travelling to Australia, the mother and child lived in a women's refuge. Further the mother asserted that she would not have accommodation in the requesting country, nor a source of income to support herself and her child.

The Court found that the return of the child would pose a grave risk of harm or an intolerable situation. However, the child was ordered to return but conditions were imposed to create a situation for the child 'which would mean the return to [Requesting Country] would no longer pose a grave risk of harm or an intolerable situation'. Several of the initial conditions imposed on the return order were either immeasurable or could not be enforced in the jurisdiction of the requesting country. These included:

- the government of the requesting country provide visas for the mother and child
- the government of the requesting country permit the mother to work for remuneration
- the father obtain an order in the requesting country restraining him from assaulting, molesting, approaching or interfering with the mother or child, in effect getting a protection order against himself;
- the father of the government of the requesting country provide the mother and child with income;
- the mother and child be given accommodation immediately upon arrival in the requesting country; and
- the mother be given legal aid by the government of the requesting country.

The Central Authority of the requesting country and the lawyer of the applicant parent did not agree to the orders and the Central Authority of the requesting country stated that they could not be expected to enforce such orders.

The NSW Central Authority and the Australian Central Authority liaised heavily with the requesting country to draft enforceable conditions. Assurances were sought from the government of the requesting country and the father. The draft condition include requiring the left behind parent to provide a specific sum of funds for the first month after the mother's return to the requesting country. The drafting of enforceable and

measurable orders was important to achieve the objective of the Convention, that is, the return of the child to her habitual residence. An appeal of the conditions would have reduced the applicant's prospects of success and could have possibly reversed the decision and created a non-return order.

k) the child objects to being returned (Article 13(2)); (see also qn 9)

Re F (Hague Convention: Child's Objections) [2006] FamCA 685 - 28/07/2006.

The case concerned a child brought to Australia from the USA in 2003 when he was 9 years old and wrongfully retained in Australia by mother. Consent orders were made in 2004 by a Judicial Registrar for the return of the child to the USA.

Over a period of approximately 18 months, various arrangements and undertakings for the return of the child were not honoured and the child remained in Australia with the mother. The father travelled to Australia early in 2006 to arrange child's return and following two failed attempts to return the child to the United States (due to the child refusing to board the plane), the mother filed an application out of time to review the original orders made in 2004 relying on the child's objections.

The mother's appeal was allowed and the return refused. The court found that the objections of the child were of sufficient strength to activate the Article 13(2) exception.

l) fundamental principles relating to the protection of human rights and fundamental freedoms (Article 20). (See also question 10)

Please see the reply to question 10.

Direct international judicial communication

14. Please describe any developments in the area of direct international judicial communication. If your country has responded to the 2002 Questionnaire on direct international judicial communication please describe any developments in this area since your response was made. (The Questionnaire is available on the website of the Hague Conference at: < www.hcch.net > → Child Abduction Section → Questionnaire & Responses).

The concept of international judicial co-operation is gradually being seen in Australia as one way to ensure the Hague Convention operates more effectively. The efforts of Justice Kay of the Family Court of Australia as Hague Convention Liaison judge have increased an awareness of judicial cooperation in Hague matters. This role does not preclude other Judges from initiating contact with judges in other jurisdictions to co-operate in matters.

In a recent case in Queensland, Justice Barry took the opportunity to liaise with a Dutch Judge in a matter before him. This followed the previous invitation of Justice Kay to provide contacts for the Australia Family Court judicial officers seeking to make contact with overseas judicial officers. In this particular case Justice Barry sought contact in an attempt to gain a greater understanding of the relevant domestic laws in that country with the view to making return orders.

Immigration / asylum / refugee matters

15. Have you any experience of cases in which immigration / visa questions have arisen as to the right of the child and / or the abducting parent to re-enter the country from which the child was abducted or unlawfully retained? If so, how have such issues been resolved?

Several matters have given rise to visa/immigration issues for the abducting parent in relation to applications linked to the USA and involved the parent overstaying a visa in

the USA. This presents challenges when seeking to negotiate a voluntary return of the parent/child to the USA. Where these issues have arisen the State Central Authority has liaised closely with the USA Consulate about developments in the Hague proceedings. Similarly, the Central Authority has become aware of a process in which the abducting parent can seek to waiver any proceedings against them in the USA pending the resolution of ant domestic proceedings undertaken in that country.

