By Sally Nicholes and Keturah Sageman

Can we do more to protect children?

Intercountry adoption, relocation and abduction

In this article we canvass the Australian and international legal frameworks that aim to protect children from trafficking and other harm that may come about as a result of intercountry adoption. We also address welfare issues for children who are the subject of international relocation and abduction. We examine the experience of LGBTQIA+ communities within this framework and discuss areas for potential reform in Australian and international jurisprudence and policy.

At its core, the approach to and process for intercountry adoption quite rightly derives from a commitment to protect children from trafficking or harm. However, the legal and policy framework underpinning this is difficult to navigate. It is extremely difficult for an Australian family to adopt an unrelated child from overseas which drives some to seek out alternative ways to start a family. This gives rise to the question of whether the current framework for intercountry adoption actually results in children facing increased exposure to harm through trafficking and other criminal activity, carrying enormous risk to the child, the child's birth parent(s) and the adoptive parent(s).[1]

The protection of children is also at the heart of the legal framework applying to international relocations and abductions.

International abduction cases are dealt with under the Hague *Convention on the Civil Aspects of International Child Abduction* (*1980 Convention*):[2] the main premise is to deter child abduction. This is achieved by returning a child who is wrongfully removed from their 'place of habitual residence' to that place. There are exceptions to the presumption of return, notably the 'grave risk' test: a child who is at 'grave risk' of 'physical or psychological harm' does not need to be returned to their 'habitual place of residence'.[3] In December 2022, the Australian Government announced a reform that family violence would be a factor for the courts to consider in applying the 'grave risk' test, discussed further below.

The primary hurdle to any application to have a child returned is to establish 'habitual residence'.[4] Subject to jurisdictional requirements being met, and if no statutory exceptions apply, then a return order will be made to the child's place of 'habitual residence'. Local courts in the country of 'habitual residence' then decide on appropriate parenting arrangements for the child.

Under a strict interpretation of the *1980 Convention* and the Australian regulations made pursuant to it (the *Family Law (Child Abduction) Regulations 1986* (Cth) (*1986 Regulations*)), the child's welfare is not a factor that courts must consider when determining abduction disputes. By contrast, applications for the relocation of a child to another country are determined based on principles of the child's 'best interests' under s60CC of the *Family Law Act 1975* (Cth) (*FLA 1975*).

INTERCOUNTRY ADOPTION

An overview

In Australia, intercountry (international) adoption typically refers to the act of bringing a child back to Australia from overseas for adoption by Australian resident parents. While 'official' adoptions are supported by various government agencies,[5] 'private' adoptions are unregulated and are run by privately funded agencies.[6] Children adopted through private means face significant challenges in entering Australia.

The legislation

Section 111C of the *FLA 1975* provides the framework for adoption in Australia. Australia is a signatory to the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (*1993 Convention*),[7] the primary aim of which is to prevent child trafficking. Where it applies, the trafficked child must be returned to their 'home' country.

The 'official' process

Intercountry Adoption Australia (IAA) assists Australians to adopt from 13 named countries.[8] Adoptions through IAA meet Australia's *1993 Convention* obligations. The adoption process depends on which state or territory the adopting parents live in, as the process is managed at state or territory level.[9]

The process can be summarised as follows:

- Prospective parents are psychologically screened, and complete education seminars and assessments such as health and police checks.
- If the application is approved locally, parent details are sent to Australia's partner jurisdictions.
- If 'matched' to a child, the applicant family needs to obtain approval for the child to immigrate to Australia.

For some adoptions, the child's birth country makes the final orders for adoption, which will be recognised in Australia. Otherwise, the adoption will need to be finalised in the Australian courts.

While this may seem straightforward, the process is lengthy and costly: there are no guarantees that a child will be found for prospective parents or that an adoption will be successful – see the table below for data showing the decreasing number of successful legal adoptions.

