

INTERNATIONAL SOCIAL SERVICE AUSTRALIA

Submission to the Senate Legal and Constitutional Affairs References Committee inquiry into international child abduction to and from Australia

July 2011

Introduction

International Social Service (ISS) Australia is a non-government organisation specialising in the provision of professional social work services to assist families and children separated across national borders. ISS Australia is an independent member of the international ISS network with representation in some 140 countries worldwide. The organisation has achieved a 50-year history defending the rights of children and connecting internationally separated family members. Since 2005, ISS Australia has received funding from the Commonwealth Attorney-General's Department to deliver an International Parental Child Abduction (IPCA) Service, the only professional social work service in Australia focusing specifically on families affected by IPCA. ISS Australia has since 2007 also received funding from the NSW Department of Families and Community Services to assist parents affected by IPCA in that state.

The experience acquired by ISS Australia in working on a long-term basis with approximately 250 IPCA-affected families and responding to a similar number of short-term enquiries since 2005 provides the context for the following submission to the Senate inquiry. In the 2010-11 financial year, for example, ISS Australia responded to 130 short-term enquiries related to IPCA, and provided long-term social work services in response to 40 new requests. Of new enquiries during 2010-11, 97 related to Hague Convention signatories, 63 related to non-signatory countries and 11 related to countries whose identity was unknown. Approximately 82 of the matters in which ISS Australia became involved concerned mothers and 70 concerned fathers. ISS Australia provided social work services to 11 taking parents and 64 left-behind parents. Enquiries related to the prevention of IPCA approximated 80.

Based on this concrete experience, ISS Australia makes the following submissions with regard to the Senate inquiry's specific Terms of Reference:

(a) The costs, terms and conditions of legal and departmental assistance for parents whose child has been abducted overseas

ISS Australia's experience in working with left-behind parents affected by IPCA suggests that, in many cases, their applications for the return of their children under the 1980 Hague Convention on the Civil Aspects of International Parental Child Abduction ("Hague Convention") incur no direct financial cost, for which the State and Commonwealth Central Authorities must be commended. The services they receive usually incorporate legal advice regarding their individual case, assistance with preparation of their Hague Convention return applications and other associated administrative tasks, and submission of materials for Court proceedings in the jurisdiction hearing the application for the child's return. ISS Australia is aware some left-behind parents instruct a private lawyer to process their Hague applications, unaware they can obtain this service free of charge from their State Central Authority.

Less clear-cut are costs associated with a parent's participation in court proceedings in the jurisdiction hearing the application for the child's return, should they wish to pursue this. Left-behind parents wishing to travel overseas to attend a return hearing must apply for means-tested funding available from the Attorney-General's Legal Assistance Scheme or bear the costs

themselves. These can be significant, involving as they do not only overseas travel but also costs for legal support and other costs. ISS Australia is also aware of instances of left-behind parents overseas whose children have been retained in Australia experiencing significant costs as a result of inadequate support offered by the Central Authority in the country from where the child has been taken. Parents in such situations face the dilemma of engaging costly independent legal advice to assist in the preparation of affidavit material for return applications and provide representation in court, or if unable to afford such costs completing return applications themselves and representing themselves in Australian court proceedings.

Also of potential concern in terms of cost is the position of the taking parent, and their capacity to participate in judicial proceedings concerning their children, particularly in cases where a taking parent wishes to appeal the left-behind parent's return application using the provisions of the Hague Convention. Pursuing such an appeal requires private legal advice and representation independent to that provided by the Central Authority in the jurisdiction the child has been taken to or retained in, whose role is of course to act on instructions from the Commonwealth Central Authority and process the return order application. There is no compensation for such costs, even if the taking parent's appeal is successful and the child is subsequently not subject to a return order under the Hague Convention. A lack of independent legal representation and in some cases a legally unrepresented parent may result in a power imbalance in court proceedings, in the sense that legal representation for one party may only be available if they have the necessary means and their rights to appeal may be curtailed.

