



## Facilitating International Co-operation in Parenting Disputes: The Hague Child Protection Convention

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### Introduction

The early resolution of international parenting disputes is arguably a step closer now that the *Hague Convention on the Protection of Children 1996*<sup>1</sup> (the *Child Protection Convention*) is incorporated into Australian law.<sup>2</sup> According to the former Commonwealth Attorney-General, the Hon. Daryl Williams, the main purpose behind the *Child Protection Convention* is to establish agreed conflicts of law rules to be applied in parental responsibility proceedings that transcend international borders, 'such as when the parents are living in different countries or the child has spent time in more than one country.'<sup>3</sup> To achieve its aim the *Child Protection Convention* provides rules to determine:

- whether a court has jurisdiction to hear an international parental responsibility dispute;
- which country's law is to be applied in determining international parental responsibility disputes;
- what conditions must be satisfied to ensure international recognition and enforcement of parenting orders; and
- what obligations courts in Australia and overseas have to co-operate in the protection of children.<sup>4</sup>

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<sup>1</sup> *The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (approved by the 18<sup>th</sup> Session of the Hague Conference on Private International Law).

<sup>2</sup> *Family Law Amendment (Child Protection Convention) Act 2002* (Cth); *Family Law (Child Protection Convention) Regulations 2003* (Cth), came into force in Australia on 1 August 2003.

<sup>3</sup> The Hon Daryl Williams, 'Australia Ratifies the Hague Child Protection Convention' (Press Release 48/03, 1 May 2003).

<sup>4</sup> Commonwealth Attorney-General's Department, 'Explanatory Information – Proposed New Child Protection Legislation' 24 September 2001, 1.

The *Child Protection Convention* also requires direct liaison between central authorities appointed in each of the *Convention* countries.

Twenty-six countries including Germany, Greece, Ireland, Italy, Portugal, Spain and the United Kingdom have now signed the *Child Protection Convention*, although most have not as yet ratified the *Convention*.<sup>5</sup> Arguably, the *Convention*, and the new laws in Australia, provide certainty for parents and children by allowing decisions made in one country about parental responsibility to be recognised and enforced in another country. In this respect the new *Convention* provides a useful complement to the *Hague Child Abduction Convention 1980*.<sup>6</sup>

The new *Convention* also addresses the problem of international cases involving protection of children from abuse and neglect. It provides rules for determining which child protection authorities have jurisdiction in relation to a child, and provides for reciprocal recognition and enforcement of child protection measures.<sup>7</sup> These care and protection matters will be a matter for states and territories to implement.

### The Hague Conference on Private International Law

The First Session of the Hague Conference on Private International Law was convened in 1893.<sup>8</sup> It was not until the Seventh Session in 1951 that the Hague Conference became a permanent institution.<sup>9</sup> Based upon unifying rules of private international law,<sup>10</sup> the Hague Conference has produced a series of multilateral treaties which seek to address the international legal problems that may arise.<sup>11</sup> It also seeks to facilitate relationships between private parties across international borders and inter-

<sup>5</sup> The countries that have now signed the *Convention* (as at 6 November 2003) are: \*Australia, Austria, Belgium, Cyprus, \*Czech Republic, Denmark, \*\*Ecuador, \*Estonia, Finland, France, Germany, Greece, Ireland, Italy, \*Latvia, Luxembourg, \*Monaco, \*Morocco, Netherlands, Poland, Portugal, \*Slovakia, Spain, Sweden, Switzerland and the United Kingdom – but only those marked with an asterisk have \*ratified or \*\*acceded to the *Convention* – source <http://www.hcch.net/e/status/>.

<sup>6</sup> *Convention on the Civil Aspects of International Child Abduction 1980*; see also *Family Law Act 1975* (Cth) s 111B; *Family Law (Child Abduction Convention) Regulations 1986* (Cth).

<sup>7</sup> In Australia this is an area of responsibility for state and territory governments that unanimously agreed to the ratification of the *Child Protection Convention* by the Commonwealth Government.

<sup>8</sup> The first Conference was convened by the Government of the Netherlands.

<sup>9</sup> The Hague Conference became a permanent institution when the *Statute of the Hague Conference on Private International Law* came into force on 15 July 1955.

