

International  
Social Service  
**Australian Branch**



1996 Hague Convention  
on Parental Responsibility  
and Child Protection: Applications  
in the inter-country casework of  
International Social Service

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# 1996 Hague Convention on Parental Responsibility and Child Protection: Applications in the inter-country casework of International Social Service



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# Contents

Executive Summary .....	1
1. Introduction .....	2
2. The ISS network .....	3
3. Scope of research project .....	4
4. Overview of the 1996 Hague Convention .....	5
4.1 The Hague Conference on Private International Law .....	5
4.2 Introduction to the Convention .....	5
Table 1: Chapters of the 1996 Hague Convention .....	7
4.3 Chapters II, III and IV .....	7
Table 2: Key provisions in Chapters II, III and IV .....	8
4.4 Chapter V .....	9
Table 3: Key provisions in Chapter V .....	10
5. Arrangements to implement the Convention .....	11
5.1 Implementing legislation in Australia .....	11
5.2 Role of the Central Authorities .....	11
6. ISS Australia services and the Convention .....	11
6.1 The ISS Mediation-Based Approach .....	12
Diagram 1: ISS mediation-based approaches .....	13
6.2 ISS referral processes .....	14
Diagram 2: ISS referral process in child welfare cases .....	14
Diagram 3: ISS referral process in Hague Convention matters .....	15
6.3 New service delivery model .....	15
Table 4: Applicable Articles of the 1996 Hague Convention .....	16
6.4 Potential role for ISS Australia .....	16
Diagram 4: Parallel and complementary services provided by ISS Australia .....	17
7. Applications of the Convention .....	18
7.1 Improving a child's contact with father .....	19
7.2 Addressing risk of child abuse overseas .....	22
7.3 Cross-border kinship care .....	26
7.4 Custody dispute following retention of child .....	29
8. Conclusions and recommendations .....	33
Resources .....	35
Appendices	
Appendix 1: Status Table - 1996 Hague Convention .....	36
Appendix 2: Project Outline .....	37
Appendix 3: Implementing legislation - Family Law Act 1975 .....	38
Appendix 4: ISS Australia Service Delivery Model .....	39
Appendix 5: Australian Central Authorities .....	41

## Executive Summary

International Social Service (ISS) Australia has undertaken research into the 1996 Hague Convention<sup>1</sup>, in particular its potential application to the inter-country casework of ISS Australia involving children. This research report is part of a project funded by the Ian Potter Foundation, “Boosting Outcomes for Australian Children Using International Laws.”<sup>2</sup>

The 1996 Hague Convention is a multi-lateral treaty developed by the Hague Conference on Private International Law to improve the protection of children in international situations. It does this by building a structure for effective international co-operation in child protection matters through a network of Central Authorities at the State and Commonwealth level.

The Convention determines which country’s authorities have jurisdiction to take measures to protect children across international borders, clarifies which are the applicable laws, and enables recognition and enforcement of protection measures in all Contracting States.

Currently only 15 countries, including Australia, have ratified the Convention and to date there have been no Australian cases under the Convention. However, once more countries ratify the Convention, it is expected that the Convention will start operating, with significant changes in the way international cases involving child protection and parental responsibility are dealt with.

This project has enabled ISS Australia to deepen its own understanding of the 1996 Hague Convention, positioning us as the leading non-government organisation in Australia with expertise on the Convention. We have also developed more effective service delivery systems for responding to inter-country cases involving children and have identified key aspects of the Convention that could be applied to improve outcomes for children.

This report sets out ISS Australia’s achievements during the project including:

- The findings of our research into the application of the 1996 Hague Convention in ISS Australia’s inter-country casework;
- Development of a new database for data collection and research purposes;
- Development of a new service delivery model to support implementation of the Convention in cross-border cases involving child protection or parental responsibility;
- Details of the contribution ISS Australia could make to complement the functions of the Central Authorities under the Convention and the parallel services we could provide to families affected by cross-border child protection or parental responsibility issues.

Key recommendations emerging from this report include:

- Building collaborative relationships between ISS Australia and the Central Authorities in relation to cross-border cases involving child protection or parental responsibility;
- The need for a new ISS Australia program to be funded by the Federal Government for affected families and children;
- As part of the new program, a range of training activities aimed at building knowledge of the Convention and how to apply it to improve outcomes for children.

Stage two of the project, which has also been funded by the Ian Potter Foundation, will involve promoting the services ISS Australia can offer nationally in relation to the 1996 Convention. In this way ISS Australia aims to progress some – if not all – of the recommendations in this report and to be able to measure the impact on outcomes for children in international situations.

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<sup>1</sup> Hague Conference, *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, 1996.

<sup>2</sup> For full details of the project, see Appendix 2.

# 1. Introduction

The *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (“the Convention”) was concluded in 1996 and entered into force in 2002. It is the result of work undertaken by the Hague Conference on Private International Law to improve the protection of children in international situations through the implementation of a multi-lateral treaty. The Convention takes into account the principles set out in the UN Convention on the Rights of the Child and confirms that the best interests of the child are to be a primary consideration.

In 2003, Australia ratified the Convention, creating new responsibilities on the Commonwealth of Australia to co-operate with other Contracting States in relation to measures of protection for the person and property of children in international situations.

The Convention is currently in force in 15 Contracting States: Albania, Armenia, Australia, Bulgaria, Czech Republic, Ecuador, Estonia, Hungary, Latvia, Lithuania, Monaco, Morocco, Slovakia, Slovenia and Ukraine. A further 19 European countries have signed the convention but are yet to proceed with ratification.<sup>3</sup>

Under Article 29 of the Convention, Contracting States are required to designate a Central Authority to perform certain functions and discharge responsibilities under the Convention on behalf of the Contracting State, with federal states being able to appoint more than one central authority. Effective Central Authorities are already operating at federal and state levels in Australia in relation to the implementation of another key Hague Convention relating to children, the 1980 *Convention on the Civil Aspects of International Child Abduction*. Details of the Departments that will undertake the Central Authority functions for the 1996 Hague Convention are contained in Appendix 5. For details of the Central Authorities in other Contracting States, see the Hague Conference website.<sup>4</sup>

With only 15 Contracting States, the Convention remains limited in its impact at this stage; indeed, as at the date of this report, there have been no cases involving requests under this Convention in Australia. With a further 19 European states still to ratify the Convention, this situation could change at any time. As there is a large amount of inter-country movement between Australia and the United Kingdom, ratification of the Convention by that country is likely to result in requests being made under the Convention between Australia and the UK.

Once the Convention is operational, there will be significant changes in the way inter-country matters involving children are dealt with. The Commonwealth and State/Territory Central Authorities have already made significant progress preparing for implementation of the new Convention and ISS Australia too is pro-actively preparing to make a contribution when the Convention starts operating. Implementation of the Convention in other Contracting States would, of course, be dependent upon these States introducing any domestic implementing legislation that may be required.

This report does not attempt to provide a fully comprehensive overview of the provisions of the Convention<sup>5</sup> but focuses on key aspects of the Convention of relevance to International Social Service’s inter-country casework involving children. The report is aimed at a non-legal audience but will be relevant for lawyers and social workers alike. This report is especially important for building ISS Australia’s own expertise on the 1996 Hague Convention and identifying ways to effectively apply the Convention in our inter-country casework services for children in need of protection across borders.

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<sup>3</sup> For the full Status Table for the Convention, see Appendix 1.

<sup>4</sup> Hague Conference website, [www.hcch.net](http://www.hcch.net).

<sup>5</sup> An Explanatory Report on the 1996 Hague Convention was prepared by Paul Lagarde in 1998 and gives a detailed analysis of the provisions of the Convention.

## 2. The ISS network

International Social Service (ISS) is an international, non-government organisation with no political or religious affiliations, dedicated to assisting families separated by international borders, with a special emphasis on the best interests of children in these situations, particularly children deprived of parental care, children affected by family breakdown across borders and internationally displaced children.

The ISS General-Secretariat, located in Geneva, co-ordinates the international ISS network which is made up of over 150 social service organisations with expertise in cross-border child and family welfare matters. ISS units around the world are familiar with their national and local social welfare and legal systems, enabling ISS to access local information and expertise in many countries. ISS facilitates communication and co-operation and acts as a central contact point linking up social and legal services of different countries and linking family members separated across borders.

There are 3 levels of membership of the network:

### Branches

- Stand-alone NGOs
- Strong links with local government departments and child protection services
- A local network of welfare agencies

### Affiliated Bureaux

- Usually located within the child or family welfare department of the overseas government
- Occasionally located within an NGO

### Correspondents

- May be located within a government department or within an NGO

ISS Australia was established in 1961 and in 2008 our core services include:

1. Inter-country welfare and protection services involving children
  - Facilitating the placement of children currently in Out of Home Care in Australia with overseas relatives
  - Home visits and assessment to facilitate overseas placements
  - Assessments of children/families who are travelling or moving to another country and where there are welfare concerns
  - Welfare checks where child protection concerns are raised across international borders
  - Early intervention with at-risk families to avoid statutory intervention
2. Family counselling and mediation
  - Counselling and mediation for families in conflict across borders
  - Facilitation of contact for children with a parent or other family members abroad and cross-cultural counselling to maintain contact
  - Psychosocial assessments and reports for children in cross-border family disputes
  - Distance mediation for families, for example, where there is a dispute about a child's residence, parenting or contact arrangements
3. International Parental Child Abduction Service
  - A telephone information, advice and referral service for parents and children affected by International Parental Child Abduction
  - Practical and emotional support for affected family members

- Mediating outcomes that are in the best interests of the child
  - Prevention of abduction where possible
4. Tracing and reunification services
- Tracing family members via the ISS network, including post adoption tracing
  - Facilitating reunification and associated counselling and support.

The structure of the ISS network aligns closely with the network of Central Authorities that liaise and co-operate in relation to cases under the Hague Children's Conventions. ISS Australia is well positioned to work closely with the Central Authorities, both in Australia and overseas through our ISS counterparts abroad.

Currently, ISS Australia works closely with the Commonwealth and State/Territory Central Authorities in relation to matters under the 1980 Hague Convention. The Federal Attorney-General's Department funds ISS Australia to deliver the International Parental Child Abduction (IPCA) Service, a support service for families affected by abduction. In this regard, ISS Australia provides an important supportive function that helps the Central Authorities discharge their responsibilities under the 1980 Hague Convention.

ISS Australia is working towards extending this collaborative relationship to include matters under the 1996 Hague Convention and a key objective of this research report is to support the building of this collaborative relationship.

### 3. Scope of research project

This report is the output of a project funded by the Ian Potter Foundation, "Boosting outcomes for Australian children using international laws". The project aims to build ISS Australia's expertise on the 1996 Hague Convention and to identify ways to effectively apply the Convention in ISS Australia's inter-country casework in order to assist children in need of protection in international situations.

Stage 1 of the project consists of 3 main components:<sup>6</sup>

- i) Research into the implementation of the Convention through ISS Australia's inter-country casework (includes literature review and case studies)
- ii) Database development for data collection purposes and to record relevant data for research purposes
- iii) Development of a service delivery model to support implementation of the Convention in cross-border cases involving child protection and/or parental responsibility.

This report sets out the findings of ISS Australia's research and details a number of achievements that will improve our capacity and readiness to deliver services supporting implementation of the 1996 Hague Convention. Upon completion of stage 1 of the project, ISS Australia expects to:

- have clearly articulated the contribution that ISS Australia could make in the implementation of the Convention and our potential future role in this regard;
- be the key non-government organisation with expertise in the Convention;
- be better positioned to build collaborative relationships with the Central Authorities at Commonwealth and State/Territory levels in relation to Convention cases; and
- have more effective service delivery systems for responding to inter-country cases involving parental responsibility and/or child protection.

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<sup>6</sup> For a complete outline of the project, please see Appendix 2.

## 4. Overview of the 1996 Hague Convention

### 4.1 The Hague Conference on Private International Law

The Hague Conference on Private International Law, established in 1893, is an inter-governmental organisation, the purpose of which is to work for the progressive unification of the rules of private international law through the drafting of multilateral treaties. It currently has 69 Member States.

Private International Law operates across international borders and is concerned with the legal rights and relationships of persons in situations where two or more legal systems are involved. It provides legal security and protection for persons across borders and uniform rules on jurisdiction and competence, thereby determining which country's authorities are entitled to decide matters that cross international borders. It also provides for recognition and enforcement of foreign judgments, clarifying when foreign decisions, judgments and decrees can be recognised or enforced. The Hague Conference promotes cross-border co-operation, both administrative (usually via Central Authorities) and judicial. It determines applicable law, clarifying which country's laws should be applied in a given situation.

There are three Hague Children's Conventions<sup>7</sup> plus a number of Conventions relating to international recovery of maintenance, which are all important achievements of the Hague Conference, providing as they do a legal framework to protect children across international borders. They provide workable systems and procedures for implementing the more broadly expressed principles set out in the Convention on the Rights of the Child (CRC).

