

**CONVENTION ON JURISDICTION, APPLICABLE LAW,
RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT
OF PARENTAL RESPONSIBILITY AND MEASURES FOR THE
PROTECTION OF CHILDREN, DONE AT THE HAGUE ON 19
OCTOBER 1996**

Documents tabled on 12 March 2002:

- **National Interest Analysis**
- **Text of the proposed treaty action**

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children, done at The Hague on 19 October 1996

NATIONAL INTEREST ANALYSIS

Proposed binding treaty action

1. It is proposed that Australia ratify the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children (the Convention). Before ratification, Australia will first sign the Convention pursuant to Article 57.

Date of proposed binding treaty action

2. The Convention entered into force generally on 1 January 2002. It is proposed that the Convention be signed for Australia and its instrument of ratification lodged as soon as practicable after the necessary domestic legislation has been enacted. Under Article 61, the Convention would come into force for Australia on the first day of the month after the expiry of a period of three months after Australia lodges its instrument of ratification.

Date of tabling of the proposed treaty action

3. The Agreement is to be tabled on 12 March 2002.

Summary of the purpose of the proposed treaty action and why it is in the national interest

4. The purpose of the Convention is to provide for international co-operation between Convention countries in the interests of protecting children. The Convention promotes co-operation among countries by eliminating potential conflicts of jurisdiction between authorities in different countries and by providing for international recognition of measures of protection for children.

5. This means that parents will know which country's courts will make decisions about their children, and will not be subject to uncertainty due to conflicting parenting orders from different courts in different countries. It also means that it will be clear which country's child protection authorities have jurisdiction in relation to a child.

Reasons for Australia to take the proposed treaty action

6. Ratification of the Convention would help resolve current problems in Australian family law in relation to :

- Removal of jurisdictional uncertainty : conflict in jurisdiction between Australian courts and overseas courts in children's matters has been a longstanding area of difficulty. In some cases Australian and overseas courts have made conflicting parenting orders in relation to the same children. The jurisdictional rules laid down in the Convention will remove uncertainty for litigants and the courts in determining the appropriate forum to determine disputes as to parental responsibility;
- Finality in litigation : in the absence of reciprocal recognition arrangements, it is open to a parent to ignore orders made by Australian courts and re-litigate residence and contact issues in the other country to the disadvantage of the child and the other parent in Australia. To a limited extent these difficulties have been overcome by bilateral arrangements on recognition of parenting orders. Some countries have refused to negotiate bilateral arrangements with Australia in this area. Ratification of the Convention will extend the number of countries in which Australian parenting orders will be entitled to direct recognition and enforcement;
- Recognition of parental responsibility acquired by operation of law : many countries do not recognise the parental responsibility of a father who is not married to the child's mother. The Convention provides for recognition in other countries of the rights and responsibilities conferred on fathers under Australian law;
- Cross border access cases : parents seeking access to their children living in other countries often face significant problems. The Convention includes a number of provisions designed to assist in these cases by clarifying which State has jurisdiction, which State's laws are to be applied and by promoting cooperation between relevant State authorities.

7. Another major objective of the Convention is to address the problem of international cases involving protection of children from abuse and neglect. It is in the best interests of children that there be internationally agreed rules determining which child protection authorities have jurisdiction in relation to a child. The absence of agreed rules may mean that authorities in one country fail to act because they assume authorities in another country have taken responsibility for protecting a child.

8. There is also an increasing need for formal co-operation procedures between child protection authorities in different countries. Some categories of cases which commonly come to the attention of Australian authorities are : overseas authorities making requests to transfer child protection measures for children immigrating to Australia; cases in which children subject to foreign protection measures are brought to Australia without notice to Australian child protection authorities; cases in which care proceedings are on foot in Australia but the child is removed to another country prior to the conclusion of the proceedings; overseas authorities asking Australian authorities to check on the welfare of a child visiting Australia on an access visit and provide a report; and parents in Australia seeking the transfer to Australian authorities of children in the care of overseas child protection authorities. The Convention will help to solve these problems by clarifying which country's child protection authorities have jurisdiction in relation to a child, and by

promoting and facilitating contact and cooperation between the child protection authorities of member States.

