



Welsh Assembly Government

Consultation Document

Fulfilled Lives, Supportive Communities:

Implementation of Chapter V of 1996 Hague Convention on the Protection of Children

This consultation note seeks views on arrangements for implementing into our domestic law the 1996 Hague Convention on "Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and measures for the Protection of Children."

Date of issue: **26 March 2010**

Action required: Responses by **30 April 2010**

Number: FLSC 3

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This consultation note seeks views on arrangements for implementing into our domestic law the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and measures for the Protection of Children.

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Overview

This consultation note seeks views on arrangements for implementing into our domestic law the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and measures for the Protection of Children.

The Ministry of Justice has issued in parallel, a short, technical consultation on the associated Regulations which will be needed to give the Convention full legal effect.

The purpose of this consultation note, which is being sent to local authorities, the WLGA, ADSS and Cafcass Cymru, is to highlight the main implications for delivery partners and to seek their views.

How to respond

Consultation responses should be completed using the questionnaire at the back of this document and returned to :

Patrick Harper, Children's Health and Social Services Directorate, Welsh Assembly Government, Cathays Park, Cardiff CF10 3NQ or e-mail Patrick.Harper@wales.gsi.gov.uk

Further information and related documents

Annex A – The Convention
Annex B – Draft Regulations
Annex C – Technical Consultation
Annex D – Table of Provisions

Contact Details

For further information:

Name: David Clayton

Address: Room 2-114
Cathays Park
Cardiff
CF10 3NQ

Email: David.Clayton@wales.gsi.gov.uk

Telephone: 029 2082 6073

Data Protection

The Welsh Assembly Government is the data controller for all personal data relating to your consultation response.

The Welsh Assembly Government intends to publish a summary of the responses to this document and where practicable, the responses. Normally, the name and address (or part of the address) of its author are published along with the response, as this gives credibility to the consultation exercise. If you do not wish to be identified as the author of your response, please state this expressly in writing to us.

The Welsh Assembly Government will share consultation responses with officials across the Department to inform the preparation of all future consultations.

IMPLEMENTATION OF CHAPTER V OF 1996 HAGUE CONVENTION ON THE PROTECTION OF CHILDREN

Summary

- i. This consultation note seeks views on arrangements for implementing into our domestic law the 1996 Hague Convention on “Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and measures for the Protection of Children.”
- ii. The Convention’s purpose is to improve outcomes for children by establishing an agreed set of rules and co-operation arrangements which will apply when children are the subject of cross-border “protection measures”, including care proceedings, placements abroad and contact and custody cases. The full text of the Convention is provided at **Annex A**.
- iii. The Ministry of Justice (MOJ), which is leading implementation on behalf of England and Wales, consulted on the principle of adopting the Convention some years ago. With the aim of completing implementation later this year, it has now issued a short, technical consultation on the regulations which will be needed to give the Convention full legal effect. Copies of the draft regulations and MOJ’s consultation letter and are appended at **Annexes B and C**.
- iv. The purpose of this separate consultation note, which is being sent to local authorities, the Welsh Local Government Association, the Association of Directors of Social Services, and Cafcass Cymru, is to highlight the main implications for delivery partners and to seek their views. Many of the Convention’s provisions mirror those which already apply in this country under existing EU law and will mean no major change except that similar provisions will now apply in our contacts with contracting countries beyond the EU. However, the change will bring certain new rights and duties and some new administrative arrangements for delivery partners. The consultation note invites views on these and on the broader issues which will need to be addressed as part of the implementation process.
- v. Consultation responses received will be shared with MOJ and help inform the final drafting of the implementing regulations for Wales. They will also help structure the further discussions on the implementation arrangements, including the development of guidance over the coming months.
- vi. The consultation note covers:
 - background to the Convention: purposes, intended benefits and timetabling for implementation;
 - key provisions, including what is new or different to our existing arrangements;
 - proposed approach and main implications for delivery partners;
 - key consultation questions.

Please send responses to this consultation, ideally in the form of a word document, to Patrick.Harper@wales.gsi.gov.uk by 4pm on **Wednesday 28 April**. If there are specific points on the framing of the regulations, it would be particularly helpful to receive these as early as possible.

