

**QUESTIONNAIRE SUR LE FONCTIONNEMENT PRATIQUE DE LA CONVENTION
DE LA HAYE DU 25 OCTOBRE 1980 SUR LES ASPECTS CIVILS DE L'ENLÈVEMENT
INTERNATIONAL D'ENFANTS ET DE LA CONVENTION DE LA HAYE
DU 19 OCTOBRE 1996 CONCERNANT LA COMPÉTENCE, LA LOI APPLICABLE,
LA RECONNAISSANCE, L'EXÉCUTION ET LA COOPÉRATION EN MATIÈRE
DE RESPONSABILITÉ PARENTALE ET DE MESURES DE PROTECTION DES ENFANTS**

établi par le Bureau Permanent

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**QUESTIONNAIRE CONCERNING THE PRACTICAL OPERATION OF THE
HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF
INTERNATIONAL CHILD ABDUCTION AND THE HAGUE CONVENTION
OF 19 OCTOBER 1996 ON JURISDICTION, APPLICABLE LAW, RECOGNITION,
ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL
RESPONSIBILITY AND MEASURES FOR THE PROTECTION OF CHILDREN**

drawn up by the Permanent Bureau

*Document préliminaire No 1 de novembre 2010 à l'intention de la
Commission spéciale de juin 2011 sur le fonctionnement pratique de la
Convention Enlèvement d'enfants de 1980 et de la
Convention Protection des enfants de 1996*

*Preliminary Document No 1 of November 2010 for the attention of the
Special Commission of June 2011 on the practical operation of the
1980 Hague Child Abduction Convention and the
1996 Hague Child Protection Convention*

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INTRODUCTION TO THE QUESTIONNAIRE

Objectives of the Questionnaire

This Questionnaire is addressed in the first place to States Parties to the 1980 and / or 1996 Convention(s).¹ It has the following broad objectives:

- a. To seek information from States Parties as to any significant developments in law or in practice in their State regarding the practical operation² of the 1980 and / or 1996 Convention(s);
- b. To identify any current difficulties experienced by States Parties regarding the practical operation of the 1980 and / or 1996 Convention(s);
- c. To obtain the views and comments of States Parties on the services and supports provided by the Permanent Bureau of the Hague Conference on Private International Law regarding the 1980 and / or 1996 Convention(s);
- d. To obtain feedback on the use made of the Guide to Good Practice under the 1980 Convention and the impact of previous Special Commission recommendations;
- e. To obtain views and comments on related projects of the Hague Conference on Private International Law in the fields of international child abduction and international child protection; and
- f. To obtain views and comments on the priorities for the upcoming Special Commission meeting.

The Questionnaire will facilitate an efficient exchange of information on these matters between States Parties, as well as other invitees, prior to the Special Commission meeting.

Scope of the Questionnaire

This Questionnaire is intended to deal with only those topics not covered by the Country Profile for the 1980 Convention (currently in development and to be circulated for completion by States Parties in April 2011). The new Country Profile will provide States Parties with the opportunity to submit, in a user-friendly tick-box format, the basic information concerning the practical operation of the 1980 Convention in their State. States Parties should therefore be aware that, for the purposes of the Special Commission meeting, their answers to this Questionnaire will be read alongside their completed Country Profile.

States Parties should also be aware that this *general* Questionnaire will be followed, in due course, by a questionnaire dealing specifically with the issue of a protocol to the 1980 Convention. This Questionnaire is not therefore intended to deal directly with any questions surrounding the issue of a protocol to the 1980 Convention.

Whilst this Questionnaire is primarily addressed to States Parties to the 1980 and / or 1996 Convention(s), we would welcome from all other invitees to the Special Commission (*i.e.*, States which are not yet Party to either Convention, as well as certain intergovernmental organisations and international non-governmental organisations) any comments in respect of any items in the Questionnaire which are considered relevant.

¹ References in this document to the "1980 Convention" and the "1996 Convention" are to the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* respectively.

² As stated in Info. Doc. 1, where reference is made to the "practical operation" of the 1980 or 1996 Convention in documentation for this Sixth Meeting of the Special Commission, this is intended to refer to the *implementation and operation* of the relevant Convention.

We intend, except where expressly asked not to do so, to place all replies to the Questionnaire on the Hague Conference website (< www.hcch.net >). Please therefore clearly identify any responses which you do not want to be placed on the website.

We would request that replies be sent to the Permanent Bureau, if possible by e-mail, to secretariat@hcch.net no later than **18 February 2011**.

Any queries concerning this Questionnaire should be addressed to William Duncan, Deputy Secretary General (wd@hcch.nl) and / or Hannah Baker, Legal Officer (hb@hcch.nl).

QUESTIONNAIRE CONCERNING THE PRACTICAL OPERATION OF THE 1980 AND 1996 CONVENTIONS

Wherever your replies to this Questionnaire make reference to domestic legislation, rules, guidance or case law relating to the practical operation of the 1980 and / or the 1996 Convention(s), **please provide a copy of the referenced documentation** in (a) the original language and, (b) wherever possible, accompanied by a translation into English and / or French.

Name of State or territorial unit:³ **New Zealand**

For follow-up purposes

Name of contact person: Patricia Bailey

Name of Authority / Office: Central Authority, Ministry of Justice, New Zealand

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E-mail address: patricia.bailey@justice.govt.nz

PART I: RECENT DEVELOPMENTS⁴

1. Recent developments in your State

- 1.1 Since the 2006 Special Commission, have there been any significant developments in your State regarding the legislation or procedural rules applicable in cases of:
- a. International child abduction; and
 - b. International child protection?
- Where possible, please state the reason for the development in the legislation / rules.

a) The most significant development in child abduction cases has been the introduction of procedural guidelines to obtain a child's view by setting out a standard brief when engaging experts to provide reports for the court or when appointing counsel to obtain and represent the child's views in the court proceedings. The guidelines were introduced as a means of ensuring the case remains focused and minimises the potential risk of delay.

b. The New Zealand government has agreed we should accede to the 1996 Child Protection Convention. Work is continuing to introduce legislation to enable accession. It is anticipated that New Zealand will be in a position to accede later this year.

b) New Zealand is currently working towards accession to the 1996 Convention.

- 1.2 Please provide a brief summary of any significant decisions concerning the interpretation and application of the 1980 and / or 1996 Convention(s) given since the 2006 Special Commission by the relevant authorities⁵ in your State.

Appointment Psychologist/Lawyer for the child

In *ST v MW* (HC 7/10/2008 CIV 2008-404-4916) where the High Court upheld a Family court decision that J, nearly five years old, should be returned to the UK, the case had been noted for the findings (i) the HC had no jurisdiction to hear ST's claim that the FC

³ The term "State" in this Questionnaire includes a territorial unit, where relevant.

⁴ This Part of the Questionnaire is intended to deal primarily with the developments in law and practice relating to international child abduction and international child protection which have occurred in your State since the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006) (hereinafter "the 2006 Special Commission"). However, if there are important matters which you consider should be raised from prior to the 2006 Special Commission, please provide such information here.

⁵ The term "relevant authorities" is used in this Questionnaire to refer to the judicial or administrative authorities with decision-making responsibility under the 1980 and 1996 Conventions. Whilst in the majority of States Parties such "authorities" will be courts (*i.e.*, judicial), in some States Parties administrative authorities remain responsible for decision-making in Convention cases.

erred in making a decision without the appointment of lawyer for child, noting that the decision not to appoint was the correct one and appointment of counsel for the child in Hague convention cases was not a universal practice, (ii) there was no jurisdiction to hear ST's challenge of the FC decision to exclude items ST had sought to be included in the psychologist's brief as the FC decision was an interlocutory decision that was not appealed (the HC noting ST was seeking to extend the psychologist's role to gathering evidence in support of her cause) (iii) the evidence did not establish a grave risk defence, the grave risk defence must be associated with the return of a child to the home country, grave risk defence may be able to be invoked even if the country to which the child will be returned has a perfectly acceptable legal system, but the ability of the Courts in the country of return to provide protection is likely to be a 'highly relevant' consideration, the grave risk defences are narrowly defined but there is no requirement that they be approached in a presumptive way and the grave risk defence in particular is not easy to invoke successfully.

