



OUR INTERNATIONAL FAMILY LAW SPECIALIST GROUP



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Welcome to the sixth edition of the Nicholes Family Lawyers International Newsletter for 2019.

In February 2020, Senior Partner Keturah Sageman will be on the panel for a symposium for the International Academy of Family Lawyers Asia Pacific Chapter meeting in Bangkok, Thailand. The IAFL symposium will be an introduction to international family law and will take place on the first day of the six-day meeting. Numerous local and international dignitaries will speak at the meeting on a range of family law topics. These will include family law in Thailand; a comparison through Asia Pacific jurisdictions on available remedies for discovery; common law marriage and de facto relationships; children, property, maintenance, inheritance and talaq in Sharia Law; transgender rights; international surrogacy and the abduction of children to non-Hague Convention countries.

In this edition we discuss the forthcoming 8th World Congress on Family Law and Children's Rights, which will take place in Singapore on 19 to 22 July 2020. Managing Partner Sally Nicholes will co-chair the Congress in her role as Deputy Chair.

Associate Isabel Britten-Jones discusses her recent trip to Cambodia with the Hon Jennifer Coates AO and Alistair Nicholson AO RFD QC. Isabel also shares a case study on Child Abduction and the Hague Convention, with a focus on the recent case of *UHD v Mackay* [2019].

Isabel Britten-Jones, Associate - Working with CRI to implement the Juvenile Justice Law in Cambodia In July 2019

In July 2019, I was given the opportunity to travel to Cambodia with the organisation Children's Rights International ("CRI") to assist with the important work they have been undertaking in Cambodia over the past decade to improve the juvenile justice system in Cambodia through developing diversionary pathways for young offenders and youth rehabilitation centres.

CRI is an Australian organisation promoting adherence to the *United Nations Convention on the Rights of the Child* ("UNCRC"). Our Managing Partner Sally Nicholes has been a Board member of CRI for many years, along with a number of other individuals who have a wealth of experience in the legal, academic and medical fields. CRI has focused their work in Southeast Asia over the years, particularly in Cambodia. One of their primary goals is to improve children's rights in Cambodia by developing a juvenile legal system and assisting the Cambodian government to implement frameworks to prevent youth imprisonment where other alternatives are available.

In Cambodia in 2016, there were nearly 800 young offenders under the age of 18 years who were being imprisoned with adults. Their offences were neither adequately investigated nor properly tried given the absence of a youth justice system and a lack of resources. The children in those prisons are often treated like adults for their offending behavior and given lengthy sentences for minor offences, which are unsuitable for children. The adult prisons are usually run in a military-like manner and are inappropriate for young offenders.

I was fortunate enough to travel to Cambodia's capital city Phnom Penh with three members of CRI's Board including the Chairman of CRI, the Honourable Alastair Nicholson, who is also the former Chief Justice of the Family Court of Australia; the Honourable Jennifer Coate, who is the former President of the Children's Court; and Sue Marshall, a Professor of Law at La Trobe University.

The purpose of the trip was to further the work which CRI has done in conjunction with UNICEF and the Cambodia Government to implement the *Juvenile Justice Law* legislation which became Cambodian law in February 2017 as a result of CRI's



input and consultation with the Cambodian Government.

The *Juvenile Justice Law* establishes a framework to protect children who have come in contact with the criminal justice system in Cambodia and put in place more child friendly practices and protections to assist youth offenders. The legislation focuses on youth rehabilitation, community involvement and alternatives to incarceration. Up until 2017, Cambodia did not have any legislation of this kind in place.

In Phnom Penh, I attended a 3 day seminar with CRI which was run in conjunction with Cambodia's Ministry of Justice. The seminar was attended by the other relevant government departments including the Ministry of Social Affairs, Veterans and Youth Rehabilitation and the Ministry of Interior. CRI presented to the Government on written Guidelines and Forms which we had prepared to explain the way in which the *Juvenile Justice Law* should be interpreted and used in practice. The documents and forms which we had prepared could be used by Police and Social Workers at the time when a child was apprehended or arrested and set out the types of questions which they could ask the child at the time of the apprehension or arrest. Among other matters, the seminar also covered the circumstances where it would be appropriate for a child to be diverted out of the justice system and ways in which the child could improve their involvement with the community following the offending behaviour.

There were some challenges faced throughout the seminar with respect to the interpretation of the Guidelines and Forms prepared by us as the Cambodian language is so different to the English language. There are many words and expressions which do not exist in the other language and as a result are unable to be translated. It was therefore important to discuss these issues during the seminar to ensure all stakeholders had an understanding of the Guidelines and Forms and the way in which this would intersect and impact upon Cambodia's Government systems.