<sup>10</sup> *Statute of the Hague Conference on Private International Law 1955*, art 1.

<sup>11</sup> A convention is the product of the continuous work of various bodies that culminates in a Plenary Session (or Conference) held every four years.

national legal transactions and establish itself as a worldwide centre in the service of international and administrative co-operation.<sup>12</sup> Since 1951, the Hague Conference has adopted 36 conventions that generally deal with the determination of applicable law, conflict of jurisdiction, recognition and enforcement of foreign judgments, and/or the administrative and judicial co-operation between authorities. There are presently 62 members of the Hague Conference.<sup>13</sup>

A country may sign, ratify or accede to a specific Hague convention. By signing a convention, the relevant country expresses its intention to become a 'party' to it, although it is not obliged to take any further action. However, when a country 'ratifies' a convention, it comes under a legal obligation to apply the convention. With some exceptions, ratification is reserved for 'Member States' exclusively.<sup>14</sup> Nevertheless, it is still possible to become a 'party' to a Hague convention without being a member of the Hague Conference and those countries doing so may 'accede' to a particular convention. Accession is only possible once the particular convention has entered into force, and the other parties to it accept the accession, either expressly<sup>15</sup> or tacitly,<sup>16</sup> depending on the actual wording of the convention. In general, three instruments of ratification, acceptance or approval are required to be deposited with the Hague Conference before the particular convention comes into force in a country. As a general rule, the particular convention then enters into force in that country three months later.<sup>17</sup> Australia became a member of the Hague Conference in 1973 and is a party to the following Conventions:

- *Convention on the Form of Wills 1961*;
- *Convention on the Legalisation of Foreign Public Documents 1961*;
- *Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970*;

<sup>12</sup> Resolution adopted by the Seventeenth Session of the Hague Conference on Private International Law, 19 May 1993.

<sup>13</sup> For full details visit the official website of the Hague Conference on Private International Law at <http://www.hcch.net>.

<sup>14</sup> For example, the *Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption 1993* is open for signature and ratification by all countries that participated in the Seventeenth Session of the Hague Conference on Private International Law, 29 May 1993.

<sup>15</sup> For example, see *Convention on the Civil Aspects of International Child Abduction 1980*, art 38(4).

<sup>16</sup> For example, see *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children 1996*, art 58(3).

<sup>17</sup> Not all Hague conventions follow this general rule: for example see the *Convention on the Recognition of Divorces and Legal Separations 1970* (1 June 1970).

- *Convention on the Recognition of Divorces and Legal Separations 1970*;
- *Convention on the Recognition and Enforcement of Maintenance Decisions 1973*;
- *Convention on the Celebration and Recognition of the Validity of Marriages 1978*;
- *Convention on the Civil Aspects of International Child Abduction 1980*;
- *Convention on the Law Applicable to Trusts 1985*; and
- *Convention on Intercountry Adoption 1993*.

### **The Child Protection Convention**

The *Child Protection Convention* was unanimously adopted by all 'member states' present at Eighteenth Session of the Hague Conference on 18 October 1996. Australia signed and ratified the *Convention* in April 2003<sup>18</sup> and it came into force on 1 August 2003 with the commencement of the *Family Law Amendment (Child Protection Convention) Act 2002* (Cth) and the *Family Law (Child Protection Convention) Regulations 2003* (Cth).

The *Convention* was created in part in response to problems experienced by the 1961 *Hague Minors Convention*<sup>19</sup> that is only in force in 11 countries mainly located in Western Europe.<sup>20</sup> Difficulties with this earlier *Convention* arose from its failure to adequately resolve conflicts of jurisdiction between the country of the child's habitual residence and the country of the child's nationality, as well as the country where the child's person or property was present.<sup>21</sup> Although predominance was given to the country of nationality in cases of conflict, this failed to cater for children of dual nationalities and often produced decisions with which the child's habitually resident country disagreed.<sup>22</sup> The earlier *Convention*

<sup>18</sup> Australia signed the *Child Protection Convention* on 1 April 2003 and ratified it on 29 April 2003.

<sup>19</sup> *Convention on the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors* (5 October 1961); this *Convention* is in force in Austria, France, Germany, Italy, Luxembourg, Netherlands, Poland, Portugal, Spain, Switzerland, Turkey.