An additional example involves the return of an abducting parent and child to Australia. In a recent case, both parents and the child were not Australian citizens but were living in Australia. The mother abducted the child to England. The English Court ordered the return of the child on the basis that the child's habitual residence was Australia. The mother and child returned to Australia. The father is the main visa applicant in Australia. The mother has also been advised that she can not become a permanent resident as she is no longer the partner of the father. The mother is now only on a temporary visa, which does not entitle her to any social security or welfare. The Australian Central authority is currently investigating the options available to the mother in regards to the provision of financial assistance while she is in Australia.

16. Have you any experience of cases involving links between asylum or refugee applications and the 1980 Convention? In particular, please comment on any cases in which the respondent in proceedings for the return of a child has applied for asylum or refugee status (including for the child) in the country in which the application for return is to be considered. How have such cases been resolved?

There have been two instances where there has been a link between asylum or refugee applications and the 1980 Convention.

The first concerns a Pakistani couple and child living in Germany as refugees. In 2001 when the child was 13 the mother removed him from Germany to Western Australia without the consent of the father. The Family Court of Western Australia ordered that the child be returned to Germany. Therefore, the father, applied for a visa to enter Australia with the purpose of travelling to Australia to escort his son back to Germany. However his visa application was refused. He did not have a right to have the visa refusal decision reviewed. The mother was unwilling to accompany the child the Germany. The Australian Central Authority attempted to make arrangements to return the child in accordance with the orders. The Central Authority liaised with the German Central Authority in attempting to reach an arrangement for the return of the child. However, the father withdrew the application once the child turned 14.

The second instance concerns a Tunisian born Swedish national, married to a Swedish national in Sweden, who removed two of his three children to Australia. The father left Sweden in March 2000 without telling the mother and travelled around Europe. When in Italy he purchased tickets to Australia for himself and his two younger daughters. The elder son was left in an orphanage in Italy. The father applied for refugee status and stated that if it was not granted he would kill himself and the children. The Family Court of Australia ordered the return of the children to Sweden. The father was deported by the Department of Immigration.

17. Have you any experience of cases in which immigration / visa questions have affected a finding of habitual residence in the State from which the child was removed or retained?

No.

18. Have you any experience of cases in which immigration / visa questions have inhibited the exercise of rights of access?

No.

Criminal proceedings

19. Please comment on any issues that arise, and how these are resolved, when criminal charges are pending against the abducting parent in the country to which the child is to be returned.

While criminal proceedings are pending against the abducting parent in the country of habitual residence the Australian courts may be reluctant to order the return of the child.

Where criminal charges exist, this is usually the subject of negotiations between the Australian Central Authority and the overseas Central Authority in order that the welfare of the returning parent and child are not adversely affected by the existence of any such charges.

It is often a condition attached to a return order that the requesting parent agrees not to institute any criminal proceedings against the returning parent. However, whether or not the court will make such an order depends on the circumstances. For example, in *Director General, Department of Community Services v Attanasio* (unreported, Cohen J, 24/3/00, Sydney), the Judge was critical of many of the orders sought by the Central Authority and of the many conditions imposed by the mother for her return. The Judge refused to make the order requiring the father's undertaking not to institute criminal proceedings against the mother in Italy. He said such orders "tend to defeat the purpose of being a signatory to the Convention…It must also be recognised that, as under the criminal law of Australia, certain acts will result in legal consequences where the best interests of a child of the perpetrator are irrelevant." The child was ordered to return. *(Note: The mother subsequently appealed this decision. Before the Appeal Court had handed down its decision, the father withdrew the application. The Court then allowed the mother's appeal.)*

On the other hand, in the first instance Family Court of Australia decision by Lindenmayer J in *Director-General Department of Families, Youth and Hobbs (2000) FLC 93 -007*, the father, who had initiated the Convention proceedings in respect of his daughter, was permitted by his Honour to file an affidavit that contained a range of undertakings, including that the father not institute or support any criminal or civil charges against the mother associated with the removal. These orders were to be filed as mirror orders in the habitual residence country.

Mediation

20. Are there any programmes of mediation available in your State for parents or other persons involved in Hague Convention cases? Please describe these, indicating *inter alia* the methods employed to ensure that mediated agreements are enforceable and respected by the parties, as well as the availability of, and training opportunities for, international mediators.

The Australian Central Authority does not currently access formal mediation programmes as a primary dispute resolution method for parties to Hague Convention cases. However, informal negotiations between parties to secure a voluntary return are common practice.

Some experience has suggested that the use of mediation may act to the detriment of a case. A Hague case heard in New South Wales in 2002 attempted formal mediation. It was seen that the mediation process significantly contributed to the delay of the proceedings.