ISS as an international organisation has a long history of close co-operation with the Hague Conference, in particular:

- The General-Secretariat of ISS has participated actively in developing, evaluating and supporting the Hague Conventions relating to children.
- ISS collaborates closely with Central Authorities around the world through our International Reference Centre, located within the General-Secretariat in Geneva.
- ISS around the world is involved in the practical operation of Conventions through our inter-country casework involving child welfare.
- ISS Australia and ISS counterparts in other countries have developed new mediation services, which are of particular relevance in the context of the 1996 Convention.
- ISS Australia collaborates closely with all Central Authorities in Australia in relation to the delivery of the International Parental Child Abduction Service, which has been funded by the Federal Attorney-General's Department since 2005.

There is a close alignment between cross-border child welfare work undertaken by ISS Australia in partnership with our overseas network and the objectives of the 1996 Hague Convention; indeed, through our inter-country child welfare casework ISS Australia is already delivering outcomes similar to the intended outcomes of the Convention.

### 4.2 Introduction to the Convention

The 1996 Hague Convention was developed in order to address deficiencies in the 1961 *Hague Convention concerning the powers of authorities and the law applicable in respect of the protection of minors*. This Convention has only been ratified by 11 Western European States and its main limitation is that jurisdiction over the protection of minors is prioritised for the authorities of the child's country of nationality. This was not always appropriate because the authorities of the child's habitual residence might be better placed to assess the child's

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<sup>7</sup> 1980 Hague Convention on Parental Child Abduction; 1993 Hague Convention on Inter-country Adoption; and the 1996 Hague Convention on Child Protection.

situation or needs. Also, the 1961 Convention could not be applied in situations where a child had dual nationality, which was quite often the case.

The 1996 Hague Convention has clear advantages such as:

- Mirroring the “best interests of the child” principle set out in Article 3 of the CRC;
- Providing Contracting States with a practical means of fulfilling the obligations of co-operation which arise under the CRC;
- Building a structure for effective international co-operation in child protection matters and promoting co-operation through the global network of Central Authorities;
- Establishing uniform rules to apply in cross-border situations involving children;
- Bringing certainty to decision-making involving children in cross-border situations and avoiding the possibility of conflicting decisions; and
- Building bridges between legal systems in diverse cultural or religious contexts.

The objects of the Convention, as detailed in Article 1, are to:

- Determine which country’s authorities have jurisdiction to take measures to protect the person or property of children in international situations;
- Determine which laws are to be applied by the authorities in exercising their jurisdiction, for example clarifying which country’s laws apply when court orders are made in one country but the affected person goes overseas;
- Determine the applicable laws regarding the enforcement of parental responsibilities;
- Enable recognition and enforcement of protection measures in all Contracting States; and
- Establish co-operation between the authorities of Contracting States in order to achieve the key objective of protecting children.

The Convention’s key rule is to give jurisdiction to take measures of protection to the authorities of the child’s country of habitual residence. However, it also allows Contracting States to take emergency measures of protection, if required, and takes into account children with no country of habitual residence, such as refugee or internationally displaced children. The Convention applies to children under the age of 18 and in this regard goes further than the 1980 *Convention on the Civil Aspects of International Child Abduction*, which only applies to children aged under 16. The 1996 Convention can be used to augment the operation of the 1980 Convention, not only by extending the age of children to which it applies but also by enabling return of an abducted child in situations outside the 1980 Convention, for example, where the countries concerned are not Contracting States to the 1980 Convention. The 1996 Convention also provides comprehensive provisions to guide decisions about parental contact, which cannot be dealt with fully under the 1980 Convention.

In short, the 1996 Hague Convention addresses the following situations:

- Protection of children at risk and administration of children’s property across borders;
- Protection of refugee or internationally displaced children, trafficked children, runaway teenagers and unaccompanied minors;
- Cross border parental disputes over custody or access, including access applications not fully addressed by the 1980 Convention;
- Conflicting claims for parental responsibility across borders;
- Placement of children in foster or institutional care overseas; and
- International parental child abduction matters outside the 1980 Hague Convention.

The full title of the Convention, *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, repeats the titles of the four most important chapters of the Convention - chapters II, III, IV and V. An overview of the 7 chapters is below.

**Table 1: Chapters of the 1996 Hague Convention**

<b>Chapter</b>	<b>Contents</b>
I. Scope of Convention	Defines the objects of the Convention, the children to whom it applies and the types of protection measures that can be taken
II. Jurisdiction	Resolves jurisdictional conflicts over the protection of minors by requiring that Contracting States accept certain limitations on their jurisdiction
III. Applicable Law	Clarifies that a competent authority taking a measure of protection applies its own internal laws and that parental responsibility is subject to the law of the child's country of habitual residence
IV. Recognition and Enforcement	Provides a detailed set of rules for the recognition and enforcement in a Contracting State of Measures of Protection taken in another Contracting State
V. Co-operation	Establishes a mechanism for co-operation between Contracting States through the creation of Central Authorities and sets out the types of requests that can be made between Central Authorities
VI. General Provisions	Facilitates the implementation and monitoring of the Convention and ensures the confidentiality of data is protected
VII. Final Clauses	Reproduces the usual final clauses of the Hague Conventions

### 4.3 Chapters II, III and IV

These chapters contain the key provisions that establish uniform rules relating to jurisdiction, applicable law and recognition and enforcement. Chapter II on jurisdiction is considered “novel” compared with the earlier 1961 Hague Convention<sup>8</sup> in that it resolves jurisdictional conflicts by requiring Contracting States to accept considerable limitations to the jurisdiction of their authorities, thereby eliminating competition between different authorities to take measures of protection for the person or property of a child.

The jurisdiction to take measures of protection rests with the competent authorities of the country where the child is habitually resident (Article 5), subject to certain limitations for refugee or internationally displaced children with no habitual country of residence (Article 6) and cases of wrongful removal or retention of a child (Article 7). If another country's authorities intervene to protect a child, it can only do so with the agreement or at the request of the country where the child is habitually resident (Articles 8 and 9). The only exceptions are temporary measures in cases of urgency (Article 11) and provisional measures with a strictly territorial effect (Article 12).

Chapter III clarifies that the country exercising jurisdiction to take measures of protection should apply its own internal laws (Article 15) and that parental authority is attributed or extinguished by operation of the law of the country of the child's habitual residence (Articles 16 to 18).

Chapter IV provides a detailed set of rules for the recognition and enforcement in a Contracting State of Measures of Protection taken in another Contracting State. It distinguishes clearly between recognition of a measure of protection (Article 23), the declaration of enforceability or registration of a measure of protection for the enforcement purposes (Article 26), and the actual enforcement (Article 28). There are also grounds for non-recognition of measures (Article 23) and a process whereby requests can be made for recognition or non-recognition of measures (Article 24).

<sup>8</sup> See Lagarde, Paul, *Explanatory Report on the 1996 Hague Convention*, 1998, page 541.

**Table 2: Key provisions in Chapters II, III and IV**

<b>Article</b>	<b>Short description</b>	<b>Details</b>
Article 5	Jurisdiction depends on child's country of habitual residence	Primary jurisdiction to make decisions about measures of protection for the person or property of a child is with the authorities of the Contracting State of the child's habitual residence.
Article 6	Refugee children or internationally displaced children	For these children, the authorities of the Contracting State where the child is present have jurisdiction. This jurisdiction ceases to apply when the child's State of habitual residence is determined.
Article 7	Wrongful removal or retention of a child	The authorities of the Contracting State where the child was habitually resident immediately prior to the wrongful removal/retention keeps jurisdiction until the child acquires habitual residence in another State, so long as: either each party with custody rights has acquiesced in the removal/retention; or the child has resided in the other State for at least 1 year, there are no pending requests for return orders and the child is settled in the new State.
Article 8	Transfer of jurisdiction to another Contracting State	The authorities of the Contracting State which normally has jurisdiction to take measures of protection may request the authority of another Contracting State to assume jurisdiction if it thinks the latter would be better placed to assess the best interests of the child; alternatively, it may suspend consideration of the case and invite the parties to make the request for transfer to the other State.
Article 9	Request to transfer jurisdiction from another Contracting State	If the authority of a Contracting State considers that it is best placed to assess the child's best interests, it may request authorisation from the authority of the Contracting State of habitual residence of the child to exercise jurisdiction to take measures of protection; or it may invite parties to request such a transfer.
Article 11	Jurisdiction to take measures of protection in cases of urgency	The authorities of a Contracting State where a child is present have jurisdiction to take necessary measures of protection in cases of urgency. Where the child is habitually resident in a Contracting State, such urgent measures will lapse when that State takes necessary measures. Where the child is habitually resident in a non-Contracting State, such urgent measures will lapse when another State takes necessary measures which are recognised by the Contracting State that initially took the urgent measures.
Article 12	Jurisdiction to take provisional measures of protection with territorial effect	The authorities of a Contracting State where a child or child's property is present have jurisdiction to take provisional measures of protection which have a territorial effect limited to the State in question. These measures will lapse in the same circumstances as outlined in Article 11.
Article 15	Law applicable to measures of protection	When exercising jurisdiction under Chapter II (relating to jurisdiction), Contracting States shall apply their own law.

Article	Short description	Details
Article 16	Attribution or extinction of parental responsibility	The attribution or extinction of parental responsibility by operation of law (without administrative or judicial intervention), by agreement or by unilateral act is governed by the law of the State of the child's habitual residence. Parental responsibility attributed by the law of the State of habitual residence continues even if the child's habitual residence changes.
Article 17	Exercise of parental responsibility	The exercise of parental responsibility is governed by the law of the State of the child's habitual residence.
Article 23	Recognition of measures of protection and grounds for non-recognition	Measures of protection taken in one Contracting State are automatically recognised in all other Contracting States, subject to refusal in certain circumstances.
Article 24	Request decision on whether measures of protection are recognised	Any interested person may request that the authorities of a Contracting State make a decision on whether measures of protection taken in another Contracting State are recognised.
Article 26	Provide declaration of enforceability of measures of protection	Upon request by an interested party, measures taken in one Contracting State that require enforcement in another Contracting State shall be declared enforceable or registered for enforcement purposes in the latter State.
Article 28	Enforcement of measures of protection	Measures taken in one Contracting State and declared enforceable or registered in another Contracting State shall be enforced in the latter State as if they had been taken there and are enforced in accordance with its own law.

#### 4.4 Chapter V

Chapter V establishes a mechanism for co-operation between Contracting States involving the creation of Central Authorities (Article 29). Consistent with other Hague Conventions, these authorities co-operate to achieve the purposes of the Convention but “in principle” are imposed with no obligations to take an initiative, to give information or to co-ordinate in advance of the taking of measures (Articles 29 to 32).<sup>9</sup> Only in Article 33, which relates to overseas foster or institutional care or the provision of *kafala*<sup>10</sup>, is there a specific obligation on Central Authorities. This Article states that a Contracting State shall consult with the authorities of the other Contracting State in question if such a placement is being contemplated. Chapter V also provides for communications and direct requests for information between Central Authorities in relation to measures of protection (Articles 34 to 37).

ISS Australia expects that the level and types of co-operation anticipated in Chapter V will not necessarily result in the desired outcomes for particular children. Where authorities are required to “take all appropriate steps” in relation to an Article, without concrete obligations actually being imposed, it is difficult to anticipate how effective these Articles will be in terms of achieving specific outcomes for children in need of protection. This is where ISS Australia may have a complementary role boosting outcomes for children in these situations.

<sup>9</sup> Lagarde, Paul, *Explanatory Report on the 1996 Hague Convention*, 1998, page 591.

<sup>10</sup> Kafala is an Arabic legal term for a formal pledge to support and care for a specific orphaned or abandoned child until the child reaches majority. Kafala is considered a form of unilateral contract and is used in various Islamic nations that do not legally recognise the concept of adoption.

**Table 3: Key provisions in Chapter V**

<b>Article</b>	<b>Short description</b>	<b>Details</b>
Article 30	General obligation of co-operation	The Central Authorities have a general obligation to co-operate to achieve the Convention's purposes. They shall take appropriate steps to provide information on the laws in force and services available in their States regarding child protection.
Article 31(a)	Facilitate communications and offer assistance	The Central Authorities are required to take all appropriate steps to facilitate the communications and offer the assistance necessary between Contracting States regarding Articles 8 and 9 (transfer of jurisdiction) and regarding Chapter V (cooperation).
Article 31(b)	Mediate situations	The Central Authorities are required to take all appropriate steps to facilitate, by mediation or similar means, agreed solutions for the protection under the Convention of the child's person or property.
Article 31(c)	Locate a child	The Central Authorities are required to take all appropriate steps to locate a child where it appears that the child may be present and in need of protection in the requested State.
Article 32(a)	Report on the situation of a child	Upon request by the authority of a Contracting State where a child has substantial connection, the Central Authority of the State where the child is habitually resident and present may provide a report on the situation of the child.
Article 32(b)	Request measures of protection	Upon request by the authority of a Contracting State where a child has substantial connection, the Central Authority of the State where the child is habitually resident and present may request its State's authorities to consider taking measures of protection for the child.
Article 33	Facilitate cross-border care placement	If an authority of a Contracting State contemplates placement of a child in foster or institutional care or the provision of care by <i>Kafala</i> for a child in another Contracting State, it shall first transmit a report to the Central Authority of the latter State, and can only authorise the placement with the latter State's consent.
Article 34	Request information for measures of protection	Where measures of protection are contemplated, the authorities of a Contracting State may request any authority of another Contracting State to provide information relevant to the protection of the child.
Article 35(1)	Help implement measures of protection or the exercise of access rights	The authorities of a Contracting State may request the authorities of another Contracting State to assist in implementing measures of protection taken under the Convention, especially in securing effective exercise of rights of access/contact.
Article 35(2)	Request evidence and findings regarding suitability to exercise access	A parent who lives in a different Contracting State to the child may request the authorities of the parent's State to compile evidence and findings regarding suitability of a parent to exercise access. Authorities of the child's Contracting State shall consider these findings when determining applications for access.