Domestic Violence/Financial Hardship

In *Andrews v Secretary for Justice* (CA, 5/6/2007 CA159/07) a mother appealed unsuccessfully from a Hague Convention order that she return her two children to Australia where she and the children's father (both NZ citizens) had been living, she leaving before a hearing where the father intended to defend proceedings alleging his domestic violence against her (and obtaining a temporary protection order upon arrival in NZ). The CA held that the lower courts had not erred in finding the father had custody rights at the time of removal – the protection order did not have the effect of removing from him the full bundle of rights associated with a right to custody or in the application of grave risk/intolerable situation defences arising from the mother also being the primary care giver to the two children who have to remain in NZ by a Family Court order and will be separated from their siblings for a time at least. On this defence the CA agreed with the High Court's observations that the mother's consent to the application of these children's father, that they not be removed from NZ, 'had the hallmarks of a strategy to raise a further impediment to the present Hague Convention order' and noted that the mothers parents are able to look after the children in the short term.

On the most difficult issue in the case, the financial position of the mother and children while in Australia, the CA accepted that likely financial hardship in the requesting country is a ground to refuse an order for return, but here the father had undertaken to provide airfares and other support, and it was unlikely that Australian authorities would not provide some sort of special financial assistance.

Grave Risk/ Intolerable situation

In *Smith v Adam* (CA, 22/11/2006) CA 164/06 S, who had removed her three year old child from England (where the father lives) to NZ, contrary to Hague Convention on International Child Abduction, appealed unsuccessfully from an order for return of the child on the basis this would expose the child to grave risk of physical or psychological harm due to the risk of the mother suffering a major depressive episode. The court of Appeal held that the test recently applied by the Supreme Court to the discretion to order return, even where a defence has been made out, is equally applicable to the grave risk exception. "Where grave risk exception is made out, it would obviously not be in the best interests of a particular child to order return" and the Court of Appeal found it "difficult to envisage a situation where the competing policy factors of the Convention, would, in terms of the Supreme Court test, clearly outweigh the interest of a child in such a situation". Here the Family Court was entitled to take into account the public health and welfare structures that exist in England and to require the mother to take steps to keep herself well by accepting assistance and support.

Harper vs Johnson (CA 21/5/2008) CA 171/2008 [2008] NZCA 131.

The Court of Appeal confirmed an order for return to Germany of a four year old child. The court of Appeal held that the merits were clear-cut, the child had been wrongly retained in NZ in clear breach of a German order, and though the evidence pointed to the father being erratic and unreliable, the facts and a properly focussed psychological report

fell well short of establishing the grave risk defence of exposing a child to physical and psychological harm if returned. Refusing leave for the mother to add a new ground of appeal that as the child had been born in NZ his habitual residence in New Zealand resumed on his late arrival in 2006 with her, or habitual residence had been achieved due to the time he was here after that, the Court of Appeal commented that quite apart from the mothers failure to run that argument in the lower Court it "is misconceived to equate habitual residence with the concept of origin which somehow reverts when a person permanently leaves his or her domicile of choice" and if courts "too readily premitted residence in a country to which a child had been wrongfully removed to constitute a change of habitual residence, then abducting parents would be given every incentive to delay and avoid the child's speedy return to the country of habitual residence. The Policy of the Convention would be undermined".

- 1.3 Please provide a brief summary of any other significant developments in your State since the 2006 Special Commission relating to international child abduction and / or international child protection.

We have experienced a significant increase in the number of applications resolved by amicable agreement or by consent orders. Approximately two thirds of applications are amicably resolved by consent orders, voluntary return or withdrawal of the proceedings. As the Courts have become more efficient in Hague Convention cases and more skilled in the application of the Convention it has become easier to negotiate voluntary returns. As the lawyers have become better educated they realise that there are really only limited arguments available to a taking parent in Convention cases and those familiar with Convention jurisprudence can and do encourage voluntary returns.

2. Issues of compliance

- 2.1 Are there any States Parties to the 1980 and / or 1996 Convention(s) with whom you are having particular difficulties in achieving successful co-operation? Please specify the difficulties you have encountered and, in particular, whether the problems appear to be systemic.

We believe that good communication and co-operation is fundamental to the effective operation of the Convention. Communication, or lack thereof, is an ongoing problem with some member States requiring the assistance of our diplomatic services. Unfortunately New Zealand has experienced problems in identifying where or who the responsible Central Authority is to address an initial request for return of a child. The information provided on the Hague website is not always current due to change in internal structure or government. New Zealand supports the ongoing work to introduce a country profile which may alleviate some of the problems.

- 2.2 Are you aware of situations / circumstances in which there has been avoidance / evasion of either Convention?

a) Art 11 requires judicial or administrative authorities to act expeditiously. While in most cases that has occurred we find that delay in initiating proceedings is of concern. It can take considerable time for a Central Authority to consider an application before it is referred to the judicial or administrative authority which defeats the obligation to act expeditiously. Art 7(f)

b) To provide or facilitate the provision of legal aid or advice.
We have experienced difficulties in obtaining information about procedural aspects in some States. Particularly information about the level of legal assistance or legal aid which may be provided. At times it is unclear whether the applicant is required to instruct private counsel or if the matter will be prosecuted on behalf of the left behind parent. Sometimes conflicting information is received which may be due to the translation of the communication. It would be helpful if information could be provided about the level of legal assistance or legal aid that is available and the process to access the assistance. We

endorse the draft country profile in this respect.

c) In accordance with the Convention countries are expected to return children who have been wrongfully removed to the appropriate jurisdiction where decisions about the care and welfare arrangements can be made. We are concerned that domestic law in some States can cross over to influence international child abduction cases, rather than the intended principles of the Convention.

PART II: THE PRACTICAL OPERATION OF THE 1980 CONVENTION
3. The role and functions of Central Authorities designated under the 1980 Convention⁶
In general

- 3.1 Have any difficulties arisen in practice in achieving effective communication or co-operation with other Central Authorities? If so, please specify.

Acknowledgment of receipt of an application is received very promptly in most cases which is always encouraging. However, after the initial acknowledgement some central authorities are very slow in responding to communications regardless whether it concerns an application to or from that State, or whether a translation of the document was also provided. The lack of communication can place an applicant at a distinct disadvantage.

- 3.2 Have any of the duties of Central Authorities, as set out in Article 7 of the 1980 Convention, raised any particular problems in practice either in your State, or in States Parties with whom you have co-operated?

Provide information about the general character of the law 7(e)

Provide legal aid and advice 7(g)

- 3.3 Has your Central Authority encountered any difficulties with the interpretation and / or application of any of the 1980 Convention provisions? If so, please specify.

a) Abduction Convention proceedings are focused primarily on the issue of establishing the proper jurisdiction to address the substantive dispute between the parties over the care of their child. It is for this reason that they are meant to be summary in nature.

We have noticed an increasing trend where judicial or administrative authorities in some States require evidence of a detailed nature on matters that are of a substantive nature rather than limiting the inquiry to the determination of the question of jurisdiction. The 1996 Child Protection Convention clearly reinforces the 1980 Convention and sets out rules for determining the question of jurisdiction. It re-emphasises that the best interest of a child is served by prompt return where matters can be determined in or by the correct or most appropriate jurisdiction. The Convention is based on mutual respect and trust which is undermined if there is no respect for jurisdiction.

b) We encourage amicable resolution in child abduction cases and the use of mediation in appropriate cases. It is important that we ensure parties understand that mediation is voluntary and it does not slow down or delay the Hague Convention proceedings. We are concerned that some States require the left behind parent to attend mediation in person. We have had the situation arise where the left behind parent travelled from New Zealand to Europe to take part in mediation only to be told the taking parent no longer wished to mediate. The matter was then listed for mention in court at a later date and the father advised he should also make arrangement to attend the hearing.

If mediation as a means of amicable resolution is considered appropriate in a particular case it needs to be flexible to meet the parties needs. We would encourage all States to consider the circumstances of each individual including the ability to fund the costs of attending and the distance and time required to attend.

Legal aid and representation

⁶ See also question 6 below on "Ensuring the safe return of children" which involves the role and functions of Central Authorities.

3.4 Do the measures your Central Authority takes to provide or facilitate the provision of legal aid, legal advice and representation in return proceedings under the 1980 Convention (Art. 7(2) g)) result in delays in proceedings either in your own State, or, where cases originate in your State, in any of the requested States you have dealt with? If so, please specify.

a) Where an application for the return of a child is received the New Zealand Central Authority will, if the applicant does not have legal representation and the circumstances so require, engage private counsel to represent the applicant. The Central Authority uses a select panel of experts to represent the left behind parent. In this way the Central Authority can be assured that cases will be run expeditiously, economically and because a well argued case will be presented to the court by experienced counsel there is a greater likelihood of the principles of the Convention being interpreted consistently.

b) It is of concern where the introduction of new measures or changes in policy causes delay in processing an application that significantly increase the timeframe for disposal.

