
# Draft Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

## Submission on Preliminary Document No 16 of October 2005

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NEW ZEALAND

## INTRODUCTORY COMMENTS

Overall, we consider that the Convention is now in good shape and commend the Drafting Committee for their efforts. Our comments below are primarily directed to further improving the operation of the Convention or promoting greater clarity.

## CHAPTER I – SCOPE AND DEFINITIONS

### Article 1 Object

The wording of Article 1 d) seems to impose a higher standard for enforcement than for other limbs. It also does not seem to reflect the terminology in Article 6 where the obligation of the Central Authority is to either "take all appropriate measures" or "the most effective measures available". We suggest that this concern could be addressed by replacing "requiring" with "providing for".

### Article 2 Scope

*Article 2(1)*

Consistent with our view that the Convention must be as wide as possible, we support removing the [ ] and retaining the text. Where States have concerns with the wording "regardless of the marital status of the parents", we consider the Convention provides scope for these concerns to be accommodated:

- States can refuse to accept a case under Article 18 a) on the basis that recognition is manifestly incompatible with the public policy of the State addressed.

- The Convention could allow States to make a reservation if they have legal problems with the words (on the basis that the wording of Article 44 allows this).

We recognise the validity of other States' concerns, but we believe they should not cause those States to reject the Convention altogether.

### Article 3 Definitions

*Article 3 c)*

We note that the term "legal assistance" does not seem to be used consistently. In some cases, such as Article 6(2) a), it is used to include publicly funded legal assistance schemes as well as private legal assistance. In other cases, such as Article 11(3), it seems to be used for publicly funded schemes only, on occasion preceded by the word "free". We suggest that where the term is intended to mean both publicly funded schemes and private assistance, the words "exemption from costs of proceeding" should be omitted from the definition.

## CHAPTER II – ADMINISTRATIVE CO-OPERATION

### Article 6 Specific functions of Central Authorities

*Article 6(2)*

Of the 2 wording options proposed, we have a preference for "the most effective measures available". However, we believe it is essential that, whichever term is used, it is explained in the Explanatory Report as proposed by the Co-Rapporteurs in Working Document No 70.

*Article 6(2) f)*

Since paragraph e) would cover collection, we suggest that the words "[collection and]" could be deleted.

*Article 6(2) h) –"Parentage"*

We suggest amending this Article so that it reads:

*"to provide,* ***or facilitate the provision of****, assistance in establishing parentage for the purposes of recovery of maintenance."* [Additional words in bold]

Not all Central Authorities (or those to whom they delegate their functions) will be able to provide direct assistance in establishing parentage, due to legal and resource constraints. We consider that adding the words "facilitate the provision of" makes it clear that, if the Central Authority cannot provide direct assistance, they should help the party locate that assistance. This follows the wording of Article 6(2) a). The risk of not including these words, when they are used elsewhere in this Article, is that their omission may imply that Central Authorities are obliged to provide a higher level of assistance here.

*Article 6(2) i)*

We favour removing the [ ] around this paragraph and retaining the text.

*Article 6(2) j)*

We support removing the [ ] around this paragraph and retaining the text.

**Article 8 Central Authority costs**

*Article 8(2)*

We have some concerns about the clarity of the relationship between this Article and others. See our comments under Article 38 below.

**CHAPTER III – APPLICATIONS**

**Article 11 Application contents**

*Option 1 and Option 2*

We strongly favour Option 2 and the use of mandatory forms.

**Article 12 Transmission, receipt and processing of applications and cases through Central Authorities**

*Article 12(4)*

We favour removing the [ ] around Article 12(4), provided the information to be conveyed is presented on a standard form. This will ensure that all States provide consistent details and include the type of information necessary to explain the status of the application.

*Article 12(8)*

We favour removing the [ ] around this Article and retaining the text.

**Article 13 Effective access to procedures**

This Article presently provides for three levels of legal assistance [advice] which is potentially confusing.