Article	Short description	Details
Article 36	Inform another State of a child in serious danger	If child is in serious danger, the authorities of a Contracting State that has taken or is considering taking measures for the protection of the child, and is informed that the child is present in another State, shall inform the authorities of the latter State of the danger involved and the measures taken or being considered.

## 5. Arrangements to implement the Convention

### 5.1 Implementing legislation in Australia

Enforceability of the Convention in Australia is limited to the extent that it is provided for in the implementing legislation and regulations. The Convention is implemented in Australia through the Commonwealth *Family Law Act 1975* and the *Family Law (Child Protection Convention) Regulations 2003*. These apply in all States and Territories until the States/Territories implement their own legislation with a comparable effect as the Commonwealth legislation. To date, only Queensland<sup>11</sup>, Tasmania<sup>12</sup> and New South Wales<sup>13</sup> have passed implementing legislation and the Northern Territory has advised that it intends to rely on the Commonwealth legislation. The key provisions of the *Family Law Act* relating to jurisdiction for the person of a child are contained in Division 4, subdivision B of the Family Law Act (see Appendix 3).

### 5.2 Role of the Central Authorities

Central Authorities serve as focal points for inter-state co-operation under the Convention and are generally located within or connected to the Ministry responsible for cross-border matters involving children. They provide advice and information on preventive measures, local laws and procedures, monitor the status of cases, facilitate access to the legal system for foreign parties and send and receive requests under the Convention.

The federal Attorney-General's Department has prepared draft documentation outlining the procedures to be followed by the Australian Central Authorities for incoming and outgoing referrals in relation to the 1996 Hague Convention. The final procedures are currently subject to negotiation between the various Central Authorities and are still to be finalised.

## 6. ISS Australia services and the Convention

ISS Australia's core areas of work align closely with the aims and provisions of the Hague Children's Conventions. The following services are already provided:

1. International Parental Child Abduction Service (relates to the 1980 Hague Convention)
  - Providing practical and emotional support to family members affected by abduction
  - Mediating outcomes such as return of a child or residence arrangements for a child
  - Cross-border access/contact arrangements
  - Prevention of abduction where possible.
2. International child welfare matters (may in future relate to the 1996 Hague Convention)
  - Children deprived of parental care, trafficked children, unaccompanied minors, internationally displaced children

<sup>11</sup> *Child Protection (International Measures) Act 2003 (Queensland)*

<sup>12</sup> *Child Protection (International Measures) Act 2003 (Tasmania)*

<sup>13</sup> *Child Protection (International Measures) Act 2006 (New South Wales)*

- Cross-border disputes over custody/residence of the child
- Cross-border care placements
- Cross-border protection of “at risk” children.

ISS Australia has a valuable contribution to make supporting the implementation of the 1996 Hague Convention. Even though the Convention provides a mechanism to link up the competent authorities in the two Contracting States concerned, complex cross-border cases involving disputes about parental responsibility or concerns for the welfare of a child can be extremely challenging to resolve. This is where the expertise of the ISS international network is of great value as ISS workers located in the two Contracting States can provide support to all family members concerned and liaise with the Central Authorities in their own country to promote effective outcomes for the child.

This is the model that has been successfully adopted by ISS Australia in the delivery of our International Parental Child Abduction (IPCA) Service, which supports the functions of the Central Authorities in relation to the 1980 Hague Convention on Abduction. This service has been growing each year and is now in its fourth year of federal government funding. In the 2008/09 financial year, funding for the service has been increased to enable ISS Australia to undertake mediation of abduction matters where appropriate. This demonstrates the growing need for ISS Australia, through the IPCA Service, to complement the functions of the Central Authorities implementing the 1980 Hague Convention.

It is also envisaged that there will be cases where an overseas Central Authority may not be functioning effectively and the capacity for the Australian Central Authorities to contact and liaise with overseas authorities via the ISS network may help to facilitate successful outcomes in these cases.

There are clear advantages to the engagement of ISS Australia and its network in cross-border cases involving children, including 1996 Hague Convention cases. For example:

- ISS staff around the world are familiar with the administration and operations of the national and local social welfare and legal systems in their own country;
- ISS facilitates communication and cooperation between social and legal services of different countries and between separated family members across borders;
- ISS has expertise in the Hague Conventions relating to children and understands this international legal context;
- ISS collaborates closely with the Central Authorities and with embassies/consulates.

## **6.1 The ISS Mediation-based approach**

ISS offers a range of mediation-based approaches to help resolve cross-border cases involving children and parental responsibility and/or child protection. It is important to note that mediating outcomes in these cases may or may not involve sitting down with family members for a formal mediation session with an accredited mediator. Often ISS Australia mediates outcomes using different communication methods such as phone and e-mail and by working directly with each parent (in partnership with ISS overseas) to get them to focus on what is in the best interests of their children. Details of the main ISS approaches to mediation are contained in the Diagram 1 below.

Currently ISS Australia only receives funding to undertake mediation cases in relation to abduction matters through the IPCA Service. This report recommends extending ISS Australia’s mediation services to include mediation of a wide range of issues involving child protection and/or parental responsibility, where the 1996 Hague Convention may apply. This

recommendation is also aimed at meeting the requirements of the Family Law Act 1975 for separating parents to undertake mediation or other forms of dispute resolution.

Generally, ISS Australia's mediation services are delivered in partnership with Family Relationship Centres (FRCs), which provide similar family services to those provided by ISS Australia. FRCs have mediation expertise but they have a *local focus* and therefore have limited capacity to provide inter-country services for families where one or more of the family members are overseas. It would be difficult for FRCs to deliver effective inter-country casework without assistance from ISS Australia, which has international expertise and access to the ISS international network. There is therefore a key role for ISS Australia as the expert co-ordination point in inter-country mediation cases, working in partnership with FRCs.

### Diagram 1: ISS mediation-based approaches

#### Stage 1: Preparation for mediation

- Preparing both parents for mediation, with assistance from ISS overseas
- Opening communication channels across international borders
- Reducing hostility between the parents, by focusing them on the children's needs
- Practical and emotional support for family members in Australia, through ISS Australia
- Parallel support for family members overseas through ISS counterparts abroad



#### Stage 2: Mediation

##### Option 1:

- ISS mediation-based approaches using e-mail and phone or, where possible, in person;
- ISS Australia works with one parent and ISS overseas works with the other parent;
- The children are involved in the process as appropriate.

##### Option 2:

- ISS mediation-based approaches using e-mail and phone or, where possible, in person;
- One ISS Australia worker works with the parent in Australia and another ISS Australia worker works with the parent overseas (this is used if ISS overseas has limited capacity);
- The children are involved in the process as appropriate.

##### Option 3:

- An accredited mediator from an FRC in Australia conducts mediation, with advice and support from ISS Australia (ISS Australia can also participate in the mediation if required);
- ISS Australia contributes its expertise on the relevant Hague Convention and provides information about the legal, social/cultural context of the country concerned;
- The children are involved in the process as appropriate.

##### Option 4:

- An Accredited mediator from an FRC in Australia conducts mediation, with advice and support from ISS Australia, while ISS and a mediator in the other country also contribute;
- ISS Australia undertakes the support role (as in option 3) whilst ISS overseas also works in partnership with a mediation specialist overseas; and
- The children are involved in the process as appropriate.



### Stage 3: Follow up

- Follow up support is provided, with ISS Australia working with one parent and ISS overseas working with the other parent;
- If the child moves from one country to another, or if a parent is visiting Australia (or overseas) for contact with the child, ongoing support is provided by ISS to both parents to reduce hostility and prevent further conflict about parenting arrangements;
- If further mediation is required, stage 2 options could be repeated (if appropriate); and
- When ISS is working with both parents in Australia (for example if the other parent moves here), a specialist contact service may provide ISS Australia with specialist advice, or supervise contact visits if required.

## 6.2 ISS referral processes

The ISS network provides the link with overseas authorities while also ensuring that children and other family members in both countries concerned receive assistance. As detailed in Section 6.1 of this report, ISS Australia uses a range of mediation-based approaches to bring parents closer to resolution of their conflict by focussing on the best interests of the child. Diagrams 2 and 3 illustrate how the ISS network already functions in child welfare cases, and how it would function in child welfare cases involving the 1996 Hague Convention.

**Diagram 2: How the ISS network functions - Child welfare matters**

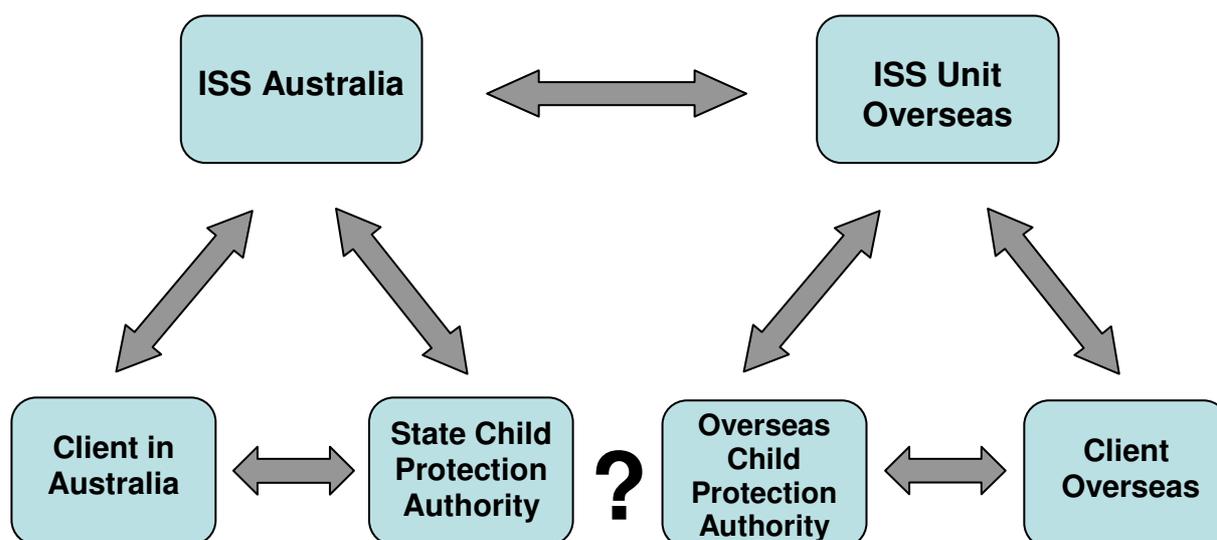


Diagram 2 illustrates the referral process for ISS involvement in a child welfare case across international borders. In some cases, an effective link between the Australian and overseas child protection authorities may not exist and if requested by a State/Territory Child Protection Authority, ISS Australia will make a referral to its ISS counterpart overseas, which has local expertise on how their social and legal systems work and is able to liaise with the relevant authorities in their country. Even in cases where the Australian child protection authority has direct links with overseas counterparts, there can be great benefit in using the ISS network to assist and they can often get a more speedy, culturally appropriate service, based on their local contacts and expertise.

**Diagram 3: How the ISS network functions - Hague Convention matters**

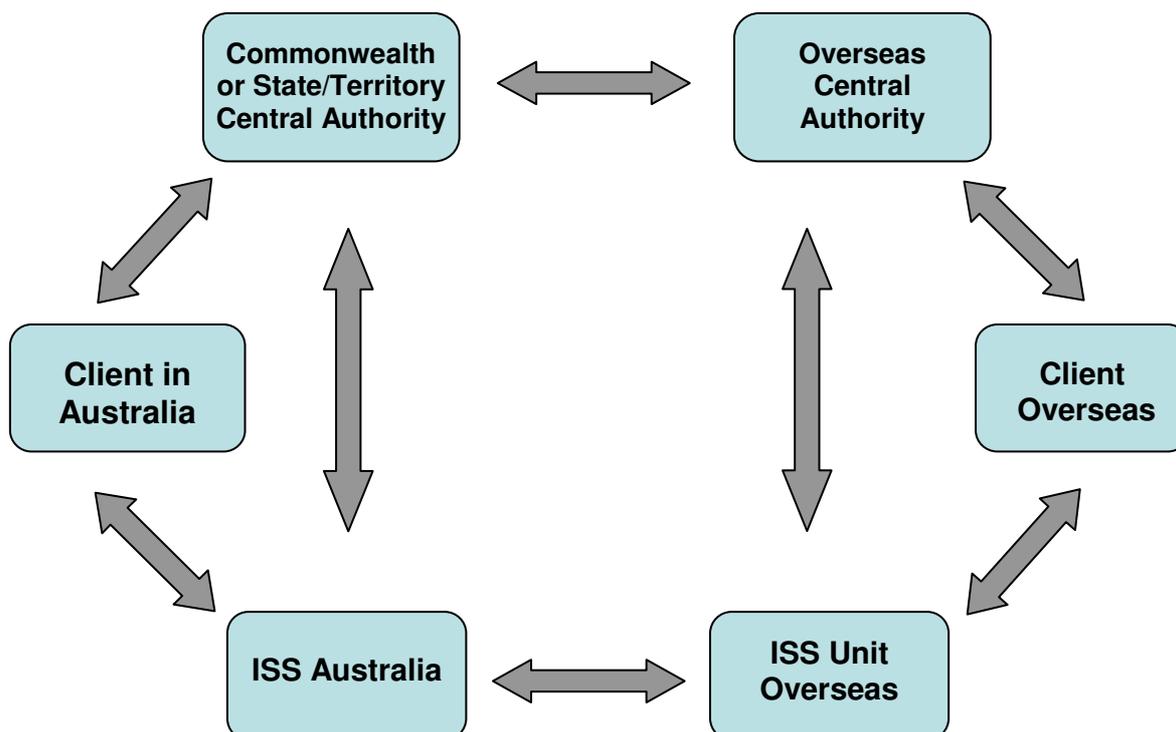


Diagram 3 shows the additional layer of complexity where the Hague Convention is invoked as the Central Authorities can make a direct link with the overseas authorities. ISS would still have a role in these cases providing a link with overseas counterparts via the overseas network in situations where the overseas central authority is not functioning effectively or the cooperation envisaged by the 1996 Convention does not occur. ISS can also provide family members, either in Australia or overseas, with any additional services they require such as counselling, referrals and general support. There is also a key role for ISS mediating outcomes in these cases using a range of mediation-based approaches across borders.