The International Social Service (ISS) operates in Australia to provide information and support to families regarding international family relationships. While the service does not offer formal mediation programmes for parents or other persons involved in Hague Convention cases it provides a coordinated point for services that can be accessed by parties involved in international abduction cases. The ISS support service provides assistance on issues surrounding international parental child abduction, contact between parents and children and parenting across international borders. The service also provides training and community education to agencies and community groups who wish to know more about international parent child abduction.

21. How do you ensure that mediation procedures do not unduly delay proceedings for the return of the child?

The use of negotiations for parties to agree to a voluntary return in Hague cases is encouraged. There is, however, a reluctance to delay court proceedings specifically to attempt formal mediation. A delay in proceedings to facilitate mediation may risk achieving the expeditious return of the child. The hearing of the substantive matter in a case may be delayed and lead to the "creation" of defences that may not otherwise have been available to the abducting parent such as acquiescence, settlement or a child might develop an objection.

Any information negotiations or mediation between the parties is therefore managed in the context of pending legal proceedings.

22. Do you have any other comments relating to mediation in the context of the 1980 Convention either at a preventive stage or when a removal or retention has occurred?

Australia notes the trial of mediation in Hague cases in other Contracting States such as the United Kingdom and is interested in its outcome.

Training and education

23. Do you have any comments relating to how judicial (or other) seminars or conferences at the national, regional and international levels have supported the effective functioning of the Convention? In particular, how have the conclusions and recommendations of these seminars or conferences, (some of which are available on the website of the Hague Conference at: < www.hcch.net > → Child Abduction Section), had an impact on the functioning of the 1980 Convention?

The geographic isolation of Australia limits its opportunity to participate in seminars or conferences at the international level. Where the Australian Central Authority has participated in international forums, such as the Special Commission Meeting concerning Civil Aspects of International Child Abduction, it has found them useful to facilitate the exchange of information on the operation of the Convention.

The Biennial Conference held in Australia provides an opportunity for domestic and New Zealand Central Authorities to explore issues relating to the operation of the Hague Convention in domestic, international and trans-Tasman issues. The 6th conference is being held on 5-6 October 2006 in Canberra.

The Australia Central Authority also participates in regional seminars to discuss and promote the Hague Conventions to other countries in the region. In August 2005 representatives from the Australian Central Authority attended the "Seminar on Fostering the Rule of Law in Cross-Border/Transnational Civil and Commercial Relations in the Asia Pacific". This included a presentation and discussion on the Hague Convention on Child Abduction.

24. Can you give details of any training sessions / conferences organised in your country, and the influence that such sessions have had?

The Australian Central Authority hosts the Biennial Conference of Australian Commonwealth and State Central Authorities. Representatives from New Zealand Central Authorities, judiciary, court services and the Australian Federal Police also attend the conference. The Conference explores emerging issues in the operation of the Hague Convention and builds and promotes relationships with other agencies in dealing with issues relating to child abduction. The Conference produces a number of papers that explore current issues that can be disseminated and used for reference.

The Commonwealth Central Authority will also be hosting The Regional Hague Conference in Australia June 2007. It is intended that this conference will provide an opportunity to discuss regional abduction issues and encourage greater participation in the Asia-Pacific region.

Ensuring the safe return of children where issues such as domestic violence and abuse are raised

25. Is the issue of domestic violence or abuse often raised as an exception to return in child abduction cases?

Yes

What is the general approach of your courts to such cases and, in particular, how far do they investigate the merits of a claim that such violence or abuse has occurred?

By way of experts' reports that can be filed by either party. Generally, however, unless there are exceptional cases, domestic violence in itself will not be a reason for an Australian Court to refuse return

26. What procedures and measures are in place in your State to secure the safe return of the child (and the accompanying parent, where relevant) where issues of (alleged) domestic violence or abuse are raised?

We ask for undertakings not to prosecute, the court will make conditional return orders to protect a returning parent and a child.

In some instances where there are allegations of abuse, arrangements have been made to place the child in the care of someone other than the parent, pending the outcome of the hearing.

27. To what extent are your courts entitled and prepared to employ "undertakings" (*i.e.* promises offered by, or required of the applicant) as a means of overcoming obstacles to the safe return of the child? Please describe the subject matter of undertakings required / requested.

Regulation 15(1) of Australia's Hague Convention Regulations provides that, in making an order in relation to the return of a child from Australia, the court may include in its order a condition that the court considers appropriate to give effect to the Convention. This provision reverses the effect of the 1993 decision in *Police Commissioner of SA v Temple* (1993) FLC 92-424 that conditions cannot be placed on the return of a child.

It is now accepted in Australia that the Court has a discretion to impose conditions or undertakings. However, if it does so, the conditions or undertakings must be purposefully related to the Convention's objects of facilitating the return of the child. A finding of 'grave risk' by the Australian court ordering return is not necessary.

