

The Hague Conventions: Operating Instructions

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Foley's List

Introduction

This paper is intended to provide a simple overview of some of the key aspects of the 1980 and 1996 Hague Conventions and the way in which they may operate in your practice. These considerations will arise if there is a concern that one of the parents may take the child or children overseas without the permission of the other parent – or indeed, may have already done so.

Often, such cases are fraught with complexity, and it can be difficult to know where to start. Rather than being a comprehensive overview, this document intends to provide a structural skeleton of the basics, so as to give you a starting point for considering what avenues may be available to your client. As always, please feel free to reach out to either of us for a comprehensive discussion of the particular circumstances arising for your client and how they may best be assisted through the legal system.

Two Conventions

Two separate Hague Conventions exist which relate to the movement of children between international jurisdictions, including by way of abduction:

- The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction¹ (**1980 Convention**); and
- The 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 Children² (**1996 Convention**).

¹ Implemented in Australia through the *Family Law (Child Abduction Convention) Regulations 1986* (Cth).

² Implemented in Australia through the *Family Law Amendment (Child Protection Convention) Act 2002* (Cth).

The 1980 Convention is the most commonly known. It is a treaty as between those states who have ratified it which provides for the protection of children from international child abduction and the return of children wrongfully abducted to their home country.

The 1996 Convention is also a treaty as between ratifying states. Whilst it relates more broadly to parenting matters over and above international child abduction, it supports the operation of the 1980 Convention by promoting international cooperation in parenting matters.

It is always best to check a current list of countries who are signatories to the 1980 and 1996 Conventions at the time advice is given, to ensure accuracy. Those lists can be found here: <https://www.hcch.net/en/home>. Further information can also be found on the Attorney-General's Department website here: <https://www.ag.gov.au/families-and-marriage/families/>.

The 1980 Convention

The preamble to the 1980 Convention provides that the states signatory to it:

...Firmly convinced that the interests of children are of paramount importance in matters relating to their custody, Desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access, Have resolved to conclude a Convention to this effect...³

Purpose and obligations

The purposes of the 1980 Convention are to secure the prompt return of children (under the age of 16) to their home country where they have been wrongfully removed or retained to another country, and to ensure that ratifying states respect each other's laws relating to custody and access rights for children.

³ Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, preamble.

The 1980 Convention obliges the courts of a country where a child has been wrongfully removed or retained (ie abducted) to return that child to their home country promptly, except in exceptional circumstances. Notably, this provision applies only to removal or retention of a child which is wrongful, as defined in the convention itself. Wrongful does not necessarily mean illegal.

In accordance with the 1980 Convention, removal or retention will be wrongful where:

- It is in breach of a person's custody rights pursuant to the law of the child's home country; and
- At the time of the removal or retention, those custody rights were actually exercised, or would have been exercised but for the removal or retention.

Of course, the 1980 Convention can only be invoked where the child's home country (where they were 'habitually resident'), and the country to which they have been abducted, are both signatories to the convention.

Proceedings commenced within a year of removal/retention

If proceedings for the return of the child to their home country are commenced within a year of the removal or retention, then an order must be made for the child's return forthwith, unless one of the following exceptions (also referred to as defences) are established:

- The person seeking return was not exercising rights of custody;
- The person seeking return consented to the removal or retention;
- The person seeking return acquiesced in the removal or retention;
- There is a grave risk the return would expose the child to physical or psychological harm, or place the child in an intolerable situation;
- The child objects to the return and has reached an age and degree of maturity where it is appropriate to consider their views; or
- The return would not be permitted by the fundamental principles of the country where the child is present (regarding protection of human rights and fundamental freedoms).

If an exception applies, the child's return may be refused.

The grave risk of physical or psychological harm is one of the common exceptions litigated to prevent the return of a child to their home country. These circumstances can include:

- A child being subjected or exposed to family violence;
- A child being neglected; or
- A child being or remaining separated from their primary parent/guardian or a sibling.

Another commonly litigated exception (whether on its own or argued in conjunction with the grave risk exception), is the child's objecting to being returned. The 1980 Convention specifically provides that a child's view may be considered. However, the weight attributed to that view will depend on several factors including the child's age, maturity, social background and the circumstances of the removal or retention. This could include how long the child has been away from their home country, whether and how often they have been communicating with the requesting party and the child's attitude towards the requesting party and whether it was genuinely or may have been influenced by the abducting party.