### **6.3 New service delivery model**

This project has developed a new service delivery model which applies the Convention to inter-country child welfare cases undertaken by ISS Australia. Under this model, we have identified the *services* and *actions* that could potentially be delivered and the *outcomes* that could be achieved in the delivery of casework services using the 1996 Hague Convention. Services fall within six broad service categories and for each service category, there are a number of services that can be provided. For full details of the model, see Appendix 4.

The service delivery model has been embedded into a new database, which has been developed as part of this research project. The database records case-related data in accordance with the service delivery model and provides a tool for determining which provisions of the 1996 Hague Convention could apply. While the database has been developed specifically for child welfare services involving the 1996 Hague Convention, the database has also been extended to include data recording for other ISS Australia services. Importantly, the database includes accessible descriptions of the key provisions of the 1996 Hague Convention that could apply in a given case (Table 5). This will be a valuable tool as it aims to de-mystify the Convention for social workers and other non-legal personnel involved in advising or supporting clients in these matters.

**Table 4: Applicable Articles of the 1996 Hague Convention**

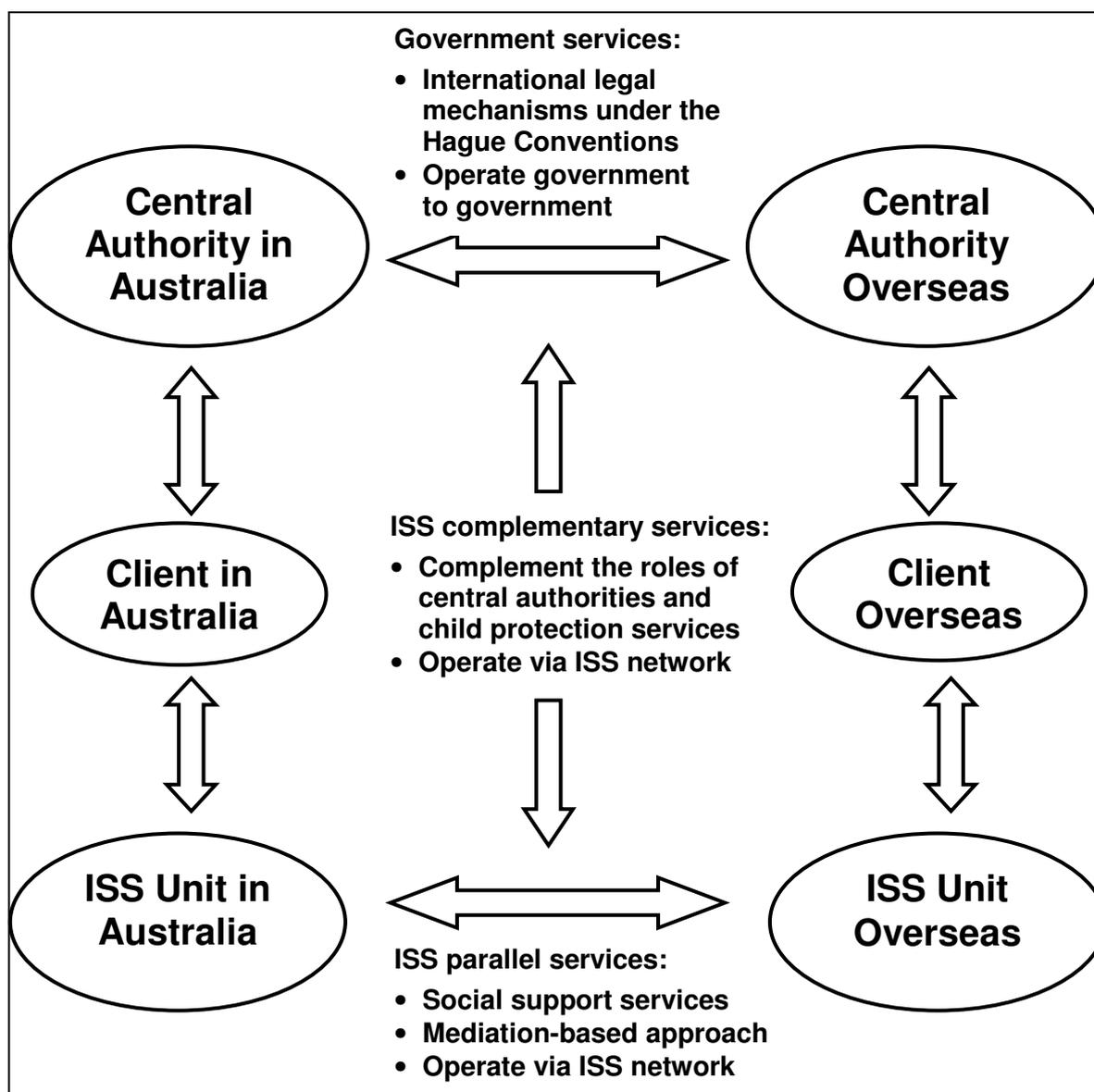
<b>Article</b>	<b>Description</b>
Article 5	Jurisdiction depends on child's country of habitual residence
Article 6	Refugee children or internationally displaced children
Article 7	Wrongful removal or retention of a child
Article 8	Transfer of jurisdiction to another Contracting State
Article 9	Request to transfer jurisdiction from another Contracting State
Article 11	Jurisdiction to take measures of protection in cases of urgency
Article 12	Jurisdiction to take provisional measures of protection with territorial effect
Article 15	Law applicable to measures of protection
Article 16	Attribution or extinction of parental responsibility
Article 17	Exercise of parental responsibility
Article 23	Recognition of measures of protection and grounds for non-recognition
Article 24	Request decision on whether measures of protection are recognised
Article 26	Provide declaration of enforceability of measures of protection
Article 28	Enforcement of measures of protection
Article 30	General obligation of co-operation
Article 31(a)	Facilitate communications and offer assistance
Article 31(b)	Mediate situations
Article 31(c)	Locate a child
Article 32(a)	Report on the situation of a child
Article 32(b)	Request measures of protection
Article 33	Facilitate cross-border care placement
Article 34	Request information for measures of protection
Article 35(1)	Help implement measures of protection or the exercise of access rights
Article 35(2)	Request evidence and findings regarding suitability to exercise access
Article 36	Inform another State of a child in serious danger

#### **6.4 Potential role for ISS Australia**

ISS Australia could perform certain functions if it were appointed as a “body” by a Contracting State (Articles 31 and 32). The Commonwealth Central Authority has given no indication that this option is under consideration and has already stated that State/Territory and Commonwealth Central Authorities will exercise the functions under the Convention. An alternative model would be for ISS Australia to be delegated certain functions by the Central Authorities, as detailed below.

ISS Australia proposes a new funded program, similar to that already operating as the IPCA Service. Under the IPCA Service, ISS Australia provides “parallel” and “complementary” services in relation to 1980 Hague Convention cases. For example, if there is an Application on foot under the 1980 Hague Convention for return of an abducted child, the Central Authority will be responsible for administering the application process, liaising with the overseas Central Authority and with the client in Australia. Meanwhile, the Central Authority refers the client to ISS Australia which provides a “parallel” service involving practical and emotional support to family members, including family members overseas (via the ISS network), counselling, and referral to other support services they may need. In appropriate cases, ISS Australia also uses mediation-based approaches to mediate outcomes, by getting the two parents talking and focusing on the best interests of the child. This is a “complementary” service in that it complements the functions of the Central Authorities and contributes to the outcomes being sought through the Convention.

**Diagram 4: Parallel and complementary services provided by ISS Australia**



In relation to international child protection or parental responsibility cases, ISS Australia's proposed new program could provide *complementary services* to support the Central Authorities in implementing Chapter V of the Convention (Articles 31 to 36). Given that some of these Articles do not impose concrete obligations on Contracting States to take particular actions to protect children,<sup>14</sup> the assistance of ISS Australia and its international network may be of great benefit where the desired outcomes for children are not being achieved through the Convention, or if overseas Central Authorities are not functioning effectively.

ISS Australia could be requested to assist Central Authorities on a case by case basis to:

- Facilitate communication and offer assistance (Article 31a);
- Mediate situations (Article 31b) using a range of ISS mediation-based approaches;
- Locate a child (Article 31c);

<sup>14</sup> For a discussion of possible limitations on the effectiveness of Chapter V of the Convention, see section 4.4.

- d) Report on the situation of a child (Article 32a);
- e) Request consideration of need to take measures of protection (Article 32b);
- f) Facilitate cross border care placements (Article 33) including assessments/reports before placement, preparing for a child's move overseas and post-placement support;
- g) Request information relevant to measures of protection (Article 34);
- h) Help implement measures of protection or the exercise of access rights (Article 35(1)), including practical assistance, counselling and supervision of contact if required;
- i) Request evidence and findings on suitability to exercise access rights (Article 35(2)); and
- j) Inform another State of a child in serious danger (Article 36).

ISS could also provide *parallel services* to assist families involved in parental responsibility and/or child protection matters under the 1996 Hague Convention. ISS Australia could be referred cases with a request for us to:

- a) Provide practical and emotional support to family members in Australia and overseas;
- b) Provide counselling as required;
- c) Use mediation-based approaches to help resolve family conflict and establish or maintain residence of contact arrangements; and
- d) Provide information and referral services to ensure clients make informed decisions about service options and receive assistance from the appropriate Central Authority.

ISS Australia would need further funding to assist with parental responsibility and child protection matters involving the 1996 Hague Convention. Parental responsibility matters are a Commonwealth responsibility and ISS will therefore be seeking Commonwealth funding in this regard, while child protection are a State-Territory responsibility.

Currently, ISS Australia receives funding in NSW from the Department of Community Services while in all other States/Territories, inter-country child protection services are provided by ISS Australia on a fee-for-service basis. A Memorandum of Understanding has been entered with the Victorian Department of Human Services for the provision of fee-based inter-country child protection services by ISS Australia. This provides an effective model for fee-based service delivery in other States/Territories.

## 7. Applications of the Convention

The Co-operation provisions contained in Chapter V of the Convention are the key provisions which will be relevant for the purposes of ISS inter-country casework involving parental responsibility and the protection of children. For this section, four case studies were undertaken with the aim of analysing the potential applications of the 1996 Hague Convention in these cases.

The case studies include details of the services, actions and outcomes delivered by ISS Australia in order to highlight the way in which ISS Australia cases closely mirror the types of cases that could come up in the near future involving the 1996 Hague Convention. There is also consideration of the Articles of the Convention that could potentially have been applied in each case study and an analysis of how this and the contribution of ISS Australia could improve the outcomes for the children concerned.

All identifying details such as names, personal details and Australian States, as well as some facts of the cases, have been changed to protect the privacy of ISS clients.

## 7.1: Improving a child's contact with father

### 1. Demographics (age, citizenship and residence of people involved in the case)

- Subject child – 8 year-old girl about whom there are welfare concerns, citizen of Country B, has been residing for 18 months with Mother in Western Australia
- Child 2 – 12-year old older brother, also citizen of Country B, has been residing for 18 months with Mother in Western Australia
- Mother – 40 year old Australian citizen, residing in Western Australia
- Father – 42 year old citizen of Country B, residing in Country B with his new partner

### 2. Countries involved and whether they're Contracting States of the Hague Conventions

Australia – Contracting State of the 1980 and 1996 Hague Conventions

Country B – Contracting State of the 1980 Hague Convention only

### 3. Case Summary (Intake)

A couple had lived in Country B for a number of years, where their 2 children were born. After the marriage broke down, Mother decided she wanted to return to Western Australia with the two children. Custody of the children was granted to the mother by the competent court in Country B and the orders allowed relocation to Australia. The subject child, about whom welfare concerns have been raised, currently resides in Australia with her mother and older brother.