Obligations

9. Implementation of the Convention would require that, in any case which has international aspects, courts and other authorities in Australia follow new rules to determine which country has jurisdiction to decide the parental responsibility issues under the *Family Law Act 1975* or to decide cases under State and Territory child protection legislation (Articles 5 to 14).

10. The Convention also provides rules for determining which country's laws are to be applied in parental responsibility and child protection issues (Articles 15 to 22).

11. Upon the request of an interested party, the Convention obliges Australia to recognise and enforce, within Australia, measures of protection made in other State parties. This obligation is subject to exceptions such as where the measure is manifestly contrary to public policy. The measures which Australia may be required to recognise and enforce include measures relating to parental responsibility, rights of custody, guardianship, a child's property, placement of the child in a foster home, and supervision of a child by a public authority (Articles 23 to 28).

12. Australia will be obliged to establish one or more Central Authorities (Article 29) which will co-operate with similar authorities in other Convention countries to implement the Convention, facilitate communications between countries, locate children, and provide reports on the situation of children (Articles 30 to 37). Authorities in each country bear their own costs in implementing these obligations but States retain the right to impose reasonable charges for the provision of services (Article 38). Particular obligations are imposed on Australian authorities to seek the consent of authorities in another Convention country before placing a child in a foster family in that country (Article 33), to co-operate in securing contact by an overseas parent to his or her child in Australia (Article 35) and to notify authorities of another country of any serious danger to a child in that other country (Article 36).

13. The Convention is limited in its scope and it does not apply to the establishment or contesting of a parent-child relationship, decisions on adoption, the names of a child, emancipation, maintenance obligations, trusts or succession, social security, public matters relating to education or health, measures taken as a result of penal offences committed by children, and decisions on the right of asylum and immigration (Article 4). Consequently, the obligations above do not apply to these subject areas.

Implementation

14. In accordance with the existing responsibilities in these areas, the parental responsibility aspects of the Convention will be implemented by the Commonwealth and the child protection aspects will be implemented by the States and Territories.

15. On 20 September 2001, the Family Law Amendment (Child Protection Convention) Bill 2001 was introduced in the Commonwealth Parliament. The Bill lapsed when Parliament was prorogued in October 2001. The Bill is expected to be reintroduced in Parliament in the first half of 2002. The Bill will amend the *Family Law Act 1975* to give effect to the Convention in Commonwealth law.

16. States and Territories are currently considering a model Bill prepared by the Queensland Government which will implement the Convention in State and Territory law.

17. The administrative aspects of the Convention will be implemented in Australia by the Commonwealth Attorney-General's Department (acting as the Commonwealth Central Authority) and State and Territory child protection Departments (acting as State Central Authorities). The Attorney-General's Department will transmit parental responsibility orders and agreements under the *Family Law Act 1975* to other Convention countries for registration and will transmit similar orders from Convention countries to the Family Court of Australia for registration. State Central Authorities will undertake similar functions in relation to child protection orders. Other functions of Central Authorities under the Convention will be undertaken by the Commonwealth Attorney-General's Department and State and Territory child protection Departments in co-operation.

Costs

18. There are not expected to be any significant additional financial implications arising from ratification of the Convention. It is not proposed to establish any new agencies to deal with matters arising under the Convention. The Commonwealth Attorney-General's Department would undertake the functions of the Australian Central Authority in relation to family law matters. Existing State and Territory agencies will be appointed as additional Central Authorities.

19. The Family Court already has administrative procedures in place for registration of foreign parental responsibility orders and is already hearing applications to make parenting orders in international cases. The costs of proceedings in the Family Court to enforce registered overseas orders would be borne by overseas parents. These parents might apply to Australian legal aid authorities for assistance in such proceedings. However the cost of proceedings to enforce an existing order should be less than the cost (which Australian legal aid bodies currently meet) of funding entirely new proceedings on behalf of indigent overseas parents (who at present cannot register existing overseas orders and are given legal aid to apply to Australian courts for entirely new parenting orders).