Background: purpose and intended benefits

1. The 1996 Hague Convention establishes a uniform set of rules and co-operation arrangements which will apply when children with family connections in more than one country are the subject of “protection” measures, including care proceedings, placements abroad and custody and contact cases. In addition to the co-operation arrangements in which delivery partners will have a particular interest, the provisions cover such matters as jurisdiction, the recognition and enforcement of judgments, and parental responsibility. The full text of the Convention is reproduced at **Annex A**.
2. The Convention’s essential purpose is to improve outcomes for children by strengthening co-operation and improving the exchange of information between the authorities of contracting states; also by removing legal uncertainty and the need to re-litigate on key issues such as which country has jurisdiction over the child, both of which can cause delay and be prejudicial to the welfare of the children involved.
3. The option to contract into the Convention is open to countries world-wide. To-date, 18 countries, including 10 from the EU, have fully implemented the Convention¹.

Process and timetabling

4. Following formal consultation, the UK Government committed in 2003 to implementing the Convention into UK law. The international issue which has delayed implementation since then has been resolved and the Ministry of Justice (MOJ) is now leading implementation on behalf of England and Wales. The Northern Ireland Assembly and the Scottish Government are leading implementation for their respective territories.
5. The Convention will be implemented in England and Wales by means of regulations made by the Secretary of State for Justice under Section 2(2) of the European Communities Act 1972. The Convention itself will become directly applicable but the implementing regulations will be used to address points where additional requirements or fit with existing law need to be made explicit. MOJ is currently conducting a short technical consultation on the draft regulations (**Annexes B and C**) which have been issued separately to legal and judicial interests. The aim is to finalise the regulations and, along with other EU member states, to ratify the Convention this Summer.
6. Assuming all EU member states ratify in time, the Convention would take effect in the UK and remaining EU member states from Autumn 2010. If there are delays, the Convention would take effect three months after the last EU member state has cleared its domestic legal processes.

¹ The countries outside the EU are Australia, Albania, Armenia, Croatia, Ecuador, Monaco, Switzerland, Ukraine, Uruguay. The EU Member States are Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia and Slovenia.

The Convention's provisions

7. The Convention's provisions are considered in detail in the Annex to MOJ's consultation document attached at **Annex C**. Briefly summarised, the main provisions are that:

- Decisions concerning the child should generally be taken in the State where the child normally resides (“the habitual residence”), except when emergency protection measures need to be taken in the country where the child may be temporarily located.
- The main basis for jurisdiction is the child's habitual residence.
- If an authority with jurisdiction over a child, such as a court, decides that the authority in another Contracting State is better placed to take decisions concerning the child, jurisdiction can be transferred. The authorities of a Contracting State with which the child has a connection can also request transfer of jurisdiction. There are restrictions on the transfer of jurisdiction where a change of habitual residence is brought about through a wrongful removal or retention of the child.
- The Convention requires countries to establish a Central Authority (CA) which will act as the co-ordinating point for contacts between contracting countries. Under the Convention Welsh Ministers will be designated as the Central Authority for Wales and be responsible for discharging functions under the Convention. Separate CAs will be established for England, Northern Ireland and Scotland
- Countries, working through relevant central authorities where appropriate, can request authorities in other countries to provide assistance in locating a child about whom there are protection concerns, in implementing measures of protection and in providing reports on the child's situation. Information cannot be requested or sent if it might endanger the child's person or property or seriously threaten the life or liberty of a member of the child's family.
- For contact purposes, a parent may ask the authorities of the Contracting State where he or she lives to gather information and offer conclusions on their suitability to have contact with a child in another contracting state and on the conditions of that contact. These findings have to be considered by the authorities which have jurisdiction over the child before reaching their decision.

How the provisions in the Convention fit with our existing legislative arrangements

8. Many of the Convention's provisions mirror existing legal requirements under the Brussels IIa Regulation². Where this is the case, implementation will mean little effective change other than that a similar legal framework to the one which already governs our

² Council Regulation (EC) No 2201/2003 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility

links with EU member states on care and custody cases will apply to other contracting states world-wide, to the benefit potentially of more children.