A further concern are direct costs faced by parents whose children are removed to countries not signatory to the Hague Convention. Such parents generally have no recourse other than the initiation of legal proceedings in the country to which the child has been removed. Although parents are eligible to apply to the Attorney-General's Department on a means tested basis for funding to cover costs of legal assistance, additional costs involved in finding and engaging a lawyer in an overseas jurisdiction, travel, interpreting and translation of documents, and representation or attendance at court proceedings whose outcome may not guarantee the child's return, may impose a financial burden on left-behind parents beyond the means of the Legal Assistance Scheme to compensate. The legal and emotional impacts of IPCA on left-behind parents are often detrimental to maintaining employment, further adding to financial stress.

Despite these concerns, in ISS Australia's view many costs involved in the Hague Convention process are rightly borne by government departments and courts, effectively containing costs for individual parents and offering a uniform process involving some certainty of a successful outcome. ISS Australia therefore strongly supports far greater accession to the Hague Convention than is currently the case. This would greatly assist in containing costs for left-behind parents seeking the return of a child removed or retained overseas, where the country involved is not currently a signatory to the Hague Convention.

(b) The effectiveness of the Hague Convention in returning children who were wrongly removed or retained, to their country of habitual residence

ISS Australia has worked with many families for whom the return of a child to their habitual residence under the Hague Convention has been a welcome outcome, a clear indication of the success of the mechanism the Convention provides. Regrettably, however, this is not the case for many more of the families with whom ISS Australia has worked. In contrast, their experience of Hague Convention processes may be that they involve delays in administrative and judicial proceedings, minimal practical arrangements implemented to facilitate children's return, and difficulties inherent when abducted children cannot be located by the respondent Central Authority, as illustrated below.

Despite the Hague Convention's clearly-stated intention of securing the return of children removed or retained away from their country of habitual residence, it provides no clear guidance on how such returns are to be facilitated once ordered. Apart from some financial assistance provided by some Central Authorities (including Australia's) to cover the costs of a child's travel to their place of habitual residence, parents are generally left to make practical arrangements themselves. ISS Australia, often at the request of Australian Central Authorities, has been able to offer several forms of assistance in this area including:

- Mediation to attempt to develop arrangements for the hand-over of children from one parent to the other;
- Assistance in transporting children to the airport and/or facilitating the handover of children from one parent to another;
- Arranging post-return support for the parent and child on arrival in the child's place of habitual residence via a referral to the relevant member in the international ISS network, particularly for the negotiation and development of ongoing contact arrangements between the child and the separated parent; and
- Direct referrals to refuges and other family violence support services in the country of habitual residence.

ISS Australia notes that its capacity to assist parents with return arrangements depends on referrals from Central Authorities or parents' awareness of its services, and it is open to assisting many more families to facilitate return arrangements in this way. It particularly notes the importance of utilising mechanisms such as mediation and psychosocial support to encourage a return process resulting in as little disturbance and trauma as possible for the child, and providing effective emotional and social support for both parents. ISS Australia believes that by offering such support, the level of conflict between parents can be diffused and parents made more likely to engage willingly in the development of arrangements to facilitate post-return contact between the child and the parent from whom they are separated internationally.

It is common for parents to disclose to ISS Australia's social workers their frustration with the length of processes involved in return applications. The cause of overly lengthy processes can range from delays in processing a case – either in Australia or the responding overseas jurisdiction – to determine whether it fits the criteria outlined in the Hague Convention for assessing parental responsibility, to delays in matters being brought to court for hearing and other factors. ISS Australia notes with concern resource constraints on some overseas Central Authorities resulting in application backlogs and lengthy delays, seriously disadvantaging applicant parents and children removed from Australia. The flow-on effect of such delays is the child's likely subsequent adjustment to their new residence, and the reluctance of courts to order a return if a taking parent can demonstrate the detrimental effects of a removing the child to their former country of residence. Parents in this situation have expressed feelings of betrayal and heightened resentment towards the taking parent which seriously inhibit the subsequent creation of appropriate contact arrangements between them and the child.

