

**OBSERVATIONS REÇUES PAR LE BUREAU PERMANENT
SUR LE GUIDE DE BONNES PRATIQUES**

PREMIÈRE PARTIE - PRATIQUE DES AUTORITÉS CENTRALES

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**COMMENTS RECEIVED BY THE PERMANENT BUREAU
ON THE GUIDE TO GOOD PRACTICE**

PART I - CENTRAL AUTHORITY PRACTICE

*Document préliminaire No 11 de septembre 2002
à l'intention de la Commission spéciale de septembre/octobre 2002*

*Preliminary Document No 11 of September 2002
for the attention of the Special Commission of September/October 2002*

Note by the Permanent Bureau

In preparing for the Special Commission, this Central Authorities part of the Guide has been called 'Part I'. However, references are made throughout the document itself to the companion piece, *Guide to Good Practice: Implementing Measures* as 'Part I'. This was because in the production stages, the two parts were being viewed in sequence as part of a large multi-part publication where *Implementing Measures* came naturally before *Central Authority Practice*. For the purposes of discussion at the Special Commission meeting, any reference in "*Central Authority Practice*" to "*Implementing measures*" as 'Part I' should be read as 'Part II'.

Remarque du Bureau Permanent

Dans le cadre de la préparation de la Commission spéciale, cette partie du Guide concernant les Autorités Centrales a été intitulée « Première partie ». Cependant, des références au document complémentaire sont faites dans le document lui-même *Guide de bonnes pratiques, mise en œuvre - « Première partie »*. Cela est dû aux différentes étapes de rédaction, les deux parties étant considérées successivement comme les éléments d'une publication à plusieurs volets dans laquelle la Mise en œuvre précède naturellement la Pratique des Autorité centrales. Dans le cadre de la discussion durant la réunion de la Commission spéciale, chaque référence dans la Pratique des Autorités centrales à la Mise en œuvre en tant que « Première partie » devra être entendue comme « Deuxième partie ».

GENERAL COMMENTS

"Although there are other things that could be added, too much detail will make it too long and detract from its utility as a quick reference guide." (Australia)

"We have very few comments to make. In general, we attempt to adhere, as far as our internal law allows, to the principles set out in the Guide. The Israeli Central Authority is quite "hands-on", taking a very active role when necessary, in various stages of the proceedings. This may begin with the location of the child and end with ensuring that a return order is enforced and the child has returned safely to the habitual residence. However, the Guide did point out several areas in which we could take a more active role, such as voluntary access, (we do send voluntary return letters at the request of the parent, but have not had a situation in which voluntary access was requested.)" (Israel)

"The *Central Authority Practice* does not mention the recommendation of the 4th Special Commission to give approval to a questionnaire being addressed to a newly acceding state before a contracting state accepted their accession. Some Central Authorities are keen to see the Questionnaire widely used as part of the process of accepting the accessions of new contracting states." (New Zealand)

Note by the Permanent Bureau: This subject is discussed in full in Guide to Good Practice Part II: Implementing Measures at Chapter 10. However a cross-reference could be made from Central Authority Practice, for example, in paragraph 1.1.1 "Sufficient powers" or 2.1.1 "Designation and establishment of the Central Authority".

Remarque du Bureau Permanent : ce sujet est abordé de manière complète dans le chapitre 10 du Guide de bonnes pratiques, Deuxième partie : Mise en œuvre. Cependant, un renvoi peut être fait à la pratique des Autorités centrales, par exemple au paragraphe 1.1.1 « des pouvoirs suffisants » ou 2.1.1 « la désignation et l'établissement d'une Autorité centrale ».

"The current version of the Good Practice Guide clearly reflects the dedicated effort that the Permanent Bureau has put into its preparation, and we appreciate this effort. We have no doubt that the Good Practice Guide, once completed, will serve as an invaluable tool for all Member States. However the US continues to have some basic concerns with segments of Part I – Central Authority Practice." (USA)

"Most of our concerns involve two fundamental issues that we previously raised at the April 2002 meeting to discuss the Good Practice Guide. The first is the extent to which the draft Guide seems to require, rather than suggest or recommend, certain practices that extend beyond the obligations undertaken by Members in the 1980 Convention. In certain instances, the practices in question also extend beyond the scope or authority of some Members, including the United States. We believe it important that all portions of the Guide remain consistent with the Recommendation of the Fourth Special Commission, including its premise that the Guide will "not be binding" upon Members. In most cases, we believe this could be accomplished through minor textual changes." (USA)

