Submission to the Legal and Constitutional Affairs Legislation Committee Inquiry into the Family Law Amendment Bill 2023

23 June 2023

**Hague Mothers**

**This submission is made on behalf of Hague Mothers[[1]](#footnote-1), an international project supported by the feminist charity FiLiA. The legal steering groups of Hague Mothers are led by Miranda Kaye (UTS Australia), Adrienne Barnett (Brunel University UK) and Sudha Shetty (University of Berkeley, US) and Merle Weiner (University of Oregon, US). The overarching aim of the project is to end the injustices created by the Hague Abduction Convention 1980, specifically for mothers and children who are fleeing abusive relationships. Our initial focus in on Australia and New Zealand, the UK and the US.**

This submission only comments on aspects of the Family Law Amendment Bill 2023 which impact upon ***Convention on the Civil Aspects of International Child Abduction (HAC)*** matters.

**In that respect we welcome and support the suggested changes in Schedule 4, *Independent Children’s Lawyers,* Part 2, *Convention of the Civil Aspects of International Child Abduction (HAC):***

We **support the clarification provided by an amended s68L(1)** that HAC proceedings are proceedings in which a child’s best interests or welfare are a paramount or relevant consideration, and so trigger a possible appointment of an Independent Children’s Lawyer.

**We also support the repeal of s68L(3)(a):**  children’s interests should be legally represented in HAC proceedings. Their voices and views should be heard and considered. The appointment of an Independent Children’s Lawyer (ICL) who can form an ongoing relationship with the child is a way of ensuring that children are properly and independently informed and heard in the proceedings.[[2]](#footnote-2) The current approach differs from those Hague Convention countries, such as Switzerland and South Africa, where children are routinely represented in HAC matters.[[3]](#footnote-3) **Therefore, we fully support the removal of the current requirement for ‘exceptional circumstances’ for the discretionary appointment of an ICL in HAC proceedings.** This will allow ICLs to be involved in ensuring the prevention of ‘grave risks’ to children in return proceedings in line with the recent amendments to regulation 16 of the *Family Law (Child Abduction Convention) Regulations 1986* (Cth) that family violence may be considered in such proceedings.

**Necessary conditions for the changes to be effective:**

Our full support for the proposal is subject to ICL training including education on how the Hague convention can be used as a tool of coercive control,[[4]](#footnote-4) as well as ensuring that ICLs are generally family violence, trauma-informed and culturally safe aware. ICLs should also be educated upon the recent changes made to regulation 16 of the *Family Law (Child Abduction Convention) Regulations 1986* (Cth), which clarifies that family violence is a relevant factor in terms of determining the risk in returning a child to the country of habitual residence.

Minimum national prerequisites to be on an ICL panel include five years of post-admission experience in family law. Hague proceedings require even more specialised expertise than general family law matters. Many private practitioners are no longer doing the complex and difficult work of being an ICL because legal aid rates compare so badly to private practitioner work.[[5]](#footnote-5)  The government cannot expect lawyers with the relevant family law experience and HAC expertise to be on the Panel unless funding rates are increased.

**Further changes should be made to the Child Abduction Regulations:**

Whilst we support the proposed amendments to section 68L and the recent amendments made in the Child Abduction Regulations, we remain concerned that the amendments are insufficient to prevent child abduction proceedings continuing to be used by perpetrators of violence and abuse as a mechanism to perpetrate ongoing abuse and place parents or carers and their children who fell violence back into unsafe situations.[[6]](#footnote-6) **We believe that further changes should be made to the regulations to mandate judges to consider family violence**. It is unclear why the wording iin the Note to Regulation16 (3) states that “the court **may** have regard to any risk that the return of the child under the Convention would result in the child being subject to, or exposed to, family violence”. This option is already available to judges and has resulted in unsafe returns to date. The wording should state that a **court** must have regard to family violence in these matters. Additionally there should be an explicit provision added that a court must refuse to make a return order if there is a relevant grave risk.

Another change to the regulations is required to ensure that Australia is complying with its obligations in Article 12 of the United Nations Convention on the Rights of the Child to ensure the child has a right to be heard in *all* proceedings affecting them. [[7]](#footnote-7) Since 2000, Australia has required the exception based on a child’s objection to show a strength of feeling beyond the mere expression of a preference or of ordinary wishes. This is more onerous than the wording of the actual Convention. It should be changed back to its original wording. This robs children of their voice in a situation where they have a right to be heard.

We are very happy to consult further on this submission. In the first instance, please contact Miranda Kaye as the primary author: Miranda.kaye@uts.edu.au

*Submitted by Hague Mothers FiLiA Legacy*

1. Hague Mothers is a voluntary international initiative which aims to end the injustices caused by the Hague Abduction Convention, specifically for mothers fleeing domestic abuse and coercive control. It is a FiLiA Legacy Project: FiLiA.org.uk. [↑](#footnote-ref-1)
2. Michelle Fernando and Nicola Ross, ‘Stifled Voices: Hearing Children’s Objections in Hague Child Abduction Convention Cases in Australia’ (2018) 32(1) *International Journal of Law, Policy and the Family* 93. [↑](#footnote-ref-2)
3. Ibid 103. [↑](#footnote-ref-3)
4. Gina Masterton et al, *Being ‘Hagued’: How Weaponising the Hague Convention Harms Women, Family and Domestic Violence Survivors* (QUT Centre for Justice Briefing Paper No Issue No 25, May 2022) 1. [↑](#footnote-ref-4)
5. Miranda Kaye, ‘The Increasing Demands on the Role of Children’s Lawyers in Family Law Proceedings in Australia’ 2019(2) *Child and Family Law Quarterly* 143. [↑](#footnote-ref-5)
6. Annabelle Gray and Miranda Kaye, ‘Redressing the Balance: How Australia’s Approach under the Hague Abduction Convention Is Still Endangering Victims of Domestic Violence’ (2023) 37(1) *International Journal of Law, Policy and the Family* ebac021. [↑](#footnote-ref-6)
7. Michelle Fernando, ‘Children’s Objections in Hague Child Abduction Convention Proceedings in Australia and the “Strength of Feeling” Requirement’ (2022) 30(3) *The International Journal of Children’s Rights* 729, 747. [↑](#footnote-ref-7)