Delays may be further compounded by an overseas court's focus on matters not pertinent to the hearing of return applications, e.g. the left-behind parent's parenting capacity. ISS Australia argues, in line with provision under the Hague Convention, that in the vast majority of cases responsibility for determining parenting arrangements for a child rests with a court with jurisdiction in the child's country of habitual residence, and that the purpose of a hearing under the Hague Convention is to secure a child's safe return to that jurisdiction, where decisions in the child's best interests can then be made. ISS Australia notes there appear to be few mechanisms to monitor and ensure compliance with the Hague Convention by Central Authorities and courts, and asks whether a monitoring and compliance role may be needed within the Permanent Bureau of the Hague Conference on Private International Law.

The emotional distress and upheaval for a left-behind parent is immense, magnified by the need to deal with hitherto unfamiliar and confusing legal processes in an attempt to secure their child's return. Compounding these multiple stressors can be the lack of progress reports regarding their case, leaving parents feeling further confused and frustrated with the legal process. ISS Australia, in liaison with Commonwealth and State Central Authorities, often has the capacity to obtain and forward information to its clients, which parents find helpful as it relieves some of the burden of uncertainty which long legal processes can cause. Although aware of resource implications in maintaining links with clients and providing information, ISS Australia nonetheless encourages Central Authorities to keep applicant parents informed of significant developments in their cases, particularly hearing dates, outcomes of decisions and any barriers impeding progress.

ISS Australia's contact with some left-behind parents reveals the serious shortfall of the Hague Convention if an abducted child cannot be located by the respondent Central Authority. ISS Australia is aware of some left-behind parents whose children, despite the efforts of themselves and the respondent Central Authority, have not been located since their removal to an overseas jurisdiction, preventing any legal process to secure their return. Such a situation is likely to occur if the taking parent removes the child to a third country or adopts a fugitive lifestyle, changing the child's identity and/or attempting to ensure they and the child cannot be traced by authorities. In Hague Convention signatory countries with less pervasive government infrastructure it may be easier for a parent to go underground and therefore harder for a child to be subsequently traced. The current outcome for such families is that their Hague Convention application becomes inactive, with neither Central Authority able to proceed until the child surfaces, but neither having the power to compel the other to actively seek the child's whereabouts or to mobilise other appropriate authorities to do so.

Such a situation is a source of severe grief and distress to a left-behind parent, disappointed that government authorities and the Hague Convention itself appear to be powerless to help them. Little can be offered such families except the mobilisation of statutory resources to assist in the location of their children, without which the Hague Convention cannot achieve its purpose of providing a mechanism for an abducted child's return. ISS Australia recommends an investigation into protocols which could facilitate the greater involvement of networks such as Interpol, with their accompanying resources and powers to locate children who have gone missing after abduction. Currently, the only alternative for left-behind parents who can afford to do so is to hire unregulated private investigators who are not required to conduct their business in a way which meets the best interests of the child or considers the holistic needs of the family. Parents who cannot afford this remedy are left waiting and hoping for a change in circumstances which will bring the whereabouts of their child to light.

Lastly, the effectiveness of the Hague Convention can of course only be guaranteed in signatory countries. It provides no recourse to parents whose children have been removed to non-signatory states, of which there are a significant number in the Asia-Pacific region. Apart from Australia and New Zealand, the only other signatories to the Convention in the Asia-Pacific region are Hong Kong, Macao, Fiji, Singapore, Sri Lanka and Thailand. ISS Australia is strongly in favour of an increase in the number of signatories to the Hague Convention, particularly in the Asia-Pacific region, and warmly welcomes the news of Singapore's signing the Convention and a commitment from Japan to do the same in the near future. Without a uniform mechanism such as that provided by the Hague Convention, left-behind parents are left with the task of navigating diverse legal systems largely by themselves, and are by no means assured of a positive outcome. If their cases involve Lebanon or Egypt, they can receive some assistance from the Commonwealth Attorney-General's Department as a result of bilateral treaties with these countries on the management of cases of international child abduction; in all other cases, only minimal official assistance is available.