<sup>20</sup> P Lagarde, 'Explanatory Report on the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children', The Hague Conference on Private International Law, 15 January 1997, para 4.

<sup>21</sup> *Ibid.*, para 5.

<sup>22</sup> *Ibid.*

was further hindered by the lack of co-operation between national authorities and the absence of international enforcement provisions.<sup>23</sup>

In addition, although the *Child Abduction Convention* has been particularly successful in the area of family law and child protection, it is deliberately limited to the extreme situation of unlawful removal and it intentionally provides an effective but limited remedy of a return order for the relevant child(ren). Furthermore, other conventions and local arrangements<sup>24</sup> have lacked the geographical scope of the new *Child Protection Convention* and only deal partially with the relevant problems.<sup>25</sup>

The aim of the new *Convention* is to provide for the international co-operation between member countries in the interests of protecting children by eliminating potential conflicts of jurisdiction between different countries and providing for international recognition of measures of protection for children.<sup>26</sup> In order to achieve these goals, the *Child Protection Convention* obligates member countries to accept considerable limitations on the jurisdiction of their authorities in matters of jurisdiction, applicable law and recognition and enforcement of protection measures and requires direct liaison between Central Authorities appointed in each country.

The *Child Protection Convention* applies to parental rights existing by operation of law, such as the attribution of parental responsibility to each natural parent, and measures by judicial and administrative authorities.<sup>27</sup> It broadly covers three types of situations encompassing the private sphere of parental responsibility, custody and access rights, the public sphere of child protection by, or on behalf of, public authorities (for example, foster or institutional care) and the property rights of children.<sup>28</sup>

<sup>23</sup> Ibid.

<sup>24</sup> For example, the *European Convention on Recognition and Enforcement of Decisions concerning Custody of Children 1980* (included under the auspices of the Council of Europe); and the *Brussels II Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters* (currently under consideration with the European Union); and local arrangements within the United States, United Kingdom and the Nordic States.

<sup>25</sup> E Clive, 'The New Hague Convention on Children' (1998) *Juridical Review* 169, 170.

<sup>26</sup> Commonwealth/State Working Group, 'Hague Convention on the Protection of Children, Proposed Amendments to Family Law Legislation' Issues Paper', September 1998, para 1.2.

<sup>27</sup> Not legislative authorities.

<sup>28</sup> *Child Protection Convention*, art 3; see also P Nygh, 'The New Hague Convention on Child Protection' (1997) *Australian Journal of Family Law* 5, 10.

Various problems continue to plague the international protection of children.<sup>29</sup> In Australia, conflicts in jurisdiction between Australian and foreign courts in children's matters has been a 'longstanding area of difficulty', occasionally resulting in conflicting parenting orders being made in relation to the same children.<sup>30</sup> Due to the absence of reciprocal arrangements, orders made by Australian courts have the potential to be ignored and re-litigated in other countries. The lack of internationally agreed rules has resulted in the failure of authorities to act due to the assumption that authorities in another country have taken responsibility for protecting a child.<sup>31</sup> Furthermore, many countries refuse to recognise the parental responsibility that arises by operation of law in Australia of a father who is not married to the child's mother.

In resolving these problems, the *Child Protection Convention* arguably confers a number of advantages by clarifying and eliminating conflicts in jurisdiction, ensuring the recognition and enforcement of Australian court orders in member countries and by providing mechanisms of co-operation. In addition, the new *Convention* should be a useful complement to the *Child Abduction Convention* particularly where a court finds that an exception to a return order applies or in relation to the general enforcement of contact and access rights.

Additionally, the implementation of the *Convention* is not expected to trigger any significant increase of international cases dealt with by Australian courts, and in any case, Australian courts already have procedures in existence for the registration of foreign custody orders and are already hearing applications for parenting orders in international cases.<sup>32</sup> Furthermore, the costs of proceedings to enforce existing orders should be less than the cost of funding entirely new proceedings and no new agencies are to be established to deal with matters under the *Convention*.<sup>33</sup> It is also anticipated that there will be bureaucratic and resource benefits for Australia as the Permanent Bureau of the Hague Conference will main-

<sup>29</sup> These problems are supplemented by the ease of international travel and the increase in cross-cultural marriages.