The father and his new partner, who reside in Country B, contacted ISS in Country B as they had concerns for the welfare of the subject child. They were concerned that she was being physically and emotionally abused by her mother and by her older brother. They were also concerned that the child was not attending school. The father also complained that the mother was not adhering to the court order regarding his contact with the subject child as regular communication via phone and e-mail was not taking place.

ISS Australia received the referral from ISS in Country B with a request to undertake a welfare check on the subject child and to help the family establish and maintain contact between the father and the child.

### 4. Work undertaken (Services and Actions)

Services and Actions detailed in this section are from the ISS service delivery model (see Appendix 4). The following services were provided by ISS Australia:

- ISS Australia requested a Welfare check from the child protection authority in WA. They advised that the abuse allegations were not well supported and therefore did not warrant child protection involvement. Further discussions with the mother established that the concerns raised about the child's non-attendance at school were also unfounded.
- ISS assisted the family with Contact arrangements for the father to have regular contact with the child. ISS used its mediation-based approach with ISS social workers in each country working directly with each parent.
- Information/advice about the 1980 Hague Convention was provided to the mother when she expressed concerns that the child might be retained in Country B during a forthcoming holiday visit to see her father. ISS advised the mother that as Country B was a Contracting State under the 1980 Hague Convention, an application for return of the child could be made in the event of a wrongful retention. ISS overseas provided similar advice to the father, with the aim of preventing a potential retention of the child in Country B.

- Visitation arrangements were established for the child's visit to her father in Country B, with assistance from ISS in both countries. The holiday visit was subsequently achieved. Support to the mother was provided prior to and following the holiday visit to ensure that ongoing contact arrangements were maintained.

Actions required to progress the case were:

- When Mother raised concerns about possible retention of the child after the holiday visit, ISS Australia had to Request action by ISS overseas to provide the father with information and advice on the 1980 Hague Convention. ISS Australia also requested ISS in Country B to be in contact with the father during the holiday visit, to support the family and prevent a potential retention.
- Case closure was completed once it was established that contact arrangements were being effectively maintained.
- The Case re-opened when the mother requested information regarding the father's parental rights around the subject child's schooling. A Referral (general) was made to a solicitor for legal advice in this regard. The case was then closed again.

## 5. Results of the case (Outcomes)

The following outcomes (from the ISS service delivery model in Appendix 4) were achieved:

- Welfare risk reduced through liaison with relevant child protection authorities and with the child's mother in WA.
- Contact maintained/ improved between the child and her father as a result of assistance provided by ISS in each country.
- Family conflict reduced as a result of improved contact arrangements and the child's successful holiday visit to Country B. Mother reported improved communication with the child's father following the holiday visit.
- Visitation achieved with assistance from ISS in each country.
- Abduction/retention prevented as a result of information, advice and support provided by ISS.
- Client's emotional well-being improved through the abduction-related information and advice provided to both parents; this greatly reduced the mother's anxiety that the child would be retained in Country B. The mother's emotional well-being was also improved through the support provided by the ISS Australia social worker while the child's emotional well-being improved as a result of the holiday visit and more regular contact with her father.
- Support in place - local services with the mother being referred for legal advice regarding other issues around parental rights.

## 6. Which provisions of the 1996 Hague Convention could apply to this case?

Country B is not a Contracting State, however, for the purposes of this exercise, we will assume a hypothetical scenario where Country B has now ratified the 1996 Hague Convention. A number of provisions in the Convention would now apply, to the extent that they are implemented through domestic implementing legislation in each Contracting State.

- Article 5 – Jurisdiction depends on child's country of habitual residence
- Article 7 – Wrongful removal or retention of a child
- Article 17 – Exercise of parental responsibility
- Article 31(b) – Mediate situations
- Article 32(a) – Report on the situation of a child
- Article 32(b) – Request measures of protection
- Article 35(1) – Help implement measures of protection or the exercise of access rights

## **7. How could the 1996 Hague Convention be used in this case?**

This discussion has been framed around the Articles of the 1996 Convention, however, it is important to note that these Articles are actually enforceable through the corresponding provisions of the domestic implementing legislation.<sup>15</sup>

Article 5 establishes that the authorities of the Contracting State of the child's habitual residence, i.e. Australia, have jurisdiction to take measures of protection for the person or property of the child.

In response to child protection concerns raised by the father, as the subject child has a "substantial connection" with Country B - having been born there and having resided there - Article 32(a) would enable the authorities in Country B to request the authorities in Australia to provide a report on the situation of the child or, under Article 32(b), to request the competent authorities to consider taking measures of protection. However, these Articles do not impose obligations on the Australian authorities to provide such a report or to take such measures.

Under Article 31(b), the authorities of both Contracting States are required to take appropriate steps to mediate solutions for the protection of the child in situations where the Convention applies. This would be relevant if the Australian authorities, after investigating child abuse allegations, found that there were protection concerns to be addressed or if, during the holiday visit to Country B, new protection concerns emerged.

Article 7 establishes that if the child is retained in Country B after visitation, jurisdiction remains with the Australian authorities, being the Contracting State of the child's habitual residence. If the Father had retained the child in Country B after the contact visit there, the Mother could have applied for return of the children using the 1980 Hague Convention.

Article 35 would enable the authorities in Country B to request the authorities in Australia to help secure the Father's effective exercise of his rights to access with his child in Australia.

Finally, under Article 17, exercise of parental responsibility is governed by the law of Australia, being the Contracting State of the child's habitual residence. This makes it clear that where issues are raised by the father relating to exercise of his parental rights around the child's schooling, the competent court in Australia, i.e. the Family Court of WA, would have jurisdiction should legal action be required in relation to this issue.

## **8. What could ISS Australia's role be?**

If the 1996 Convention had applied in this case, the role actually undertaken by ISS Australia in this case could still have been undertaken. Particularly important are the parallel and complementary services ISS Australia could provide including:

- Providing information and advice to both parents about the 1996 Hague Convention, the 1980 Hague Convention and related services that ISS Australia and the Australian Central Authorities could provide;
- Providing emotional support to family members in each country concerned;
- Where child abuse allegations are raised and if they warrant investigation, ISS Australia could undertake a home visit to produce a report on the situation of the child - the assistance of ISS may be essential as the authorities in Country B cannot be compelled under Article 32(a) to provide the report and their cooperation cannot be guaranteed;

<sup>15</sup> *Division 4 Subdivision B of the Family Law Act 1975 - and the Family Law (Child Protection Convention) Regulations 2003.*

- ISS Australia could help to mediate a solution in relation to arrangements for the child to have contact with her father using the ISS mediation-based approach;
- Also through mediation, ISS Australia could help the family maintain contact arrangements;
- While complex legal issues involving the 1996 or the 1980 Hague Convention are being dealt with by the Central Authorities, ISS Australia could provide family members with ongoing support and reassurance, linking them up with local services such as legal advice or specialist counselling as required; and
- Finally, we could provide a link, via the ISS network, to the overseas authorities in the event that communications are poor or the desired outcomes for the child are not being achieved using the 1996 Convention procedures.

If Country B was not a Contracting State to the 1996 Hague Convention (which was actually the situation in this case), then all of the Services and Actions provided by ISS Australia would have been needed as the Convention would not have applied.

### **9. How would this improve the outcomes for Australian children and their families?**

In this case, the 1996 Hague Convention and the parallel and complementary services of ISS Australia could potentially contribute to the following outcomes:

- Resolving jurisdictional conflicts;
- Reducing welfare risks to the child by ensuring that if there are child protection concerns warranting investigation, measures of protection can be requested promptly via the Central Authorities;
- Preventing a potential retention of the child in Country B;
- In the event of the child being unlawfully retained, enabling the child to be returned to her country of habitual residence so that the court with jurisdiction i.e. the Family Court of Western Australia, could determine the issue of the child's place of residence;
- Through mediation, reducing family conflict and reducing protracted and costly legal proceedings relating to residence and/or contact arrangements for the child;
- Helping to establish/maintain arrangements for the child to have regular contact with her father in Country B; and
- Improving the child's well-being through regular contact with both parents, and improving the well-being of the whole family through reduced family conflict.

## **7.2: Addressing risk of child abuse overseas**

### **1. Demographics (age, citizenship and residence of people involved in the case)**

Subject child 1 – 11 year-old girl, an Australian citizen, residing in Country C with parents

Subject child 2 – 6 year-old girl, an Australian citizen, residing in Country C with parents

Mother – 45 year old Australian citizen, residing with husband and children in Country C

Father – 45 year old citizen and resident of Country C

Maternal grandmother – Australian citizen who was visiting the family in Country C and had concerns about the welfare of the children

### **2. Countries involved and whether they're Contracting States of the Hague Conventions**

Australia – Contracting State of the 1980 and 1996 Hague Conventions

Country C – Not a Contracting State of either of the Hague Children's Conventions

### 3. Case Summary (Intake)

A couple had been living in Country C for 4 years with their 2 children. The children's maternal grandmother, during a visit to Country C to see her daughter and grandchildren, became very concerned about domestic violence issues including allegations of physical and sexual abuse of the children by their father. She contacted a domestic violence service in her daughter's home state of South Australia and they referred her to ISS Australia.

After fleeing the domestic violence situation, the mother requested assistance via ISS in Country C to obtain travel documentation for her daughters to travel back to Australia with her. The father had retained the children's passports and he was likely to try to hinder the return of the children to Australia. Mother had already contacted the Australian Consulate in Country C to try to get new passports for the children, but proof of the violence was required to get new passports issued without the father's consent.

The mother had concerns that one of her daughters was suicidal and via ISS in Country C, requested ISS Australia to organise counselling for the children upon their return to Australia. Mother was also worried that the father might find them and that she and her daughters would be further abused. On one occasion, the father had taken the children and kept them for several weeks and was continuing to threaten to take the children from their mother.

### 4. Work undertaken (Service and Actions)

Services and Actions detailed in this section are from the ISS service delivery model (see Appendix 4). The following services have been provided by ISS Australia to date:

- Information/advice was provided by ISS Australia to the mother and the maternal grandmother in Country C via telephone. Even though Country C is not a Contracting State to the 1980 Hague Convention, the issue of abduction was discussed with a view to preventing a possible abduction. ISS Australia also advised the mother to contact ISS in Country C.
- A Referral (facilitated) was made to ISS in Country C requesting a home visit and assessment report on the situation of the children, as proof of the abuse was required to obtain new passports for the children. We also requested ISS overseas to provide ongoing support to the clients in Country C.
- A Referral (general) was made to Legal Aid in the mother's home state to obtain advice on legal options and to prepare affidavits about the alleged abuse of the children by their father.
- Support was provided to Mother, Grandmother and the 2 children via ISS in Country C.

Actions required to progress the case were:

- As the clients contacted ISS directly from Country C, ISS Australia had to Request action by ISS overseas to ensure support was provided to the family while still in Country C.
- Consultation with the Department of Immigration was required in relation to the requirements to issues new passports to the children.
- Consultation with Legal Aid was required to ensure the mother received appropriate advice.

### 5. Results of the case (Outcomes)

The following outcomes (from the ISS service delivery model, Appendix 4) have been achieved:

- Abduction/retention prevented through the information and advice provided ISS.
- Support in place – local services through referral to Legal Aid in South Australia.
- Support in place – overseas services as a result of services provided by ISS overseas.
- Welfare risk reduced as the children were removed from the abusive parent.

- Client's emotional well-being improved (parent) through the support provided to the mother by ISS, the information and advice provided, and the referrals to other agencies/departments.
- Client's emotional well-being improved (child) through the support provided by ISS in Country C and preparation for the provision of counselling when the girls return to Australia.

#### **6. Which provisions of the 1996 Hague Convention could apply to this case?**

Country C is not a Contracting State. However, for the purposes of this exercise, we will assume a hypothetical scenario where Country C has now ratified the 1996 Hague Convention. A number of provisions in the Convention would now apply, to the extent that they are implemented through domestic implementing legislation in each Contracting State.

- Article 5 – Jurisdiction depends on child's country of habitual residence
- Article 7 – Wrongful removal or retention of a child
- Article 8 – Transfer of jurisdiction to another Contracting State
- Article 9 – Request to transfer jurisdiction from another Contracting State
- Article 11 – Jurisdiction to take urgent measures of protection
- Article 31(b) – Mediate situations
- Article 32(a) – Report on the situation of a child
- Article 32(b) – Request measures of protection
- Article 36 – Inform another State of a child in serious danger

#### **7. How could the 1996 Hague Convention be used?**

The children are habitually resident in Country C so Article 5 establishes that the authorities of Country C have jurisdiction to take protective measures. This may be relevant given the risk that the father may try to take the children and harm them while they are still in Country C.

Applying Article 7, the plans of the mother to remove the children from Country C would normally be considered a wrongful removal. As Country C is not a Contracting State to the 1980 Hague Convention on Abduction, the 1996 Hague Convention could be used by the father to seek return of the children to Country C. However, it is very unlikely that an application for return of the children would be successful as evidence of the domestic violence and abuse of the children is being gathered prior to the mother's departure from Country C.

Given the facts of this case and the available evidence to support the allegations of child abuse, it would be more appropriate that no application for return of the children be pursued by the father. A better approach would be for the authorities in both countries to cooperate to mediate a solution for the protection of the children, applying Article 31(b).