As everyone should have effective access to procedures for claiming maintenance, our preferred position is for the Convention to require non-discrimination in the provision of legal aid (that is, to provide it on the same basis as it is provided to people in New Zealand – no more or no less). This is the approach adopted in the Child Abduction Convention. We suggest wording based on Article 25 of the Child Abduction Convention would be preferable (replacing Article 13 paragraphs (2) to (5) and (7), and the words "where necessary by the provision of free legal assistance" in paragraph (1)):

*Nationals of a Contracting State, and persons habitually resident in a Contracting State, shall be entitled in matters to which this Convention applies to legal aid and advice in any other Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.*

**CHAPTER V – RECOGNITION AND ENFORCEMENT**

**Article 15 Scope of the Chapter**

*Article 15(1)*

We have concerns about the inclusion of authentic instruments and private agreements within the definition of "decision" by virtue of Article 25. This is discussed under Article 25 below.

Article 12 of the Choice of Court Convention provides for judicial settlements to be enforced under the Convention *if they are enforceable in the same manner as a judgment in the State of origin*. We suggest that this approach could be adopted here. This would involve adding to the end of the second sentence in Article 15(1) the words "and enforceable in the same manner as a decision rendered by that authority". This clarifies the concept of a settlement concluded before or approved by an authority (otherwise this could cause uncertainty due to procedural differences

between States, and ensures that only agreements that are enforceable as judgments in the State of origin are enforced as judgments in the State addressed). It would not be appropriate for an agreement to have greater effect under the Convention than it would have in the State of origin.

We favour removing the [ ] in the last sentence but retaining the text. We also consider it would be desirable to have the terms "arrears" and "retroactive maintenance" defined in accordance with Footnote 21.

**Article 16 Bases for recognition and enforcement**

*Article 16(1) b)*

We query how a respondent who has objected to the jurisdiction but whose objection has not been upheld and who proceeds to defend the case would be treated. Would proceeding to defend the case in those circumstances be treated as a submission to the jurisdiction for the purpose of this paragraph? It would be desirable, in our view, to clarify the intention given the wording of the second limb.

*Article 16(1) e)*

We support removing the [ ] around this paragraph and retaining the text.

We also suggest that, consistent with the recently concluded Convention on Choice of Court Agreements, the term "in writing" should be defined, so that it is technologically neutral. We suggest "in writing" should include:

*"any other means of communication which renders information accessible so as to be usable for subsequent reference".*

This is Article 3(c) ii) of the Choice of Court Convention.

*Article 16(1) f)*

We support removing the [ ] around this paragraph and retaining the text.

**Article 19 Procedure on an application for recognition and enforcement**

*Article 19(4)*

We continue to have some reservations about the second sentence of Article 19(4), particularly since this Article applies to direct applications. We are concerned that not allowing submissions to be made at this stage of the process means the competent authority may not have all the necessary information when making its decision. This may increase the likelihood of appeals. There may be some sifting and checking carried out by Central Authorities before submitting the application but this will not happen where the application is direct.

We appreciate the desire to have a simple and streamlined process that results in a prompt determination. However, this could be achieved and our concern addressed by requiring the competent authority to initially make a provisional determination. This could become final after a specified number of days, unless there is an objection

from either the applicant or respondent based on Article 16 or 18. If there is an objection, the other party should have the opportunity to present their position with the competent authority taking that information into account when making a final order.

An alternate suggestion is for the application for recognition and enforcement to be accompanied by information supporting compliance with the requirements of Articles 16 and 18.

*Article 19(5)*

This paragraph does not seem to be entirely consistent with paragraph 7. We suggest that the interrelationship of the paragraph be reviewed and consideration be given to merging them. (We note that if, contrary to the suggestion above, the second sentence of paragraph (4) is retained then it will be essential to have an appeal on grounds of fact, as this will be the first opportunity to raise relevant matters of fact by way of submission.)

*Article 19(9)*

We favour removing the [ ] around this paragraph and retaining the text.

In relation to the issue raised in Footnote 26, we consider that the question of whether enforcement is stayed or suspended should be left to domestic law in the State addressed, but that the Convention should provide that there is no automatic stay or suspension by reason of an appeal being filed. We therefore favour including the text in Footnote 26 in the Convention, but with the addition of the words “unless a court orders otherwise pursuant to the law of the State addressed”.

