

# Protecting Children from unintended effects of return orders under the Hague Convention

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This article will discuss a way forward for dealing with the not infrequent harm done to children and their carers as a result of return orders made under the Hague Convention on the Civil Aspects of International Child Abduction (the 1980 Hague Abduction Convention). I will examine the need for some intervention and the role to be played by the 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 Protection Convention). I will also advocate for the provision of Legal Aid to the abducting parent as a cost effective means of minimising the harm done to children by traumatic returns to their country of habitual residence and a means of speeding up the resolution of these difficult matters.

## Introduction

*Personal and family or commercial situations, which are connected with more than one country, are commonplace in the modern world. These may be affected by differences between the legal systems in those countries. With a view to resolving these differences, States have adopted special rules known as "private international law" rules.*

*The statutory mission of the Conference is to work for the "progressive unification" of these rules. This involves finding internationally-agreed approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status.<sup>1</sup>*

This quotation from the website of the Permanent Bureau of Hague Conference on Private International Law (the PB) succinctly and perhaps a little dryly, explains what is a legal miracle: that is binding one country to respect and enforce the laws of another country, laws, which its citizens have had no say in determining.

In the case of the 1980 Hague Convention on the Civil

Aspects of International Child Abduction (the 1980 Convention), the Hague Conference has produced an instrument, which is exceptionally effective.

The 1980 Convention affects the lives of many children each year. Worldwide 2,904 children were involved in applications concerning the 1980 Convention in the 2015 calendar year.<sup>2</sup>

Looking at applications concerning Australia in the 2015/16 financial year 109 children were returned to the country from which they had been taken by a parent without the consent of the other parent or an order of the court. Of these 44 children were returned to their country of habitual residence from Australia and 63 children were returned to Australia from overseas.

The Preamble of the 1980 Convention opens with the following words:

Desiring 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 ....<sup>3</sup>

The stated purpose of the 1980 Convention is to avoid harm to children. However not infrequently the return of a child to their country of habitual residence is more traumatic than the initial abduction. In many cases the return process itself can be traumatic and upon return the child may be taken from the abducting parent who in most cases is also the custodial parent, and placed in the care of the other parent whom they have not seen for many months and who has not been the primary carer of the child.

## Profile of the abducting parent

Comprehensive statistics on the 1980 Convention have been submitted to the Permanent Bureau by Professor Nigel Lowe in 1999<sup>4</sup>; 2003<sup>5</sup>; 2008<sup>6</sup> and 2017<sup>7</sup>. These statistical reports look at many aspects of the operation of

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<sup>1</sup> <https://www.hcch.net/en/about> accessed 30 June 2017

<sup>2</sup> Part 1- *A statistical analysis of applications made in 2015 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction- Global Report – provisional edition, pending the completion of the French Version*, Professor Nigel Lowe and Victoria Stephens, Preliminary document 11A <https://www.hcch.net/en/publications-and-studies/details4/?pid=6545&dtid=57>, page 3 (2017 Lowe Report)

<sup>3</sup> 1980 Hague Convention on the Civil Aspects of International Child Abduction (the 1980 Convention) Preamble.

<sup>4</sup> *A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* drawn up by Professor Nigel Lowe, Ms Sarah Armstrong and Ms Anest Mathias (1999 Lowe Report)

<sup>5</sup> *A statistical analysis of applications made in 2003 under the Hague Convention of 25 October 1980 on the civil aspects of international child abduction part 1 – overall report* drawn up by Professor Nigel Lowe (2003 Lowe Report)

<sup>6</sup> *A statistical analysis of applications made in 2008 under the Hague Convention of 25 October 1980 on the civil aspects of international child abduction part 1 – global report* drawn up by Professor Nigel Lowe, Cardiff University Law School (2008 Lowe Report)

<sup>7</sup> 2017 Lowe Report

the 1980 Convention including assembling a profile of the Abducting Parent.

The gender of the Abducting Parent is overwhelmingly female. In the 1999 Lowe Report 69% of taking parents were female and 30% were male. In the 2003 Lowe Report 68% were the mothers of the children and 28% were the fathers of the children. In 2008 the figures were virtually identical with 69% of the taking parents being mothers and 28% fathers. In the 2017 Report 73% of the taking parents were mothers.

As a general rule the taking parent is also the principal or joint carer of the child and is returning to a country of which they are a national. The 2017 Lowe Report finds that 83% of the taking parents were the primary or joint carers of the child with this figure rising to 92% where the taking parent was the mother.<sup>8</sup>

With respect to the country to which the children are taken, the 2017 Lowe Report indicates that 58% of the taking persons took the child to a State of which they were a national.<sup>9</sup>

From the above statistics we can conclude that the typical abducting parent is a mother who is either the primary carer of the child or the joint carer of the child, and that most commonly she is returning to a country of which she is a national.

In the Australian context most of the parents abducting children to Australia are young women who are the primary or joint carers of the children and are returning home to Australia after a failed relationship overseas.

### **Lack of availability of legal assistance for the abducting parent**

Legal Aid is available in all Australian states and territories and a parent defending an application made to return a child under the 1980 Convention is not automatically precluded from applying for legal aid.

In practice however Legal Aid is rarely granted to the abducting parent. The basic test used by all Legal Aid Commissions in Australia is what is commonly referred to as the means and merits test. In short the applicant for Legal Aid must meet an income test and the case must have sufficient prospects of success to justify the allocation of funds.

In NSW, family law matters must satisfy Merit test B.<sup>10</sup> This test has two additional requirements which are “whether a prudent self-funded litigant who was not eligible for Legal Aid would risk his or her funds in legal proceedings” and “whether it is appropriate to spend limited public funds on the case”.

Child abduction matters in addition to meeting the Means Test and Merit Test B are required to meet 2 further

tests. They are the Unpaid Funds Test and the Availability of Funds Test. The former is simply that if they have previously received Legal Aid and not repaid any compulsory contribution, they must repay that contribution before a further grant is made. The second additional requirement directs Legal Aid NSW to consider “available funds and competing priorities in determining applications for legal aid.”<sup>11</sup>

Applicants for Legal Aid are not generally provided with assistance in completing their applications for financial assistance and so most commonly applicants are not aware of what if any defence they may have. Consequently in their applications they tend to focus on issues not relevant to the 1980 Convention further reducing their chances of securing financial assistance.

The additional hurdles which applications for assistance in Convention matters have to overcome; the lack of awareness of the defences and the limited resources available to Legal Aid Commissions mean that an abducting parent defending an application will rarely be able to access a grant of Legal Aid even if they meet the means test and have a very good defence.

Providing a legal representative for the child can sometimes be an effective alternative to legal representation for the abducting parent. This option is limited by the capacity of the court to order an Independent Children’s Lawyer (ICL) for the child. Section 68L of the Family Law Act, 1975 (the FLA) requires exceptional circumstances for the appointment of ICLs in Convention cases. This is unfortunate because the ICL has an important role in trying to negotiate a settlement between the parents and can draw possible defences to the notice of the court so that they are raised early in the initial hearing and not as is often the case, on appeal. Appointing an ICL can go some way to remedying the imbalance in the resources available to the left behind parent and those available to the taking parent. In some cases the arguments put by the ICL can determine the outcome of the case.

Given the restrictions on the appointment of ICLs most cases proceed without an ICL and the abducting parent must manage as best she can.

### **Consequences of current situation**

The left behind father making the application seeking the child’s return is guaranteed generous, non-means tested funding by the Australian Government. He is represented by lawyers, usually from the State Central Authorities, who are experts in this area of law and who brief similarly expert barristers. The abducting mother will be unrepresented if she cannot fund her own defence and at the mercy of

<sup>8</sup> 2017 Lowe Report, page 3, paragraph 11

<sup>9</sup> 2017 Lowe Report, page 3, paragraph 11

<sup>10</sup> <http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/8.-merit-test/8.3.-merit-test-b-commonwealth-matters>

<sup>11</sup> [www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/5.-family-law-matters-when-legal-aid-is-available?a=22101](http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/5.-family-law-matters-when-legal-aid-is-available?a=22101)

private lawyers who generally do not have expertise in Convention cases, if she does have the financial resources to pay for legal representation.

The imbalance between the well-resourced and expert team, which appears on behalf of the applicant father meets at best an inadequate and poorly expressed defence from the abducting mother. Although as the institutional litigant, the applicant's lawyers do have a responsibility to the court not to take advantage of the ignorance of the defendant, that duty does not extend to running their case for them.

This creates a serious problem for the child because there is a real risk that a return will be ordered in cases where there is a valid defence. If a return is ordered the abducting mother does not have the resources to negotiate proper arrangements for that return.

In many cases this means that young women will return to a country of which they are usually not a national and in which they have no family support. Not infrequently these young women are met at the airport by the father who has in the meantime secured domestic custody orders which require the children to be handed over to him at the airport. In these cases the children are returned to their country of habitual residence but are removed from the parent who has been their long-term custodian. If the taking mother lacks financial resources in the country to which she is returning, as is often the case, she will have difficulty even securing proper access to her children. The taking mother may also have to meet criminal charges for having taken the children out of the country.

No statistics are kept of what happens to these young women and their children once they are returned to the country of habitual residence. The Central Authorities of both countries no longer have a mandate to be involved and the case is subsumed into the great mass of domestic family law disputes.

There are however anecdotal reports of the difficulties

these young women face upon return including lack of housing and financial resources to commence proceedings in the habitual residence country or to meet the domestic proceedings, which the left behind parent may bring. In many cases this is in the context of credible domestic violence allegations, which are often the immediate spur to leaving the country of habitual residence in the first place. In at least one case of which the writer is aware the father murdered a returning mother within weeks of a court ordered return to the country of habitual residence.

The benefits of providing these mostly misguided young women with Legal Aid when proceeding are brought in Australia is not only one of equity but more importantly so that the abducting parent's legal advisor can negotiate proper return orders protecting the child from further sudden upheavals when they are returned to their country of habitual residence. Essentially Legal Aid will protect the returning child from further trauma when the abducting parent returns the child to the country of habitual residence.

We cannot wash our hands of our responsibility for these children because their mothers have done the wrong thing.

#### **How the 1996 Convention<sup>12</sup> can help**

The 1996 Hague Convention gives Australian courts a proper opportunity to protect children returning to their country of habitual residence. This Convention gives Australian courts the opportunity to make detailed orders, which can provide for things such as the children remaining in the care of the abducting parent and requiring the left behind parent to make proper provision for the return of their family so that their children will have a proper place to live and the returning mother will have resources to live and importantly to be able to do the right thing and make an application to the courts in the country of habitual residence.

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<sup>12</sup> 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 Perez Vera Report<sup>13</sup> makes it clear that one of the main reasons for establishing the 1980 Hague Convention was to prevent a parent removing a child to another country to obtain a jurisdictional advantage.<sup>14</sup> We have for many years ignored the jurisdictional advantage, which the left behind parent gains by securing self-serving orders in the country of habitual residence while the abducting parent is defending his application under the 1980 Hague Convention. Add to this the fact that most left behind parents are fathers and most fathers are the breadwinners and therefore have the financial resources to prosecute their claims under domestic legislation while their Hague Application is prosecuted courtesy of the Australian tax payer and you will see that the well intention 1980 Convention is paradoxically being used to disadvantage the vulnerable custodial parent upon their return to the country of habitual residence.

The possibility that the 1996 Hague Convention gives Australian courts to make detailed orders protecting returning children and their mothers and to be confident that these orders can be registered and enforced in the country of habitual residence once the children return, is an opportunity to enhance the efficacy of the 1980 Hague Convention and to minimise the trauma of children being returned to the country of their habitual residence after lengthy litigation in the country of refuge.

### **Strengthening the 1980 Hague Convention**

The profile of the abducting parent revealed by each of the 4 statistical reports prepared by Professor Lowe, that is

an abducting parent who is usually female and usually the custodial parent, is quite at variance with the original paradigm on which the 1980 Hague Convention was based. It is clear from the Perez Vera report that the original paradigm was abduction by a non-custodial father. In paragraph 25 Ms Perez Vera discusses the trauma created by the initial abduction in the following terms:

...the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and un-known teachers and relatives'.<sup>15</sup>

This mismatch between the paradigm of the 1980 Hague Convention and the reality revealed by the statistical analyses has created problems which judges and courts have tried to deal with by creating an ever more elaborate jurisprudence around the defences set out in the 1980 Hague Convention. A simpler approach, which would strengthen rather than undermine the 1980 Hague Convention would be to ensure that both the left behind and abducting parent have proper legal representation. This would allow the abducting parent to be given an early and realistic appraisal of their chances of success in defending an application and would give them someone in their corner once return orders are made to ensure that effective safe harbour orders are made and that trauma to returning children is reduced.

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<sup>13</sup> Explanatory Report by Elisa Pérez-Vera

<sup>14</sup> Perez Vera Report paragraphs 16 to 19