Proceedings commenced more than a year of removal/retention

If proceedings for the return of the child to their home country are commenced after a year of the removal or retention, then an order must be made for the child's return unless it is demonstrated that they are 'now settled' in their 'new environment'.

Whether a child is settled in their new environment is the subject of judicial discretion and will depend on a number of factors within the circumstances of the case.

Order for the return of a child – limitations

Keep in mind that any order for the return of a child to their home country may be limited in that the 1980 Convention does not require:

- The return of the child to a specific location within their home country;
- The return of the child to a specific person within their home country, including the requesting party; or

- The notification to the requesting party that the child has been returned to the home country.

Further, the 1980 Convention does not require the parties to engage in mediation or other dispute resolution processes. However, if proceedings have been commenced in the Federal Circuit and Family Court of Australia, then the principles of the Central Practice Direction apply, and the parties are of course subject to any orders made within the proceedings.

The 1996 Convention

The preamble to the 1996 Convention provides that the states signatory to it:

...Considering the need to improve the protection of children in international situations, Wishing to avoid conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children, Recalling the importance of international co-operation for the protection of children, Confirming that the best interests of the child are to be a primary consideration... Desiring to establish common provisions to this effect, taking into account the United Nations Convention on the Rights of the Child of 20 November 1989, Have agreed on the following provisions...⁴

Purpose and obligations

The purpose of the 1996 Convention is to recognise the variety of legal and administrative systems which exist internationally for the regulation of parenting matters and promote their cooperation. Specifically, its stated purposes are to:

- Determine the state whose authorities have jurisdiction to make decisions regarding parenting matters;
 - Determine which law is to be applied by the authorities exercising their jurisdiction;
 - Determine the law applicable to parental responsibility;
 - Provide for the recognition and enforcement of those laws within contracting states;
- and

⁴ 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, preamble.

- Establish cooperation between the relevant authorities of contracting states necessary to achieve the purposes of the convention.

Application to the 1980 Convention

The 1980 Convention requires the return of abducted children to their home countries so that necessary parenting arrangements can be made in that jurisdiction (whether by agreement or order). The 1996 Convention supports the operation of the 1980 Convention in that it recognises, preserves and upholds the jurisdiction of the child's home country to make such orders, and requires contracting states to also recognise, preserve and uphold orders made in each other's jurisdictions by relevant authorities (such as courts).

Many concepts are common to the 1980 and 1996 Conventions, including habitual residence, wrongful removal and retention, parental responsibility and rights of custody.

What does the 1996 Convention do?

Specifically, the 1996 Convention sets out rules to determine which country's authorities can make orders and other arrangements about children who have ties in different international jurisdictions. Article 23(1) provides that any measures (including orders) made by a particular contracting state shall be recognised by operation of law in all other contracting states. The certainty provided by the Convention prevents the need for parties to engage in costly and time-consuming litigation to determine proper jurisdiction for family law proceedings.

The jurisdictional rules provided for in the 1996 Convention are contained in the *Family Law Act 1975* (Cth), specifically section 111CD, which is set out at the end of this paper.

In accordance with Article 5 of the 1996 Convention, the judicial or administrative authorities of the child's habitual residence have jurisdiction to make orders about that child. However, states where a child may be temporarily located (for example, by reason of abduction) have limited jurisdiction to make decisions about that child on an urgent or provisional basis, if required.

Jurisdiction

Prima facie, if a child's habitual residence changes, then the jurisdiction over the child necessarily also changes to the state where the child now resides.

However, in circumstances where a child's habitual residence changes because of wrongful removal or retention, then the child's previous state will have jurisdiction to make orders about the child **unless and until**:

- Each person who has rights of custody over the child consents or acquiesces to the removal or retention; **or**
- The child has:
 - lived in the new state for at least one year after the person who has rights of custody knew (or should have known) the child's whereabouts, **and**
 - no request for the child's return remains pending (including if an application was made and was unsuccessful), **and**
 - the child is settled in the new environment.

