

## **Submission by the Department of Foreign Affairs and Trade to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into International Child Abduction to and from Australia**

The Attorney General's Department (AGD) has the lead role on the legal issues surrounding the abduction of minors from Australia and their return to Australia and would be the Agency to comment on items (b) and (c) of the enquiry. The Department of Foreign Affairs and Trade (DFAT) has a limited role in representations concerning the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) and with associated welfare and passports issues.

DFAT's role encompasses:

- Posts overseas undertaking a representational role in encouraging non-Hague convention countries to ratify the Convention or to negotiate alternatives.
- Consular officers providing welfare assistance to Australian children who have been abducted.
- The Australian Passport Office having a system in place to prevent the issue of a passport to a child whose custody is in dispute and facilitating the issue of passports to children who have been abducted in order to permit their return to Australia.
- Publication in the department's *Smartraveller* series of information regarding the abduction of children.

### **Representational Role**

Australia's overseas missions assist the international effort to have the Convention ratified by as many countries as possible.

Australia, along with 12 other countries, lobbied Japanese Ministries, hosted an international child abduction symposium and participated in demarches over two years to encourage Japan to ratify the Hague Convention. In May 2011 the Japanese Government announced that it would proceed with preparations to ratify the Hague Convention.

DFAT and posts in Cairo and Beirut assisted the Attorney General's Department (AGD) to establish bilateral child abduction treaties with Egypt and Lebanon who were reluctant to ratify the Convention. They continue to act as a conduit for diplomatic communication between countries.

### **Welfare Assistance**

From an Australian consular perspective, abduction occurs when a child is removed from Australia or retained in an overseas country without the consent of all persons having parental responsibility for the child. Given the complexity and sensitivity of these cases, great care is taken by DFAT to maintain privacy and ensure all parents and children involved are provided with consular assistance.

Consular officers do not become involved in custody matters - custody is determined by the courts. Consular officers differentiate between the welfare and legal aspects of a case. They can be asked to provide a list of local lawyers to either or both parents; to take steps to ensure the welfare of an abducted child, contacting, for example, parents or local welfare agencies or to assist in arrangements for the child's safe return to Australia.

Cases in non-convention countries are often complex and lengthy. The ability of consular staff to monitor the welfare of abducted minors depends on agreement of the abducting parent (or other legal custodian) allowing consular access. This can take significant time and resources both in Canberra and at Australian overseas posts.

## **Passport Issues**

The *Australian Passports Act 2005* (the Act) and the *Australian Passports Determination 2005* (the Determination) govern the issue of Australian passports to children. The relevant provisions are designed to protect children from abduction and to safeguard the rights of all people with parental responsibility.

In the majority of cases, Australian travel documents will only be issued to children where full parental consent has been obtained or where an Australian court order permits international travel, including any reference in an order that permits the issue of a passport to the child or permits contact outside Australia between the child and another person.

An Australian travel document may also be issued to a child if a court order of a country, which is a party to the Convention, permits international travel. It should be noted that foreign court orders, apart from those issued by the Convention countries permitting international travel, are not recognised by the Act.

### **Difficulties caused by Court orders**

Court orders permitting international travel can be difficult to interpret. Courts often place conditions on international travel or passport issue which leaves DFAT in the position of ensuring certain requirements have been met to satisfy our duty of care. It could be argued that it is not the role of DFAT to police the adherence to court orders nor do passport officers have the legal qualifications to interpret what can be complex orders.

*DFAT would like to see the courts address passport issue and international travel as a matter of course in all proceedings relating to children and, in doing so, we would further suggest that courts use standardised wording which would clearly stipulate whether international travel is permitted and whose consent is required in order to obtain a child's passport.*

### **Child passport applications without full parental consent**

Where full parental consent cannot be obtained or a court order permitting international travel has not been provided, the lodging parent may apply to have the application considered by the Minister's delegate under certain specified circumstances in which it is procedurally difficult or inappropriate to seek parental consent or an Australian court order for travel. These circumstances include facilitating travel: in emergencies, or where the child's welfare would be adversely affected if unable to travel; back to Australia of a child who was removed from Australia within the last 12 months; in cases where the passport office is unable to locate or contact the other person(s); where there has been no contact between the child and the other person(s) for a substantial period; where there are relevant family violence court orders or proceedings; where there is medical incapacity of a non-consenting parent; where the child is overseas and it is procedurally difficult or unreasonable to obtain a court order; or where a child welfare law grants parental responsibility to a parent other than the non-consenting parent, or to a person other than a parent. Applications of this nature represent approximately one per cent of all child passport applications.

DFAT is enhancing measures to access information to assist it in locating non-lodging parents and is strengthening its communications strategy to highlight the facility available to parents to raise alerts that warn passport offices that there may be circumstances that need to be considered before issuing a passport to children.

### **Child at risk of abduction**

When a parent suspects that a child is in danger of being removed from Australia or elsewhere on an Australian passport, DFAT recommends to the parent that they raise a 'child alert'. A child alert is a warning to DFAT that there may be circumstances that need to be considered before issuing an

Australian travel document to a particular child. A child alert does not prevent the delegate from issuing a passport pursuant to the Act nor does it necessarily mean the person raising the alert will be contacted. A person may not be contacted where it is deemed inappropriate to do so (for example, in the case of domestic violence) or it is considered unnecessary (where an Australian or Hague Convention country court order permitting international travel has been provided by the lodging parent).

A child alert will not stop a child from travelling if she/he already has an Australian travel document or a travel document issued by another country (including where the child may have been included in a parent's foreign travel document). In these cases, the parent is referred to the Australian Federal Police to seek further guidance on obtaining a court order to have the child's name placed on the Airport Watch List or the equivalent authority overseas.

### **Passport validity**

A number of child abductions from Australia occur using passports issued with full parental consent. Child passports are usually issued with five years' validity. This means that a child may hold a passport that was issued before the parents' relationship broke down or which was issued for a particular trip with full parental consent or which was permitted by the court. The issue of a passport to a child is not reviewable under the Act. A child's passport will only be cancelled where an Australian court has directed DFAT to do so, or if the delegate becomes aware of information that, if known at the time of the application, would have resulted in refusal to issue the passport at that time.

### **Passport requirements for children taken overseas**

Where a child has been removed from Australia, and a new travel document is required to facilitate the return of the child to Australia, it is often difficult, particularly if the child has been out of Australia for a substantial period of time, to meet the requirements for issuing an Australian travel document. It is unlikely that full parental consent will be provided and, unless the country is a party to the Hague Convention, it is rare for the parent who was left behind to hold a court order permitting international travel. Even when a passport can be issued under the Act the parent may not be able to provide a recent photo or guarantor's declaration. Therefore, in most cases, the child can only be issued with a 12 month limited validity emergency passport restricting travel to Australia only. (Note that Foreign authorities may allow the child to travel to other destinations on this document.) The left behind parent is expected to lodge the passport application in the country where the child is currently residing. Arrangements to have a passport issued can take significant time and resources in Canberra and at Australian overseas posts. While these applications are considered on a case by case basis, client expectations may not always be met due to the onerous requirements. Some complaints have been received about the level of documentation required.

It also occasionally arises that children overseas, who may be the subject of abduction claims, require passports to meet local identification and visa requirements. Failure to issue a passport could result in action against the children concerned by the local authorities. Again, these applications are managed as flexibly as possible consistent with passport policies, but clients may be disappointed with the level of documentation required to be submitted.

### **Public Awareness**

DFAT publishes information on child abduction through its *Smartraveller* website and 'Travelling Parents' booklet. The information explains that DFAT cannot intervene in the judicial processes in foreign countries but DFAT does monitor the welfare of Australian children overseas. The website and booklet also refers people to the relevant areas in AGD.