

# **Processing passport applications where all parties with parental responsibility have not provided consent**

THE DEPARTMENT OF FOREIGN AFFAIRS AND TRADE

March 2015

Report by the Commonwealth Ombudsman,  
Colin Neave, under the *Ombudsman Act 1976*

REPORT NO. **03|2015**

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# ISSUES PAPER

## PROCESSING PASSPORT APPLICATIONS WHERE ALL PARTIES WITH PARENTAL RESPONSIBILITY HAVE NOT PROVIDED CONSENT

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### EXECUTIVE SUMMARY

The Ombudsman received 32 complaints between 2011 and 2014 about the Department of Foreign Affairs and Trade's (DFAT) administration of the *Australian Passports Act 2005* (the Act) in relation to applications for passports where consent from both parents with parental responsibility for a child was not provided.

Specific concerns raised by complainants included: whether the other parent has parental responsibility for the child, referral by DFAT to obtain a court order, missing or unclear information prolonging and confusing the application process, lengthy amount of time taken to process applications, and refusal by DFAT to accept a priority processing fee to expedite an application.

This paper highlights the issues raised in those complaints about:

- the fairness, consistency and predictability of decisions
- the quality and sufficiency of publically available information, and
- explanations to individual applicants about the policies, procedures and reasons for decisions.

Issues we have commented on in this paper are: parental responsibility, access to and clarity of information, court orders, application processing times and priority processing fees.

To protect children from abduction and to safeguard the rights of all people with parental responsibility, the Act requires that all parties with parental responsibility for a child consent to the issue of a passport for that child. DFAT states on its website that the only way to guarantee the issue of a passport to a child without full parental consent is with an Australian court order that permits the child to travel internationally. If an applicant is unable to provide the necessary consent from both parents, they may request that the application be referred to a delegate of the Minister for Foreign Affairs, within the Australian Passport Office (APO) which is within DFAT, for consideration under 'special circumstances' provisions.

There is no guarantee that an application seeking consideration of special circumstances will result in a passport being issued for a child. However, where the delegate decides that the circumstances are not special enough to warrant the favourable exercise of the discretion to issue a passport, the applicant may seek a review of that decision by the Administrative Appeals Tribunal (AAT).

There is no right of review if the delegate approves the issue of a passport or refuses to make a decision to exercise their discretion on the basis that the matter would best be dealt with by a court. Where there is a dispute between parents about their child

travelling internationally, it becomes a matter for a court to determine. Where a delegate refuses to make a decision, a parent can seek a court order which specifically allows the child to travel internationally and lodge a new application with the court order attached.

The APO has advised that it is considering amending the definition of parental responsibility in the Act to better align it with the *Family Law Act 1975* (Family Law Act) and sought comments from the Ombudsman which were provided. The Ombudsman understands the APO is in the process of reviewing existing policy and procedural guidance to delegates as well as a review of all passport forms. We trust this Issues Paper can inform that process.

## 1 THE DEFINITION OF PARENTAL RESPONSIBILITY

1.1 The definition of parental responsibility for the purposes of passport applications, s 11(5) of the Act, includes any parties where:

(a) the person:

- (i) is the child's parent (including a person who is presumed to be the child's parent because of a presumption (other than in section 69Q) in Subdivision D of Division 12 of Part VII of the Family Law Act 1975); and
- (ii) has not ceased to have parental responsibility for the child because of an order made under the Family Law Act 1975; or

(b) under a parenting order:

- (i) the child is to live with the person; or
- (ii) the child is to spend time with the person; or
- (iii) the person is responsible for the child's long-term or day-to-day care, welfare and development; or

(d) the person is entitled to guardianship or custody of, or access to, the child under a law of the Commonwealth, a State or a Territory.

1.2 The definition of parental responsibility in the Act is broader than the definition in the Family Law Act which defines parental responsibility in s 61B as 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children' and states in s 61C that each parent has parental responsibility.

1.3 The APO advised us during a complaint investigation that:

The three paragraphs in section 11(5) are set out as alternatives. For example, it is possible that a parent has been awarded 'sole parental responsibility' by a court order, which would have the effect of removing the other parent's parental responsibility under section 11(5)(a), but the other parent may still have parental responsibility for the purposes of the Passports Act under section 11(5)(b) if, under a parenting order, the child is to spend time with that parent.

1.4 In practice this means that biological parents, who have not had contact with their child for lengthy periods and who have not formally acknowledged paternity and/or have not been involved in the child's upbringing, may still have parental responsibility under the Act.

1.5 In these cases, the APO is obliged to contact the parents to obtain their consent to issue a passport to their child. This can cause frustration for applicant parents who consider that the non-applicant parent is not involved in the child's upbringing and should not be entitled to refuse consent to the grant of a passport.