As the children are Australian citizens and Australia arguably has a "substantial connection" with the children, under Article 32(a) the Australian authorities could request the authorities in Country C to provide a report on the situation of the children or, under Article 32(b), to request the competent authorities to consider taking measures of protection. This could facilitate an appropriate response by Country C authorities to the abuse allegations.

Article 36 may be relevant if the authorities in Country C have taken or are contemplating taking measures of protection. If they become aware of the children travelling to Australia, the authorities in Country C must inform the Australian authorities of the dangers to the children. This would be important as there is the possibility that the father would follow the children to Australia, placing them at further risk of harm.

Once informed of the risk to the children, the Australian authorities may be able to take steps to stop the father from entering Australia or, under Article 11, they could take urgent measures to protect the children from harm if the father has already entered Australia.

Applying Article 9, once the children relocate to Australia the authorities in Australia could request jurisdiction to be transferred to them if they need to take further measures for the protection of the children as they would be best placed to assess the best interests of the children. Alternatively, using Article 8, the authorities of Country C could request the Australian authorities to assume jurisdiction to take measures of protection.

#### **8. What could ISS Australia's role be?**

If the 1996 Convention had applied in this case, the role actually undertaken by ISS Australia in this case could still have been undertaken. Particularly important are the parallel and complementary services ISS Australia could provide including:

- Providing information and advice to both parents about the 1996 Hague Convention and related services that ISS Australia and the Australian Central Authorities could provide;
- Providing emotional support to family members in both countries, including the children;
- Undertaking a home visit in Country C and providing a report on the situation of the child - the assistance of ISS may be essential as the authorities in Country C cannot be compelled under Article 32(a) to provide the report and their cooperation cannot be guaranteed;
- Helping to mediate solutions for the protection of the children using ISS mediation-based approaches across international borders;
- While complex legal issues involving the 1996 or the 1980 Hague Convention are being dealt with by the Central Authorities, ISS Australia could provide family members with ongoing support and reassurance, linking them up with local service such as legal advice or specialist counselling as required; and
- Finally, we could provide a link, via the ISS network, to the overseas authorities in the event that communications are poor or the desired outcomes for the child are not being achieved using the 1996 Convention procedures.

If Country C was not a Contracting State to the 1996 Hague Convention (which was actually the situation in this case), then all of the Services and Actions provided by ISS Australia would have been needed as the Convention would not have applied.

#### **9. How would this improve the outcomes for Australian children and their families?**

In this case, the 1996 Hague Convention and the parallel and complementary services provided by ISS Australia have the potential to contribute to the following outcomes:

- Resolving jurisdictional conflicts;
- Reducing welfare risks to the children by ensuring that information required for their protection is provided promptly and that measures of protection can be requested via the Central Authorities, or alternatively via the ISS network;
- Preventing a potential abduction of the children into Australia and deterring an application under the 1996 Hague Convention for return of the child, as such application is likely to fail;
- Through mediation, ensuring solutions for the protection of the children are in place;
- After relocation of the children to Australia, enabling the competent authorities in Australia to have jurisdiction to determine the issue of the children's place of residence or to take any measures of protection required to keep them safe; and
- Improving the children's well-being through referral to specialist counselling services.

### 7.3: Cross-border kinship care

#### 1. Demographics (age, citizenship and residence of people involved in the case)

- Subject child – 10 year-old girl, citizen of Country D, was residing in Australia with mother
- Mother – 40 year old citizen of Country D, was residing in Australia while studying here
- Father – 42 year old citizen and resident of Country D
- Maternal aunt – citizen and resident of Country D

#### 2. Countries involved and whether they're Contracting States of the Hague Conventions

Australia – Contracting State of the 1996 Hague Convention

Country D – Not a Contracting State of the 1996 Hague Convention

#### 3. Case Summary (Intake)

Mother and Father divorced 1999. Mother was granted sole custody of the child, then only a baby, by the court in Country D. Soon after the divorce, Mother came to Australia on a student visa with her child. Father then had no further contact with the child.

At the time of the initial referral from child protection in Victoria, the child had been placed in foster care as a result of concerns about the mother's capacity to care for the child due to alcohol use and a transient lifestyle. The child was unlikely to ever return to the mother's care. Father in Country D expressed willingness to care for the child back in Country D. The Victorian child protection authority, which had interim custody of the child, referred the case to ISS Australia to undertake an assessment of father in Country D as a potential carer for the child. The child's maternal Aunt in Country D also expressed interest in caring for the child. The mother, who was the child's guardian, would not consent to the child's relocation to Country D, even though the child expressed a wish to relocate to Country D and live with her father.

#### 4. Work undertaken (Services and Actions)

Services and Actions detailed in this section are from the ISS service delivery model (see Appendix 4). The following services were provided by ISS Australia:

- Information/advice about child protection laws in Country D was obtained via ISS there.
- Kinship placement of the child in Country D was explored as a placement option for the child, with assistance from ISS in both countries. The proposed carers were required to be assessed for their capacity and suitability to care for the child.
- A Referral (facilitated) was made to ISS in Country D requesting background checks, home visits and assessment reports on the potential carers.
- The Background checks were organised by ISS in Country D to look into the child protection history of the potential carers in Country D.
- Foster care for the child in Country D was also explored but no suitable placement was found.
- Contact arrangements were made for the child to have contact with her father via telephone.
- Some time later, the mother died and in due course the father was re-assessed and awarded custody by the court in Country D. A Family reunification was facilitated and new Residence arrangements for the child were established with the relocation of the child to Country D.

The following actions were required to progress the case:

- The Home visit and Assessment report on the father were completed by ISS in Country D. The assessment of the Aunt didn't proceed as she withdrew her offer to care for the child.
- The father was found to be unsuitable to care for the child and ISS Australia therefore asked to Request action by ISS overseas to arrange foster care for the child in Country D.

## 5. Results of the case (Outcomes)

The following outcomes (from the ISS service delivery model, Appendix 4) were achieved:

- Welfare risk reduced as the decisions of the child protection authority were informed by the information gathered by ISS in Country D about the father's unsuitability as a carer.
- Support in place - overseas services for the father and child after she returned to Country D.
- Contact established, with assistance from ISS in both countries, to enable the child to have regular contact with her father by telephone.
- Kinship placement established as the father was assessed again by authorities in Country D and this time was deemed a suitable carer for the child. He was granted custody by the court in Country D and after relocation, the child was reported to be adapting well to her new life in the care of her father.
- Client's identity improved (child) as the child's wish to return to Country D and live with her father was ultimately respected.

## 6. Which provisions of the 1996 Hague Convention could apply to this case?

Country D is not a Contracting State, however, for the purposes of this exercise, we will assume a hypothetical scenario where Country D has now ratified the 1996 Hague Convention. A number of provisions in the Convention would now apply, to the extent that they are implemented through domestic implementing legislation in each Contracting State.

- Article 5 – Jurisdiction depends on child's country of habitual residence
- Article 8 – Transfer of jurisdiction to another Contracting State
- Article 9 – Request to transfer jurisdiction from another Contracting State
- Article 16 – Attribution or extinction of parental responsibility
- Article 31(b) – Mediate situations
- Article 33 – Facilitate cross-border care placement
- Article 35(1) – Help implement measures of protection or the exercise of access rights

## 7. How could the Convention be used in this case?

Article 5 establishes that the authorities of the Contracting State of the child's habitual residence, i.e. Australia, have jurisdiction to take measures for the protection of the child.

Under Article 33, when the authorities in Australia are contemplating placement of the child in overseas foster care in Country D, they are required to transmit a report to the authorities of Country D and the placement can only proceed if the authorities of Country D consent. This would have been relevant if the authorities had wanted to pursue the placement of the child with the maternal Aunt, but it is possible that Article 33 would not apply to placement of the child with her father as this may not come within the definition of "foster care".

Under Article 31(b), the authorities of both Contracting States are required to take appropriate steps to mediate a solution for the protection of the child in situations where the Convention applies. This may be relevant if the Australian authorities wanted to cooperate with the authorities in Country D to make a decision about care arrangements for the child in Country D that are in the child's best interests and to ensure that any overseas placement is monitored.

Applying Article 8, the authorities in Australia could request the authorities in Country D to assume jurisdiction to take measures for the protection of the child as they would be best placed, after the relocation, to assess the child's best interests. Alternatively, using Article 9, the authorities of Country D could request the Australian authorities to transfer jurisdiction to them.

If a suitable foster care placement could be found for the child in Country D, [Article 35\(1\)](#) would enable cooperation between the authorities in the two States in order to secure the father's rights to access to his child.

Under [Article 16](#), attribution or extinction of parental responsibility is governed by the law of the child's habitual residence i.e. Australia. This means that once the mother had died, the question of whether parental responsibility would be attributed to the father would be determined by operation of law in Australia. If the child's country of habitual residence changed to Country D, parental responsibility could be attributed, by operation of the law in Country D, to a person who did not already have such a responsibility, i.e. the father.

#### **8. What could ISS Australia's role be?**

If the 1996 Convention had applied in this case, the role actually undertaken by ISS Australia in this case could still have been undertaken. Particularly important are the parallel and complementary services ISS Australia could provide including:

- Providing information and advice to both parents about the 1996 Hague Convention and related services that ISS Australia and the Australian Central Authorities can provide;
- Helping to establish contact arrangements between the father and his daughter;
- Helping to mediate a solution in relation to placement of the child overseas either in kinship care or foster care, and providing ongoing post-placement support;
- While complex legal issues involving the 1996 Hague Convention are being dealt with by the Central Authorities, ISS Australia could provide ongoing support and reassurance to the father overseas, linking him up with local support services, and supporting the child in relation to contact arrangements and relocation overseas to be reunited with her father; and
- Finally, we could provide a link, via the ISS network, to the overseas authorities in the event that communications are poor or the desired outcomes for the child are not being achieved using the 1996 Convention procedures.

If Country D was not a Contracting State to the 1996 Hague Convention (which was actually the situation in this case), then all of the Services and Actions provided by ISS Australia would have been needed as the Convention would not have applied.

#### **9. How would this improve the outcomes for Australian children and their families?**

In this case, the 1996 Hague Convention and the parallel and complementary services provided by ISS Australia have the potential to contribute to the following outcomes:

- Resolving jurisdictional conflicts;
- Reducing welfare risks to the child by obtaining background information to inform decision-making about the child's future care;
- Reducing protracted and costly legal proceedings to determine the residence of the child;
- Helping to establish/maintain arrangements for the child's contact with her father;
- Clarifying the applicable laws in relation to attribution of parental responsibility;
- Improving the children's well-being by re-establishing a relationship with her father and eventually removing her from foster care;
- Relocation of the child to Country D and reunification with her father; and
- Ongoing monitoring of the care placement to ensure that the child is safe and well.

## 7.4: Custody dispute following retention of child

### 1. Demographics (age, citizenship and residence of people involved in the case)

Subject child – 4 year-old boy, dual citizen of Australia and Country E; was born in and has always resided in Country E

Mother – 30 year old citizen of Country F; was residing in Country E while studying there; currently resides in Country F with her parents

Father – 31 year old citizen of Australia; was residing in Country E while wife was studying there; has now returned to Australia where he intends to reside permanently

### 2. Countries involved and whether they're Contracting States of the Hague Conventions

Australia – Contracting State of the 1980 and 1996 Hague Conventions

Country E – Contracting State of the 1980 Hague Convention only

Country F – not a Contracting State of either Convention

### 3. Case Summary (Intake)

This is a complex child retention case involving three countries. A husband and wife were residing in a European country (Country E) where the wife was studying. The subject child (aged 4) was born in Country E and has always resided there with both parents. Within one month of the child's birth, Mother returned to her studies and Father remained at home as the main carer, returning to part-time work when the child was 2 ½ years old.

Mother took the child to Country F in early 2008, saying she had been given an extra week's holiday from University and wanted to visit her home country. Mother became evasive when Father tried to contact her and his son there and it transpired that Mother had returned to University after only 1 day, leaving the child behind in Country F with her parents. Subsequent efforts by Father to get Mother to return the child to Country E were unsuccessful and in due course, the Mother commenced divorce proceedings. As parental child abduction is a criminal offence in Country E, Father brought charges against Mother in that country. Mother now resides in Country F with her parents and Father has returned to Australia to reside with his extended family. Father is pursuing custody of the child in Country F and may also seek Consent Orders in the Family Court of Australia.

### 4. Work undertaken (Services and Actions)

Services and Actions detailed in this section are from the ISS service delivery model (see Appendix 4). The following services have been provided by ISS Australia to date:

- Information/advice was provided to the father regarding the 1980 Hague Convention and the process to seek return of an abducted/retained child. However, this was not an option as Country F was not a Contracting State to the 1980 Hague Convention.
- Support during abduction/retention was provided to both the father and members of his extended family in Australia via telephone. Immediately following the retention, Father was still overseas in Country E so support was provided to him by the ISS Unit in that country.
- Assistance with Residence arrangements for the child is an ongoing service being provided as there are custody proceedings on foot in Country F. This service has included Information/advice about the evidence required for the custody proceedings.
- A Referral (facilitated) was made to ISS in Country E requesting advice on progress of criminal proceedings against Mother in that country and possible application for return of the child should Mother and the child return there.