Undertakings are regularly sought by the Australian Central Authority when an abducting parent claims that the child faces a grave risk of harm if returned. Where the court, the Central Authority or the parents are concerned that the returning parent may be homeless, destitute, or at risk of violence, undertakings may also be sought to address the welfare of the returning parent. In recent cases, undertakings have been given by the left behind parent that:

- the parent will not enforce a temporary or interim or ex parte custody order until the matter is brought back before the courts of the habitual residence country
- pending such hearing before the court, the parent will not attempt to remove the child from the mother except for periods of visitation as agreed between the parties or as ordered by the court
- the parent will provide maintenance and accommodation to the mother and child until any further order of the court in the requesting country
- the parent will provide one way air tickets for the respondent and child to return to the requesting country; and
- the parent will not institute or support any criminal or civil charges associated that the removal.

In a 2004 matter, the Central Authority make such arrangements as necessary to ensure the return of the child to the USA subject to a number of significant conditions. As the abducting parent's application for permanent residency in the USA had been denied, the Central Authority was ordered to apply for and secure a visa enabling the abducting parent to travel to the USA and remain there for the duration of the domestic parenting proceedings. In addition to the left behind parent paying for air travel and accommodation, transport and living expenses until a further order of the court in the requesting country, the court ordered that the left behind parent pay a particular sum to enable the abducting parent to retain an attorney for the proceedings in the requesting country (as the abducting parent would not be able to work or apply for benefits in the USA).

In a 2006 matter, the Court imposed several conditions on a return order that could not be met or were immeasurable. Some of the conditions ordered that the government of the requesting country provide certain welfare provisions. Others were simply unenforceable as they impinged on the rights of the applicant parent in the requesting country. The Australian Central Authority has liaised with the Central Authority in the requesting country and with the applicant parent to meet more achievable and enforceable orders.

28. Will your courts / authorities enforce or assist in implementing such undertakings in respect of a child returned to your jurisdiction? Is a differentiation made between undertakings by agreement between the parties and those made at the request of the court?

Experience with undertakings required by overseas courts to facilitate the return of a child to Australia is that generally these undertakings are not entered into lightly and compliance is reasonably good. Unfortunately there have been a number of cases where the requesting parent has reneged on his or her undertakings.

As is well known, the undertakings given by a left behind parent to a foreign court are not enforceable in the requesting country. This is also the case in Australia. The power of the court to assist in this situation would depend on the Central Authority seeking orders to protect the welfare of the returning child, under Regulation 5 of the Convention Regulations. The Central Authority could not enforce the foreign undertakings by this mechanism, but orders under Regulation 5 may be sought in similar terms to any

undertakings related to the welfare of the returning child.

If a parent was to breach an undertaking, whether that was an undertaking required of them by the overseas court or the result of an agreement with the other parent, it would be open for the Family Court, in further proceedings relating to the child to take that breach of undertaking into account in determining where and with whom the child should live.

Furthermore, amendments to the Family Law Act in 2000 provide that an order made under the Convention is an 'overseas child order'. This means a Convention order made in a 'prescribed overseas jurisdiction' can be registered in Australia. Similarly, an Australian Convention order can be registered in a 'prescribed overseas jurisdiction'. The effect of these two provisions is that orders with conditions, or undertakings, can now be registered and enforced in 'prescribed overseas jurisdictions'. At present these are limited to New Zealand, Papua New Guinea and most states of USA.

29. To what extent are your courts entitled or prepared to seek or require, or as the case may be to grant, safe harbour orders or mirror orders (advance protective orders made in the country to which the child is to be returned)?

The Full Court of the Family Court of Australia has required undertakings to be lodged in the jurisdiction to which a child was being returned. The first instance Family Court of Australia decision by Lindenmayer J in *Director-General Department of Families, Youth and Hobbs* (2000) FLC 93-007 remains the only reported illustration of the use of mirror orders by an Australian court in ordering the return of a child under the Convention.

The father consented to those undertakings being incorporated into 'mirror orders' to be granted by both the Family Court of Australia and the High Court of South Africa. Lindenmayer J made orders for the return of the child which would become operative '*conditional upon'* the father first filing the undertakings in the South African court and then filing in the Family Court of Australia an affidavit attesting to his having done so.

The amendments to the Family Law Act in 2000 referred to in question 28 will facilitate the use of mirror orders for Australia. Where an overseas child order is registered in an Australian court, it is enforceable until registration is cancelled and 'has the same force and effect as if it where an order made by that court under this Part'.

30. Do you have any comments on the use of undertakings, mirror orders or safe harbour orders?

Undertakings or safe harbour orders are a good idea in the right cases but in recent times implementing the conditional return orders have been very difficult.