Receiving states: Number of successful legal intercountry adoptions[10]

Country	2004	2009	2013	2018	2020
USA	22,988	12,753	7,094	4,059	1,622
Spain	5,541	3,006	1,191	456	195
Australia	370	269	138	65	37

Legal adoptions and illegal activity

It is unlawful to arrange private adoptions in Australia[11] and it is unlikely that children adopted through a private agency will be able to meet the requirements of Australian immigration.[12] However, the following forms of legal intercountry adoption exist:

- *Intercountry relative adoptions:*[13] Australians may adopt a child living overseas who is related to them. This route is dependent on satisfying the 'best interests of the child' test and the terms of the *1993 Convention.*
- *Expatriate adoptions:* Australians may adopt a child while living overseas. These parents must navigate the 'standard' Australian immigration and visa rules to bring the child to Australia.[14]

'Illegal' adoptions into Australia have occurred historically.[15] According to the Department of Social Services:

> 'This may happen when an individual or body, directly or indirectly, misrepresents information to the biological parents, falsifies documents about the child's origins, or abducts, sells or traffics a child for intercountry adoption. They may also use other fraudulent methods to adopt a child for financial or other gain.'[16]

The risk of child trafficking and human rights violations such as the violation of 'the rights of every child to preserve their identity'[17] is manifest.

The LGBTQIA+ experience

For LGBTQIA+ communities, the challenges in achieving intercountry adoption are felt even more acutely due to additional legal and practical barriers. Research undertaken by the author of a Flinders University Report, *Australian Family Diversity: An Historical Overview 1960–2015*, indicates that these families 'face considerable scrutiny and regulation … particularly when from a country outside Australia'.[18]

Another challenge is the interference of bias.[19] For example, it is often presumed that prospective LGBTQ+ parents want to or are best suited to raise LGBTQ+ youth.[20]

Many countries that Australia has adoption treaties with – even signatories to the *1993 Convention* – will not allow, or do not in practice permit, LGBTQIA+ families to adopt children from their country.[21]

As the laws affecting these decisions are outside Australia's jurisdictional remit, we encourage the Government to advocate for LGBTQIA+ families to adopt from a broader range of countries. The research led by Professor Susan Golombok at the University of Cambridge supports the conclusion that 'the quality of family relationships and the wider social environment are more influential in children's psychological development than are the number, gender, sexual orientation, or biological relatedness of their parents'.[22]

Reform

The UN and HCCH[23] have been active in proposing reform of intercountry adoption laws. In our view, these proposed measures are sound.

UN proposals

In September 2022, the UN released proposals to eradicate illegal intercountry adoptions.[24] The UN has called upon '[s]tates to fulfil their duty to prevent illegal intercountry adoption by promulgating and implementing laws, policies and other necessary measures concerning the adoption process'.[25] Specifically, they have called for action to:

- strengthen 'best interests of the child' tests;
- allow children to express views that are given weight appropriate to age, maturity, etc;
- strengthen criminal law and enforcement to prosecute and punish those who traffic children; and
- establish procedures to investigate illegal intercountry adoption and assist with victim reparation.[26]

At the time of writing, the Australian Government has not responded to the UN's statement.

HCCH points of reform

The HCCH Working Group on Preventing and Addressing Illicit Practices in Intercountry Adoption prepared an advanced draft of a toolkit in November 2021.[27] The Working Group discussed points of reform which will be reflected in new fact sheets and a new toolkit for state signatories of the *1993 Convention*. The Group proposed some important reforms including:

- Prohibiting prospective adoptive parents from communicating with the government of the country where the child is located unless they have first joined the adoption program run by their own government.
- Ensuring that the government where the child is located verifies whether the government of the receiving state has approved the proposed match.
- To investigate further reform, the effect of which will be to add a stage to the adoption process to allow the birth parents (and possibly the child) to obtain independent legal advice before consenting to the adoption.