- Assistance with Contact arrangements for the child to have contact with both parents is another ongoing service being provided. Father wants to be able to maintain regular contact with his son in his current situation and should the residence of the child change, assistance will also be required for the child to establish and maintain contact with Mother overseas.
- A Referral (facilitated) was made to ISS in Country F requesting a home visit to ascertain the situation of the child and preparation of a report for the custody proceedings in Country F. The referral also requested assistance to promote the healthy relationship between both parents and the child, in particular to establish regular contact between Father and son.
- A Referral (general) was made to a solicitor in Australia for advice on legal options including possible consent Orders in the Australian Family Court regarding residence and contact.

Actions required to progress the cases:

- A Home visit to the Father's home in Australia was undertaken to assess the father and extended family as potential carers for the child and the suitability of the home environment.
- An Assessment report was then prepared by an ISS Australia social worker to support the custody application being brought in Country F.
- A Home visit and Assessment report will also be prepared by ISS in Country F.

##### **5. Results of the case (Outcomes)**

The following Outcomes (from the ISS service delivery model, Appendix 4) have been achieved:

- Client's emotional well-being improved (parent) as the father was supported by ISS Australia.
- Support in place - family/community as client has returned to his extended family in Australia.
- Support in place - overseas services as ISS overseas provided support for client while he was in Country E.

The case is still ongoing with ISS in Australia and in Country F trying to help the Father establish regular contact with his son. We still await action by ISS counterparts overseas in relation to the home visit and assessment in Country F and progress on criminal proceedings in Country E. We also await the outcome of the custody proceedings. If the court in Country F awards the Father custody and allows the child to relocate to Australia, the family will require further assistance to establish and maintain the child's contact with Mother overseas.

An alternative outcome is that custody is awarded to the Mother in Country F and the Father has to seek custody in Australia or in Country E. In the event that there are conflicting Court orders in two countries, this would create an unsolvable situation with no way to enforce the return of the child and the Mother, who had wrongfully retained the child in Country F, would be advantaged by her wrongful action. In such a situation, ISS Australia would work with both parents to try to mediate a solution in relation to the child's residence and contact arrangements.

##### **6. Which provisions of the 1996 Hague Convention could apply to this case?**

Neither Country E nor Country F is a Contracting States. However, for the purposes of this exercise, we will assume a hypothetical scenario where Countries E and F have now ratified the 1996 Hague Convention. We will also assume that the child's country of habitual residence remains Country E, i.e. that it cannot be factually shown that the child has resettled in Country F as a new country of habitual residence. A number of provisions in the Convention would now apply, to the extent that they are implemented through domestic implementing legislation in all three Contracting States.

- Article 5 – Jurisdiction depends on child’s country of habitual residence
- Article 7 – Wrongful removal or retention of a child
- Article 8 – Transfer of jurisdiction to another Contracting State
- Article 9 – Request to transfer jurisdiction to another Contracting State
- Article 16 – Attribution or extinction of parental responsibility
- Article 23 – Recognition of measures of protection and grounds for non-recognition
- Article 26 – Provide declaration of enforceability of measures of protection
- Article 28 – Enforcement of measures of protection
- Article 31(a) – Facilitate communication
- Article 31(b) – Mediate situations
- Article 32(a) – Report on the situation of a child
- Article 32(b) – Request measures of protection
- Article 35(1) – Help implement measures of protection or the exercise of access rights

## **7. How could the Convention be used?**

This discussion has been framed around the Articles of the 1996 Convention, however, it is important to note that these Articles are actually enforceable through the corresponding provisions of the domestic implementing legislation.

Article 5 establishes that the authorities of the child’s country of habitual residence, i.e. Country E, have jurisdiction to take measures of protection of the child.

Article 7 establishes that as a result of the wrongful retention of the child in Country F and because the child has been present there for less than one year, jurisdiction remains with Country E, the child’s habitual residence, despite the child’s presence in Country F.

Under Article 16, attribution of parental responsibility by operation of law, agreement or unilateral act rests with the competent authorities of Country E, the child’s habitual residence. Accordingly, the court in Country F should not be making a decision about custody of the child as it does not have jurisdiction to do so. However, if the Court in Country F made an Order in relation to residence or contact in favour of the Father, under Article 26 the Father could request a declaration that the Order is enforceable in Australia and seek registration of the Order in Australia for enforcement purposes.

As the child has a “substantial connection” with Australia, Article 32(b) would enable the authorities in Australia to request the authorities in Country E to consider taking measures of protection. This could include requesting an Order for return of an abducted/retained child.

Assuming the court in Country F does not award custody to the Father, the other alternative is that the authorities in Country E make an Order for return of the child to Country E, using their jurisdiction established under Articles 5 and 7. Article 23 states that any measure of Protection taken in the country with jurisdiction, i.e. Country E, would be automatically recognised in Country F. However, there are exceptions to Article 23 and it is possible that recognition would be refused, for example, if it were contrary to public policy in Country F.

Assuming recognition were not refused, under Article 26 this measure of protection would be registered for enforcement purposes in Country F so that even if Country F hasn’t ratified the 1980 Hague Convention, the return of the child could be achieved. Article 28 states that enforcement in Country F is in accordance with Country F’s own law.

Under Article 8, Country E could then request the authorities in Country F to assume jurisdiction if they are considered better placed to assess the best interests of the child. Australia may also receive such a request as the child is an Australian national and has a substantial connection

with Australia, given that the child's father resides here. Alternatively, under Article 9, the competent authorities in Australia could request Country E to transfer jurisdiction to them.

Article 31(a) requires that if jurisdiction is being transferred under Article 8 or 9, the authorities of the countries concerned are required to take appropriate steps to facilitate communication and offer assistance in relation to the transfer. Under Article 31(b), the authorities of all three States should take appropriate steps to mediate a solution for the protection of the child.

As there are concerns about the welfare of the child while he is still in Country F, Article 32(a) could be used by the authorities in Australia to request a report on the situation of the child. The report may also be of use for any competent Court considering custody or contact issues.

Finally, Article 35(1) would enable the authorities in Australia to request authorities in Country F to help secure the Father's effective exercise of his rights to contact with his son in Country F.

#### **8. What could ISS Australia's role be?**

If the 1996 Convention had applied in this case, the role actually undertaken by ISS Australia in this case could still have been undertaken. Particularly important are the parallel and complementary services ISS Australia could provide including:

- Providing information and advice to clients about the 1996 Hague Convention and related services that ISS Australia and the Australian Central Authorities could provide;
- Providing practical and emotional support to family members in each country concerned;
- ISS could undertake a home visit and produce any reports required for the custody proceedings and could help to mediate a solution in relation to residence arrangements for the child using the ISS mediation-based approach;
- Also through mediation, helping the parents to establish contact arrangements that enable the child to have regular contact with both parents, and maintenance of contact arrangements through ongoing support;
- While complex legal issues involving the 1996 Hague Convention are being dealt with by the Central Authorities, providing family members with ongoing support and reassurance, linking them up with local services such as legal advice or specialist counselling as required; and
- Providing a link via the ISS network to the overseas Central Authorities in the event that communications are poor or the desired outcomes for the child are not being achieved;

If Countries E and F were not Contracting States to the 1996 Hague Convention (which was actually the situation in this case), then all of the Services and Actions contributed by ISS Australia would have been required as the Convention would not apply.

#### **9. How would this improve the outcomes for Australian children and their families?**

In this case, the 1996 Hague Convention and the parallel and complementary services provided by ISS Australia have the potential to contribute to the following outcomes:

- Resolving jurisdictional conflicts;
- Reducing the protracted and costly legal proceeding that may be required to determine residence or contact arrangements for the child;
- Enabling the child to be returned to his country of habitual residence so that the court with jurisdiction could determine the issues of residence and contact;
- Helping to establish/maintain arrangements for the child to have regular contact with both parents, both in Country F immediately, and in his new situation if he relocates to Australia;
- Through mediation, reducing family conflict by focussing on the best interests of the child; and
- Ensuring that family members in Australia and overseas receive support, information/advice and referral to other agencies as required, thereby improving their well-being.

## 9. Conclusions and Recommendations

This report has taken a comprehensive look at the 1996 Hague Convention and its potential application to the inter-country casework of ISS Australia, including:

- An overview of the aims and objectives of the ISS Australia project, *Boosting Outcomes for Australian Children Using International Laws*;
- An introduction to ISS Australia and its international network;
- An overview of the structure of the 1996 Hague Convention, its key Articles and the way in which it resolves questions of jurisdiction, applicable laws and recognition and enforcement of measures of protection across international borders;
- The arrangements in place for implementation of the Convention, specifically the Commonwealth and State/Territory implementing legislation and the Draft Procedures of the Central Authorities;
- How ISS Australia's services function, including referral processes, the ISS mediation-based approach and the new service delivery model developed which applies the 1996 Hague Convention to ISS Australia's inter-country casework involving children;
- The potential role for ISS Australia, providing complementary services to support implementation of the Convention and parallel services to assist affected families;
- Applications of the 1996 Hague Convention in ISS case studies; and
- Recommendations for ISS Australia's future role, including future funding arrangements and collaborative relationships with the Australian Central Authorities.

There are several key points to draw out in concluding this report. First, as a result of research undertaken for this project, ISS Australia has consolidated its expertise on the 1996 Hague Convention and, with the development of a new service delivery model for 1996 Convention cases and the related database, ISS Australia has established its readiness to undertake inter-country cases involving children where the 1996 Convention applies.

Second, ISS Australia has existing collaborative relationships with the Australian Central Authorities, particularly in relation to abduction matters under the *Hague Convention on the Civil Aspects of Parental Child Abduction* and the delivery of ISS Australia's cross-border child welfare services. These relationships need to be built upon as we move towards full implementation of the 1996 Hague Convention once it is ratified by more countries. In particular, discussions with the Federal Attorney-General's Department need to be pursued to ensure that appropriate funding arrangements are in place for ISS Australia to be able to contribute effectively to the implementation of the 1996 Hague Convention by providing parallel and complementary services in appropriate cases.

Third, the mediation-based approaches offered by ISS Australia in partnership with our overseas network offer great opportunities to improve outcomes for children in international situations. While the 1996 Hague Convention will improve outcomes for children by clarifying jurisdictional questions and providing a mechanism for inter-country co-operation via the network of Central Authorities, some limitations on the effectiveness of international co-operation are likely, and there are opportunities for ISS Australia, through its inter-country casework, to assist the Australian Central Authorities to achieve outcomes that are in the best interests of the children concerned.

As more countries are expected to ratify the 1996 Hague Convention in the near future, further steps need to be taken to ensure the readiness of ISS Australia and the Central Authorities to fully operationalise the Convention, and to ensure the effectiveness of outcomes for children. ISS Australia recommends action in 4 main areas:

#### 1. Improving outcomes for Australian children using the 1996 Hague Convention

- The new service delivery model developed for this project is recommended for use by ISS Australia in cross-border child protection or parental responsibility cases;
- The database developed for the project should be used for data collection purposes so that the impact of ISS Australia's new service delivery model, and in particular the impact of the 1996 Hague Convention, can be measured; and
- Future data collection should be used to inform strategies for the continuous quality improvement of ISS Australia's services and to improve client outcomes.

#### 2. Cooperation between ISS Australia and the Australian Central Authorities

- ISS Australia needs to develop a networking plan aimed at building collaborative relationships with Central Authorities at the Commonwealth and State/Territory levels;
- ISS Australia and the Central Authorities should aim to increase referrals to ISS Australia, in appropriate cases, for assistance with cross-border child protection or parental responsibility matters; and
- The collaboration of the Central Authorities is sought to identify appropriate cases for referral to ISS Australia, both child protection and parental responsibility matters.

#### 3. Funded services for affected families

- Federal government funding, through the Attorney-General's Department, is needed for ISS Australia to establish a new national program encompassing parallel and complementary services in relation to inter-country parental responsibility matters to which the 1996 Hague Convention may apply;
- At the State-Territory level, further exploration of possible funding arrangements is needed to ensure that ISS Australia services are accessible to State/Territory Central Authorities in relation to child protection matters to which the Convention may apply; and
- A key contribution that ISS Australia can make is mediating solutions for the protection of children using ISS mediation-based approaches; this should be a key focus of future funding arrangements relating to the 1996 Hague Convention.

#### 4. Training and information dissemination on the 1996 Hague Convention

- Knowledge of the 1996 Hague Convention is currently limited and there is a need for a range of training activities to improve understanding of the 1996 Hague Convention and how its use could improve outcomes for children in international situations;
- Training activities could include community education for migrant communities and their leaders and professional development for workers involved in these cases, both within the Central Authorities and within welfare agencies that are part of ISS Australia's referral network in all states and territories; and
- If funded by the Federal Government, the new ISS Australia program should include new training courses and resources on the 1996 Hague Convention, targeted at identified stakeholders.

Stage 1 of ISS Australia's project, *Boosting Outcomes for Australian Children Using International Laws*, has successfully delivered the project aims but to begin to see a measurable impact on outcomes for children, we need to proceed with the next important phase. Stage 2 of the project, which is also funded by the Ian Potter Foundation, will commence immediately and is aimed at operationalising the findings in this report and progressing our recommendations in co-operation with key stakeholders. ISS Australia looks forward to the next stage of the project and the opportunities it presents to boost outcomes for Australian children using international laws.

