



# Australian Children's Rights News

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## The Hague Convention on the Civil Aspects of International Child Abduction



**International child abduction is motivated by numerous factors. Krista M. Bowie looks at some reasons and explains how the Convention has been implemented in Australia.**

### INTRODUCTION

The *Convention on the Civil Aspects of International Child Abduction* ("the Convention") was adopted at The Hague on 25 October, 1980. Since January 1, 1987, Regulations made under the *Family Law Act 1975* (Cth) have enabled the performance of Australia's obligations under the Convention.

Where the Convention operates, the courts of the land are required to return the child unless certain exceptions are established. Where it does not, the nation to which the child has been taken is less likely to order the return of the child.

Whilst the Convention has enjoyed increasing ratification and accessions since its inception, by countries from all continents, the most notable absence of support emanates from Asia.

However, notwithstanding the global support that the Convention has attracted over the years, international child abduction seems to remain an imminent problem.

### THE OBJECTIVE AND RATIONALE OF THE CONVENTION

In the formal language of the Convention, its overarching policy is:

"...to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."

Thus, the purpose of the Convention is to protect children from the harmful consequences of abduction which arise when they are wrongfully removed from their country of habitual residence, or wrongfully retained in a country other than that of their habitual residence, through the establishment of procedures which ensure their expeditious and safe return.

The Convention does not facilitate extradition and Article 19 specifically states that the instrument does not seek to adjudicate the merits of any

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residence dispute that may also be simultaneously occurring. The gravamen of the Convention is to deter international abduction whilst preserving the child's rights to regular contact with both parents.

Decisions of the High Court of Australia and the United States Court of Appeal, have emphasised that, save for the most exceptional cases, the fundamental objective of the Convention is to facilitate the restoration of the pre-abduction status quo. Subsequently, this would have the desired "dual effect" of enabling disputes concerning residence and contact to be resolved in the appropriate jurisdiction, whilst simultaneously depriving the abducting parent of the fruits of their conduct.

#### **REASONS FOR INCREASE IN ABDUCTIONS**

Since 1989, the number of children abducted per year from Australia, the USA and the UK, has steadily increased despite the operation of the Convention. In the first three months of 1998-99, as many as 113 such cases had been reported in Australia alone.

Two major reasons contribute to this continuous increase in international child abductions.

##### **■ Proliferation of Inter-cultural Marriages:**

As a result of contemporary phenomena such as globalisation, in conjunction with advances made in the telecommunications and travel industries, the world is becoming an increasingly smaller place. One of the consequences that arises as a result of this change, is an increase in the number of bi-national/multicultural marriages.

According to the Australian Bureau of Statistics, 28% of marriages registered in Australia in 1998 consisted of couples from different countries. This is a substantial rise when one considers the minimal percentage associated with the same category 20 years ago, when different nations were not as closely connected.

Bi-national marriages can be based on different, even opposing, cultural norms and religions. Consequently, when these types of marriages breakdown there is an increased risk of abduction occurring for two reasons:

- 1) one party may abduct the child to their homeland in order to ensure that they are raised in accordance with the religion and/or cultural norms that conform with their own; and
- 2) following the failure of the marriage, one party may be left in a foreign environment without any support.

Furthermore, given that frequently the children of bi-national couples have dual citizenship, they can be taken from one country and gain entry to another quite easily.

The abduction of children to countries where family law is governed by Islamic traditions, which are generally regarded as patriarchal and oppressive when compared with Western practices and beliefs, is illustrative of the problems that may arise by virtue of the chasm potentially generated by multi-cultural marriages. So enormous is the divide that in countries where Islamic law dominates society, the Convention has not been adopted, essentially leaving the deprived parent, which is usually the mother, with no legal recourse.

Often for the mother, obtaining custody of the child pursuant to the law of the Islamic country to which the child has been abducted is also virtually impossible given that:

- 1) regardless of the mixed heritage of the child, at law, the child is considered to be a Muslim and a citizen of the father's country; and
- 2) Muslim fathers always have ultimate custody of the children, whereas the mother's right of custody dissipates when the child reaches the age of independence, which is seven for a son and nine for a daughter.