<sup>30</sup> Commonwealth/State Working Group, 'Hague Convention on the Protection of Children, - Proposed Amendments to Family Law Legislation' (Issues Paper, September 1998), para 3.2.

<sup>31</sup> *Ibid.*

<sup>32</sup> Commonwealth/State Working Group, 'Hague Convention on the Protection of Children, - Proposed Amendments to Commonwealth, State and Territory Laws' (Report of the Commonwealth/State Working Group, April 1999), see generally paras 4.1-4.7.

<sup>33</sup> *Ibid.*

tain lists of contact officers for each relevant *Convention* member<sup>34</sup> and that the relevant foreign child protection agencies will have an obligation to co-operate with Australian authorities in providing information and working to resolve problems arising in Australian child protection cases.<sup>35</sup>

### Family Law Matters

The *Family Law Amendment (Child Protection Convention) Act 2002* (Cth) inserts new Divisions into Part XIII AA of the *Family Law Act 1975* (Cth).<sup>36</sup> The relevant provisions for the 'international protection of children' are located in Division 4.<sup>37</sup>

### Jurisdiction

In relation to a child who is present in Australia but habitually resident in a *Child Protection Convention* country, an Australian court<sup>38</sup> may exercise jurisdiction for a 'personal protection measure'<sup>39</sup> but only if one of the following situations exist:<sup>40</sup>

- the child's protection requires taking the measure as a matter of urgency;

<sup>34</sup> Ibid, para 4.6.

<sup>35</sup> Ibid, para 4.7.

<sup>36</sup> *Family Law Act 1975* (Cth) Division 1 - International maintenance orders and agreements etc s 111A; Division 2 - International child abduction s 111B; Division 3 - International agreements about adoption etc s 111C; International protection of children - Subdivision A - Preliminary ss 111CA-111CB, Subdivision B - Jurisdiction for the person of a child ss 111CC-111CI, Subdivision C - Jurisdiction for decisions about a guardian of a child's property ss 111CJ-CP, Subdivision D - Applicable law ss 111CQ-CS, Subdivision E - Recognition of foreign measures s 111CT, Subdivision F - Co-operation ss 111CU-CY, Subdivision G - Regulations s 111CZ; Division 5 - Other Matters; the *Child Protection Convention* is added as Schedule 1 to the Act.

<sup>37</sup> *Family Law Act 1975* (Cth); see also Subdivision A s 111CA for definitions for Division 4.

<sup>38</sup> A court exercising jurisdiction under the *Family Law Act 1975* (Cth).

<sup>39</sup> *Family Law Act 1975* (Cth) s 111CD (jurisdiction in relation to a 'Commonwealth personal protection order'); see also s 111CA definition ('a Commonwealth personal protection order relating to a child means a measure (within the meaning of the *Child Protection Convention*) under this Act that is directed to the protection of the child'); as to when a Commonwealth personal protection measure lapses see s 111CI; in relation to jurisdiction for decisions about a guardian of a child's property (a 'Commonwealth property protection measure') see Division 4 Subdivision C ss 111CJ-111CP; as to when a Commonwealth property protection measure lapses see s 111CP.

<sup>40</sup> *Family Law Act 1975* (Cth) s 111CD(1)(b)(i)-(vi); see also s 111CD(4) ('paragraphs 111CD(1)(a)-(d) are subject to the limitations in ss 111CE, 111CF and 111CH).

- the measure is provisional and limited in its territorial effect to Australia;<sup>41</sup>
- the child is a refugee;
- 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;
- a competent authority of the country of the child's habitual residence agrees to the court assuming jurisdiction; or
- the court is exercising jurisdiction in proceedings concerning the divorce or separation of the child's parents or the annulment of their marriage (but this is subject to other pre-conditions such as one of the child parent's being habitually resident in Australia).<sup>42</sup>

In relation to a child who is present in a *Child Protection Convention* state, an Australian court may only exercise jurisdiction if:<sup>43</sup>

- the child is habitually resident in Australia;
- the child has been wrongfully removed from or retained outside Australia and the court keeps jurisdiction under Article 7 of the *Child Protection Convention*;
- 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;
- a competent authority of the country of the child's habitual residence or country of refuge agrees to the court assuming jurisdiction; or
- the child is habitually resident in a *Child Protection 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 again this is subject to other pre-conditions such as one of the child's parents being habitually resident in Australia).<sup>44</sup>

In addition, an Australian court may exercise jurisdiction for a personal protection measure in relation to:<sup>45</sup>

- a child who is present in Australia and is a refugee child;

<sup>41</sup> See also *Family Law Act 1975* (Cth) s 111CD(2) ('if the measure is not incompatible with a foreign measure taken by a competent authority of a Convention country under Articles 5 to 10 of the Child Protection Convention).