3.5 Are you aware of any other difficulties in your State, or, where cases originate in your State, in any of the requested States you have dealt with, regarding the obtaining of legal aid, advice and / or representation for either left-behind parents or taking parents?⁷

Lack of legal aid and experienced legal representation continue to be problems faced by parents where children are taken to the USA. While a left behind parent may complete the required legal assistance questionnaire even if he/she qualifies for legal assistance there is no guarantee that a pro bono attorney can be found to represent them.

⁷ See paras 1.1.4 to 1.1.6 of the "Conclusions and Recommendations of the Fifth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* and the practical implementation of the *Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (30 October – 9 November 2006) (hereinafter referred to as the "Conclusions and Recommendations of the 2006 Special Commission") (available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings"):

"1.1.4 The importance for the applicant of having effective access to legal aid and representation in the requested country is emphasised. Effective access implies:

a) the availability of appropriate advice and information which takes account of the special difficulties arising from unfamiliarity with language or legal systems;
b) the provision of appropriate assistance in instituting proceedings;
c) that lack of adequate means should not be a barrier to receiving appropriate legal representation.

1.1.5 The Central Authority should, in accordance with Article 7[(2)] g), do everything possible to assist the applicant to obtain legal aid or representation.

1.1.6 The Special Commission recognises that the impossibility of, or delays in, obtaining legal aid both at first instance and at appeal, and / or in finding an experienced lawyer for the parties, can have adverse effects on the interests of the child as well as on the interests of the parties. In particular the important role of the Central Authority in helping an applicant to obtain legal aid quickly or to find an experienced legal representative is recognised."

Locating the child

- 3.6 Has your Central Authority encountered any difficulties with locating children in cases involving the 1980 Convention, either as a requesting or requested State? If so, please specify the difficulties encountered and what steps were taken to overcome these difficulties.

In the majority of cases a child is located from the information provided by the left behind parent. But sometimes where there is limited information it can be quite challenging. With the growing use of technology especially social network sites we have had to look at different methods or ways to locate a person. An internet address or cell phone number does not provide a readily identifiable physical address. We have had to use quite different and at times resource intensive means for locating people.

- 3.7 Where a left-behind parent and / or a requesting Central Authority have no information or evidence regarding a child's current whereabouts, will your Central Authority still assist in determining whether the child is, or is not, in your State?

On receipt of an application the Central Authority may make initial inquiries through Interpol and immigration to ascertain if a child has entered New Zealand.

In one particular case the Central Authority confirmed the arrival of a child into New Zealand. The left behind parent had no information about the current whereabouts of the child. The application was filed in the local court and orders obtained securing the location of the child. Extensive inquiries were made through Interpol, immigration services, education department, inland revenue department and welfare services but no trace could be found. The taking parent and child were placed on a persons of interest watch list and a review conducted at regular intervals to trace the missing persons. A year later the taking parent and child made contact with the local police seeking financial assistance to return to the requesting State as they had run out of money. The family had assumed false identities while in New Zealand. This is a very unusual situation due to New Zealand's relative isolation and there being no shared borders.

- 3.8 In your State do any particular challenges arise in terms of locating children as a result of *regional* agreements or arrangements which reduce or eliminate border controls between States? If so, please specify the difficulties encountered and any steps your State has taken to overcome these difficulties. Are there any *regional* agreements or arrangements in place to assist with locating children because of the reduced / eliminated border controls?

Not that we are aware of

- 3.9 Where a child is not located in your State, what information and / or feedback is provided to the requesting Central Authority and / or the left-behind parent as to the steps that have been taken to try to locate the child and the results of those enquiries?

The Central Authority will provide a brief report setting out what steps have been taken to locate the child. If our inquiries are unsuccessful we will seek the assistance of the requesting State to obtain further information from the left behind parent.

- 3.10 Has your Central Authority worked with any external agencies to discover the whereabouts of a child wrongfully removed to or retained within your State (e.g., the police, Interpol, private location services)? Have you encountered any particular difficulties in working with these external agencies? Is there any good or bad practice you wish to share on this matter?

The Central Authority has a good working relationship and network available. Initial inquiries are made with Interpol who respond very quickly. If they are unable to locate we will seek information from other government agencies such as immigration

department, tax department, welfare services and education. We do not engage the services of private investigators but this does not preclude an applicant from doing so if we are unable to locate a child.

Information exchange, training and networking of Central Authorities

- 3.11 Has your Central Authority shared its expertise with another Central Authority or benefited from another Central Authority sharing its expertise with your Central Authority, in accordance with the Guide to Good Practice – Part I on Central Authority Practice?⁸

The Central Authority has participated in a number of conferences and seminars on international child abduction. The Central Authority was invited to present at a conference of the International Academy of Matrimonial Lawyers.

In 2010 the New Zealand Central Authority participated in a seminar to demystify the Hague Convention and encourage Japan to consider ratifying the 1980 Convention.

The Australian Central Authority have kindly invited New Zealand to attend their biennial conferences on child abduction which we find a very valuable source of discussion and resolving issues between our two States.

- 3.12 Has your Central Authority organised or participated in any other networking initiatives between Central Authorities such as regional meetings via conference call, as proposed in Recommendations Nos 1.1.9 and 1.1.10⁹ of the 2006 Special Commission?

The New Zealand Central Authority have worked closely with the Singaporean Central Authority. Delegates from Singapore attended a seminar hosted by the New Zealand Central Authority and have shared our experience of the Convention and implementation issues with them. We hope to continue to strengthen our relationship with the Singaporean Authority.

New Zealand has participated in a number of conference calls with the Australian Central Authority. We have a close working relationship with our Australian colleagues and continue to discuss aspects of evolving practices and international trends between our two States.

- 3.13 Would your Central Authority find it useful to have an opportunity to exchange information and network with other Central Authorities on a more regular basis than at Special Commission meetings?

The New Zealand Central Authority considers good communication and co-operation between Central Authorities is fundamental to the success and operation of the Convention. We value the opportunity to share experiences with other Central Authorities and to discuss the changing interpretation and application of the Convention.

We consider attendance at Special Commission meetings by Central Authorities and government representatives enhances the operation and co-operation between member States.

⁸ Available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice". See, in particular, Chapter 6.5 on twinning arrangements.

⁹ See the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 7):

"1.1.9 The Special Commission recognises the advantages and benefits to the operation of the Convention from information exchange, training and networking among Central Authorities. To this end, it encourages Contracting States to ensure that adequate levels of financial, human and material resources are, and continue to be, provided to Central Authorities.

1.1.10 The Special Commission supports efforts directed at improving networking among Central Authorities. The value of conference calls to hold regional meetings of Central Authorities is recognised."

*Statistics*¹⁰

- 3.14 If your Central Authority does not submit statistics through the web-based INCASTAT database, please explain why.

New Zealand does submit statistic

Views on possible recommendations

- 3.15 What recommendations would you wish to see made in respect of the role and particular functions that Central Authorities might, or do, carry out?

From our experience the Central Authority's role is fairly well defined. We would be interested in the development of the role of the Central Authority in light of the increased membership to the 1996 Child Protection Convention and the effect this will have on the operation and interpretation of the 1980 Convention. In particular whether the 1996 Convention will allay some of the concerns that have been expressed or arisen under the 1980 Convention regarding grave risk and safe returns.

4. Court proceedings

- 4.1 If your State has not limited the number of judicial or administrative authorities who can hear return applications under the 1980 Convention (*i.e.*, it has not "concentrated jurisdiction"), are such arrangements being contemplated?¹¹ If the answer is no, please explain the reasons.

New Zealand has a specialised Family Court as a division of New Zealand's District Court. Applications are heard in the court closest to where the child is located. As the bench is a specialist bench and quite small no consideration has been given to limit the number of judges or courts that deal with Hague matters.

- 4.2 Are any procedural rules in place in your State in relation to return proceedings brought under the 1980 Convention? If so, do you consider that the procedural rules which are applied allow the relevant authorities to reach a decision within six weeks? To what extent do you consider that delays in return proceedings under the 1980 Convention are linked to a lack of appropriate procedures?