The Australian legal context

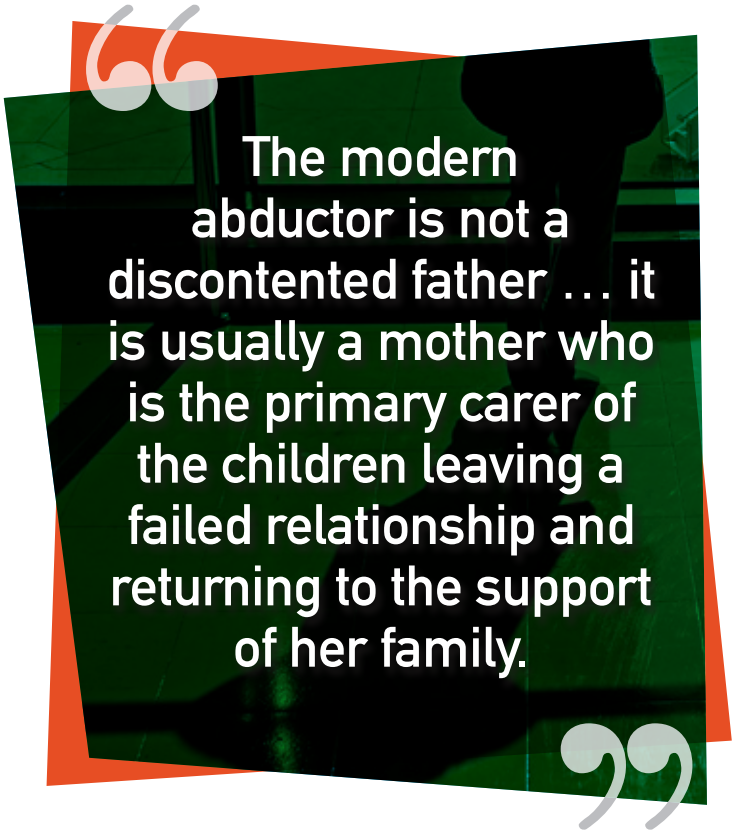
There is truth in the argument that the 'abundance of international law, conventions and treaties that govern international adoption hasn't prevented illegal international adoptions from occurring … [leaving] children institutionalised and vulnerable to human trafficking'.[28]

In the Australian legal context, this 'abundance' of international law is exacerbated by the tug-of-war between state and federal regimes. While states govern the adoption process and large parts of the criminal code (especially where child welfare is concerned), the federal government controls family law legislation, the immigration process, and international treaty compliance. A singular approach could prove helpful.

INTERNATIONAL CHILD RELOCATION AND ABDUCTION

Overview: International child relocation

Child relocation refers to the situation where one parent moves to a different country with their child, rendering existing parenting arrangements impracticable. The Federal Circuit and Family Court of Australia applies a statutory framework[29] to determine whether the move is in the child's 'best interests'.[30] This is a question of fact and involves a balancing exercise of factors such as the child's right to enjoy



their culture and/or traditions[31] with other factors that may include the need to protect the child from harm;[32] the likely effect of separation from either parent or other relatives;[33] the practicalities of maintaining the relationship with the other parent; and the views of the child.[34]

Where possible, the court should aim to facilitate the child having a meaningful relationship with both parents.[35] The impact of international relocation on the relationship with the 'left-behind' parent is always a question of degree.[36] The court is more likely to approve an international relocation application if it is satisfied that the primary caregiving parent intends to support and/or facilitate this relationship.[37]

Overview: International child abduction

Where a parent takes a child from the child's home country to live abroad without the consent of the other parent or the court, it is called child abduction.[38] This situation is regulated internationally by the *1980 Convention,* and in Australia under s111B of the *FLA 1975* and the *1986 Regulations*.