20. Ratification of the Convention is not expected to result in a significant increase in the number of international cases being dealt with by Australian child protection authorities. To some extent State child protection Departments are already expending resources in dealing with overseas child protection cases. At present such cases arise infrequently but, when they do arise, their resolution can be a complex and lengthy process. There may be some additional costs for State and Territory child protection Departments in communicating with overseas authorities on child protection cases arising under the Convention.

21. Ratification of the Convention may have some savings implications for Australian agencies. The Convention will simplify the process of resolving international child protection cases by providing for direct communication between central authorities in Convention countries, thus eliminating current delays and confusion which often arise from the current practice of using diplomatic channels to identify authorities responsible for handling child protection cases and to pass communications to and from Australian child protection Departments. By being designated State and Territory Central Authorities under the Convention,

State and Territory child protection Departments will avoid problems which have arisen in some past cases in establishing their status and bona fides to the satisfaction of overseas courts and authorities. In some past cases, overseas courts have insisted on involving State government Ministers as they were unsure of the status and authority of Australian child protection Department officers. Another resource benefit of ratification of the Convention will be that overseas child protection agencies will have an obligation under the Convention to co-operate with Australian authorities in providing information and in working to resolve problems arising in Australian child protection cases. In the past a lack of co-operation by some overseas child protection authorities has resulted in Australian authorities expending considerable resources.

Consultation

22. The implementation of the Convention in Australia has been the subject of lengthy consideration by Commonwealth, State and Territory Governments. A working group of Commonwealth and State officials has developed legislation to implement the Convention in Commonwealth, State and Territory law.

23. The working group prepared two issues papers in 1998 'Hague Convention on the Protection of Children - Proposed Amendments to Family Law Legislation' and 'Hague Convention on the Protection of Children - Proposed Amendments to State and Territory Laws'. The issues papers were circulated for comment to relevant Commonwealth and State agencies, courts, legal aid bodies, community legal centres, the Law Council of Australia and family law practitioner associations. The working group's final report stated there was no opposition to Australia's ratification of the Convention and concluded that there were no substantial arguments against ratification. These documents are available on the internet at http://www.ag.gov.au/aghome/legalpol/cld/int_judicial_asst/international_child_custody/Internationalchildcustodyproposedreforms.html

24. Following the introduction of the Family Law Amendment (Child Protection Convention) Bill 2001, comments on the Bill and the Convention were sought from courts, legal aid bodies, community legal centres, the Law Council of Australia, law societies, family law practitioner associations, and public interest groups concerned with family law policy issues. Comments received in response were supportive of Australian ratification of the Convention. Two responses raised questions relating to the protection of children who are returned to other countries under the Hague Abduction Convention or pursuant to a foreign custody order registered in Australia. The Attorney-General's Department responded to these questions, referring to steps available to protect the interests of a child returned to another country. Two other responses raised questions as to the operation of the Convention in relation to measures to combat domestic violence. The Attorney-General's Department responded to these questions, pointing out that while the Convention deals with the appropriate forum to determine child protection issues it does not alter the substantive law in Australia relating to the nature of (or procedures for obtaining) measures of protection for children.

25. The Convention has been advised to the States and Territories through the Commonwealth State-Territory Standing Committee on Treaties.

Regulation Impact Statement

26. No Regulation Impact Statement is required for the proposed treaty action.

Future treaty action: amendments, protocols, annexes and other legally binding instruments

27. The Convention does not specify how it may be amended, but under Article 39 and 40 of the *Vienna Convention on the Law of Treaties* such a treaty may be amended by agreement between its parties. Any such proposed amendment would be subject to Australia's standard treaty-making procedures.

28. Article 52 of the Convention provides that the Convention does not preclude Contracting States from concluding agreements which contain, in respect of children habitually resident in those States, provisions on matters governed by the Convention.

Withdrawal or denunciation

29. Article 62 of the Convention provides that a State Party to the Convention may denounce the Convention by notice in writing to the depositary of the Convention. The denunciation would take effect on the first day of the month following the expiration of 12 months after the notice of denunciation is received by the depositary; or if a longer period is specified in the notice of denunciation then that longer period. The depositary of the Convention is the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

Contact Details

Civil Justice Division
Attorney-General's Department