Convention proceedings are accorded priority within our Court system. Guidelines have been established for use in Hague proceedings that set out the procedure to be followed. The guidelines recommend Hague child abduction cases be disposed of in six weeks. For cases where a specialist report or other evidence, material or information is required which cannot be obtained immediately then cases are to be disposed of in thirteen weeks.

In practice Courts work to the 6 weeks anticipated under Article 11. If a matter is not determined within the six week timeframe it is usually due to an evidential reason rather than a delay in the Court process.

5. Domestic violence allegations and Article 13(1) b) of the 1980 Convention¹²

¹⁰ See paras 1.1.16 to 1.1.21 of the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 7).

¹¹ See, for example, the "Conclusions and Recommendations of the Fourth Meeting of the Special Commission to review the operation of the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (22-28 March 2001)" (available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings") at para. 3.1:

"The Special Commission calls upon Contracting States to bear in mind the considerable advantages to be gained by a concentration of jurisdiction to deal with Hague Convention cases within a limited number of courts."

¹² See the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 7) at paras 1.1.12, 1.4.2 and 1.8.1 to 1.8.5. Please also refer to question 6 of this Questionnaire regarding the safe return of children.

- 5.1 Is the issue of domestic violence or abuse often raised as an exception to return in child abduction cases in your State? What is the general approach of the relevant authorities to such cases?

Allegations of domestic violence or grave risk are frequently raised though it has not been a deciding feature in the majority of cases. If evidence or information of the relevant law is provided by the requesting State when submitting the request for return the Court will take the information or evidence into account when determining the matter. Providing the information with the initial request for return can reduce the potential for delay.

- 5.2 In particular:
- a. What is the standard of proof applied when a taking parent relies on Article 13(1) b)?

In cases involving the Hague Convention it is a case of assessing the risk to the child associated with the return. Article 13B requires the Judge to be persuaded that the return to the country would expose the child to a grave risk of physical or psychological harm.

- A Judge must be persuaded that it is a grave risk.
- That is a risk to the child not the taking parent.
- This usually involves consideration of what systems/resources are in place in the country of habitual residence to deal with the allegations of domestic violence.
- In New Zealand as with most other Convention countries there is respect for the legal systems in the country of habitual residence. There is an acceptance that the "home" jurisdiction has the resources, systems and ability to protect the child upon the return.

In NZ, the majority of international child abduction cases occur between Australia and NZ. Our Judges have therefore become familiar with the domestic protection system that operates in the Australian legal system. In the majority of cases the Judges accept that the domestic violence situation will be able to be addressed upon the return to Australia in a variety of ways. This reduces the level of risk to the child upon return.

- b. Bearing in mind the obligation in the 1980 Convention to act expeditiously in proceedings for the return of children,¹³ how far do the relevant authorities in your State investigate the merits of a claim that domestic violence or abuse has occurred? How are resulting evidentiary issues dealt with (e.g., obtaining police or medical records)? How is it ensured that no undue delay results from any such investigations?

In a few very rare instances, because of the nature of the person involved or the type of harm being claimed a grave risk of harm is established. In other words, the unusual factual situation that applies to that child might convince a Judge that the country of origin doesn't have anything in its legal system that can afford protection to that child in that particular case.

This rare type of case may involve situations such as:

- Despite a Protection Order, the left behind parent repeatedly breaches that order despite knowing the consequences. Therefore a return to the country is a return to that situation of future psychological/physical harm because the left behind parent might be so dangerous that even a suitably warned State Agency would not be able to afford sufficient protection.
- The children may have witnessed abuse of the father to the mother and be so traumatised by that experience that a return to the country where the abuse occurred may place the child at risk of psychological harm.
- The taking parent may be so damaged by the abuse and violence she was

¹³ Art. 11 of the 1980 Convention: "The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children."

exposed to at the hands of the left behind parent that despite adequate protection systems a return to the country of habitual residence may lead her to a depressive or because of her deteriorating psychological state at risk of suicide. It is the possibility of the primary carer or custodial parent committing suicide that causes the grave risk for the child.

It must be emphasised that these cases are rare and the evidential burden has to be discharged by filing objective or expert evidence.

- c. Is expert evidence permitted in such cases and, if so, regarding which issues? How is it ensured that no undue delay results from the obtaining of such evidence?

If there are allegations of domestic violence or grave risk the taking parent must establish evidence of grave harm. In most cases police reports and medical records are provided. The taking parent may file expert evidence from a psychologist or expert on the psychological effect of the violence on the taking parent. It is for the Court to determine if an expert report on the effect of any violence on the children is appropriate or necessary in a particular case.

- 5.3 Where allegations of domestic violence / abuse are made by the taking parent, how will the relevant authority deal with any reports from children as to the existence of such domestic violence / abuse?

If domestic violence is raised as a grave risk defence a Court may seek a psychologist report on the child/ren.

1. The primary concerns when briefing a psychologist are:
 - (a) to ensure the report has the appropriate limited focus; and
 - (b) that it can be completed in a short time frame.
2. The appointment of a psychologist may be sought where the defence of grave risk and child's objection is raised.

In those circumstances, a suggested brief might be:

Having regard to the child's objection to return;

- (a) What is the basis of that objection.
- (b) If the child objects to return, what is the basis of that objection?
- (c) Does it appear as if the objection is reality based and/or affected by undue influence and/or able to be addressed by explanation or intervention,
- (d) Does the child have sufficient maturity and understanding to recognise the implication of the objection.
- (e) Having regard to the child's age, cognitive ability, maturity and the options available, how might the child respond if the Court makes an order for return despite the objection.

- 5.4 Where allegations of domestic violence / abuse are made by the taking parent, what tools are used by judges (or decision-makers) in your State to ascertain the degree of protection which can be secured for the child (and, where appropriate, the accompanying parent) in the requesting State upon return (e.g., information is sought from the requesting Central Authority, direct judicial communications are used, expert evidence on foreign law and practice is obtained, direct notice can be taken of foreign law, etc.)?

If there are allegations of grave risk information is sought regarding the protective measures available to the taking parent and child in the requesting State upon their return. This can be obtained through different channels such as expert evidence by counsel representing the left behind parent, Central Authorities or direct judicial communication. The New Zealand court may take direct notice of foreign law.

If Domestic Violence has been alleged, contact can be made with the authority or agency charged with the protection of children in the home jurisdiction. If there are serious issues affecting the children in terms of domestic violence then the taking parent will make the contact with a lawyer to set up a mechanism for getting protective orders upon return. If there are other issues of child safety then it is the taking parent, their legal adviser or the Central Authority who makes contact with the local Child Protection Agency.

- 5.5 Do any regional agreements affect the operation of Article 13(1) b) in your State (e.g., for European Union Member States excluding Denmark, Art. 11(4) of the

Brussels II a Regulation¹⁴)? If so, please comment upon how the relevant regional provision(s) have operated in practice.

No

- 5.6 From your practical experience, what do you see as the main (a) similarities, and (b) inconsistencies between States Parties regarding the application and interpretation of Article 13(1) *b*) in cases of alleged domestic violence? Can you suggest any good practice which should be promoted on this issue?

One of the primary obligations under the Convention is to return children promptly so that matters about their care can be determined in the correct jurisdiction. For that reason matters should be dealt with expeditiously. It is concerning that in some States the level of inquiry is in our view more appropriate to the determination of substantive issues or is a finding of fact rather than limiting the investigation to whether the requesting State has the ability to keep its citizens safe. We are concerned that this is undermining the spirit of the Convention and shows a loss of focus.

- 5.7 Do you have any other comments relating to domestic violence or abuse in the context of either the 1980 or the 1996 Convention?

6. Ensuring the safe return of children¹⁵

*The implementation of previous Special Commission recommendations*¹⁶

- 6.1 What measures has your Central Authority taken to ensure that the recommendations of the 2001 and 2006 Special Commission meetings¹⁷ regarding the safe return of children are implemented?

¹⁴ Full title: Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

¹⁵ See Art. 7(2) *h*) of the 1980 Convention and the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 7) at paras 1.1.12 and 1.8.1 to 1.8.5. Please also refer to the "Domestic violence allegations and Article 13(1) *b*) of the 1980 Convention" section of this Questionnaire (question 5).

¹⁶ See the Conclusions and Recommendations of the Special Commission of 2006 (*op. cit.* note 7) at paras 1.1.12 and 1.8.1 to 1.8.5 and the Appendix to the Conclusions and Recommendations.