The *1980 Convention* applies to any child who is a 'habitual resident' of a contracting state. If the child is removed from their home country by a parent and taken to another contracting state, the 'left-behind' parent may lodge an application for the child's return.[39]

In Australia, return applications are managed by the Australian Central Authority (ACA) (performed by the Australian Government Attorney-General's Department).[40] The ACA will review and transfer the application to the relevant Central Authority in the other state, who will take steps (including mediation or court orders)[41] to ensure the return of the child to Australia.

If the child is taken to a country that is not a signatory to the *1980 Convention* (or does not have a bilateral treaty with Australia) the situation is more complex. Typically, a child can be returned only through private means, such as leveraging Australian Government (Attorney-General) connections and contacting lawyers, government authorities and child welfare agencies in the other country.[42]

In *DP v Commonwealth Central Authority*,[43] Kirby J observed:

> 'it is proper to regard [the *1986 Regulations*'] objective as including that of normally restoring the child, and the other parties concerned, to the status quo that existed before the international removal or retention in question. Specifically, it is ordinarily to require that the authorities (courts or tribunals as the case may be) in the country of the child's habitual residence should resolve the merits of disputes over custody and, in that context, decide the best interests of the child.
>
> It is in this sense that the Regulations are properly to be classified not, as such, as laws searching for the best interests of the child but rather as laws for selecting the forum where that search is to be undertaken and concluded.'

Habitual residence

'Habitual residence' is not defined in the *FLA 1975* or *1986 Regulations*. In *LK v Director-General, Department of Community Services*,[44] the High Court accepted that any analysis of 'habitual residence' involves a 'broad factual inquiry'.[45]

Grave risk

Article 13(b) of the *1980 Convention* operates as an exception to the rule that children who are wrongfully removed should be returned to their place of 'habitual residence'. This 'grave risk' exception allows the courts to consider the impact that factors (such as war) may have on a child. It broadly provides that a court shall not be obliged to return a child if 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'.

The question of whether a 'grave risk of harm' exists is a question of fact and degree, including an analysis of what measures are proposed to mitigate that risk.[46] It is applied restrictively in most abduction cases in Australia involving Hague Convention countries because the purpose of the *1980 Convention* is to swiftly return the child to their country of 'habitual residence' to allow that jurisdiction to determine the parenting dispute. The 2007 case of *State Central Authority* & *Sigouras*[47] demonstrates how narrowly the 'grave risk' test is construed.

In international jurisprudence, we have seen a gradual shift towards a wider interpretation of the 'grave risk' exception. The United States (US) courts have, for example, applied the art 13(b) exception to a child who needed medical care not available in his country of 'habitual residence'. In *Ermini v Vittori*,[48] the child, who was severely disabled, lived in Italy. The child was taken to the US for treatment and retained there by their mother, who argued there was 'grave risk' in returning the child to Italy as the Italian health system didn't

offer the medical support that was available in the US. The US Court of Appeal held that removal of the child to Italy would amount to a 'grave risk'.

A shift is also occurring in the Australian lower courts: for example, in *Department of Child Safety, Youth and Women (Cth) v Comar* (*Comar*),[49] the mother's mental health was a critical factor in deciding whether the 'grave risk' test applied. The trial judge accepted, following the advice of a family report expert, that there would be a 'grave risk of harm' to the children if they returned to Columbia. Among other things, the mother argued that her long history of mental health issues meant that she may not cope with going back to Columbia with the children if they were returned. And if she did go back to Columbia, it may adversely impact her parenting as she would not have access to mental health support as she did in Australia. The judge agreed that this would put the children at risk of physical harm and/or in an intolerable situation. The Full Court overturned this decision on the grounds that the expert did not adequately consider the father's position in the report, so the trial judge should not have relied on it.

It appears that a significant societal shift since the *1980 Convention* has taken effect. In the 1980s, it was largely fathers who were not getting access to their children and choosing to 'abduct' them to achieve that contact.[50] Now, it is largely mothers who are taking their children (see the statistics below). The reasons for this are complex but, in our experience, the 'child abductors' are often mothers with compromised mental health, such as in *Comar*, who are returning to family networks and/or fleeing family violence.

