



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

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NEW ZEALAND

INTRODUCTORY COMMENTS

We have prepared our comments taking into account both the draft Convention (Preliminary Document No 29) and the draft Explanatory Report (Preliminary Document No 32). In many instances, our original concerns have been addressed by the detailed and thorough explanation in the Explanatory Report. We have found the Report to be an invaluable aid and wish to express our appreciation to the Co-Rapporteurs for their hard work.

We also wish to acknowledge the work of the Drafting Committee. The draft Convention has clearly been improved as a result of their recent revisions. Our comments below are primarily directed to further improving the operation of the Convention or promoting greater clarity.

CHAPTER I – SCOPE AND DEFINITIONS

Article 2 Scope

Article 2(1)

We have a query about the interface between this paragraph and Option 2 of Article 14. Article 2(1) refers to “maintenance obligations arising from a parent-child relationship”. Assuming the words in square brackets remain, this concept is extended to include a combined claim for spousal support. Article 14 bis (1) also refers to maintenance obligations arising from a parent-child relationship. It does not expressly refer to a combined claim for spousal support.

In light of Article 14 ter, we understand that the requirement to provide free legal assistance under Article 14 bis would not extend to spousal support that might be combined with that child support claim. However, the extended concept in Article 2(1) might be seen as colouring references to “maintenance obligations arising from a parent-child relationship” in other parts of the Convention, such as Article 14 bis.

We would have concerns if this were the case. To avoid this outcome, we would like to either see the drafting clarified or the intended approach reflected in the Explanatory Report.

Article 2(3)

We strongly support the Convention extending to children regardless of the marital status of their parents. Having regard to the discussion in the draft Explanatory Report, we are relaxed whether this clause remains or is deleted.

Where States have concerns with the inclusion of children regardless of the marital status of their parents, we consider the Convention provides, or could readily provide, scope for these concerns to be accommodated:

- States can refuse to accept a case under Article 19 a) on the basis that recognition is manifestly incompatible with the public policy of the State addressed.
- The Convention could be amended to allow States to make a reservation if they have legal problems with the words (on the basis that Article 57 is amended to allow this).

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

Article 2(4)

Consequent on our comment above, if Article 2(3) is retained, we would support the removal of [] and retaining the text.

Footnote 2

We support allowing public bodies to apply to establish or modify a decision on behalf of a creditor. This ensures that those States which provide support for children and seek reimbursement from child support payments are not disadvantaged, if they need to take these steps.

CHAPTER II – ADMINISTRATIVE CO-OPERATION

Article 6 Specific functions of Central Authorities

Article 6(2) i)

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

CHAPTER III – APPLICATIONS

Article 11 Application contents

Option 1 and Option 2

We support the recommendation of the Forms Working Group on the issue of which forms should be mandatory and which should be recommended only.

Article 14 Effective access to procedures

Option 1 or Option 2

We support Option 2.

Public bodies

We consider public bodies should be entitled to free legal assistance under Option 2. A public body is either acting in place of the creditor or seeking reimbursement of benefits provided to the creditor in lieu of maintenance. States that offer creditors these advantages should benefit from the same level of access to procedures as individual applicants would enjoy. If not, the extra costs incurred by the public body may ultimately be borne by the creditor, or systems that assist the creditor in this way will be disadvantaged and exposed to greater costs. This may negatively impact on their ability to assist future creditors.

If Option 2 is adopted, these States will be required to provide free legal assistance to applicants from States that do not provide creditors with benefits in lieu of maintenance.

Yet they will be unable to secure reciprocal free assistance, simply because they have a system that supports and advantages creditors. It is inequitable that these States will end up bearing a double layer of cost under the Convention.

Option 2 Article 14(5)

We support extending the benefits of this paragraph to debtors. We consider it important to treat both parties in an even-handed way. In our view, a debtor is more likely to comply voluntarily if he or she considers they have been fairly treated.

Article 14 bis Free legal assistance for child support applications

Article 14 bis (1)

We support the deletion of the words in [] as we consider that creditors and debtors should be treated on an equal basis, for the reasons outlined in the draft Explanatory Report. As noted above, we also support free services being made available to public bodies.