(c) The roles of various Commonwealth departments involved in returning children who were wrongly removed or retained, to their country of habitual residence

In its work with both left-behind and taking parents, ISS Australia is aware of limitations in the scope of the Hague Convention, and its implementing legislation in the form of the Family Law Rules in Australia, to influence the conduct of returns once decided. This task is usually left to parents, or more recently has in some instances been referred to ISS Australia by the state Central Authority involved. Although ISS Australia acknowledges the capacity of parents to conduct timely, safe and child-focused returns in some cases, it is informed by its work with parents and by professional literature on the subject of the very high level of conflict prevailing within families where international abduction of a child has occurred. Due to its social work expertise and contact with families and children, ISS Australia is also mindful of the cumulative impact of family violence on children, and the relative frequency with which this issue is raised in its work with both taking and left-behind parents. In line with current developments in post-separation support of families and children in this country, ISS Australia firmly believes the highest priority in all interventions is the physical and emotional welfare and safety of children. Currently, the Central Authorities have scope to play only a minimal role in facilitating return procedures, and lawyers, if involved, are neither mandated nor adequately trained in the psychosocial aspects of working with highly-conflictual families to play a significant role.

Family dispute resolution, although mandatory in most parenting disputes, is rarely used in the planning of Hague Convention returns. When receiving referrals from Central Authorities, ISS Australia has had some success in assisting families to facilitate return arrangements, especially when referrals are made across borders to family support services, income support programs and refuges for parents fearing family violence after a return. ISS Australia expresses concern that, without thorough research into the post-return conditions likely to be experienced by children and taking parents, returns may be unsafe and unsuccessful for the children involved, potentially leading in turn to greater parental conflict and ongoing disputes relating to the child's relationship with each parent. ISS Australia is particularly aware of a few cases of return in which, due to technicalities of the child's or taking parent's citizenship status in the country of return, eligibility for income support for the child was almost impossible to secure.

ISS Australia therefore calls for greater liaison between government departments such as Central Authorities, DFAT, Centrelink and others to ensure thorough research is conducted into likely post-return conditions for children and parents, so that resources can be put in place to ensure some measure of financial and other support until such time as parenting arrangements can be determined by the court with jurisdiction in the child's place of habitual residence. ISS Australia further recommends that mediation be used wherever suitable to assist in facilitating return arrangements between parents and children. It stresses that a more holistic view of return processes will ensure less distress and upheaval for children and parents, and encourage greater adherence by both parents to post-return parenting agreements / orders.

(d) Policies, practices and strategies that could be introduced to streamline the return of abducted children

ISS Australia believes the most effective means of streamlining the return of abducted children is to prevent IPCA from occurring in the first place. Its study of the literature surrounding the international abduction of children and its work with parents involved informs its view that IPCA does not occur in a vacuum, but rather within a context of power imbalance, conflict or abuse within families which, if addressed early, may significantly reduce the incidence of IPCA. Although some of the suggestions made below are likely to be resource-intensive, they would help to ensure fewer children and families experience the heartbreak and stress associated with international abduction.

IPCA receives considerable media attention when it occurs, and ISS Australia argues the possibility of its occurrence and the resulting damage to children should be considered during families' engagement with post-separation support services and the judicial system. A high number of enquiries received by ISS Australia relate to the prevention of IPCA, and much of its work involves providing information to parents regarding Airport Watch-List orders and other means to prevent the removal of a child overseas. ISS Australia similarly provides information on this topic to professionals within the community support and legal sectors both on a case-by-case basis and via its training presentations and forums. It is aware some providers of family mediation screen for IPCA risks and educate clients regarding its risks, and recommends that such practices should extend to all family mediation providers. ISS Australia's experience in working with families suggests mechanisms such as Airport Watch-List orders and passport alerts can be effective if parents are aware of them. ISS Australia also advocates for the need to educate parents and professionals regarding appropriate risk assessment for IPCA, being mindful that, in some cases, perpetrators of family violence may seek to unduly control the movement of the other parent by raising concerns about IPCA as justification.