While we are supportive of an international trend towards a wider interpretation of the 'grave risk' test, the legal system should not endorse the abduction of children without facts that warrant that action. The processes put in place by the *1980 Convention* and *1986 Regulations* support a return to the child's place of 'habitual residence' for determination of what is in the child's best interests.

Michael Nicholls KC eloquently summarised the conundrum in his submission to a Senate Standing Committee:

> 'The Convention is an effective remedy for securing the return of children and deterring international child abduction. However, since its inception, the paradigm case has changed; the modern abductor is not a discontented father dissatisfied with the access arrangements; rather it is usually a mother who is the primary carer of the children leaving a failed relationship and returning to the support of her family… The failed relationship may well have included serious abuse and violence. In those circumstances, the rigorous and restrictive approach adopted towards the 'defences' in the Convention, especially Article 13(b) [grave risk of harm], begins to look oppressive, especially if protective measures in the requesting State have already failed (indeed, that might be a reason for leaving the country).'[51]

The statistics outlined below support the assertion in this submission.

The statistics

The HCCH's fourth research study investigating the operation of the *1980 Convention* contains the following statistics (albeit 2015 data collected from Central Authority applications to have a child returned under the *1980 Convention*):

- In 73 per cent of cases, the taking person is the child's mother. This is an increase from 69 per cent recorded in 2008 and 68 per cent in 2003.
- Father-led applications – sitting at 24 per cent – have dropped from 28 per cent in 2008 and 29 per cent in 2003.[52]
- Of the 2002 applications in 2015, the courts returned the child in 28 per cent of cases while 27 per cent of cases saw the child voluntarily returned. The courts determined not to return the child in 12 per cent of cases.[53]

The Australian statistics (compared to select other countries)[54]

The complete data can be found in the Annex of the study. The selection below is intended to show a cross section of countries from different regions and socio-economic status – for comparison purposes only.

State	Incoming return applications	Outgoing return applications
Australia	45	63
Brazil	46	0
Canada	43	35
China	6	0
France	105	122
UK	294	249
US	313	183

Reform

Family violence

In response to arguments that the *1980 Convention* failed to put sufficient weight on the impact that family violence may have on the child's welfare or the need to leave the 'habitual place of residence',[55] and cases that demonstrated need for reform,[56] on 12 December 2022 the Australian Government

announced that it had amended the law to make it clear that allegations of family and domestic violence can be considered before return orders are made for children[57] under the *1980 Convention*. The changes are intended to provide explicit direction that fleeing family violence is a relevant consideration when applying the 'grave risk' exception; a court does not need to be satisfied that such violence has occurred or will occur before it is factored into the court's analysis. The new laws will also allow a court to impose various conditions on return orders to help protect children from exposure to family violence (but regard must be had to risk management measures proposed by parties to the dispute).[58] This is a welcome and timely development.

Rights of the child

The UN Child Rights Committee decree (June 2022) states that the 'best interests of the child' must be taken into consideration before a child is returned under the *1980 Convention*.[59] To our minds, this is an anomaly under the current *1980 Convention* framework but may be the genesis of reform.

CONCLUSIONS

In the context of promoting the 'best interests of the child' in intercountry adoptions and international child relocation and abduction cases, there is room for reform in our domestic laws not only to meet our *1980 Convention* responsibilities but also to ensure that the child's 'best interests' are sufficiently addressed. In respect of intercountry adoption, children who are stateless or living in limbo before they are (re)united with their adoptive parents deserve better treatment from our legal system.

The complex web of international and domestic rules has created opportunities for child traffickers to capitalise on the desperation of some to create a family. The complex and lengthy regime is forcing people to look for alternative routes to adoption. We need a regime that allows children in need of homes to be adopted, not trafficked, and one that incentivises people to do the right thing.