"The second fundamental issue of concern is the inclusion of a chapter on access in the current draft. Per discussion at the April 2002 meeting, we believe it is premature at this point to postulate as to what are the "good practices" among Members concerning access. The draft Guide itself makes note of an "absence of certainty or agreement on the scope or effectiveness of the access provisions" of the 1980 Convention. Under these circumstances, and in view of the fact that access will be a major topic of discussion at the September Special Commission meeting, we believe that Chapter V of the draft Guide should be set aside until greater consensus emerges among Members as to the scope of and best means of implementing the provisions of the 1980 Convention regarding rights of access." (USA)

PARAGRAPH 1.2 SPEED

"It is accepted that even if the Central Authority has enough regular (permanent) staff to implement the Convention, court procedures have in some instances hampered the speedy operation of the Convention. It is however of paramount importance that applications be processed properly in accordance with the normal court rules of the High Court of South Africa. In this instance the principles and methods to be applied have been set out in the matter of *Sonderup v Tondelli*." (South Africa)

PARAGRAPH 1.3.4 PROVIDE INFORMATION ABOUT THE PRACTICE AND PROCEDURE OF EACH COUNTRY

"Continuous communication between Central Authorities should be followed to assist in preparation of court documents. Although the principle exists that proceedings should be less formal to allow the prompt return of children, in general there should also be acceptance for the fact that legal proceedings differ from country to country and that incoming applications have to be prepared in accordance with the court procedure that exist in each country.

To this end the raising of problems and explanations of internal legal systems should be stressed to prevent delay in proceedings. Information should be provided in "flyers" or individual websites about the practice and procedure in each country." (South Africa)

PARAGRAPH 1.5.1 USE OF THE MODEL FORM FOR A REQUEST FOR RETURN IS PREFERRED

"The use of the model form should be encouraged. The following reasons could be added to the existing dot points:

- ~~///~~ uniformity will be created especially in regard to court documentation that will have essential information about the abducted child and measures that will be provided to protect the interest of the child and prevent secondary trauma
- ~~///~~ for access applications, information on existing and future access arrangements should be provided and in this respect the use of "undertakings" must be stressed." (South Africa)

PARAGRAPH 2.3 WHERE TO ESTABLISH THE CENTRAL AUTHORITY

"The Central Authority should normally be an internal judicial body with powers and expertise in International Private Law (family matters). In practice most of the signatory states have involved their respective departments of Justice or judiciary.

It should be noted that the Central Authority has an obligation in terms of the Convention to facilitate legal communication and also to assess relevant applications. The Central Authority should preferably have a network with government and non-governmental organizations which deal with children's matters.

The Central Authority should also have expertise in internal legal matters. A prerequisite could also include skills in case management." (South Africa)

PARAGRAPH 2.3.3 OFFICE OF THE CENTRAL AUTHORITY SHOULD HAVE STRONG LINKS TO THE INTERNAL JUSTICE AND WELFARE SYSTEM

"A cross-reference could be made to paragraph 4.10, making the point that it is important that the Central Authority in any country be able to access information held by other agencies in that country quickly and efficiently, in order to ensure a child is promptly located." (Australia)

"Various informal procedures have been negotiated between its Central Authority and other Government Departments but the budgetary constraints have hampered the speed with which return applications are processed and implemented.

South Africa also noted that in terms of the Guardianship Act (no.192 of 1993) both parents are required to consent in writing for the children to leave the country. This prescript has proven to be a useful tool for prevention of abductions except where parents forged the applications for travel documents and passports. In this instance the assistance from its Department of Foreign Affairs has been invaluable." (South Africa)

PARAGRAPH 3.3 DIPLOMATIC IMMUNITY CASES

"One topic which could be mentioned in the guide concerns applications for the return of children of diplomats. Although these applications are likely to be very rare, a number of unusual questions arise, including:

- (a) Whether the country of habitual residence is the diplomat's home country or the country of current residence;
- (b) Is the diplomat (or his or her spouse) subject to the court processes in the country of residence in the face of their diplomatic immunity?
- (c) If the diplomat's length of residence in the country of current and/or habitual residence is likely to be short to what country should a child removed from that country be returned?
- (d) What are the requirements of the diplomat's employer for the waiver of diplomatic immunity." (Australia)

PARAGRAPH 3.5 COVERING LETTERS

"Under paragraph 3.5 is mentioned the very helpful covering letter used for applications from Australia. However for Central Authorities staffed by people who are not legally qualified and who are not able to sign out such letters the precedent affidavit of the applicable law which NZ has on its web-site may be a model for some countries. In NZ, solicitors for the applicant download the NZ precedent and amend it to suit their client's facts before attaching it to their application." (NZ)

PARAGRAPH 3.7 PROVIDE A TRANSLATION OF THE APPLICATION AND ALL ESSENTIAL DOCUMENTS

"The co-operation between South African Central Authority and other Central Authorities has not presented many problems however communications have created problems when documentation is received in other languages than English. Endeavours have been made to provide translations in these cases through the assistance of left-behind parent but resources do not exist to provide sworn translations in all instances.