31. Do you have any other comments relating to domestic violence or abuse in the context of the 1980 Convention?

No.

32. Are you aware of cases in which your authorities have refused to make or enforce an order in respect of a young child on the basis that an abducting parent who is the child's primary carer, refuses or is otherwise not in a position to return with the child?

One issue related to the welfare of the returning child and parent is the ability of the abducting parent to take part effectively in custody proceedings in the jurisdiction of habitual residence. The Australian Central Authority and the Family Court take the view that it is a fundamental objective of the Convention to return abducted children so that issues of custody and other matters related to the child's best interests are decided in the

country of habitual residence.

There have been some difficulties for non-citizen parents wishing to return with their children to the USA to contest custody. Usually the non-citizen parent's right to enter and remain in the USA is dependent on their status as spouse of a USA citizen. This issue arose in the matter of *State Central Authority v Ardito* (unreported decision of Joske J, 29 October 1997, Melbourne) and the so-called 'visa defence' was the basis for the non-return of the child because the parent could not get the required visa.

While criminal proceedings are pending against the abducting parent in the country of habitual residence the Australian courts may be reluctant to order the return of the child.

Standard questionnaire for newly acceding States

33. If your State has acceded to the Convention have you filled out the standard questionnaire for newly acceding States? If so, have you any comments about the ease or otherwise of filling out this questionnaire? If not, can you explain why?

The standard questionnaire for newly acceding States is not applicable to Australia. The Convention has been in operation in Australia since 1 January 1987.

34. Has your State found the responses to the standard questionnaire for newly acceding States (available on the website of the Hague Conference at: < www.hcch.net > → Child Abduction Section → Standard questionnaire for newly acceding States) useful when considering whether or not to accept the accession of an acceding State? What additional information would be useful?

N/A.

35. What measures, if any, do your authorities take, before deciding whether or not to accept a new accession (under Article 38), to satisfy themselves that the newly acceding State is in a position to comply with Convention obligations, and how do you ensure that this process does not result in undue delays?

N/A.

The Guide to Good Practice

36. In what ways have you used the Guide to Good Practice – Part I on Central Authority Practice, Part II on Implementing Measures and Part III on Preventive Measures to assist in implementing for the first time, or improving the implementation or operation of, the Convention in your State?

Australia was heavily involved in the development of the Guide to Good Practice. As such, Australian practice in relation to abduction matters closely reflects that detailed in the Guide. Central Authorities in each Australian state and territory were consulted on drafts of the Guide.

37. How has the Guide to Good Practice assisted your State in making policy or practical decisions relating to the implementation or operation of the Convention?

As discussed in question 36, Australian practices and procedures are similar to those detailed in the Guide to Good Practice. The Guide has been useful for Central Authorities as a useful reference and in consolidating knowledge regarding processes.

38. How have you ensured that relevant authorities in your State have been made aware of, and have had access to, the Guide to Good Practice?

As discussed in question 36, Australian state and territory Central Authorities were consulted on drafts of the Guide to Good Practice. Central Authorities are aware of, and regularly refer to, the documents available from the Hague website.

39. Do you have any comments concerning the Guide to Good Practice – Part III on Preventive Measures including how best to publicise this Part of the Guide?

No.

40. Please describe any developments in legislation, case law or practice relating to enforcement measures and transfrontier access / contact. If your country has responded to the Questionnaire on Enforcement Measures distributed in July 2004 or the Consultation Paper on Transfrontier Access / Contact distributed in January 2002 please describe any developments in legislation, case law or practice since your response was made. (The Questionnaire and Consultation Paper are available on the website of the Hague Conference at: < www.hcch.net > → Child Abduction Section → Questionnaire & Responses).

41. Are there any particular matters which you would like to see included in a Guide to Good Practice on Transfrontier Access / Contact? (See "Transfrontier Access / Contact and the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction – Final Report" drawn up by William Duncan, Deputy Secretary General, Preliminary Document No 5 of July 2002 available at: < www.hcch.net > → Conventions → Convention 28 → Practical Operation Documents.)

42. Are there any other topics that you would like to see form the basis of future parts of the Guide to Good Practice in addition to those which are already published or are under consideration (these are: Part I on Central Authority Practice; Part II on Implementing Measures; Part III on Preventive Measures as well as enforcement measures and access / contact)?

No.

43. Do you have any other comments about any Part of the Guide to Good Practice?

No.

44. Can you list any examples of good practice not included in the Guides?

No.