In an ideal world, the courts would be expressly empowered to move away from the traditional interpretation of the 'grave risk of harm' test (which typically reflects a life-or-death type analysis) and transition to a more nuanced and modern interpretation. The changes announced by the Attorney-General on 12 December 2022 concerning family violence and 'grave risk' are a step in the right direction, but this may also open up a new body of case law to test the extent to which family violence may influence the outcome in a *1980 Convention* dispute. This would give courts the power to decline to issue a mandatory return order and allow for a wider application of the 'grave risk' test. ■

Notes: **1** S Orr, 'Human trafficking through international adoption', *Global Honours Theses*, 12–3. **2** Concluded 25 October 1980 (entered into force for Australia 1 January 1987). **3** Ibid, art 13(b). Note that the 'grave risk' test is only one of several exceptions to the mandatory return rule. **4** *LK v Director-General, Department of Community Services* (2009) 237 CLR 582. **5** For example, the Department of Justice and Community Safety in Victoria. **6** Intercountry Adoption Australia (IAA), *Other types of overseas adoptions* <https://www.intercountryadoption.gov.au/countries-and-considerations/apply/other-types-overseas/>. **7** Concluded 29 May 1993. The *1993 Convention* has been law in Australia since 9 August 1994. **8** The list of countries can be found at IAA, *What countries can I adopt from?* <https://www.intercountryadoption.gov.au/countries-and-considerations/countries/>. Not all of these countries are signatories to the *1993 Convention*. **9** For example, see Victoria State Government, Justice and Community Safety, *National Principles in Adoption* (2022) <https://www.justice.vic.gov.au/your-rights/adoption/national-principles-in-adoption>. **10** P Selman, *Global statistics for intercountry adoption: Receiving states and states of origin 2004–2020*, Newcastle University, UK (2022) <https://assets.hcch.net/docs/a8fe9f19-23e6-40c2-855e-388e112bf1f5.pdf>. **11** IAA, above note 6. **12** Ibid. **13** IAA, *Applying for intercountry relative adoption* <https://www.intercountryadoption.gov.au/countries-and-considerations/apply/applying-for-intercountry-relative-adoption/>. **14** Ibid. **15** D Higgins, Australian Institute of Family Studies, *Past and present adoptions in Australia* (Factsheet, 2012) <https://aifs.gov.au/research/research-snapshots/past-and-present-adoptions-australia>. **16** Department of Social Services, *Families and Children: Protocol for Responding to Allegations of Illicit or Illegal Practices in Intercountry Adoption* (18 March 2021) <https://www.dss.gov.au/families-and-children-programs-services-intercountry-adoption-key-policy-documents/protocol-for-responding-to-allegations-of-illicit-or-illegal-practices-in-intercountry-adoption>. **17** United Nations Human Rights Office of the High Commissioner, *Illegal intercountry adoptions must be prevented and eliminated: UN