¹⁷ *Id.*

- 6.2 In particular, in a case where the safety of a child is in issue and where a return order has been made in your State, how does your Central Authority ensure that the appropriate child protection bodies in the *requesting* State are alerted so that they may act to protect the welfare of a child upon return (until the appropriate court in the requesting State has been effectively seised)?

If there are serious issues affecting the child in terms of grave risk then the taking parent will be encouraged to make contact with a lawyer to set up a mechanism for getting protective orders prior to or upon the return. If there are other issues of child safety then it is the taking parent, their legal adviser or the Central Authority who makes contact with the local Child Protection Agency.

The court may also seek undertakings from the left behind parent that will ameliorate the risk such as they will not attend at the airport .

*Methods for ensuring the safe return of children*¹⁸

- 6.3 Where there are concerns in the requested State regarding possible risks for a child following a return, what conditions or requirements can the relevant authority in your State put in place to minimise or eliminate those concerns? How does the relevant authority in your State ensure that the conditions or requirements put in place are implemented and adhered to?

In circumstances where there have been allegations of violence or a Protection Order exists the Court needs to be satisfied that there will not be any safety issues for a child before allowing a return or access visits with the left behind parent. If the child's safety cannot be guaranteed or some risk exists undertakings may be sought that access be arranged in a supervised environment.

Where there is violence in the households of both separated parents and the risk to the child is unacceptable a referral will be made to the State care and protection agency.

As part of the negotiation process to ensure a safe return, and to alleviate judicial concern, conditions may be negotiated to deal with any real or likely risk. Conditions have included such matters as interim housing, payment of an allowance and on-going contact arrangements. It is more usual however to provide evidence on how risk can be dealt with through the resources available in the requesting State to which the child is to be returned.

Direct judicial communications

- 6.4 Please comment upon any cases (whether your State was the requesting or requested State), in which the judge (or decision-maker) has, before determining an application for return, communicated with a judge or other authority in the requesting State regarding the issue of the child's safe return. What was the specific purpose of the communication? What was the outcome? What procedural safeguards surround such communications in your State?¹⁹

Direct judicial communication is seen as one way in which a particular question may be dealt with expeditiously and enable the Convention to operate more effectively. It is our experience that direct judicial communication has had mixed results.

We support the development of a protocol or guide for direct judicial communication that takes into consideration the differing legal systems (common law and civil jurisdictions) and roles of the judiciary under each.

Use of the 1996 Convention to ensure a safe return

¹⁸ Where relevant, please make reference to the use of undertakings, mirror orders and safe harbour orders and other such measures in your State.

¹⁹ See the draft General Principles on Judicial Communications which will be circulated prior to the 2011 Special Commission meeting.

- 6.5 If your State is not Party to the 1996 Convention, is consideration being given to the possible advantages of the 1996 Convention in providing a jurisdictional basis for urgent protective measures associated with return orders (Arts 7 and 11), in providing for their recognition by operation of law (Art. 23), and in communicating information relevant to the protection of the child (Art. 34)?

No, New Zealand is currently working towards accession to the 1996 Convention.

Other important matters

- 6.6 Are you aware of cases in your State where a primary carer taking parent has refused or has not been in a position to return with the child to the requesting State? How are such cases dealt with in your State? Please provide case examples where possible.

a) In the course of the proceedings a mother indicated she would not be returning with the child if an order for return were made. On the making of an order for return the case was adjourned for three days for further orders as to the final arrangements for return including where the child was to reside pending further orders. Orders were then made for the return of the child to the father who was to accompany the child on the return. To minimise the risk to the child changeover was to take place at the office of the Child Protection Agency which was seen as a neutral venue in the presence of a social worker. Prior to the changeover the father met with the social worker. The father was not present at the changeover. The child was delivered with no clothing or other personal belongings. The social worker accompanied the father to the local shopping complex where the father purchased relevant items of clothing for the return.

b) A mother had hidden the children for some months and was not co-operative. An order for return was made. Details for return were made to ensure the childrens safety. Because of concerns raised by the mother about the fathers care the children would be placed in the care of an aunt. Child Protection Services were notified in New Zealand and in the requesting State of concerns raised by the mother. An initial investigation was conducted to assess the aunt as carer of the children on return.

- 6.7 What steps has your State taken to ensure that all obstacles to participation by parents in custody proceedings after a child's return have been removed (in accordance with Recommendation No 1.8.5 of the 2006 Special Commission)? In particular, where a custody order has been granted in the jurisdiction of, and in favour of, the left-behind parent, is the order subject to review if the child is returned, upon application of the taking parent?

Once jurisdiction has been established and a child is returned the parents may access the systems and processes available to all residents of New Zealand. The New Zealand domestic legal system and supports are available to all parties including accessing legal aid.

In cases where a parent returns with a child and may face financial hardship due to lack of financial assistance or entitlement a new payment, the International Custody Dispute (ICD) payment was introduced. This payment is to provide assistance to parents involved in international custody disputes who are experiencing financial hardship and are in New Zealand on a temporary permit, and have accompanied a child or children required to be returned to New Zealand pursuant to an order made in compliance with the Hague Convention, or have entered New Zealand, and have voluntarily returned to New Zealand with a dependant child in order to resolve custody and access disputes.

The ICD payment is designed to assist people in hardship and is only available as a 'last resort under humanitarian grounds'.

- 6.8 In cases where measures are put in place in your State to ensure the safety of a child upon return, does your State (through the Central Authority, or otherwise) attempt to monitor the effectiveness of those measures upon the child's return? Would you support a recommendation that States Parties should co-operate to provide each other with follow-up information on such matters, insofar as is possible?

In NZ as with most other Convention countries there is respect for the legal systems in the country of habitual residence. There is an acknowledgment that the "home" jurisdiction has the resources, systems and ability to protect the child upon the return. A child is usually returning to a familiar environment.

7. The interpretation and application of the exceptions to return

In general

- 7.1 Where the taking parent raises any exceptions under Article 13 or Article 20 of the 1980 Convention, what are the procedural consequences? What burden and standard of proof rest on the taking parent in respect of such exceptions?²⁰
see 5.2
- 7.2 Does the raising of exceptions under Article 13 or Article 20 in practice cause a delay to return proceedings? What measures, if any, exist to keep such delay to a minimum?

Article 13(2) and hearing the child

- 7.3 In relation to Article 13(2) of the 1980 Convention:
- By whom, and how, will any enquiry be made as to whether a child objects to a return?
see 5.3
 - Who will assess the child's maturity for the purposes of Article 13(2)?
In most cases if a defence of child objection is raised a psychologist will be appointed to assess the level of the child's maturity.
 - In what circumstances, in practice, might the relevant authority in your State refuse to return a child based on his or her objections? Please provide case examples where possible.
A court may refuse a return if the child is of an age and has attained a degree of maturity and has expressed a significant objection to return.
- 7.4 How, if at all, have other international and / or regional instruments affected the manner in which the child's voice is heard in return proceedings in your State?²¹

New Zealand has ratified the United Nations Convention on the Rights of the Child. Article 12 of UNCROC has led to greater recognition of the need to listen to children when the 'child objection' defence is raised.

- 7.5 How does your State ensure that hearing a child does not result in any undue

²⁰ In relation to Art. 13(1) b), see also question 5.2 above.

²¹ For EU Member States, excluding Denmark, reference should be made to Art. 11(2) of the Brussels II a Regulation:

"When applying Articles 12 and 13 of the 1980 Hague Convention, it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity."

delay to the return proceedings?

In each case a Court must consider whether counsel should be appointed to represent the views of the child. The appointment may be for a specified purpose or limited period of time. The brief for such appointments is framed in two parts, the first part to address the initial task following the filing of the Notice of Defence, the second part to state what role should exist if the matter proceeds to a defended hearing.

It would, however, be a very rare set of circumstances that would have to exist for the appointment not to continue to the hearing.

9. In general, a suggested brief for lawyer for the child is as follows:

- (a) Taking into account the defences raised by the Respondent, what are the child's views.
- (b) From the child's perspective are there any other defences which should be pleaded.
- (c) From the child's perspective, are there any interim orders/directions that the Court should make pending the hearing eg:
 - Directions in relation to contact with the left-behind parent.
 - Alternative placement if there is a flight risk or alternatively direction that child not be removed from current physical residential address pending hearing
- (d) To represent the child at the hearing.