Psychological and social support for families, especially during times of transition such as parental separation, is crucial if the occurrence of IPCA is to be prevented. The research literature on IPCA points to a greater risk in families experiencing high levels of stress and conflict relating to one or both parents' post-migration settlement. Psychosocial supports such as counselling, and practical support in the areas of employment, education, English tuition and parent support services, if accessible to families, may lessen one parent's desire to remove themselves and their children from Australia in the event of family breakdown. Equally important is ready access to family violence support services, including crisis support for women and children fleeing violence and longer-term, culturally-competent counselling and support to women and children. Again, access to such services may mean the difference between remaining in Australia after separating from an abusive partner and deciding to leave the country to escape family violence.

As research also demonstrates links between IPCA and a parent's belief in their entitlement to control the actions of the other parent by removing their children, education regarding IPCA is important for services providing behaviour change programs for perpetrators of family violence. ISS Australia believes that in some instances judicial decisions allowing a parent's relocation with their child to an overseas jurisdiction with accompanying arrangements for contact is preferable to a parent's growing resentment due to the compulsion to remain in a country without family or social support, and the erosion of any goodwill left between the separated parents and a resulting unilateral decision to remove the child from the country. Since the Hague Convention's advent in 1980, technological advances and greater ease of international travel may allow more effective cross-border interactions between parents and children than was previously possible, and relocation and mediated contact arrangements between internationally separated families may minimise the occurrence of non-consensual removal of children.

A further barrier to the streamlining of procedures to return children abducted to or from Australia observed by ISS Australia is the lack of data measuring the rate of international child abduction. Currently, data collected by the Commonwealth Central Authority reflect abductions between Australia and other Hague Convention signatories. Parents unaware of the Hague Convention who attempt to resolve their abduction issue privately or by means of mediation are not counted, nor are cases of abduction between Australia and non-Hague signatories, as no involvement of the Central Authority occurs. Various statistics on the prevalence of IPCA are promoted, but the source or accuracy of such figures is unclear. ISS Australia believes the collection of accurate statistics and the use of these statistics to accurately quantify the problem of IPCA in this country can avoid either needless panic or complacency regarding the extent of IPCA and provide a framework to inform policy decisions surrounding its reduction.

(e) Any other related matters

Unlike some jurisdictions, IPCA is not a criminal offence in Australia, unless the removal of the child occurs in the context of Family Court proceedings relating to the child. ISS Australia supports the current stance of the Commonwealth Attorney-General's Department regarding this issue, despite strong support for the criminalisation of IPCA in some sections of the community. ISS Australia has some sympathy for the argument that criminalisation of IPCA would result in the mobilisation of international police networks and resources to help in locating and returning internationally-abducted children. However, it believes that criminalising IPCA would not, in the long-term, ensure children's best interests in a holistic sense.

ISS Australia holds grave concerns regarding the impact on a child of criminalisation and the imposition of criminal sanctions on one parent. Criminal proceedings and sanctions may result in the labelling of a parent as criminal to the child, as well as possible rapid separation from the parent who has been the child's primary carer if incarceration is imposed as a sentence. This is inevitably not in the best interests of the child and is likely to sever any chances of the parents making ongoing joint decisions for their child or facilitating any form of contact. ISS Australia believes a focus on the need to punish a parent shifts attention away from the necessity to work, as far as the child's safety permits, towards ongoing relationships with both parents in a form which prioritises the child's needs. ISS Australia believes Australia's criminal courts are currently ill-equipped to intervene productively within the complex family circumstances in which the abduction of children occurs. It is further of the view that fear of criminal proceedings may force a taking parent and their child to go underground, adopting a fugitive lifestyle detrimental to a child's right to stability, safety, and the maintenance of day-to-day emotional, social, educational and physical welfare.

ISS Australia thanks the Senate for the opportunity to make a submission to this inquiry. It hopes the inquiry process results in useful policy decisions which will strengthen the existing roles of the Commonwealth and State Central Authorities in implementation of the Hague Convention between Australia and the Convention's other signatories. ISS Australia looks forward to increasing utilisation of education and other services to prevent the occurrence of IPCA and to a greater role for mediation in the facilitation of return procedures for children abducted to or from Australia.

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