## Resources

1. Hague Conference on Private International Law, *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, 1996.
2. Hague Conference on Private International Law, *Convention on the Civil Aspects of International Child Abduction*, 1980.
3. Hague Conference on Private International Law, *Report on the 5th meeting of the Special Commission to review the operation of the 1980 Hague Child Abduction Convention and the practical implementation of the 1996 Hague Protection of Children Convention*, published 2006.
4. Hague Conference on Private International Law, *Conclusions and Recommendations of the 5th meeting of the Special Commission (October-November 2006)*, published 2006.
5. Hague Conference on Private International Law, *Proceedings of the Eighteenth Session (1996)*, tome II, *Protection of children*, published 1998.
6. Lagarde, Paul, Explanatory Report on the 1996 Hague Child Protection Convention, from the Proceedings of the Eighteenth Session (1996), tome II, *Protection of children*, published 1998.
7. Family Law Act 1975 (Commonwealth)
8. Family Court (Child Protection Convention) Regulations 2003
9. Child Protection (International Measures) Act 2003 (Queensland)
10. Child Protection (International Measures) Act 2003 (Tasmania)
11. Child Protection (International Measures) Act 2006 (New South Wales)

## Status Table - 1996 Hague Convention

Member States	Date of signature	Date of ratification or accession	Type *	Entry into Force
Albania		18-5-2006	A	1-4-2007
Australia	1-4-2003	29-4-2003	R	1-8-2003
Austria	1-4-2003			
Belgium	1-4-2003			
Bulgaria		8-3-2006	A	1-2-2007
Cyprus	14-10-2003			
Czech Republic	4-3-1999	13-3-2000	R	1-1-2002
Denmark	1-4-2003			
Ecuador		5-11-2002	A	1-9-2003
Estonia		6-8-2002	A	1-6-2003
Finland	1-4-2003			
France	1-4-2003			
Germany	1-4-2003			
Greece	1-4-2003			
Hungary	4-7-2005	13-1-2006	R	1-5-2006
Ireland	1-4-2003			
Italy	1-4-2003			
Latvia	15-5-2002	12-12-2002	R	1-4-2003
Lithuania		29-10-2003	A	1-9-2004
Luxembourg	1-4-2003			
Monaco	14-5-1997	14-5-1997	R	1-1-2002
Morocco	19-10-1996	22-8-2002	R	1-7-2002
Netherlands	1-9-1997			
Poland	22-11-2000			
Portugal	1-4-2003			
Romania	15-11-2006			
Slovakia	1-6-1999	21-9-2001	R	1-1-2002
Slovenia	13-5-2004	11-10-2004	R	1-2-2005
Spain	1-4-2003			
Sweden	1-4-2003			
Switzerland	1-4-2003			
Ukraine		3-4-2007	A	1-2-2008
United Kingdom	1-4-2003			

Non-Member States	Date of signature	Date of ratification or accession	Type *	Entry into Force
Armenia		1-3-2007	A	1-5-2008

\* Type: R=Ratification; A=Accession.

- **Signatory** of a Hague Convention means a state that has indicated an intention to join but is not yet bound by the obligations of the Convention until ratification takes place.
- **Ratification** of a Hague Convention means becoming a party to a Convention (*i.e.* a Contracting State) - for the Member States of the Hague Conference or States present during the negotiations.
- **Accession** to a Hague Convention means the procedure by which a country joins a Convention for countries that are not Member States and are not present at the negotiations.
- **Contracting State** means a country which has joined the Convention by ratification or accession.
- Date of **entry into force** of a Hague Convention - date on which a Convention commences legal operation 3 months after ratification / accession. After entry into force, the same obligations apply for each Contracting State, regardless whether the ratification or accession procedure was used.

## Project Outline: Boosting outcomes for Australian children using international laws

### DESCRIPTION OF THE PROJECT

#### *Stage 1 – Funded by the Ian Potter Foundation*

The project will be undertaken by a part-time social worker who is currently employed by ISS Australia on a locum basis. This worker will continue part-time until the end of June, with supervision to be provided by ISS Australia's Casework Coordinator as an "in kind" contribution from ISS Australia. Research assistance will be provided by a final year social work student.

### AIMS AND METHODS

#### Aims

1. Undertake research into the implementation of the Convention on Child Protection through our inter-country casework.
2. Develop a Microsoft Access database for data collection purposes. (This will be essential for the research as it will track progress against the new service delivery model.)
3. Develop a new service delivery model to support implementation of the Convention on Child Protection. The service delivery model will apply the 1996 Convention in the delivery of inter-country casework services for Australian families where the family is separated by international borders and where there a cross-border issue relating to child welfare.

#### Methods

For Aim 1:

- Review inter-country child welfare cases previously undertaken by ISS Australia to determine how these align to the 1996 Convention.
- Undertake a literature search relating to the Convention on Child Protection.
- Seek feedback from ISS clients using questionnaires (time permitting).

For Aim 2:

- Set up the database to record service outcomes for service evaluation purposes.
- Use the database to record service outcomes for service evaluation purposes.

For Aim 3:

- Develop a new service delivery model for any new inter-country child welfare cases received during the project.
- Apply the new service delivery model to any new inter-country child welfare cases received during the project.
- Use the database to record client details and track progress on different aspects of the new service delivery model, particularly in relation to implementation of the 1996 Convention.
- Write up research findings in a report.
- Distribute to ISS Australia's partners and other key stakeholders (time permitting).

## Division 4, subdivision B - Family Law Act 1975

### Section 111 CD

- (1) A court may exercise jurisdiction for a Commonwealth personal protection measure only in relation to:
- (a) a child who is present and habitually resident in Australia; or
  - (b) a child who is present in Australia and habitually resident in a Convention Country, if:
    - (i) the child's protection requires taking the measure as a matter of urgency; or
    - (ii) the measure is provisional and limited in its territorial effect to Australia and the measure is not compatible with a foreign measure already taken by a competent authority of a Convention country under Articles 5 to 10 of the Child Protection Convention; or
    - (iii) the child is a refugee child; or
    - (iv) a request to assume jurisdiction is made by a competent authority of the country of the child's habitual residence; or
    - (v) a request to assume jurisdiction is made to the court by, or at the invitation of, a competent authority of the country of the child's habitual residence; or
    - (vi) a competent authority of the country of the child's habitual residence agrees to the court assuming jurisdiction; or
    - (vii) the court is exercising jurisdiction in proceedings concerning the divorce or separation of the child's parents or the annulment of their marriage (but see subsection (3)); or
  - (c) a child who is present in a Convention country, if:
    - (i) the child is habitually resident in Australia; or
    - (ii) the child has been wrongfully removed from or retained outside Australia and the court keeps jurisdiction under Article 7 of the Child Protection Convention; or
    - (iii) a request to assume jurisdiction is made to the court by, or at the invitation of, a competent authority of the country of the child's habitual residence or country of refuge; or
    - (iv) a competent authority of the country of the child's habitual residence or country of refuge agrees to the court assuming jurisdiction; or
    - (v) the child is habitually resident in a Convention country and the court is exercising jurisdiction in proceedings concerning the divorce or separation of the child's parents or the annulment of their marriage (but see subsection (3)); or
  - (d) a child who is present in Australia and is a refugee child;
  - (e) a child who is present in a non-Convention country, if:
    - (i) the child is habitually resident in Australia; and
    - (ii) any of paragraphs 69E(1)(b) to (e) applies to the child; or
  - (f) a child who is present in Australia, if:
    - (i) the child is habitually resident in a non-Convention country; and
    - (ii) any of paragraphs 69E(1)(b) to (e) applies to the child.

## ISS Australia Service Delivery Model

Table 1: ISS Services

<b>Service Category</b>	<b>Specific Services</b>
Child protection	Adoption Background check Counselling Family reunification Foster care Kinship placement Support Information/advice Welfare check Referral - facilitated Referral – general
Family welfare	Contact arrangements Contact facilitation (post-box) Contact under supervision Counselling Information/advice Mediation Referral - facilitated Referral - general Residence arrangements Support Visitation arrangements Welfare check
IPCA	Contact arrangements Contact facilitation (post-box) Contact under supervision Counselling Information/advice Mediation Prevention of abduction/retention Referral – facilitated Referral – general Residence arrangements Support – during abduction/retention Support – post-return Tracing abducted/retained child Visitation arrangements Welfare check
Post-adoption Support	Contact facilitation (post-box) Counselling Family reunification Information/advice Referral – facilitated Referral – general Support Tracing

**Table 2: ISS Services (continued)**

Tracing – general	Contact facilitation (post-box) Counselling Family reunification Information/advice Referral – facilitated Referral – general Support Tracing
Other	Adult welfare Counselling Health support Housing support Immigration support Legal support Repatriation support Referral - facilitated Referral - general Other

**Table 3: ISS Actions**

<b>Actions</b>
Administration
Advice
Case closure
Case re-opened
Case summary
Case transfer
Consultation
Correspondence
E-mail
Home visit
Intake
Letter of Support
Meeting - agency/government
Meeting - client
Notes
Reading/research
Referral sent
Referral received
Report - assessment
Report - other
Request action by ISS overseas
Request action by local partner
Supervision
Telephone call

**Table 4: ISS outcomes**

<b>Outcomes</b>
Abducted/retained child located
Abducted/retained child returned
Abduction/retention prevented
Adopted child/offspring traced
Birth parent traced
Child reunited with parent
Child reunited with other family member
Client's emotional well-being improved (adult/parent)
Client's emotional well-being improved (child/offspring)
Client's identity improved (adult/parent)
Client's identity improved (child/offspring)
Contact established
Contact maintained/improved
Family conflict reduced
Family member traced
Family members reunited
Family relationship established
Family relationship maintained/improved
Kinship placement established
Kinship placement maintained/improved
Kinship placement prepared for
Medical/genetic information accessed
Other information accessed
Support in place – local services
Support in place – family/community
Support in place – overseas services
Parental responsibility established/maintained/improved
Residence established/maintained/improved
Visitation arrangements established
Visitation achieved
Welfare risk reduced

## Australian Central Authorities

### **For the Commonwealth Central Authority:**

International Family Law Section  
Civil Justice Division  
Commonwealth Attorney-General's Department  
Robert Garran Offices  
National Circuit, Barton  
Canberra ACT 2600  
AUSTRALIA

### **Contact details:**

Freecall: 1800 100 480  
Facsimile: (02) 6234 4849  
Email: [centralauthority@ag.gov.au](mailto:centralauthority@ag.gov.au)

### **For Western Australia:**

Director-General  
Department for Child Protection  
189 Royal Street  
East Perth WA 6004  
AUSTRALIA

### **Contact details:**

Phone: (08) 9222 2555  
Freecall: 1800 622 258  
Email: [dept@dcp.wa.gov.au](mailto:dept@dcp.wa.gov.au)

### **For Queensland:**

Director-General  
Department of Child Safety  
GPO Box 806  
Brisbane QLD 4001  
AUSTRALIA

### **Contact details:**

Freecall: 1800 811 810  
Telephone: (07) 3224 8045  
Facsimile: (07) 3404 3570  
Email: [info@childsafety.qld.gov.au](mailto:info@childsafety.qld.gov.au)

### **For New South Wales**

Director-General  
Department of Community Services  
4-6 Cavill Ave  
Ashfield NSW 2131  
AUSTRALIA

### **Contact details:**

Ph: (02) 9716 2222  
Fax: (02) 9798 5486  
Website: [www.community.nsw.gov.au](http://www.community.nsw.gov.au)

### **For Victoria**

Secretary  
Department of Human Services  
50 Lonsdale Street  
Melbourne VIC 3001  
AUSTRALIA

### **Contact details:**

Freecall: 13 1278  
Email: [contact\\_cyf@dhs.vic.gov.au](mailto:contact_cyf@dhs.vic.gov.au)  
Website: [www.cyf.vic.gov.au](http://www.cyf.vic.gov.au)

### **For Tasmania**

Secretary  
Department of Health & Human Services  
34 Davey Street  
Hobart TAS 7000  
AUSTRALIA

### **Contact details:**

Telephone: 1300 135 513  
Website: [www.dhhs.tas.gov.au](http://www.dhhs.tas.gov.au)

### **For South Australia**

Executive Director  
Families SA  
Department for Families & Communities  
Level 7 EDS Centre  
108 North Terrace  
Adelaide SA 5000  
AUSTRALIA

### **Contact details:**

Telephone: (08) 8226 7000  
Email: [customer.families@dfc.sa.gov.au](mailto:customer.families@dfc.sa.gov.au)  
Website: [www.families.sa.gov.au/](http://www.families.sa.gov.au/)

**For Australian Capital Territory**

Chief Executive  
Chief Minister's Department  
GPO Box 158  
Canberra ACT 2601  
AUSTRALIA

**Contact details:**

Telephone: 13 22 81  
Fax: (02) 6207 5886  
Website: [www.cmd.act.gov.au/](http://www.cmd.act.gov.au/)

**For the Northern Territory:**

Chief Executive Officer  
Department of Health and Community Services  
PO Box 40596  
Casaurina NT 0811  
AUSTRALIA

**Contact details:**

Telephone: (08) 8999 2400  
Freecall: 1800 700 250  
Website: [www.health.nt.gov.au/](http://www.health.nt.gov.au/)