Article 20

- 7.6 How has Article 20 of the 1980 Convention been applied in your State? Are you aware of an increase in the use of this Article (please note that Art. 20 was not relied upon at all according to the 1999 Statistical Survey, nor was it a sole reason for refusal in 2003²²)?

Article 20 has not been relied on.

Any other comments

- 7.7 Do you have any other comment(s) you would like to make regarding any of the exceptions to return within the 1980 Convention?

8. Article 15 of the 1980 Convention

- 8.1 Have you encountered any difficulties with the use of Article 15? If so, please specify the difficulties encountered and what steps, if any, have been taken to overcome such difficulties.

In New Zealand an Article 15 declaration is obtained from a Court and involves a formal court process. An application once made may be contested and delays are inevitable. It is not common for declarations to be sought from New Zealand.

- 8.2 Has the use of Article 15 caused undue delay in return proceedings in your State? Are there particular States Parties with whom you have had difficulties in this regard? Please provide case examples where possible.

No undue delay experienced

- 8.3 Are you aware of any cases in your State where direct judicial communications have been used in relation to Article 15? If so, please provide details of how, if at all, direct judicial communications assisted in the particular case.²³

No

9. Immigration, asylum and refugee matters under the 1980 Convention

- 9.1 Have you any experience of cases in which immigration / visa questions have arisen as to the right of the child and / or the taking parent to re-enter the State from which the child was wrongfully removed or retained? If so, how have such issues been resolved?

The Central Authority has sought information from the requesting State about immigration status and what if any assistance is available to allow re-entry.

- 9.2 Have you any experience of cases involving links between asylum or refugee applications and the 1980 Convention? In particular, please comment on any cases in which the respondent in proceedings for the return of a child has applied for

²² It was, however, partially relied upon in eight cases (9%), all of which were in Chile. See N. Lowe, "A Statistical Analysis of Applications made in 2003 under the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, Part I – Overall Report", Prel. Doc. No 3, Part I, of October 2006 for the attention of the Fifth Meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction of October – November 2006 (2007 update, published in September 2008). Available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Special Commission meetings" and "Preliminary Documents".

²³ See *supra*, note 19.

asylum or refugee status (including for the child) in the State in which the application for return is to be considered. How have such cases been resolved?

Not aware of any such cases

- 9.3 Have you any experience of cases in which immigration / visa questions have affected a finding of habitual residence in the State from which the child was removed or retained?

No

- 9.4 Have you any experience of cases in which immigration / visa questions have inhibited the exercise of rights of access?

Yes. More associated with criminal offences committed prohibiting travel to a particular State.

10. Newly acceding States to the 1980 Convention

- 10.1 If your State has recently *acceded* to the 1980 Convention, what steps have been taken to inform other States Parties of the measures taken to implement the Convention in your State?²⁴ Did you find the Standard Questionnaire for newly acceding States²⁵ useful for this purpose?
- 10.2 How regularly does your State consider declaring its acceptance of the accessions of new States Parties to the 1980 Convention (Art. 38)?

On receipt of notification from our Ministry of Foreign Affairs.

- 10.3 What measures, if any, do your authorities take to satisfy themselves that a newly acceding State is in a position to comply with 1980 Convention obligations, such that a declaration of acceptance of the accession can be made (Art. 38)? How does your State ensure that this process does not result in undue delay?

11. The Guide to Good Practice under the 1980 Convention

- 11.1 In what ways have you used the Guide to Good Practice – Part I on Central Authority Practice, Part II on Implementing Measures, Part III on Preventive Measures and Part IV on Enforcement²⁶ – to assist in implementing for the first time, or improving the practical operation of, the 1980 Convention in your State?

The Central Authority has made reference to the Guide to Good Practice part 1 when working with and assisting Central Authorities of other States. The Guide has been a useful reference and in providing clarification about processes.

- 11.2 How have you ensured that the relevant authorities in your State have been made aware of, and have had access to, the Guide to Good Practice?
- 11.3 Do you have any comments regarding how best to publicise the recently published Guide to Good Practice – Part IV on Enforcement (published October 2010)?

The order for return is usually implemented without need for enforcement from any State agency. We appreciate the work undertaken by the experts. If a question or situation arose we would refer to the guide and to counsel or the relevant authority.

- 11.4 Are there any other topics that you would like to see form the basis of future parts of the Guide to Good Practice in addition to those which are already published or

²⁴ See Art. 38 of the 1980 Convention.

²⁵ The Standard Questionnaire for newly acceding States is available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Questionnaires and responses".

²⁶ All Parts of the Guide to Good Practice under the 1980 Convention are available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice".

are under consideration (these are: Part I on Central Authority Practice; Part II on Implementing Measures; Part III on Preventive Measures; Part IV on Enforcement; and the draft of Part V on Mediation)?

Not currently

11.5 Do you have any other comments about any Part of the Guide to Good Practice?

12. Relationship with other instruments

- 12.1 Do you have any comments or observations on the impact of international instruments on the operation of the 1980 Convention, in particular, the *1989 United Nations Convention on the Rights of the Child*?

As discussed in paragraph 7.4, UNCROC has had a positive effect on the need to listen to children when the 'child objection' defence is raised. The Child Abduction Convention's aims complement New Zealand's obligations under UNCROC.

- 12.2 Do you have any comments or observations on the impact of regional instruments on the operation of the 1980 Convention, for example, the Brussels II a Regulation²⁷ and the *1989 Inter-American Convention on the International Return of Children*?

No comment

13. Publicity and debate concerning the 1980 Convention

- 13.1 Has the 1980 Convention given rise to (a) any publicity (positive or negative) in your State, or (b) any debate or discussion in your national Parliament or its equivalent? What was the outcome of this debate or discussion, if any?
- 13.2 By what methods does your State disseminate information to the public about the 1980 Convention?

PART III: THE PRACTICAL OPERATION OF THE 1996 CONVENTION²⁸
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14. Implementation of the 1996 Convention

- 14.1 If your State is Party to the 1996 Convention, do you have any comments regarding:
- a. How it has been implemented?
N/A
 - b. How it is operating?
 - c. Further, when implementing the 1996 Convention, did your State use the implementation checklist drawn up by the Permanent Bureau in consultation with States Parties?²⁹ If so, do you have any comments regarding the implementation checklist and how it might be improved in future?
- 14.2 If your State is not Party to the 1996 Convention, is your State considering implementing the 1996 Convention? What are viewed as the main difficulties, if any, in implementing this Convention?

New Zealand is working towards accession to the 1996 Convention. It is anticipated we will be in a position to accede later this year.

²⁷ *Op. cit.* note 14.

²⁸ This part of the Questionnaire is directed both to States Parties and non-States Parties to the 1996 Convention save where indicated otherwise, and should be completed by all States insofar as is appropriate.

²⁹ Available on the Hague Conference website at < www.hcch.net > under "Conventions" then "Convention No 34" and "Practical operation documents".

15. The role and functions of Central Authorities designated under the 1996 Convention

- 15.1 If your State is Party to the 1996 Convention:
- a. Did you encounter any difficulties designating a Central Authority?
 - b. Have any difficulties arisen in practice in achieving effective communication or co-operation with other Central Authorities? If so, please specify.
 - c. Have any of the duties of Central Authorities within the 1996 Convention raised any particular problems in practice either in your State, or in States Parties with whom you have co-operated?
 - d. Has your Central Authority encountered any particular difficulties with the interpretation or application of the 1996 Convention provisions? If so, please specify.
 - e. Would you consider the development of any model forms under the 1996 Convention useful (e.g., in relation to the provisions regarding transfer of jurisdiction (Arts 8 and 9), or in relation to the certificate which may be given by the relevant authorities under Art. 40)?

16. Publicity concerning the 1996 Convention

- 16.1 If your State is Party to the 1996 Convention, by what methods does your State disseminate information to the public about the 1996 Convention?
- 16.2 Could you provide a list (including contact details and website addresses) of non-governmental organisations in your State which are involved in matters covered by the 1996 Convention?

17. Relationship with other instruments

- 17.1 Do you have any comments or observations on the impact of regional³⁰ or international instruments on the operation of the 1996 Convention, in particular, the *1989 United Nations Convention on the Rights of the Child*?

No comment

PART IV: TRANSFRONTIER ACCESS / CONTACT AND INTERNATIONAL FAMILY RELOCATION
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18. Transfrontier access / contact³¹

- 18.1 Since the 2006 Special Commission, have there been any significant developments in your State regarding Central Authority practices, legislation, procedural rules or case law applicable in cases of transfrontier contact / access.