experts* (2022) <https://www.ohchr.org/en/press-releases/2022/09/illegal-intercountry-adoptions-must-be-prevented-and-eliminated-un-experts>. **18** DW Riggs, *Diverse Pathways to Parenthood* <https://www.australianfamilydiversity.com/adoption/>. **19** United States Child Welfare Information Gateway, *Working with LGBTQ+ families in foster care and adoption* (2021) <https://www.childwelfare.gov/pubPDFs/f_profbulletin.pdf>. **20** Ibid. **21** Taiwan, for example, does recognise same-sex couples but does not allow them to adopt a child except where one member of the LGBTQIA+ couple has a genetic connection to the child. For a US reference, see National Council for Adoption, *Intercountry adoption options for LGBTI parents* (2021) <https://adoptioncouncil.org/article/intercountry-adoption-options-for-lgbt-parents/>. For an infographic on which countries allow and do not allow LGBTQIA+ adoptions, see A Fleck, *Where Adoption is illegal for LGBT+ couples* (22 June 2022) <https://www.statista.com/chart/13179/where-adoption-is-illegal-for-lgbt–couples/>. **22** S Golombok, *Modern families: Parents and children in new family forms*, Cambridge University Press, 2015 <https://www.cambridge.org/core/books/modern-families/B133ECA09685B46DAA5D116CF2AB2743#fndtn-information>. **23** Hague Conference on Private International Law – Conférence de La Haye de droit international privé. **24** United Nations Human Rights Office of the High Commissioner, above note 17. **25** Ibid. **26** United Nations Human Rights, *Joint statement on illegal intercountry adoptions* (29 September 2022) [5], [16] and [17] <https://www.ohchr.org/sites/default/files/documents/hrbodies/ced/2022-09-29/JointstatementICA_HR_28September2022.pdf>. **27** Working Group on Preventing and Addressing Illicit Practices in Intercountry Adoption, *Report of the Working Group on Preventing and Addressing Illicit Practices in Intercountry Adoption* (Meetings of 28–30 September and 8 November 2021) Annex I <https://assets.hcch.net/docs/35d8530a-b5bd-4330-b2fc-abda099e7f6b.pdf>. **28** Orr, above note 1, 17. **29** *Family Law Act 1975* (Cth) (*FLA 1975*), s60CC. **30** Ibid, s60CA. **31** Ibid, ss60CC(3)(g)–(h) and (5). **32** Ibid, ss60CC(2)(b). **33** Ibid, s60CC(3)(d). **34** Ibid, s60CC(3)(a). The leading case in Australia on relocation factors is *A v A: Relocation Approach* [2000] FamCA. See also *Rosa's case* (*MRR v GR* [2010] HCA 4). **35** *FLA 1975*, s60CC(2)(a). **36** See for example *London & London* [2019] FCCA 2948 and *Ready v Ready* [2020] FamCA 6. **37** *FLA 1975*, s60CC and see also the seminal case of *A v A: Relocation Approach* (2000) FLC 93-035 and cases like *Goode v Goode* (2006) FLC 93-286 and *M v S* (2006) FamCA 1408. **38** Australian Government Attorney-General's Department, *International Parental Child Abduction* <https://www.ag.gov.au/families-and-marriage/families/international-family-law-and-children/international-parental-child-abduction>. **39** Ibid. See also International Social Service Australia, *How can I have my child returned from overseas (Parents)* <https://