<sup>42</sup> *Family Law Act 1975* (Cth) ss 111CD(1)(b)(vi), 111CD(3).

<sup>43</sup> *Family Law Act 1975* (Cth) s 111CD(1)(c)(i)-(v).

<sup>44</sup> *Family Law Act 1975* (Cth) s 111CD(1)(c)(v), 111CD(3).

<sup>45</sup> *Family Law Act 1975* (Cth) s 111CD(1)(d)-(f).

- a child who is present in a non-Child Protection Convention country, if the child is habitually resident in Australia and any of the paragraphs in s 69E(1)(b) to (e) of the Family Law Act 1975 applies to the child; or
- a child who is present in Australia, if the child is habitually resident in a non-Child Protection Convention country and similarly any of paragraphs in s 69E(1)(b) to (e) applies to the child.

Other than in the case of urgency, an Australian court cannot exercise jurisdiction or take a personal protection measure where the child is wrongfully removed from or retained outside a *Child Protection Convention* country and an authority of the *Convention* country keeps jurisdiction under Article 7.46. This Article preserves the jurisdiction of the courts of the child's original habitual residence, even after a return order is refused under the *Child Abduction Convention*. The country to which the child has been taken is only deemed to become the child's new habitual residence if the child has resided there for at least one year and is settled in its new environment and the person with 'rights of custody' has acquiesced in the child's removal.<sup>47</sup> This provision has been welcomed as it corrects the mistaken assumption of courts that a non-return decision results in jurisdiction to deal with the custody of the child and thus discourages the use of the defences (to a return order) in the *Child Abduction Convention*.<sup>48</sup> However, concern has been expressed that this provision may be interpreted as allowing the original habitually resident jurisdiction to take measures contrary to those taken under the *Child Abduction Convention*, and consequently the refusal to return a child under the *Child Abduction Convention* should be final.<sup>49</sup> In response, the Attorney-General's Department has suggested that the drafters of the *Child Protection Convention* never intended this consequence, and that Australia's decision to ratify must be based on 'a balanced consideration of the whole of the Convention'.<sup>50</sup> Further limitations on jurisdiction apply when prior

<sup>46</sup> *Family Law Act 1975* (Cth) s 111CE.

<sup>47</sup> *Child Protection Convention*, art 7(1)(b) - this requirement of acquiescence is satisfied if one year has passed since the person with custody rights became aware of the child's removal and no request for the child's return is pending.

<sup>48</sup> *Child Abduction Convention* art 13; *Family Law (Child Abduction Convention) Regulations 1986* (Cth) reg 16; see also G DeHart, 'The Relationship between the 1980 Child Abduction Convention and the 1996 Protection Convention', (2000) *International Law and Politics* 83, 92-93.

<sup>49</sup> Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation referred to the Committee: Provisions of the Family Law Amendment (Child Protection Convention) Bill 2002*, (2002) Legal Aid Directors' Secretariat submission 2 at 2-3.

<sup>50</sup> *Ibid.*, submission 3 at 4.

child proceedings are pending in another *Child Protection Convention* country.<sup>51</sup>

It is worth noting that agreement for an Australian court to assume jurisdiction can be made or sought under Articles 8 and 9 of the *Child Protection Convention*.<sup>52</sup> Likewise, a relevant Australian court may order or invite the parties before the court to request the Commonwealth Central Authority to request a competent foreign authority to assume jurisdiction.<sup>53</sup>