Applications received to establish or secure rights of access under the Convention are

³⁰ E.g., the Brussels II a Regulation (*op. cit.* note 14).

³¹ See the Conclusions and Recommendations of the 2006 Special Commission (*op. cit.* note 7) at paras 1.7.1 to 1.7.3.

treated the same as a application for contact under our domestic legislation.

18.2 Please indicate any important developments in your State, since the 2006 Special Commission, in the interpretation of Article 21 of the 1980 Convention.

18.3 What problems have you experienced, if any, as regards co-operation with other States in respect of:

a. the granting or maintaining of access rights;
It is generally accepted that there are a range of approaches taken when interpreting or implementing the Convention obligations regarding access. Some States do require an order that can be enforced or has been breached before an application is accepted which restricts the ability of the left behind parent to make a request and limits the application of the Convention.

b. the effective exercise of rights of access; and

c. the restriction or termination of access rights.

Please provide case examples where possible.

18.4 In what ways have you used the "General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children"³² to assist in transfrontier contact / access cases in your State? Can you suggest any further principles of good practice?

The Central Authority is familiar with the guide but has not had cause to reference the guide.

19. International family relocation³³

19.1 When does a parent require the permission of (a) the other parent, and (b) the relevant State authorities, to relocate internationally with a child (*i.e.*, to move with a child from your State to another State, on a long-term basis)?

Under the Care of Children Act 2004 where a child lives is a decision of the child's guardians. Both parents are usually automatically guardians of the child at birth. Where a father is not automatically a guardian he can become a guardian by having his details included, (with the consent of the mother), on the child's birth certificate or apply to the court to be appointed a guardian.

19.2 Do you have a specific procedure in your State which applies when a parent wishes to seek the relevant authority's permission to relocate internationally? When permission of the relevant authority is required to relocate internationally, what criteria are applied to determine whether such permission should be granted, or not?

Guardians have a responsibility to co-operate with each other and if they cannot agree where a child should live, should seek a decision from the Family Court. As noted above, in New Zealand decisions about relocation are made under the Care of Children Act 2004. The overriding consideration in decision-making under the Act is the welfare and best

³² Available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Guides to Good Practice".

³³ See the Conclusions and Recommendations of the 2006 Special Commission meeting at paras 1.7.4 to 1.7.5: "1.7.4 The Special Commission concludes that parents, before they move with their children from one country to another, should be encouraged not to take unilateral action by unlawfully removing a child but to make appropriate arrangements for access and contact preferably by agreement, particularly where one parent intends to remain behind after the move. 1.7.5 The Special Commission encourages all attempts to seek to resolve differences among the legal systems so as to arrive as far as possible at a common approach and common standards as regards relocation."

interests of the child. A non-exhaustive list of principles must be applied, where relevant, in the court's assessment of the child's welfare and best interests. A recent decision of the Supreme Court has made it clear that there is no presumptive emphasis or priority in the principles.

19.3 Are you aware of any recent decisions in your State concerning international family relocation which may be of interest to the Special Commission meeting? In particular, are you aware of any cases where the international relocation of a child was permitted by the relevant authorities in your State following the return of the child to your State under 1980 Convention procedures?

19.4 Do you have any comment on the Washington Declaration on International Family Relocation³⁴ reached at the conclusion of the International Judicial Conference on Cross-Border Family Relocation³⁵ in March 2010? In particular, do you have any comment on paragraph 13 of the Washington Declaration, which states:

"The Hague Conference on Private International Law, in co-operation with the International Centre for Missing and Exploited Children, is encouraged to pursue the further development of the principles set out in this Declaration and to consider the feasibility of embodying all or some of these principles in an international instrument. To this end, they are encouraged to promote international awareness of these principles, for example through judicial training and other capacity building programmes."

We commend the co-operation and promotion of international awareness of family relocation issues. However, we consider it is unnecessary to look at the development of a further international instrument for relocation.

We consider that the 1996 Convention establishes internationally agreed principles and rules for cross-border relocation. We support the continued encouragement of States to become signatory to the 1996 Convention and consider this Convention is an international instrument for relocation.

We are concerned that aspects of the Declaration, such as the section "Factors relevant to decisions on international relocation", do not make sufficient allowance for the impact of the relevant domestic law or the role of States in determining the content of that law. Although couched as factors for the exercise of judicial discretion, we consider these would be matters for the domestic law of each State to determine. In New Zealand, for example, decisions about relocation are made under the Care of Children Act 2004. The overriding consideration in decision-making under the Act is the welfare and best interests of the child. A non-exhaustive list of principles must be applied, where relevant, in the court's assessment of the child's welfare and best interests.

We are comfortable with the approach in Hague Conventions, consistent with the goal of the Hague Conference, of harmonising private international law rules but it is a different matter to seek to harmonise substantive domestic law. That is what paragraphs 3 – 6 seem to us to be effectively seeking. We are not convinced that it is necessary to harmonise substantive law in this area. We are also not confident that this would be an easily achievable outcome.

We do think that paragraph 7 makes an important point. From our perspective, international child abduction and family relocation should be addressed through the concurrent operation of the 1980 and 1996 Conventions. That is certainly our goal, with New Zealand working towards accession of the 1996 Convention. We would support

³⁴ Available in full on the Hague Conference website at < www.hcch.net > under "News & Events" then "2010".

³⁵ The International Judicial Conference on Cross-Border Family Relocation was held in Washington, D.C., United States of America, from 23 to 25 March 2010 and was co-organised by the Hague Conference on Private International Law and the International Centre for Missing and Exploited Children (< www.icmec.org >), with the support of the United States Department of State.

efforts to encourage more States to consider acceding to the 1996 Convention.

The 1996 Convention facilitates the recognition and enforcement in one country of relocation orders made in another. We would suggest paragraph 9 can be addressed by reference to the 1996 Convention.

We also note that mediation or voluntary settlement and judicial communication are already the subject of other work. In both these areas, we think that detailed guidance, developed in close consultation with States, is needed to ensure that the availability and use of mediation or other forms of alternate dispute resolution, and judicial communication, are consistent with the law of the relevant State and appropriately reflect the respective roles of the State and the judiciary.

For these reasons, we are not supportive of the proposal for further work by the Hague Conference to develop the principles in the Declaration and we have reservations about the benefits of developing an international instrument on relocation.

PART V: NON-CONVENTION CASES AND NON-CONVENTION STATES

20. Non-Convention cases and non-Convention States

- 20.1 Are you aware of any troubling cases of international child abduction which fall outside the scope of the 1980 Convention? Are you aware of any troubling cases of international child protection which fall outside the scope of the 1996 Convention?
- 20.2 Has your State had a significant number of cases of international child abduction or protection with any particular non-Contracting States?
- 20.3 Are there any States that you would particularly like to see become a State Party to (a) the 1980 Convention and / or (b) the 1996 Convention? If so, what steps would you suggest could be taken to promote the Convention(s) and encourage ratification of, or accession to, the relevant Convention(s) in those States?
- 20.4 Since the 2006 Special Commission, has your State concluded:
- a. Any bilateral, or other, agreements on international child abduction with States not Party to the 1980 Convention?
 - No
 - b. Any bilateral, or other, agreements on international child protection with States not Party to the 1996 Convention?
 - No
- Please provide brief details of any such agreements, including which non-Contracting States are party to the agreement(s).
- 20.5 Are there any States which are not Parties to the 1980 or 1996 Conventions or not Members of the Hague Conference that you would like to see invited to the Special Commission meeting in 2011 and 2012?³⁶

³⁶ See the "Request for funding" made in Info. Doc. No 1 (circulated at the same time as this Prel. Doc. No 1).

*The "Malta Process"*³⁷

20.6 In relation to the "Malta Process":

- a. Do you have any comment to make on the "Principles for the Establishment of Mediation Structures in the context of the Malta Process" and the accompanying Explanatory Memorandum?³⁸ Have any steps been taken towards implementation of the Principles in your State?
No comment
- b. Do you have any comment to make on the "Malta Process" generally?
No comment
- c. What is your view as to the future of the "Malta Process"?
No comment

**PART VI: TRAINING AND EDUCATION AND
THE TOOLS, SERVICES AND SUPPORTS PROVIDED
BY THE PERMANENT BUREAU**³⁹

21. Training and education

- 21.1 Do you have any comments regarding how judicial (or other) seminars or conferences at the national, regional and international levels have supported the effective functioning of the 1980 and 1996 Convention(s)? In particular, how have the conclusions and recommendations of these seminars or conferences (some of which are available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section"), had an impact on the functioning of the 1980 and 1996 Convention(s)?