<u>Standardised consent form</u>

45. The Permanent Bureau is consulting with States and relevant authorities with regard to developing a standardised or harmonised form for obtaining consent from holders of parental responsibility when a child leaves a State (see the Guide to Good Practice – Part III on Preventive Measures). Do you have any comments about the development of such a form? Or any

suggestions as to what information such a form should / should not include?

The Australian Central Authority sees value in developing a standardised form of obtaining consent in principle. Concerns arise however with respect to the practical implementation and imposition of such a form of consent on all States. A principal consideration may be whether a form of consent would operate as supporting evidentiary issues or consideration of the extent to which a form of consent would be legally binding on the receiving State, and the extent to which such consent is conclusive, manner of reception in each State.

It must be very clear that this consent is provided within specific frameworks, for specific conditions rather then an acquiescence to permanent removal.

The imposition of a form of consent may also need to give due consideration to:

- Particulars of the party providing the consent, ie. Description of nature of parental responsibilities/ current access arrangements. Further consideration will need to be given to the relationship between the provision of consent and the concurrent and persisting right to the exercise of parental responsibilities. Ie. How the form of consent will not impact on current access arrangements etc;
- The means by which consent is obtained from the party and processes that will prevent duress and undue influence. Mechanisms by which to ensure checks and balances of these processes, including the opportunity to allow for/ provision of independent legal advice, witnessing by third party, copies of consent made between parties and to independent third person;
- Timeframes by which consent to be sought prior to intended dates of travel;
- Clear and specific terms to which the consent is provided ie. terms of the agreed relocation, specific dates of travel, nature of the undertaking, persons accompanying child/ addresses that the child will reside at.
- Circumstances that may impact, qualify or lead to a revocation of the consent ie. Unforeseen circumstances and the manner of recourse that may be taken by the left behind parent in such instances.
- The provision of information outlining the consent-giver's rights and mechanisms whereby further information could be obtained via legal advice.

Statistics and case management

46. Does your Central Authority maintain accurate statistics concerning the cases it deals with under the Convention, and does it submit annual returns of statistics to the Permanent Bureau in accordance with the forms established by the Permanent Bureau in consultation with Central Authorities? If not, please explain why.

Yes.

The Australian Central Authority maintains accurate statistical data in relation to the cases it deals with under the Convention. These statistics are submitted annually to the Permanent Bureau on the prescribed forms. In addition the Australian Central Authority records statistical data for reporting purposes.

47. Does your Central Authority use any special software for case management / statistical purposes? Would your Central Authority be interested in using the new iChild software which is currently being piloted in seven Central Authorities in six Contracting States?

At present, the Australian Central Authority does not use any special software for case management/statistical purposes. However, the Australian Central authority is one of the seven Central Authorities piloting the new iChild software.

Publicity / debate concerning the Convention

48. Has the Convention given rise to (a) any publicity (positive or negative) in your country, or (b) any debate or discussion in your national Parliament or its equivalent?

The Australian Central Authority has enabled provision in its enacting legislation that restricts the publication of court proceedings, and the identification of persons on account of such proceedings, within a public context, including, print and, radio broadcast, television or other electronic means. Negative publicity has been noted to arise when, in the absence of similar restrictions in other Convention States, reports are made from abducting parents dissatisfied with return orders make public declarations denouncing the operation of the Convention.

A recent matter that caused widespread publicity followed an application made by a father in the U.S. for the return of his child from Australia. The child had been in the U.S. for some three months prior to the child's removal to Australia. The mother lodged an appeal on the basis that there was an absence of intention to settle within the U.S. given her intention to see if the relationship with the residence of the country would "work out." It was noted in by the judiciary that whilst a decision to allow the appeal would be said to "deny the child the benefit of the Convention" it was the view that "the interests of children…could well be adversely affected" whereby a parent's attempts at reconciliation in a foreign country could result in a determination being made that such was the habitual residence of a child. Public reaction conceded with the outcome of appeal, supporting the determination of the child's habitual residence.

A further recent matter involved an order made by a State Australian jurisdiction ordering the return of two children back to their mother in Switzerland. This matter gained negative publicity due to the manner at which the children were abducted, which involved the use of fraudulent passports and the restricted conditions of the father's access with the children, enabling only for supervised access to be enjoyed. This matter has been flagged within WA parliament and also flagged within federal parliament in Australia.

49. Is the Convention having any negative effects which are causing concern?

There is some concern that the Convention is now being used by abusive (usually male) parents to seek the return of children and primary carers back to the country of habitual residence and that the Convention is moving away from what it was meant to deter.