##### **■ Consequence of Domestic Violence:**

Studies have indicated that there is a high correlation between incidents of child abduction and marriages plagued with domestic violence.

To many batterers, abducting the child of the marriage is a further way of abusing their spouse, notwithstanding the fact that physical violence may have ceased. In the United States of America as many as 25% of batterers abduct their children.

However, whilst this alternative manifestation of domestic violence contributes to an increase in the occurrences of child abduction, according to English barrister Marilyn Freeman, domestic violence further contributes to the problem in another way. Her studies conclude that more and more frequently it is the battered wife who, in the absence of a supportive environment following separation, abducts the children so that she can escape to a place where familial and emotional support is available.

Furthermore, Freeman cites the gender-bias evident in the language of the Convention and the principles applied in family law proceedings with respect to both the division of property and the battered wife syndrome, as factors which contribute to women needing to seek a more compassionate environment.

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## LEGAL ELEMENTS OF THE CONVENTION

In order to activate the Convention and secure an order for the return of an abducted child, the following elements must be established in Australian courts:

- 1) there must be a wrongful removal or retention of a child;
- 2) the child is under 16 years of age;
- 3) the child was habitually resident in a Contracting State immediately prior to the removal to or retention in another Contracting State.

Assuming a deprived parent is successful in establishing a case for the return of the child, notwithstanding the overall policy of the instrument regarding mandatory return, the Convention makes provision for a couple of narrow exceptions and situations which, when proven on the evidence, give the Court a discretion as to whether the return of the child should be ordered or not.

The discretion, unfettered by the “mandatory return” principle, seldom arises and is often difficult to invoke. However, the discretion arises if one of the following is established on the evidence:

- one year has elapsed between the date on which the child was removed or retained and the date on which an application was lodged under the Convention;
- the child was removed or retained when custody rights were not actually being exercised; or alternatively the removal or retention was consented to or subsequently acquiesced to by the deprived parent;
- should the child be returned there is a grave risk of exposure to either physical or psychological harm; or the child would otherwise be placed in an intolerable situation;
- the child objects to being returned and has reached an age and possess a degree of maturity which warrants the Court taking into account his/her wishes;
- the return of the child would be abhorrent to the fundamental principles of the Requested State with respect to the protection of human rights and fundamental freedoms.

However, it is important to remember that even if one of the exceptions or defences to the presumption of mandatory return is made out, the Court merely has a **discretion** as to whether to order the return of the child or not. The next section of this article focuses on the situation where a child objects to being returned.

## THE OBJECTION AND WISHES OF THE CHILD

Justice Kay of the Family Court of Australia has delineated that the accurate approach to adopt when considering this exception involves the application of a two-fold test which proposes the following questions:

- 1) Does the child object to being returned to his or her place of habitual residence? and
- 2) Is the child at an age and does he or she possess such a degree of maturity that it is appropriate to take his or her wishes into account?

Contrasting positions have been espoused by different Courts around the globe with respect to, firstly, the interpretation of the word “objects” and, secondly, the age at which a child is regarded as being sufficiently mature for their views to be considered.

In the Australian decision *De L v Director General, NSW Department of Community Services*, the High Court concluded that the word “objects” should not be construed narrowly. Later decisions have emphasised that the objection should be directed to the child not wanting to be returned. Therefore, if a child’s objection to returning to their place of habitual residence is motivated by a desire to avoid being placed in the care/custody of a particular parent, the exception will not be made out.

Whilst it can be gleaned from Australian caselaw that, as a general rule of thumb, a child aged twelve possess the appropriate degree of maturity to warrant the Court considering their wishes, there is no authoritative, binding principle to this effect. However, the Courts in both Australia and England have refused to return a younger sibling, whose objections would not otherwise have been a relevant consideration, where the objections of an older sibling enlivened the jurisdiction of the exception. The Australian Court specifically stated that to order the return of a six year old child, when his/her thirteen year old sibling was permitted to remain in Australia in accordance with their wishes, would be intolerable.