We have been fortunate to participate in national and regional seminars and encourage participation in such seminars. New Zealand's relative isolation can limit the opportunity to participate at the international level. Attendance at international forums such as the Special Commission Meeting has provided a valuable opportunity to share experiences and promote a consistent approach to improve the operation of the Convention.

We consider that the Special Commissions are the most useful option for promoting co-operative relationships and consistent approaches. As a general principle, we support measures such as seminars and conferences aimed at promoting co-operative relationships between Central Authorities, promoting understanding and encouraging membership of the 1980 and 1996 Conventions and achieving a consistent application and interpretation of the Conventions

We appreciate that recommendations and conclusions of seminars are made available to Member States. The recommendations or conclusions of seminars are a very useful resource for analysing interpretation, to explore current issues and evolution of the Convention. However, any formal conclusions or recommendations from those attended by non-official delegates should be framed and promoted so as to be clear that the

³⁷ The "Malta Process" is a dialogue between certain States Parties to the 1980 and 1996 Conventions and certain States which are not Parties to either Convention, with a view to securing better protection for cross-border rights of contact of parents and their children and the problems posed by international abduction between the States concerned. For further information see the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Judicial Seminars on the International Protection of Children".

³⁸ The Principles and Explanatory Memorandum were circulated to all Hague Conference Member States and all States participating in the Malta Process in November 2010. They are available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "Judicial Seminars on the International Protection of Children".

³⁹ Further information regarding the tools, services and supports provided by the Permanent Bureau will be set out in the report to the 2011 Special Commission meeting on this subject (see the "Documentation" section of Info. Doc. No 1).

content does not necessarily reflect the views of the Member States. Making these available on the Hague Conference website without suitable caveats may suggest that they are endorsed or supported by Member States, which may be misleading and problematic.

- 21.2 Can you give details of any training sessions / conferences organised in your State, and the influence that such sessions have had?

22. The tools, services and supports provided by the Permanent Bureau (including through the International Centre for Judicial Studies and Technical Assistance)

In general

22.1 Please comment or state your reflections on the specific tools, services and supports provided by the Permanent Bureau to assist with the practical operation of the 1980 and 1996 Conventions, including:

- a. INCADAT (the international child abduction database, available at < www.incadat.com >). INCADAT underwent a complete revision and an improved, re-designed version was launched on 30 April 2010;⁴⁰

INCADAT is a useful and practical resource for research of the case law.

- b. *The Judges' Newsletter* on International Child Protection - the bi-annual publication of the Hague Conference on Private International Law which is available in hard copy and online for free;⁴¹

The Judges' Newsletter continues to be an excellent resource for information on the development of trends and judicial interpretation of the Convention. The combined sharing of expertise and co-operation between the judiciary is a valued resource when analysing international trends and issues.

- c. The specialised "Child Abduction Section" of the Hague Conference website (< www.hcch.net >);

We refer to the Specialised Child Abduction section of the Hague Conference website on a regular basis. It is primarily used to access information about the contact details of Central Authorities and the status of membership.

- d. INCASTAT (the database for the electronic collection and analysis of statistics on the 1980 Convention);⁴²

New Zealand provides statistics electronically in the required form. We look forward to the development of an accessible database.

- e. iChild (the electronic case management system designed by the Canadian software company WorldReach);⁴³

- f. Providing technical assistance and training to States Parties regarding the practical operation of the 1980 and 1996 Conventions.⁴⁴ Such technical assistance and training may involve persons visiting the Permanent Bureau or, alternatively, may involve the Permanent Bureau (often through the International Centre for Judicial Studies and Technical Assistance) organising, or providing assistance with organising, national and international judicial and

⁴⁰ Further information regarding the INCADAT re-launch can be found on the Hague Conference website at < www.hcch.net > under "News & Events" then "30 April 2010". Further information regarding the improvements to INCADAT and the continuing work being undertaken will be provided in the report to the 2011 Special Commission meeting on the services provided by the Permanent Bureau (see Info. Doc. No 1).

⁴¹ Available on the Hague Conference website at < www.hcch.net > under "Child Abduction Section" and "Judges' Newsletter on International Child Protection". For some volumes of *The Judges' Newsletter*, it is now possible to download individual articles as required. Further, an index of relevant topics is being created to enable more user-friendly searches of the publication. The publication is also in the process of being re-designed. Further information regarding this publication will be provided in the report to the 2011 Special Commission meeting (see Info. Doc. No 1).

⁴² Further information is available via the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "INCASTAT".

⁴³ Further information is available via the Hague Conference website at < www.hcch.net > under "Child Abduction Section" then "iChild".

⁴⁴ Such technical assistance may be provided to judges, Central Authority personnel and / or other professionals involved with the practical operation of the Convention(s).

other seminars and conferences concerning the Convention(s) and participating in such conferences;

Overall, seminars and conferences we are aware of have produced mixed results. Some have been successful in promoting understanding and encouraging membership. We consider that the Special Commissions are the most useful option for promoting co-operative relationships and consistent approaches. If future seminars or conferences are planned, their value should be assessed in light of the limited resources of the Permanent Bureau and benefit to all Member States.

- g. Where individuals contact the Permanent Bureau seeking help in cases involving international child protection issues (which occurs on an almost daily basis), providing referrals (primarily to Central Authorities) and offering advice of a general nature on the operation of the Convention(s);
- h. Encouraging wider ratification of, or accession to, the Convention(s), including educating those unfamiliar with the Convention(s);⁴⁵

With increased globalisation we support the encouragement of States to become members of the 1980 and 1996 Conventions. The Conventions provide better protection for children caught up in cross-border family disputes by establishing conflict of law rules and for the recognition of measures of protection in other member States.

- i. Supporting communications between Central Authorities, including maintaining an online database of updated contact details.

New Zealand supports the organisation of seminars for Central Authorities concerning the Conventions. We encourage the exchange of information between Central Authorities to assist in monitoring and analysing international experiences.

Other

22.2 What other measures or mechanisms would you recommend:

- a. To improve the monitoring of the operation of the Conventions;
- b. To assist States in meeting their Convention obligations; and
- c. To evaluate whether serious violations of Convention obligations have occurred?

PART VII: PRIORITIES AND RECOMMENDATIONS FOR THE SPECIAL COMMISSION AND ANY OTHER MATTERS

23. Views on priorities and recommendations for the Special Commission

⁴⁵ Which again may involve State delegates and others visiting the Permanent Bureau or, alternatively, may involve the Permanent Bureau organising, or providing assistance with organising, national and international judicial and other seminars and conferences concerning the Convention(s) and participating in such conferences.

23.1 Which matters does your State think ought to be accorded particular priority on the agenda for the Special Commission? Please provide a brief explanation supporting your response.

a) We would be interested to hear the views of other member States whether with increased membership to the 1996 Convention some of the concerns or obstacles to prompt return and the increased requirement to extend the level of inquiry may be reduced.

The 1980 Abduction Convention is to discourage parents from unlawfully removing their children from the jurisdiction by providing for the prompt return of children who have been abducted so the taking parent gains no advantage from their actions. Parents who wish to relocate with children should get the agreement of the other parent or a court order before doing so. The 1980 Convention proceedings are focused solely on the issue of the proper jurisdiction to address the substantive dispute between the parties over the care of their child.

The 1996 Child Protection Convention reinforces the 1980 Convention and re-emphasises that the best interest of a child is served by prompt return where matters can be determined in the most appropriate jurisdiction.

b) Subject to the draft guide to good practice for mediation being circulated to member States for comment and there being sufficient time to discuss, or more detail of the proposed guide to good practice available, we would welcome discussion on mediation and the application to the 1980 and 1996 Convention.

The guidelines should not, in our view, create the perception that mediation for 1980 Convention cases will be almost automatic, as this will reduce the incentive for the taking parent to act lawfully by obtaining a relocation order prior to removing a child, thereby undermining the very purpose of the Abduction Convention.

23.2 States are invited to make proposals concerning any particular recommendations they think ought to be made by the Special Commission.

24. Any other matters

24.1 States are invited to comment on any other matters which they may wish to raise concerning the practical operation of the 1980 and / or the 1996 Convention(s).