#### **Applicable Law**

In accordance with Article 15 of the *Child Protection Convention*, where an Australian court is exercising jurisdiction in accordance with the requirements of the new legislation,<sup>54</sup> it must apply the relevant Australian law when it exercises that jurisdiction.<sup>55</sup> Where the child has a substantial connection with another country,<sup>56</sup> an exception exists for the court here to apply the law of another country if the court considers that child's protection warrants it.<sup>57</sup> Notwithstanding this, and in accordance with Article 16, the law of the country of the child's habitual residence governs the exercise of parental responsibility and this parental responsibility subsists after a change of that habitual residence to another country.<sup>58</sup> Conversely, a person not initially invested with parental responsibility may be attributed such responsibility if it is conferred by the law of country of the child's new habitual residence.<sup>59</sup> These provisions have significant benefits for Australian parents who do not have court orders, because although our family law legislation recognises that parental responsibility rests on both parents,<sup>60</sup> other countries (such as the United Kingdom and New Zealand) currently give no rights of custody to an unmarried father by operation of law.<sup>61</sup>

<sup>51</sup> For details see *Family Law Act 1975* (Cth) s 111CF.

<sup>52</sup> *Family Law Act 1975* (Cth) s 111CG.

<sup>53</sup> *Family Law Act 1975* (Cth) s 111CL.

<sup>54</sup> *Family Law Act 1975* (Cth) Part XIII AA Division 4 Subdivisions B-C ss 111CC-111CP.

<sup>55</sup> *Family Law Act 1975* (Cth) s 111CR(1), (2).

<sup>56</sup> Or the child's property is substantially connected with another country.

<sup>57</sup> *Family Law Act 1975* (Cth) s 111CR(3).

<sup>58</sup> *Family Law Act 1975* (Cth) s 111CS.

<sup>59</sup> *Family Law Act 1975* (Cth).

<sup>60</sup> *Family Law Act 1975* (Cth) s 61C(1).

<sup>61</sup> Commonwealth/State Working Group, above n 30, para 7.6.

In accordance with Article 22 of the *Child Protection Convention*, the application of a law concerning parental responsibility may be refused if its application would be manifestly contrary to public policy, taking into account the best interests of the child.<sup>62</sup>

### Recognition of Foreign Measures

Article 23 of the *Child Protection Convention* provides that all measures taken by the authorities of one *Convention* country shall be recognised in other *Convention* countries, and for Australian purposes, a foreign measure that is registered in accordance with the *Child Protection Convention Regulations*<sup>63</sup> has the same effect as a measure made by a relevant Australian court.<sup>64</sup>

### Co-operation Between Countries

As with the *Child Abduction* and *Child Adoption* conventions, the new *Child Protection Convention* requires that Central Authorities designated in each country be endowed with the responsibility of co-operating with each other and promoting co-operation to achieve the objects of the *Convention*.<sup>65</sup> However, under the *Child Protection Convention*, the task of Central Authorities is also largely facilitative and informative. Besides assisting in locating children and finding solutions for their protection, Central Authorities are required to provide information on laws and services, provide reports on the situation of children, communicate and exchange information, request overseas authorities to take certain measures and inform them of any information they may have regarding a serious danger to which a child may be exposed, while bearing their own costs.<sup>66</sup>

### Co-operation in Contact Proceedings

In accordance with Article 35 of the *Child Protection Convention*, a relevant Australian court hearing proceedings<sup>67</sup> concerning contact with a child must admit into evidence and consider any findings of a competent authority of a *Convention* country relating to the suitability of a parent to

<sup>62</sup> *Family Law Act 1975* (Cth) s 111CS(8).

<sup>63</sup> *Family Law (Child Protection Convention) Regulations 2003* (Cth).

<sup>64</sup> *Family Law Act 1975* (Cth) s 111CT.

<sup>65</sup> *Child Protection Convention* arts 29, 30.

<sup>66</sup> *Child Protection Convention* arts 30-39; see also *Family Law Act 1975* (Cth) s 111CU-111CY.

<sup>67</sup> Being proceedings under either the *Family Law Act 1975* (Cth) or the *Family Law (Child Protection Convention) Regulations 2003* (Cth).

have contact with the child.<sup>68</sup> The court also has the power to adjourn such proceedings pending the outcome of a request by a parent to the relevant foreign authority for a finding on the suitability of a parent to have contact with the child.<sup>69</sup> Moreover, where an Australian court is hearing an application by a parent (who is an Australian resident) seeking to obtain or keep contact with a child, the court may admit evidence, make a finding on the suitability of that parent to have contact with the child, and specify conditions on which the contact is to be given.<sup>70</sup> This arguably addresses deficiencies inherent in the *Child Abduction Convention* in relation to contact and access rights.