It would not be feasible for the Central Authority to provide translations, especially of court documents, in any other language than English. It should be noted that although South Africa has eleven official languages court documentation is normally done in English." (South Africa)

PARAGRAPH 3.15 ARTICLE 15 DECLARATION OR DETERMINATION

"We often suggest to a left-behind parent, (in both out-going and in-coming cases), especially in more complex cases, that he/she obtain an Article 15 declaration from the court of the child's habitual residence. This request is made to the court by the attorney for the left-behind parent. The Israeli Central Authority does not appear in court except in special cases when requested to give an opinion by the court. We were unaware that the Central Authority had the power to make a declaration under Article 15. As far as we understood the Central Authority was to assist applicants as far as possible in obtaining such a declaration. Is there any information regarding the way in which a Requested court views a declaration issued by a Requesting Central Authority, as opposed to a declaration issued by a Requesting court? Could you provide an example of such a declaration issued by a Central Authority?" (Israel)

Note by Permanent Bureau: The terms of Article 15 leave open which "authorities" may make this declaration. Delegates might be able to provide examples.

Remarque du Bureau Permanent : les termes de l'article 15 laissent ouverte la question des « autorités » habilitées à faire cette déclaration. Les délégués pourront peut-être fournir des exemples.

PARAGRAPH 3.15 ADDITIONAL LEGAL PROCEEDINGS FOR ENFORCEMENT OF RETURN

"We had a case with the Czech Republic in which the return of a child was ordered in 1999. We understand, under Czech law a mandatory period of 30 days has to lapse from the time the judgment is served on the abducting parent, before separate proceedings for enforcement can be initiated. In our experience, it took 6 weeks from the time of the judgment until the parent was served with the judgment. Only then did the 30 day period begin to run. The abducting mother was able to take advantage of this time lapse in order to appeal to the Czech Court of Human Rights as well as to the media, with the claim that since she refuses to return with the child to Israel, ordering the child's return without the mother is an infringement of her human rights. The Court of Human Rights found that the child's views should be heard (the child was 9 years of age) and sent the matter back to the lower court where the case is still pending. As the Israeli Central Authority was not kept informed of the regulations with respect to the proceedings after an order for return, the father was placed at a great disadvantage and today has almost no chance of having his child returned." (Israel)

PARAGRAPH 4.9 GUIDANCE FOR AN APPLICANT WHOSE APPLICATION IS REJECTED

"An additional topic (to 4.9) is needed about the options open to the applicant, when a Central Authority has refused to accept an application." (Estonia)

PARAGRAPH 4.10 INFORMATION ABOUT THE CHILD'S LOCATION

"With respect to informing the applicant as to the location of the child once we are informed of a location we always forward it to the requesting Central Authority and to the attorney for the applicant. In some cases, the applicant may want to communicate with the child or abducting parent. But in every case, the attorney for the applicant requires the address in order to serve the abducting parent with the court documents as well as with the court summons. Only in cases, for example, where the parent and child are under the protection of the welfare authorities, would their address be kept confidential. In such a case arrangements could be made for service of documents to an attorney who is representing the abducting parent." (Israel)

"Problems have occurred with the tracing of children having regard to the demographics of South Africa. It should also be noted that most neighbouring countries with the exception of Zimbabwe have not ratified the Convention with the result that abducting parents can further abduct children and the Central Authority of South Africa has no recourse to the authorities in these specific countries. It must however be stated that International Social Service in Geneva and Interpol have rendered assistance as well as the Africa Desk of Department of Foreign Affairs." (South Africa)

PARAGRAPH 4.13 ARRANGE TO ASSIST WITH LEGAL REPRESENTATION FOR APPLICANTS

"Some countries have made reservations to provision of Legal Aid in applications. Should the position of South Africa be reviewed, it is of particular importance to take cognizance of the fact that most applicants live in poverty and countries also do not have sufficient funding to properly resource Central Authority offices." (South Africa)

PARAGRAPH 4.15 PREVENTING FURTHER HARM OR PREJUDICE

"Paragraph 4.15 could have added to it a reference that article 7(b) could be relied upon to obtain orders such as:

- ~~///~~ placing the child in the care of a third person pending determination of the Hague application,
- ~~///~~ an injunction requiring a respondent not to change a child's day-to-day address until the Hague application is completed, or
- ~~///~~ an injunction/order in imposing a reporting condition upon the parent.