9. However, there are certain provisions within the Convention which are slightly different to, or extend beyond, Brussels IIa; also certain others where, if we are to implement effectively, our delivery partners' powers and duties to respond and to share information need to be made explicit. These provisions need to be either the subject of specific provision within the implementing regulations or addressed by new administrative arrangements and up-dated guidance.

10. The provisions concerned and the Government's proposed approach to them are set out in the table attached at **Annex D**. Where regulatory provision is needed, the table provides a cross reference to the relevant draft regulation in **Annex B** on which MOJ is now consulting.

What will be new and different for delivery partners: an overview

11. As set out more fully in **Annex D**, for our local authorities and Cafcass Cymru, implementation will provide new legal rights to request information, assistance and reports from other contracting counties when undertaking relevant case work on children within our jurisdiction.

12. Implementation will also mean some new administrative arrangements (e.g. procedures for working with or through our CA) and certain new or more explicit duties. The main duties are:

(i) A duty on LAs to respond where our CA, following a request from another Contracting State, asks the LA for assistance in locating the whereabouts of a child about whom there are protection concerns (Article 31 (c)). The circumstances in which it would be appropriate for the CA to exercise its discretion to make an approach to a LA will need to be agreed MOJ will provide guidance to the CA.

(ii) A duty on LAs (Cafcass Cymru when appropriate) to provide a report on the situation of a child to our Central Authority when the latter receives a request for a report from another contracting state with which the child has a substantial connection (Article 32 (a)). Again, the CA will have discretion as to whether it puts such a request to our authorities. The circumstances in which it will generally be appropriate to do so will need to be agreed and covered in guidance to the CA.

(iii) Where a local authority contemplates the placement of a child in a foster family or institutional care in another contracting state in a situation where the courts is not involved, the local authority must both consult the authorities of the other state and transmit a report on the child (Article 33(1)).

(iv) Where an authority proposes to apply for a care or supervision order but needs to apply for jurisdiction over the child concerned to be transferred to this country it will need to request that a court in this country makes the transfer.

13. To ensure legal consistency and the effective flow of data for child protection purposes, the new duty on our authorities to assist the CA under paragraph 12 (i) will also be extended through the implementing regulations to apply to similar requests for assistance made under Brussels IIa. Details are provided in **Annex D**.

14. Implementation will also mean that local authorities may be requested to communicate information relevant to a child's protection (Article 34(1)), though acting on such requests remains discretionary. They may also be asked by a parent in their area who is seeking to establish contact with a child in another contracting state to make a finding on the requesting parent's suitability to have contact (Article 35(2)). Producing the report will not be obligatory - LAs will have discretion not to do so - but the implementing regulations will provide that such requests are directed to local authorities to consider. A facility to levy a reasonable charge for such reports will be available. Guidance will need to be developed and agreed on the operation of this provision.

Implementing the new duties – issues and priorities

15. Our suggested approach to implementation is guided by two main priorities - that we maximise benefits for children offered by this measure and that our authorities are protected from unnecessary additional burdens. Ensuring there is clarity and agreement on what is reasonable to expect of our authorities and what, in turn, they may expect of other contracting countries will be particularly important. So too will ensuring, as far as possible, that inappropriate requests are filtered out and that our authorities – many of whom handle relatively few international cases each year – can access advice when need be.

16. To help address these issues we propose the following:

- That, wherever possible, requests for assistance should be routed through the UK's planned CA. This is automatically the case under Articles 31(c); 32(a); and 32 (b). We are also able to make provision for this in relation to requests under Article 34(1) and intend to do so. However, there are certain provisions under which countries may choose to approach our local authorities (and Cafcass Cymru) directly. The handling of some of these enquiries may be straightforward but where not and LAs or Cafcass Cymru are uncertain about the appropriateness of the request, we hope there could be a role for the CA to offer advice and to provide a source of expertise. With MOJ and delivery partners we will explore this in more detail over the coming weeks and, if appropriate, address this through guidance.
- That, in advance of measures coming into effect, clear, simple web-based guidance should be developed for Cafcass Cymru, local authorities, the CA and other key delivery partners on the practical application of the new procedures and requirements, the types of assistance which they might reasonably be expected to provide or expect of others, and on how the requirements fit with other relevant international instruments. This guidance would need to reflect existing best practice and be developed over the coming months in close collaboration with key delivery partners.