The 1996 Convention also permits the transfer of jurisdiction from the state of a child's habitual residence to a different state in certain circumstances if that different state is 'better placed in the particular case to assess the best interests of the child', for example:

- A state where the child is present;
- A state where the child is a national;
- A state whose authorities are dealing with other parenting or marriage proceedings (such as divorce or annulment); or
- A state with which a child has a substantial connection.

Urgency

The 1996 Convention does not define 'urgency' in relation to a case of a child's relocation, and so it is up to each state's authorities (including courts) to interpret and determine situations of urgency.

Central Authorities

Both the 1980 and 1996 Conventions require the appointment of a Central Authority for each contracting state, to ensure that state's compliance with the convention. These Authorities may be the same for each convention, or different. The Central Authority appointed in Australia in relation to both the 1980 and 1996 Conventions is the Australian Government Attorney-General's Department.

The role that each Authority has in relation to each convention is different.

Whilst the Central Authority appointed pursuant to the 1980 Convention takes an active role in the administration of that convention, the Central Authority pursuant to the 1996 Convention may not have such a role, and relevant communications and processes may pass through other authorities (such as a government department, if a court has been appointed as the Central Authority, or vice versa) without much, if any, interaction.

Family Law Act 1975 (Cth)

Division 4—International protection of children

Subdivision B – Jurisdiction for the person of a child

111CD Jurisdiction relating to the person of a child

(1) A court may exercise jurisdiction for a Commonwealth personal protection measure only in relation to:

- (a) a child who is present and habitually resident in Australia; or
- (b) a child who is present in Australia and habitually resident in a Convention country, if:
 - (i) the child's protection requires taking the measure as a matter of urgency; or
 - (ii) the measure is provisional and limited in its territorial effect to Australia; or
 - (iii) the child is a refugee child; or
 - (iv) a request to assume jurisdiction is made to the court by, or at the invitation of, a competent authority of the country of the child's habitual residence; or
 - (v) a competent authority of the country of the child's habitual residence agrees to the court assuming jurisdiction; or
 - (vi) the court is exercising jurisdiction in proceedings concerning the divorce or separation of the child's parents or the annulment of their marriage (but see subsection (3)); or
- (c) a child who is present in a Convention country, if:
 - (i) the child is habitually resident in Australia; or
 - (ii) the child has been wrongfully removed from or retained outside Australia and the court keeps jurisdiction under Article 7 of the Child Protection Convention; or
 - (iii) a request to assume jurisdiction is made to the court by, or at the invitation of, a competent authority of the country of the child's habitual residence or country of refuge; or
 - (iv) a competent authority of the country of the child's habitual residence or country of refuge agrees to the court assuming jurisdiction; or
 - (v) the child is habitually resident in a Convention country and the court is exercising jurisdiction in proceedings concerning the divorce or separation of the child's parents or the annulment of their marriage (but see subsection (3)); or
- (d) a child who is present in Australia and is a refugee child; or
- (e) a child who is present in a non-Convention country, if:
 - (i) the child is habitually resident in Australia; and
 - (ii) any of paragraphs 69E(1)(b) to (e) applies to the child; or

(f) a child who is present in Australia, if:

(i) the child is habitually resident in a non-Convention country; and

(ii) any of paragraphs 69E(1)(b) to (e) applies to the child.

(2) A court may only exercise jurisdiction in accordance with subparagraph (1)(b)(ii) if the measure is not incompatible with a foreign measure already taken by a competent authority of a Convention country under Articles 5 to 10 of the Child Protection Convention.

(3) A court may only exercise jurisdiction in accordance with subparagraph (1)(b)(vi) or (c)(v) for a Commonwealth personal protection measure relating to a child if:

(a) one or both of the child's parents are habitually resident in Australia when the proceedings referred to in that subparagraph begin; and

(b) one or both of the parents have parental responsibility for the child; and

(c) the jurisdiction of the court to take the measure is accepted by the parents and each other person with parental responsibility for the child; and

(d) the exercise of jurisdiction to take the measure is in the best interests of the child; and

(e) the proceedings on the application for divorce or separation of the child's parents or the annulment of their marriage have not been finalised.

(4) Paragraphs 111CD(1)(a) to (d) are subject to the limitations in sections 111CE, 111CF and 111CH.