assets.website-files.com/5f02fe3bffd6de28dca82125/5f699e098b2fed40354290a7_How%20can%20I%20have%20my%20child%20returned%20from%20overseas%20(Parents).pdf>. **40** Australian Government Attorney-General's Department, above note 38. **41** Ibid, which has a useful flowchart outlining the process for return of an abducted child to Australia. **42** Australian Government Attorney-General's Department, *Questions about international child abduction and access*, 'What if my child is in a non-Hague Convention country?' <https://www.ag.gov.au/families-and-marriage/families/international-family-law-and-children/questions-about-international-child-abduction-and-access>. **43** *DP v Commonwealth Central Authority* [2001] HCA 39, [127]–[128]. **44** (2009) 237 CLR 582. **45** Ibid, [18]. **46** M Patel, S Baldeo, P Swartz et al, 'International child abduction: The complexities of forensic psychiatric assessments before the Hague Convention', *Forensic Psychiatry*, July 2021 and HCCH, *Child Abduction Section* (2020) <https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction>. **47** [2007] FamCA 250 – especially [128] and [139]. In that case, the children were returned to Greece into their father's care, which removed them from their Australian-based mother who was their primary caregiver (whom the children were very dependent upon) and who had confirmed that she would not accompany the children to Greece because of mental health concerns. The Court considered that the children were not at 'grave risk' on the evidence before it: that the alleged substandard care and violence on the part of the father had not been proven; Greece was found to have a robust child protection regime which would protect the children if violence was proven; the anxiety the children would endure in the relocation was not 'grave'; the mother's mental distress was just because she was 'desperately unhappy' about having to go back to Greece; and that it was up to the Greek courts to test the veracity of the mother's allegations of violence and abuse and make a parenting order based on the evidence before it. **48** ---F.3d---, 2014 WL 3056360, C.A.2, July 08, 2014. **49** [2019] FamCA 909 (*Comar*); Full Federal Court decision in *Comar* & *Comar* [2020] FamCAFC 99. **50** MH Weiner, 'International child abduction and the escape from domestic violence', *Fordham Law Review*, Vol. 69, No. 2, 2000, 593 at 602 <http://ir.lawnet.fordham.edu/flr/vol69/iss2/6>. **51** M Nicholls KC, Submission No. 6 to the Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into International Child Abduction to and from Australia*, 2011; our parentheses added. **52** HCCH and International Centre for Missing and Exploited Children, *A Statistical Analysis of Applications Made in 2015 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* (Global Report, 2018) [37] <https://assets.hcch.net/docs/d0b285f1-5f59-41a6-ad83-8b5cf7a784ce.pdf>. **53** Ibid, [55]. **54** Ibid, Annex 1. **55** G Masterton, 'Fleeing family violence to another country and taking your child is not "abduction", but that's how the law sees it', *The Conversation* (21 January 2019) <https://theconversation.com/fleeing-family-violence-to-another-country-and-taking-your-child-is-not-abduction-but-thats-how-the-law-sees-it-109664>. **56** For example, the NZ case of *COL v LRR*: [2018] NZFC 4040 (Family Court judgment) and [2020] NZCA 209 (Court of Appeal), which involved a mother who had fled Australia to NZ with her child in circumstances that involved family violence. The courts discussed the 'grave risk' exception and what constitutes an 'intolerable situation'. **57** Australian Government Attorney-General, *Ensuring family safety in Australian Hague Convention cases* (12 December 2022) <https://ministers.ag.gov.au/media-centre/ensuring-family-safety-australian-hague-convention-cases-12-12-2022>. **58** *Family Law (Child Abduction Convention) Amendment (Family Violence) Regulations 2022* <https://www.legislation.gov.au/Details/F2022L01611>. **59** E Sinander, 'UN Child Rights Committee on the 1980 Hague Convention', *EAPIL* (2022) <https://eapil.org/2022/09/23/un-child-rights-committee-on-the-1980-hague-convention/>. Note: the UN appears to have conflated the 'best interest' test with the Hague approach. There is, as noted above, reasonable argument that some kind of 'best interests' or child welfare test should be included in the *1980 Convention* – which effectively allocates forum and then determines whether the return to place of 'habitual residence' should be excepted or not.

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Exceptions to consequences for breaching costs disclosure

Section 204(2)(c) of the *Legal Profession Uniform Law* (*LPUL*),[1] which governs solicitors in NSW, Victoria and Western Australia, clearly stipulates that 'the costs of a costs assessment are payable by a law practice if the law practice's costs have been reduced by 15 per cent or more on assessment' (subject to the discretion of the costs assessor). Similar provisions exist in laws governing solicitors in other Australian jurisdictions.[2]

On 1 February 2021, in *Palmos v Pravlik (No. 3)*,[3] following the taxation of a law practice's costs, the Supreme Court of Victoria made orders allowing a law practice to *recover* the costs of the costs application process due to the following circumstances:

- the law practice was compliant with all of its disclosure obligations as set out in pt 4.3, div 3 of the *LPUL*; and
- the law practice's costs were not reduced by 15 per cent or more; or
- the law practice made an offer of compromise, or *Calderbank* offer, that was ultimately accepted.

The respondent client sought a review of this decision. On 16 September 2022, Efthim AsJ delivered a judgment on the application for review[4] that brought to light the Court's