Orders such as these, particularly injunctions, are routinely obtained in Australia." (Australia)

PARAGRAPH 4.20 FUNDING APPEALS

"The Guide does not refer to the funding of appeals. It may be helpful to put in a few words of guidance. For example, the practice in Australia and New Zealand is for automatic funding of appeals where the merits of the case require an appeal to be made." (NZ)

PARAGRAPH 4.21 ENFORCING RETURN ORDERS

"A practical question to consider is whether coercive type orders should be sought from the court to assist in returning the child to the requesting country. Such orders may be of assistance where the taking parent has been recalcitrant throughout the entire process and there is reason to believe that he/she will frustrate the mechanics of returning the child to the requesting country. An example of such a coercive order would be to require the placement by the taking parent of a bond with the Court or administrative authority or a legal adviser, which

would be forfeited in the event that the child did not return as ordered. Obviously, the Court/administrative authority considering the application would need to have the power to impose such an order/requirement." (Australia)

PARAGRAPH 5.21 ACCESS REQUIREMENTS

"Some countries such as Australia have a more restrictive approach to access and require evidence of a breach of pre-existing rights of access, having regard to Article 4 the convention. This requirement should be included in the dot points for paragraph 5.21." (Australia)

Note by Permanent Bureau: As this is not a "commonly agreed requirement" as stated in Paragraph 5.21 it was not included here. Those countries having such a requirement should make it clearly known to other Contracting States.

Remarque du Bureau Permanent : cela n'est pas inclus ici, ne constituant pas un « principe de base communément reconnu » tel que posé au paragraphe 5.21. Les pays posant de telles conditions devraient le faire clairement savoir aux autres Etats contractants.

PARAGRAPH 5.33 COERCIVE ORDERS

"The possibility of obtaining coercive type orders such as the placement of a bond to ensure compliance with access arrangements could be added to the dot points in that section." (Australia)

PARAGRAPH 6.2 EDUCATION AND TRAINING

"All the officers of the South African Family Advocate have attended internal and in some instances external training courses which has been proven to be successful in the creation of an expert body of operational staff.

The Australian Central Authority has provided South Africa with an extremely informative package on the implementation of the Convention and these documents have been distributed to all the offices of the Family Advocate. Various in-house and official training session have been conducted with staff to conform with the sample documentation as set out in the Good Practice Guide." (South Africa)

PARAGRAPH 6.3 SAFE RETURN

Note by Permanent Bureau: The first dot point has been deleted from the Executive Summary and should be deleted from the main Guide. A change of emphasis on the role of the Central Authority was the reason for this deletion.

PARAGRAPHE 6.3 RETOUR SANS DANGER

Remarque du Bureau Permanent : Le premier point a été supprimé de la synthèse et devra l'être du Guide principal. L'accent mis sur le rôle de l'Autorité centrale ayant été déplacé.

PARAGRAPH 6.5 TWINNING ARRANGEMENTS

"It is of extreme importance that ongoing programs be introduced to encourage member countries in developing proper resource database and also to create networks of experts to assist in these matters. It is also recommended that the approved questionnaire available on the Hague Conference website be distributed. The distribution of the Judges' Newsletter on

International Child Protection has proven to be invaluable to various new signatory countries. It is also suggested that a network of mentoring countries be developed to assist new signatory countries in par with developing areas.” (South Africa)

APPENDICES

Notes by Permanent Bureau:

Size of the Appendices: can the size be reduced by taking out the previous years' Conclusions and Recommendations?

Provisional appendices: More examples are needed of documents from civil law countries. The current version of the Appendices can be considered quite provisional, until a wider range of sample documents are received for inclusion.

ANNEXES

Remarques du Bureau Permanent :

La taille des annexes peut-elle être réduite en supprimant les « Conclusions et Recommandations » des années précédentes ?

Annexes provisoires : d'autres exemples de documents issus des pays de tradition civiliste sont requis. La version actuelle des annexes doit être considérée comme relativement provisoire jusqu'à ce qu'un éventail plus large de documents y soit inclus.