

The Hague Convention and child abduction

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Unless there are Parenting Orders permitting international travel, a parent generally cannot travel overseas with their children without the consent of the other parent. The same applies to a parent who holds the children in another country beyond the agreed time. These are forms of international child abduction and are punishable offences which may result in imprisonment.

The Hague Convention is an important consideration for parents who have separated or divorced. You can read more about international travel with children from separated families in our blog, "International travel with children from separated families".

What is the Hague Convention?

The 1980 Hague Convention of the Civil Aspects of International Child Abduction ("Hague Convention") is the main international agreement that covers international child abduction. You can find out which countries are members to the Hague Convention on the Hague Conference on Private International Law website. Australia is a member country to the Hague Convention.

The Hague Convention sets out the process for seeking the return of abducted children to their home country. It also deals with issues of international child access, such as restoring contact between parents and children when they live in separate countries.

The Convention itself, like all international treaties or agreements, is not automatically part of Australian domestic law. The Family Law (Child Abduction Convention) Regulations 1986 ("the Regulations") are used to interpret the Hague Convention.

On 9 December 2022, the Regulations were amended to include family violence as a consideration in whether a child is at grave risk and should return to their home country or not. The amended regulations have been in effect since 10 December 2022 and apply to any applications made after this date.

Australian Central Authority – the *honest broker*

The Hague Convention requires each member to establish a central authority that is responsible for administering any proceedings related to the Hague Convention. The Australian Central Authority (ACA) sits within the Federal Attorney-General's Department and assesses whether an application meets the Hague Convention requirements.

The ACA, any person, institution, or body (once requirements are met) may apply for the return of a child to Australia or for the return of the child from Australia to their home country. The ACA is not limited to the instructions of the parent seeking the return of the child. The ACA must put all relevant information before the Court to enable it to implement the Hague Convention.

Hague Convention proceedings

Pursuant to the Regulations, the Federal Circuit and Family Court of Australia hears matters relating to international child abduction to and from Australia. These are referred to as "Hague Convention proceedings".

Hague Convention proceedings are not determined by the paramount consideration of the best interests of the child, like other parenting matters in Australian family law.

The Court must determine the following issues before it makes a return order:

Age – the child was under the age of 16 years;

Habitual residence – the child resided in Australia or the other convention country immediately before the wrongful removal or retention;

Wrongful removal or retention – the removal or retention of the child breached the left-behind parent's "rights of custody".

Hague Convention proceedings regard the "rights of custody" as:

guardianship rights;

long term or day-to-day care responsibilities;

the welfare and development of the children; and

the person whom the child lives with.

It is worth noting that typical parenting matters in Australia refrain from using the term “custody” to describe care arrangements.

Hague Convention proceedings only determine whether a child is returned to Australia or another convention country – not who the child returns to. A separate application would need to be filed in the Federal Circuit and Family Court of Australia to determine these matters.

When can the Court decline to make an order for the return of a child?

The Court’s discretion is very limited, as are the grounds for refusing to make a return order. However, there are six grounds on which the Court can decline to make a return order of a child to Australia or other Hague Convention country:

> The applicant parent was not actually exercising their rights of custody and would not have exercised those rights had the child remained in Australia or other convention country.

> The applicant parent acquiesced or consented to the child being removed to or remaining in Australia.

> There is a grave risk of exposing the child to harm (psychological or physical) or placing the child in an intolerable situation if they were returned. This includes instances of family violence.

> The child objects to being returned, more so than a preference. The child must have reached an age and maturity where it is appropriate to consider the views of the child.

> The return of the child would not be permitted according to the fundamental principles of protecting human rights and freedoms.

> The application was filed one year after the child was removed or retained in Australia.

What about countries that are not members of the Hague Convention?

Australia has bilateral agreements with other countries who may not be a signatory to the Hague Convention. Australia is currently entered into agreements with Egypt and Lebanon.

If your child has been taken to a country that is not a member of the Hague Convention, you may be able to get assistance from the Consular Branch of the Department of Foreign Affairs or Trade. You may be required to file a family law application in the country where your child is located.

Worried that the other parent will take your child from Australia without consent?

If you are concerned that your child may be removed from Australia without your consent, you should seek immediate legal advice from an experienced family lawyer.

There are some steps than can be taken to try to stop your child leaving Australia:

You may consider making an application the Court to have your child's name placed on the Family Law Watchlist.

If your child does not have a passport, you may submit a Child Alert Request with the Australian Passport Office. A child alert does not guarantee that the passport application will be refused. However, the Australian Passport Office will give special scrutiny to the application and you will be notified of the application.

How can a family lawyer help?

This is a very complex area of family law that can require you to act or respond very quickly. Our experienced team at Meillon and Bright can help put things in place to prevent a child being taken overseas or respond if they have already been taken.

If you are a separated parent looking to move overseas with a child, your best option (if you can't gain the written consent of the other parent) is to make an application to the Federal Circuit and Family Court seeking to relocate with your children.

The information contained in this article is of general nature and should not be construed as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.