There is concern that the Convention is now being used by abusive (usually male) parents to seek the return of children and primary carers back to the country of habitual residence and that the Convention is moving away from what it was meant to deter. Recent statistics demonstrate that the majority of abducting parents are women, often those fleeing situation of abuse and domestic violence. There is also growing concerns regarding the correlation between incidents of child abduction and the presence of domestic violence and that the Convention does not give due consideration and sufficient weight to such mitigating circumstances in the context of 'grave risk' arguments.

Further concern has been noted in respect to States achieving the objects of the convention, including the prevention of further harm to the child and the exchange between States of information relating to the social background of the child. While it is accepted that the return of the child under the Convention allows for the child to be returned to the appropriate forum to make decisions with respect to the child's residence, custody and welfare. These are matters that are seen not to be properly addressed by the relevant State of the child's habitual residence. These concerns are further compounded when migration and visa issues may impact on the level and nature of financial and social support afforded to parents and their children by the State.

It is accepted that the abduction of a child is framed in the means of an International tort under the Convention, the appropriate remedy being the return of the child. It becomes concerning more so when enacting legislations in differing States enforce penal sanctions on the abducting parent, increasing the rate and incidents of abductions from these countries.

50. By what methods do you disseminate information about the Convention?

The Australian Central Authority:

- Maintains its own pages on the official Attorney-General's Department website; includes sections on Information for Parents; Contains links to relevant Commonwealth Legislation; Contains links to the International Child Abduction News (newsletter of the Commonwealth Central Authority - Attorney-General's Department), other publications on international child abduction, and statistics on child abduction in Australia; Contains links to booklets providing further information on international child abduction produced by the Commonwealth Central Authority - Attorney-General's Department; Contains links to available social services and support networks (including the Australian Central Authority funded telephone service, International social Service assisting families affected by international child abduction) further information on international parental child abduction, missing children services, courts and legal services, state and territory legal aid offices, and overseas central authorities; Provides links to courts and other legal services
- Includes on the website hyperlink to other relevant government departments, such as the Commonwealth Financial Assistance, Department of Foreign Affairs and Trade, the Australian Federal Police Family Law Unit; this also includes links to non-government departments such as the International Social Services (ISS).
- Hosts a biennial conference of Australian Commonwealth and State Central Authorities for the Convention addressing the operational issues facing Central Authorities and specific legal issues.
- Maintains a Child Abduction Hotline – providing information and referrals to parents, organisations and government departments on information pertaining to international child abductions policies and procedures.
- Gives presentations to Department of Foreign Affairs and Trade Consular courses.

51. Could you provide a list (including contact details and web site addresses) of non-governmental organisations in your State which are involved in matters covered by the 1980 and / or 1996 Conventions?

International Social Service
International Parental Child Abduction Service
National Office
Level 2, 313-315 Flinders Lane
Melbourne VIC 3000
Australia
Telephone: +61 3 9614 8755
Toll free 1300 657 843
Fax: +61 3 9614 8766
Email: iss@iss.org.au
Website: www.iss.org.au

Services provided by the Permanent Bureau

52. Please comment or state your reflections on services provided by the Permanent Bureau to assist the implementation and operation of the Convention, such as:

a) INCADAT;

INCADAT is an accessible and practical resource in researching and monitoring the development of case law in international jurisdictions relating to international child abduction. It would be useful if decisions from courts in Contracting States were directly uploaded to ensure that the database is current.

b) The Judges' Newsletter on International Child Protection;

The Judges' Newsletter on International Child Protection has continued to prove an excellent resource in informing on international trends and developments in international jurisdictions. It is understood that it is widely used by Australian Central Authorities and the judiciary.

c) the bibliography of the Convention;

While the bibliography to the Convention is a comprehensive and extensive resource it is not regularly used.

d) the Child Abduction Section on the website of the Hague Convention;

The Child Abduction Section on the website of the Hague Convention is a useful central resource for accessing information relating to the operation of the convention. The Australian Central Authority primarily relies on the site to obtain contact details of Central Authorities and the status of signatures, ratifications and accessions.

e) INCASTAT (the database for the electronic collection and analysis of statistics on the Convention, which is currently being developed);

The Australian Central Authority currently provides statistics to the Permanent Bureau in the required format. The development of an accessible database would be welcomed to assist in reporting and analysing international experience.

f) iChild (the electronic case management system designed by the Canadian software company WorldReach which is currently being piloted by seven Central Authorities in six Contracting States)

Australia was one of the six Contracting States that piloted iChild. As explained in Australia's response to the Questionnaire, it was not an effective case management system for Australia's needs.

g) support for national / international judicial (and other) seminars / conferences concerning the Convention;

The Australian Central Authority supports the organisation of national and international judicial and other seminars concerning the Convention. It has found that they facilitate exchange of information to influence domestic practices in the operation of the Convention.

h) support for communications among Central Authorities, including maintenance of updated contact details.