CRI will be returning to Cambodia at the end of 2019 and again during 2020 to roll out workshops to actively train the Police, Social Workers, Lawyers and Judges in the implementation of the *Juvenile Justice Law* and working with young offenders. The end goal is to set up a fully functioning juvenile justice system and Children's Court, similar to the Children's Court in Victoria. It was a privilege to return to Cambodia following the time I spent in Cambodia working on the Khmer Rouge Tribunal at the Extraordinary Chambers in the Court of Cambodia ('ECCC') in 2016. The effects of the Khmer Rouge are still very much present in Cambodia and rebuilding the destruction of the country's system of government is ongoing.



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VISION 2020

THROUGH THE EYES OF A CHILD

19-22 July 2020 | Singapore

The 8th Family Law and Children's Rights Conference will take place at the World Congress on Family Law and Children's Rights from 19 to 22 July 2020 in Singapore. The Conference will be jointly presented by the World Congress on Family Law and Children's Rights and LAWASIA. The theme of the Conference is "2020 Vision: Through the Eyes of a Child", representing the purity through which children view the world; free from hate and prejudice.

The Conference is a major international event concerning family law and family law processes and the rights of children and youth. It provides a platform for professionals such as lawyers, judges, medical professionals and various associations to converge and share best practices to promote the rights of children and family law issues.

The program will offer many areas of law for discussion and debate including: new approaches to family justice and child issues; the exploitation of children; protecting especially vulnerable children; changing family formations; international families; social media and children; adoption, surrogacy, parentage; a diagnosis of possible interventions or troubled families; financial rights, including property, offshore assets, cryptocurrencies, as well as international, social and cultural considerations.

Fundamentally, the Conference aims to develop outcomes that directly benefit those who are especially vulnerable and disadvantaged.

<https://wcflcr2020.com/>

Further information regarding early bird registration and ticketing to come.

Forthcoming 8th World Congress on Family Law and Children's Rights

Child Abduction and the Hague Convention- A Case Study

UHD v Mackay [2019] EWHC1239 (Fam)

There has been much media flurry in recent months around three-year-old Ruby, an Australian girl who went missing after she was taken to the UK, by her mother, where her mother is citizen.

Ruby's case came before the Family Division of the High Court in London to determine whether the Mother should be ordered to return Ruby to Australia. The Court found that Ruby's case was a blatant and premeditated act of child abduction.

Where international child abduction occurs, the Hague Convention on the Civil Aspects of International Child Abduction applies. This multilateral treaty provides that the child must be ordered to return to his or her country of habitual residence, unless a defence can be successfully raised.

One of the defences written into the Hague Convention is found in Article 13(b) which states:

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that -

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

In Ruby's case, her Mother attempted to raise this defence before the Family Division of the High Court. She alleged that the Father had perpetrated family violence towards her, Ruby and Ruby's half-brother, including physical, emotional and sexual violence, and financial control.

The Court was asked to consider whether there was a 'grave risk' or would otherwise be an 'intolerable situation', as required by the defence. In answering this question, the Court looked to case law which provided the following:

- The risk must be 'grave', a real risk is insufficient;
- The 'gravity' relates to the risk not the harm, though there is necessarily a link between the two;

'Intolerable' must mean "a situation in which this particular child in these particular circumstances should not be expected to tolerate"; The Court's concern must extend beyond the immediate future; and The Court should assume the risk of harm is at its highest and if this meets the Article 13(b) defence, it should then consider protective measures.

Further, under case law, the subjective anxieties of the respondent mother may be sufficient to establish the defence. This will occur where it is



likely that the return of the child will destabilise her parenting to a point where the child's situation would become intolerable. However, the Court noted there are three caveats to this:

1. Court will look very critically at an assertion of intense anxieties not based upon objective risk;
2. Court must consider evidence of whether there is objectively good cause to be anxious upon return; and
3. Where anxieties not based upon objective risk, the Court will ask if those anxieties can be dispelled through protective measures.

Here, the Court considered the anxieties of the Mother who had made repeated allegations of family violence and brought numerous applications to the Australian Court, including for a series of Intervention Orders against the Father. However, the Mother's allegations had not been founded in the Australian courts and the British High Court found no reason to depart from these conclusions. The Court considered the mother's accounts were changeable and highly contradictory, and was left with the strong impression that she had sought to distort and misrepresent the facts in the case in order to fall within the Article 13(b) defence.

Further, the Father entered into a series of undertakings which would have the practical effect of reducing the Mother's anxieties and were considered ample protective measures for the child.

The Court ultimately found that the objective level of risk was insufficient to raise the Article 13(b) defence and orders were made for Ruby's immediate return to Australia.



Isabel Britten-Jones
ASSOCIATE
and Giulia Brugliera, Clerk
(Former)

What is the Hague Abduction Convention?

The Convention is the main international agreement that covers international parental child abduction and also deals with issues of international child access. It provides a process by which a parent can seek for their child to be returned to their home country.

How would the Hague Abduction Convention be applied by Australian Courts?

Both the UK and Australia are parties to the Hague Convention. Hence, matters heard in Australian Courts will involve consideration of the Convention and its associated provisions and defences.