As noted in our comments under Article 2, we query whether the reference to "maintenance obligations arising from a parent child relationship" is intended to extend to a combined claim for spousal support. In our view, it should only apply to pure child support matters and not include the spousal support component. For one thing, it is likely to encourage the linking of claims to take advantage of the higher level of free assistance offered. Although we feel able to support special arrangements for child support, we would find it more difficult to do so for spousal maintenance.

Article 14 bis (2) a)

We support the removal of the [] brackets around paragraph a) and the retention of the text. This would enable States that currently were unable to fund the cost of such tests to have the option of charging. Over time, as testing costs reduce or States are better placed to provide the tests, more States could move to provide the service for free. This seems consistent with the discussion in the Explanatory Report about States and Central Authorities improving their services over time as resources allow. We note that States are still obliged to provide effective access to procedures and Central Authorities have obligations under Article 6.

Article 14 bis (2) b)

As explained at the meeting in May this year, our system is an administrative one. Child support is determined administratively using a statutory formula. There is an opportunity to seek an independent review of that determination within the administrative system. From there, there are rights of appeal into our courts system. Steps up to and including the review are free but after that people would need to apply for legal aid to pursue an appeal. With a formula basis for assessing child support, the scope for substantive appeals is significantly reduced. Our preference, with option 2, would be to include the first review or appeal from the initial decision or determination but exclude subsequent ones. If that is not accepted by other States, then we would want to see the [] in this paragraph deleted but the words retained. This would clearly give us the ability to refuse free legal assistance to appeals devoid of merit.

Article 14 bis (2) c)

We prefer option C, on the basis that the other two options are very complex and will be extremely difficult to apply. If these cases are likely to be rare, there seems little benefit in trying to apply complex tests. If Option A or B is favoured by the majority of States, then ideally the tests should be adjusted to make them easier to apply.

Article 14 ter Applications not qualifying under Article 14 bis

We have a query about the placement of this article. Article 2(1) states that Chapters II and III do not apply to spousal support claims. However, the discussion in paragraph 437 of the draft Explanatory Report suggests that this Article applies to a wide class of applications including those for spousal support (presumably including one that has been combined with a claim for child support as per our comments under Article 14 bis(1)). We therefore query whether the placement of this article is correct, or whether Article 2 should be adjusted to clarify that although chapters II and III do not apply to spousal support claims, Article 14 ter does.

CHAPTER V – RECOGNITION AND ENFORCEMENT**Article 16 Scope of the Chapter***Article 16(1)*

We understand that this paragraph is drawn from the 1973 Hague Maintenance Convention (Enforcement). However, we would prefer to see additional words added to clarify that settlements or agreements concluded before or approved by a judicial or administrative authority should be enforceable in the same manner as a decision rendered by the authority. This provides an assurance that only agreements or settlements that are enforceable as decisions in the State of origin are enforced as such in the State addressed. It would not be appropriate for an agreement or settlement to have greater effect under the Convention than it would have in the State of origin.

Article 20 Procedure on an application for recognition and enforcement*Article 20(6)*

The cross-reference to “paragraph 6” should refer to “paragraph 5”.

Article 25 Physical presence of the child or applicant

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

Article 26 Authentic instruments and private agreements

We agree with the comment in the draft Explanatory Report that it is important to accommodate the trend towards using alternative dispute resolution. We therefore support, in principle, the idea of including authentic instruments and private agreements within the Convention. However, as noted in the draft Explanatory Report, some States do not have authentic instruments and others are unfamiliar with private agreements. There are also potential concerns with arrangements that have not been subject to judicial or administrative scrutiny. We therefore suggest that States should have the ability to “opt-in”

to coverage under this Article either in respect of authentic agreements or private agreements, or both.

CHAPTER VII – PUBLIC BODIES

Article 33 Public bodies as applicants

Please refer to our comments under Article 14 about public bodies.

CHAPTER VIII – GENERAL PROVISIONS

Article 35 Protection of personal information

We suggest that the Explanatory Report could, for the sake of clarity, explain the breadth of the term 'use' as, for example, including disclosure of information, given this latter term is used in Article 37.

Article 37 Non-disclosure of information

While we strongly support the intention behind this Article, we suggest that the Explanatory Report could clarify that this Article is not intended to be used to protect debtors from enforcement action.

Article 40 Costs recovery

To the extent that costs may be charged for services under Article 8, our understanding is that those costs that would be payable by an applicant would normally be paid at the time the services are provided, before any maintenance is collected. We assume that this is not prevented by Article 40.