**Article 20 Documents**

*Article 20 a)*

We favour the first option, and not the alternative proposal. Our system is partly judicial and our courts are likely to require a copy of the original maintenance decision.

*Article 20 b)*

We support removing the first set of [ ] and retaining the text. We support the Drafting Committee’s suggestion that the words in the second set of [ ] are not necessary and we suggest they be deleted.

*Article 20 d) and e)*

We support removing the [ ] and retaining the text.

**Article 24 Physical presence of the child or applicant**

We support removing the [ ] around this Article and retaining the text.

### Article 25 Authentic instruments and private agreements

We understand that a proposal to treat authentic instruments as if they were judgments raised concerns in the course of preparation of the Convention on Choice of Court Agreements. There were concerns about the concept of "authentic instrument" being unfamiliar in many States, and that it would be too difficult to determine which instruments were included and which were not, particularly for States that were not familiar with them. As a result, the proposal to include authentic instruments as judgments was not adopted. The same concerns are relevant here.

Private agreements were addressed under Article 15 above. If they form the basis of a decision, that decision is enforceable under the Convention. If they do not form the basis of a decision, we consider that they should only be enforced under the Convention if they meet the test suggested in our comments under Article 15 above, namely, that they must be concluded before or approved by an authority, and be enforceable in the same manner as a decision rendered by that authority.

For these reasons, we consider that Article 25 is not appropriate in its current form. However, we would have no objection to the inclusion of a similar Article in relation to authentic instruments on an "opt-in" basis, so that States that are familiar with the concept of authentic instruments can apply the Convention to such instruments as between themselves.

### [Article 26 Enforcement of a decision for costs]

*Footnote 32*

Please refer to our comments under Article 38 below about costs.

## CHAPTER VI – ENFORCEMENT BY THE REQUESTED STATE

### Article 27 Enforcement under national law

*Article 27(3)*

For consistency with our earlier comment under Article 15(1), we suggest that retroactive maintenance should be included here as similar limitation issues could arise.

## CHAPTER VII – PUBLIC BODIES

### Article 32 Public bodies as applicants

*Article 32(3)*

We agree with the comment in Footnote 35 that if paragraph (2) is accepted, then the words in [ ] are not needed. (If paragraph (2) is not accepted, we would favour retaining these words in paragraph (3) and removing the [ ].)

## CHAPTER VIII – GENERAL PROVISIONS

### Article 33 Protection of personal information

We consider that “use” should include the “disclosure” of personal information. We suggest that the Article should make this clear.

### Article 35 Non disclosure of information

We support removing the [ ] and retaining the text.

### Article 38 Costs recovery

We are concerned that the relationship between Articles 8 (in particular paragraph (2)), 26, 39 and 40 (in particular paragraph (3)) is not clear, leading to the potential for confusion.

Our understanding is that costs under Articles 8(2) and 40(3) are payable by the applicant and will normally be paid at the time the services are provided, before any maintenance is collected. It should also be possible, in appropriate cases, to defer payment of such costs and deduct them from any maintenance collected; this is likely to be preferable to payment up front so far as the creditor is concerned. Article 38 should not prevent this.

We understand Article 38 to be concerned with costs payable by the debtor, and to require that payments received from the debtor be applied first to meet maintenance, so that it is only if all maintenance due has been paid in full that payments received can be applied to costs. If this is correct, we support this approach, but suggest that the provision be redrafted to make this clearer.

### Article 40 Means and costs of translation

*Article 40(3)*

We are unsure whether the translation costs under Article 39 can be passed on under this provision. We suggest that the wording should clarify that this is intended.

### Article 42 Relationship with other international instruments

As the default position at international law is potentially complex and difficult for authorities to ascertain in particular cases, we consider it is important for this Convention to clarify its relationship with other existing instruments. In particular, it should be clear whether (and in what circumstances) this Convention would govern the rights and obligations as between States where they are also parties to other instruments.