The Australian Parliament has recently legislated to counter the principle in the High Court decision *De L*, which effectively provided that where a child expresses an objection to return under the Convention, that child should ordinarily be separately represented in the proceedings. Relevantly, the legislation now reads:

**- SECT 68L Court orders for separate representation ...**

*(2A) However, if the proceedings arise under regulations made for the purposes of section 111B [the Convention], the court may order that*

*the child be separately represented only if the court considers there are exceptional circumstances that justify doing so, and must specify those circumstances in making the order.*

The Explanatory Memorandum pointed out that the pre-abduction status quo should be expeditiously restored in the absence of any consideration of the best interests of the child in the particular case. Accordingly, the separate representation of children who object to being returned should only be confined to exceptional cases which warrant such representation, with such circumstances to be specified by the Judge when such an order was made.

One must critically evaluate the soundness of such a reform, particularly given that when a defence or exception is raised, the Court requires evidence to assess whether the requisite elements are established. These assessments are most effectively made by a separate, independent representative who is focused on the interests of the child.

## CONCLUSION

Given Australia's rich and diverse multi-cultural society, appropriate remedies for abductions to countries with dissimilar religious and societal practices to mainstream Anglo-Saxon traditions, should be pursued in order to facilitate peaceful resolutions to international child abductions. International mediation which endeavours to encourage solutions through co-operation between the parties involved, their lawyers and the Central Authorities that handle Convention applications, is one such avenue that should be explored in order to stem the proliferation of international abductions.

**Krista M. Bowie is the Legal Associate to the Honourable Justice Lindenmayer of the Appeal Division of the Family Court of Australia. This article is an edited version of a fuller paper (with references) available at:**

[www.familycourt.gov.au/papers/html/bowie.html](http://www.familycourt.gov.au/papers/html/bowie.html)

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# The Australian Missing Children Website

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Australia is part of an international network designed to reunite missing children with their families. The Australian Missing Children Web Site (<http://au.missingkids.com>) carries prevention messages as well as photographs and information about children reported missing in Australia. Special age progression technology will allow identification from photographs, even years after a child's disappearance.

When launching the site on 29 November 2000, Senator Amanda Vanstone (then Minister for Justice and Customs) said "While approximately 99.5% of our 20,000 missing children are located, most within hours, the effect on family and friends, waiting to learn what has happened, can be devastating. I congratulate those involved with this initiative which supports Australia's families."

The new site is managed by the National Missing Persons Unit (NMPU) at the Australian Bureau of Criminal Intelligence in Canberra, under the umbrella of the International Center for Missing and Exploited Children (ICMEC, <http://icmec.missingkids.com>). The NMPU represents a partnership with police, non-government tracing organisations, community agencies, the business community and families and friends of missing people. Through this partnership, the NMPU co-ordinates and promotes a national integrated approach to reduce the incidence and impact of missing persons in Australia. The NMPU brings together two national committees:

- ~ The Police Consultative Group on Missing Persons involves Officers in Charge of the jurisdictional police Missing Persons Units and works to improve police response to reported missing persons.
- ~ The National Advisory Committee on Missing Persons includes representatives from police, the Salvation Army, The Australian Red Cross, International Social Service, Kids Help Line, the Victorian and NSW Missing Persons Committees.

The NMPU has three main objectives:

- ~ to assist police and non-government tracing organisations in locating missing persons
- ~ to facilitate a coordinated approach to addressing the social and economic impacts of missing persons
- ~ to develop effective preventative action.

The website is linked to and supported by the Family Court of Australia. The Court's website lists children where a judicial officer has made an order permitting names and photographs to be released to the public in an effort to help find the child (see <http://www.familycourt.gov.au/missing/>). There is also information about what steps someone should take if they fear a child has or may be abducted (see also <http://law.gov.au/childabduction/>, the Australian web site on International Child Abduction of the Attorney-General's Department).