The Australian Central Authority has strong communication with Central Authorities

particularly where there is a high volume of cases, such as New Zealand. The Australian Central Authority would welcome opportunities to improve communication with other Central Authorities to enhance the case management.

The Australian Central Authority notes the importance of regular maintenance of the contact list and would support implementing a universal system to ensure that the list is updated.

53. Have you any comments or suggestions concerning the activities in which the Permanent Bureau engages to assist in the effective functioning of the Convention?

It would be useful if upon being notified of a State's accession to the Convention, that there is additional information provided to Convention States with respect to the practices, procedures, including the documentation required for successful communication from that State. This would be seen to greatly assist in the effective functioning of the Convention. Ukraine's recent accession was noted as a positive addition to the Convention. The Australian Central Authority would welcome material regarding Ukraine's requirements and processes in communication under the Convention and similarly value the promotion and exchange of practice, procedure and policy amongst all current Convention and newly acceded States. In this way adherence to accepted practice would avoid delays and better allow for the prompt return of children consistent with the principles of the Convention.

Compliance with the Convention

54. Are there any Contracting States with whom you are having particular difficulties in achieving successful co-operation? Please specify these difficulties.

The Australian Central Authority have been unable to communicate successfully with Guatemala and Mexico. Only limited communication has been achieved with Spain and Macua. There have been delays in communication with Turkey, although it is duly considered that there appears to be limited resources available to expedite communication and practice. On a general basis, the Australian CA have noted that Colombia and Brazil communicate in Spanish, resulting in further delays.

55. Are you aware of situations / circumstances in which there has been avoidance / evasion of the Convention?

No.

Non-Convention cases and non-Convention States

56. Are you aware of any troubling cases of international abduction which fall outside the scope of the Convention?

No.

57. Are there any States that you would particularly like to see become a State Party to the Convention? Are there any States (which are not Parties to the Convention or Members of the Hague Conference) that you would like to see invited to the Special Commission meeting in October / November 2006. Would you be willing to contribute to a fund to enable certain developing States to attend?

Yes. The Australian Central Authority would like to see India, Papua New Guinea, Tonga and Somoa become a State party to the Convention.

Australia is providing financial assistance to facilitate Indonesia's participation in the Special Commission meeting.

58. Do you have any comments on bilateral or other agreements between your State and a non-Contracting State?

The bi-lateral agreement that exists between Australia and Egypt has thus far been positive.

59. What additional information would you find useful on the non-Hague Convention page on INCADAT available at < www.incadat.com >.

Listings of agreements or instruments under the headings on the INCADAT–non-Hague Convention page *"Global Instruments - Regional Instruments"* and *"Bilateral Instruments - Agreements & Declarations"* would be a valuable resource.

Relationship with other instruments

60. Do you have any comments or observations on the impact of regional instruments on the operation of the 1980 Hague Convention, for example, *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000* and the *1989 Inter-American Convention on the International Return of Children*?

No.

61. Do you have any comments or observations on the impact of international instruments on the operation of the 1980 Hague Convention, in particular, the *1989 United Nations Convention on the Rights of the Child*?

No we have not seen any direct impact of other international instruments and Australia's ratification of the *1989 United Nations Convention on the Rights of the Child* has not directly impacted on the operation of the 1980 Hague Convention.

The *Hague Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*

62. If the 1996 Hague Convention is in force in your State, do you have any comments regarding (a) how it has been implemented; (b) how it is operating?

The 1996 Hague Convention has been in force since 2003. Each State and Territory will also implement the Convention through model legislation relating to child protection matters. Australia has not received any applications under the Convention.

63. If the 1996 Hague Convention is not in force in your State, is your State considering implementing this Convention? What are viewed as (a) the main advantages and (b) the main difficulties in implementing this Convention?

N/A

64. Have you experienced any difficulties concerning interpretation of particular provisions?

N/A

65. Would you find a Guide to Good Practice on implementation of this Convention useful?

Yes, a Guide to Good Practice would be useful.

66. The Special Commission of 2001 recognised the potential advantages of the 1996 Hague Convention as an adjunct to the 1980 Hague Convention, and recommended that Contracting States should consider ratification or accession. How has your State responded to this recommendation?

Australia ratified the 1996 Convention in 2003.

Any other matters and recommendations

67. States are invited to comment on any other matters which they may wish to raise concerning the practical operation of the 1980 Convention or the implementation of the 1996 Convention.

68. States are invited to make proposals concerning recommendations to be made by the Special Commission.