### Care and Protection Matters

The States and Territories are required to implement the child protection aspects of the new *Convention*, and government officials are currently co-operating in the development of an appropriate legislative scheme to this effect. Generally, it is envisaged that amendments will be made to child protection laws, common law and statute law regulating the *parens patriae* jurisdiction of the Supreme Court(s) and the appointment and powers of guardians of children's property,<sup>71</sup> as well as other State and Territory laws.<sup>72</sup> These amendments will cover the definition of measures of protection, the jurisdiction of courts and child protection authorities, the applicable law, and recognition and enforcement abroad of Australian measures, and arrangements for co-operation between Australian and overseas authorities.<sup>73</sup>

The Commonwealth Attorney-General's Department and the relevant State and Territory child welfare/protection departments (acting as the Central Authorities) will also be responsible for implementing the administrative aspects of the *Convention*.<sup>74</sup> In this respect it is worth noting that although registration provisions and procedures are consistent with those

<sup>68</sup> *Family Law Act 1975* (Cth) s 111CW(1).

<sup>69</sup> *Family Law Act 1975* (Cth) s 111CW(2).

<sup>70</sup> *Family Law Act 1975* (Cth) s 111CW(3).

<sup>71</sup> This is because decisions made by State and Territory Supreme Courts in the exercise of their *parens patriae* jurisdiction are measures of protection within the meaning of the *Convention*.

<sup>72</sup> Commonwealth/State Working Group, 'Hague Convention on the Protection of Children, - Proposed Amendments to State and Territory Laws' (Issues Paper, August 1998), para 3.1.

<sup>73</sup> *Ibid*, para 5.1.

<sup>74</sup> 'Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children', *National Interest Analysis*, 12 March 2002.

already in existence in the *Family Law Act*, State and Territory child protection laws in Australia do not presently provide for reciprocal recognition and enforcement of overseas child protection orders. Despite the review prohibitions in the *Child Protection Convention*, it has been considered that direct recognition and enforcement of overseas child protection orders is undesirable in Australia on policy grounds and that it is impossible to establish in advance a legislative scheme that enforces these orders as being equivalent to Australian orders.<sup>75</sup> As a consequence, proposed amendments to State and Territory legislation require consultation to take place between the overseas and Australian child protection authorities before recognition and enforcement is considered.<sup>76</sup>

### Conclusion

The *Child Protection Convention* is the latest addition to the Hague family of multilateral treaties and seeks to promote international co-operation in relation to parental responsibility and the protection of children. It removes uncertainties where Australian and foreign courts conflict in relation to parental responsibility and centralises jurisdiction in the courts of the country where the relevant child is habitually resident. It provides for the registration and enforcement in Australia of parenting and related orders made in *Convention* countries (and for the registration and enforcement in a *Convention* country of parenting and related orders made in Australia). Moreover, it provides mechanisms for co-operation between *Convention* countries where one parent seeks contact with his or her child located in another *Convention* country, and for the location of children generally. The new *Convention* also addresses the problem of international cases involving protection of children from abuse and neglect by providing rules determining which child protection authorities have jurisdiction in relation to a child, and by providing for reciprocal recognition and enforcement of child protection measures.<sup>77</sup> While the number of

<sup>75</sup> This difficulty arises from the belief that in practice it would be difficult to effectively register and enforce many overseas child protection orders in Australia as it is hard to ascertain what types of overseas child protection orders might be sent to Australia or what powers or limitations they may involve.

<sup>76</sup> Commonwealth/State Working Group, above n 72 paras 5.20-5.21. If an Australian child authority does not accept the view of the foreign authority that the measure of protection is appropriate, the proposed amendments provide that recognition and enforcement can be refused on public policy grounds.

<sup>77</sup> The Hon Daryl Williams, above n 3. The Attorney General notes that 'this is an area of responsibility for State and Territory Governments, which have all agreed that Australia should ratify the Convention.'

*Child Protection Convention* countries is currently few, it is anticipated that more countries will join in the years ahead.