Impact of the changes

17. The new legal rights which the Convention will provide to request assistance, information and reports from other contracting states should deliver positive benefits for children. Particularly if backed by guidance so that processes are clearer and easier to apply, they should, in principle, make our authorities' dealings with other contracting countries easier and quicker and provide for more efficient handling of cases, to the benefit and better protection of the children involved. Reciprocal rights for other contracting states should bring similar benefits for children abroad.

18. In relation to the duties arising from the Convention, for the most part these should mean little immediate change in terms of our contacts with other EU Member States, as most of the duties – apart from those highlighted in paragraph 12 above - already apply under Brussels IIa. Even in relation to our contacts with non-EU contracting states, it is far from clear that the duties will result in more new work. Some co-operation and sharing of information of the type provided for or required under the Convention is already undertaken with non-EU countries. Where this is the case, implementation will not mean additional work but will place existing activity onto a clearer legal footing.

19. Nonetheless, it is reasonable to assume that, over time, as more countries contract into the Convention and as countries from within and outside the EU become more aware of the assistance that can be provided, the flow of contacts could increase. Continuing trends in migration, divorce and family separation may add to the likelihood of this happening. However, without firmer information on the nature and number of requests currently received across the country and on the additional future work flows that might occur when/if more countries choose to contract into the Convention, it is difficult to gauge whether our local authorities and Cafcass Cymru will see any significant net additional work.

20. In the short term, a similar increase unlikely. However, as part of our planning, we want to look at these issues more closely to assess what the impact might be over the longer term. We would also welcome views and any information which individual local authorities can offer on existing experience of assistance as well as and possible future work flows as part of this consultation.

21. Implementation of the Hague Convention 1996 is identified in Welsh Assembly Government Circular (WAGC 11/2010) which advises local authorities on the availability and distribution of specific grant funding for 2010/11. A copy of the Circular is available on our website.

Questions

We have asked a number of specific questions. If you have any related issues which we have not specifically addressed, please use this space to report them:

Question 1. Do you have any comments on the technical framing of the proposed implementing regulations (draft regulations are at Annex B. You may also wish to refer to the issues and questions raised in MOJ's technical consultation document at Annex C)?

Question 2. A priority, in shaping the regulations, has been to ensure that delivery partners have the powers they need to share information, taking account of the requirements of the Data Protection Act – see Regulations 9 to 11 as well as the powers under Regulation 13. Are there any issues you would wish to raise or highlight on these draft regulations?

Question 3. Implementation will bring new powers for our authorities to request reports and assistance from other countries. How can we ensure these new rights are used in a way which maximises benefits for children? What assistance or guidance might you need to do this? Are there particular barriers or concerns that need to be addressed?

Question 4. On the new duties or provisions which bear on delivery partners in paragraphs 12 and 13 of the main consultation document and set out in more detail in Annex D, what impact do you see these having? What needs to be considered in guidance to ensure that our authorities can fulfil these duties in an effective and resource-efficient way? What are your views on the proposed facility to charge for a report provided for under Article 35(2) raise any issues?

Question 5. Paragraph 15 of the main consultation document sets out plans to develop guidance and to promote effective working with and through the Central Authority. Are these plans helpful? Is there other action or support that you feel needs to be taken to ensure effective implementation or to guard against unnecessary burdens?

Question 6. How much of the co-operation and assistance provided for under this Convention (both help offered to other countries or assistance you request of others) is already undertaken by your organisation/local authority area? Has the type or level of work you undertake changed over recent years? What impact would you expect implementation of this Convention to have in your area?

Please send responses to this consultation, ideally in the form of a word document, to Patrick.Harper@wales.gsi.gov.uk by 4pm on Wednesday 30 April. If there are specific points on the framing of the regulations, it would be particularly helpful to receive these as early as possible.

Responses to consultations may be made public – on the internet or in a report. If you would prefer your response to be kept confidential, please tick here: