

The Child Protection Convention and jurisdiction of the Children's Court

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Snapshot

- While recent amendments extend the jurisdiction of the Children's Court to make orders for children who are not present or ordinarily living in NSW, practitioners need to be mindful of the provisions of the *Child Protection (International Measures) Act* when children are living overseas.
- The *Child Protection (International Measures) Act* implements the *Child Protection Convention* and applies to all NSW courts. It sets out when the Children's Court can exercise jurisdiction for children living overseas.
- The *Child Protection Convention* can improve the protection of children placed overseas and prevent conflicting decisions being made in different countries.

On 3 April 2024 the [Children and Young Persons \(Care and Protection\) Amendment Act 2024](#) (NSW) ('**Amendment Act**') came into force. The *Amendment Act* was passed to remedy some of the difficulties that arose following the decision in [DN v Secretary, Department of Communities and Justice \[2023\] NSWCA 321](#) ('**DN**'). Although the case was about children living in the UK, what flowed from it was a discussion about the jurisdiction of the Court when children were placed interstate.

The amendments extend the jurisdiction of the Children's Court to make orders for children who are not present or ordinarily living in NSW but have maintained a 'sufficient connection' with NSW. Section 4 of the [Children and Young Persons \(Care and Protection\) Act 1998](#) now includes a non-exhaustive list of things for the Court to consider when determining whether it has jurisdiction.

When considering whether a NSW Court has jurisdiction to make orders for children living overseas (like the children in *DN*), practitioners still need to be mindful of the provisions of the [Child Protection \(International Measures\) Act 2006](#) (NSW) ('**Child Protection Act**'), which implements Australia's international obligations under 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 Children](#) ('**Convention**').

This article will provide a brief overview of the Convention and its impact on the jurisdiction of the Children's Court of NSW, an area that care practitioners may be less familiar with. It also explains how the Convention can improve the protection of children placed overseas and avoid conflicting decisions being made in different countries about the care and protection of a child.

An overview of the Convention

Scope of the Convention

The Convention entered into force in 2002 and there are now 54 contracting states, including the United Kingdom. Australia signed and implemented the Convention in 2003. The USA and Canada have signed but neither country has implemented the Convention. New Zealand is not a signatory to the Convention.

The Convention covers a wide range of public and private civil measures of child protection. It includes the kinds of orders that we would ordinarily refer to in Australia as parenting orders (e.g. orders

regarding parental responsibility, spending time with and communicating with children) and care orders (including orders allocating parental responsibility for a child to the Minister, guardianship and supervision). It also includes measures taken in relation to the property of a child (see art 3). The Convention does not apply to some things, like parentage, adoption and maintenance (see art 4).

Importantly for care practitioners, the Convention supports many forms of alternate care for children, including kinship care, foster care, residential care, supervised independent living arrangements and *kafala* (a practice prevalent in Islamic countries, which occurs when a person voluntarily cares for a child who cannot be looked after by their own family).

The Convention covers both administrative and judicial decisions. This means that it can, for example, include decisions made by social workers in relation to children.

Jurisdictional rules

The Convention sets out some clear jurisdictional rules to determine which country's authorities are competent to take the necessary protection measures for a child. This avoids the possibility of conflicting decisions being made about a matter in different legal systems. The Convention gives the primary responsibility to the authorities of the country where a child is habitually resident.

The term 'habitual residence' is not defined in the Convention. In Australia, the leading decision concerning habitual residence is [LK v Director General, Department of Community Services \(2009\) 237 CLR 582 \('LK'\)](#). In *LK*, the High Court held that determining a person's place of habitual residence involved consideration of 'a wide variety of circumstances that bear upon where a person is said to reside and whether that residence is to be described as habitual' (at [23]). Those circumstances might include a person's intended and actual length of stay in a country, the purpose of their stay, the strength of their ties to the two countries and their cultural, social and economic integration.

The Convention sets out the very limited circumstances in which a contracting state can exercise jurisdiction in relation to a child who is habitually resident in another contracting state. Those are:

- where the child is present in the country and there is an urgent need to take protective measures (art 11);
- where there is a need to make provisional measures with limited territorial effect (art 12);
- where there has been a transfer of jurisdiction (art 8 and 9); or
- where the Court is deciding upon an application for divorce (art 10).

The Convention does not define what might constitute a case of urgency. Where this issue arises, practitioners may find the comments of the UK Supreme Court in [Re J \(AP\) \[2015\] UKSC 70](#) helpful (see [34]-[39]).

In practice, this means the Children's Court of NSW could only exercise jurisdiction to make long term orders for a child who is habitually resident in a Contracting State and not present in Australia, if there was a transfer of jurisdiction to the Australian courts, on the basis that the Australian court was better placed to assess the child's best interests. The competent authority in the Contracting State would then have to agree to the transfer of jurisdiction. See, for example, [Bunyon & Lewis \(No. 3\) \[2013\] FamCA 888](#), [Kubat & Kubat \[2019\] FamCA 671](#) and [Lynch & Hagen \(No. 2\) \[2020\] FamCA 727](#), where the Family Court (as it was then) considered whether to request a transfer of jurisdiction from another contracting state.

Recognition and enforcement of measures

The Convention sets out the principle that measures taken in one contracting state will be recognised by operation of law in all other contracting states (art 23). Where it is necessary to enforce a measure, each contracting state will have in place a simple and rapid procedure for measures to be registered and enforced (art 26).

The Convention also provides very specific grounds for when measures will not be recognised or enforced (art 23(2) and art 26(3)). Those grounds include where there was a lack of jurisdiction; where a person with parental responsibility of a child was not given an opportunity to be heard; where the measure was manifestly contrary to public policy; and where consent was not obtained from authorities for the placement of the child.

Cooperation between contracting states

Each contracting state is required to designate a central authority to discharge the duties imposed by the Convention. In Australia, we have the Australian Central Authority and a state central authority designated in each state and territory. In NSW, the Secretary of the Department of Communities and Justice is the State Central Authority.

Central authorities cooperate with other central authorities in many important respects. They facilitate communication between competent authorities for the purposes of transferring jurisdiction (art 8 and art 9), arrange mediation (art 31(b)), provide assistance to locate the whereabouts of a child (art 31(c)), provide reports of the situation of the child (art 32) and are involved in the placement of children (art 33). Central authorities should share information about a child when a measure of protection is contemplated (art 34) and should assist in the implementation of measures of protection including maintaining direct contact (art 35). Central authorities should inform each other when a child is exposed to serious danger (art 36).

The placement of children in Convention countries

It is important for practitioners to be aware that an international cross-border placement of a child in a Contracting State may not be recognised or enforced if the competent authority has not consulted or obtained the prior consent of the central authority in the state where the placement or provision of care is to take place.

The duty to consult, transmit a report on the child and obtain consent is set out in article 33 of the Convention. Where this does not occur, the placement may not be recognised.

This issue was recently considered by the Supreme Court of Morocco (*Ruling No. 71 of 7 February 2023*). In that case, a single woman living and working in France filed a petition to undertake guardianship of an abandoned child by means of *kafala*. On appeal, the Supreme Court held there had been no prior consultation with the Central Authority or other competent authority in France where the woman resided and, therefore, the placement had not complied with the requirements of article 33 and was a violation of the law (for further discussion see this [case summary](#) by Beligh Elbalti).

The implementation of the Convention in NSW

The Convention is implemented in Australia by division 4, part XIII A of the [Family Law Act 1975](#) (Cth) and the [Family Law \(Child Protection Convention\) Regulations 2003](#) (Cth) ('**Regulations**'). Schedule 2 of the Regulations sets out which state laws are affected by implementation of the Regulations and

includes the [Children and Young Persons \(Care and Protection\) Act 1998](#) (NSW) and the [Children's Court Act 1987](#) (NSW).

Pursuant to regulation 21 of the Regulations, the provisions of the Convention have effect in each state. However, states can make their own rules with respect to the implementation of the Convention. NSW has implemented the Convention through the *Child Protection Act* and the jurisdictional rules explained above can be found in section 9 of that Act.

The *Child Protection Act* also sets out when a NSW Court can exercise jurisdiction for a child who is present or habitually resident in a non-Convention country (see s 9(2)(e) and (f)).

It is important to remember that the *Child Protection Act* applies to all NSW Courts, including the Local Court, the Children's Court, the District Court, the Supreme Court, and the Civil and Administrative Tribunal. This means that the same jurisdictional rules will apply to the NSW Supreme Court in its exercise of the *parens patriae* jurisdiction.

Whilst practitioners should be aware of the recent amendments with respect to children placed interstate, when children are living overseas the *Child Protection Act* will determine whether the Children's Court of NSW has jurisdiction to make orders. Where the placement of children overseas is being contemplated, practitioners will be assisted by the safeguarding mechanisms set out in the Convention.