1.6 **SUGGESTION:** Better information available to applicant parents about what constitutes 'parental responsibility', as well as options to provide evidence relating to special circumstances, would assist parents to lodge a more complete application to the APO the first time.

## 2 Who else may have parental responsibility?

2.1 The term 'parental responsibility' where both parents are listed on the birth certificate is outlined in the 'Children and parental consent' publication: 'in most cases, people with parental responsibility are the parents named on the child's full birth certificate. Their parental responsibility can only be removed by an Australian court order'.

2.2 In cases where only one parent is named on the birth certificate, the publication states that other persons may have parental responsibility but not how 'parental responsibility' is established for people who are not the biological parents or who are not named on the child's birth certificate. In cases where only the mother's name is listed on the child's birth certificate, a B8 form ('Mother's name only on child's birth certificate') is required.

2.3 The purpose of the B8 form is to determine if the biological father, who is not listed on the birth certificate, has parental responsibility. The B8 form asks for personal details of the father as well as the following:

- the parents' marital status at the time of the child's birth
- whether the father has ever signed a document acknowledging paternity
- whether the father has ever made any child support payments, and
- whether there are any court orders or proceedings or agreements in existence or pending 'that could affect another person's rights in relation to the child'.

2.4 The responses to these questions determine whether, under the definition in the Act, the non-applicant parent has parental responsibility and the right to refuse consent to issue a passport. The APO has advised that it is reluctant to publicise the circumstances in which parental responsibility is established, in case a false declaration by the applicant parent incorrectly leads to a determination that the father does not have parental responsibility. The APO says that this is in order to reduce the likelihood that the applicant parent will knowingly provide false information to it in order to facilitate the grant of a passport without the consent of the other parent.

2.5 The APO is concerned that if 'suspect' declarations increased, there would be an increased burden on the APO to verify claims, handle fraud investigations and prosecute false declarations, as well as increasing the risk to children and the rights of parents. However, as a matter of procedural fairness people have an entitlement to know what the relevant criteria are and what evidence they need to provide in order to support their application.

### **3 Access to and clarity of information**

3.1 Many complainants raised issues about a lack of access to or the clarity of publicly-available information, especially regarding who has parental responsibility.

3.2 The APO has advised the Ombudsman that it considers that the provision of detailed information about its internal processes, particularly that of special circumstances and the definition of parental responsibility, may constitute legal advice and/or could result in applicant parents intentionally providing incorrect and misleading information in a passport application. The APO states this would threaten the integrity of the passports system, put children at risk of potential abduction and breach the rights of parents in consenting to their child travelling internationally.

3.3 One specific area that requires greater clarification to the public is 'special circumstances' and what constitutes these. The 'Child and parental consent' publication notes that '(a)n application lodged for consideration under special circumstances will be assessed by a delegate...' and provides the three decisions open to a delegate (issue a passport on the basis of special circumstances, decide a passport cannot be issued, or refuse to exercise discretion because the matter would be best dealt with by a court) but it is silent on what circumstances may be considered to be 'special'.

3.4 We note that the APO is reviewing existing policy and procedural guidance to delegates on relevant considerations and acceptable evidence for assessing applications under all special circumstances.

3.5 We do not believe that providing information to the public about how legislation and ministerial determinations are interpreted amounts to 'giving legal advice'. We welcome any substantiation from the APO about how providing such information could increase the risk of fraudulent applications where, as a matter of procedural fairness, people have an entitlement to know what the relevant criteria are and what evidence they need to provide in order to support their application. It is administratively beneficial to have applicants provide sufficient and relevant information at the time they submit their application.

3.6 **SUGGESTION:** That information on the policy and procedures, relevant to a member of the public lodging a more accurate and detailed application, be made publically available. In the interests of good public administration the APO should review the publicly-available information to provide greater clarity about the options available to parents applying for passports for children where consent from both parties with parental responsibility for a child has not been provided. More information in the 'Children and parental consent' publication about the conditions under which special circumstances are met, the impact of current courts proceedings regarding permission for a child to travel, and what documentation applicants could provide to support their applications, especially where contacting the non-applicant parent might be an issue, would assist applicants.

***Case study: Ms A- Access to information***

Ms A applied for a passport for her infant child, Child B, without consent from Child B's father. The APO contacted the father who declined to provide his consent. The APO refused to exercise its discretion to determine the application, deciding that the matter should be dealt with by a court.

Ms A told us that when she subsequently spoke to the APO she was informed that a passport would be issued for her child if she had a court order or a domestic violence order taken out against the father.

Ms A lodged a second application and supplied a domestic violence order and a court order stating that Child B was to reside with her. Ms A advised us that she considered that the father had surrendered his parental rights and responsibilities by virtue of court orders preventing him contact with his child. Ms A also advised the APO that court proceedings were underway in relation to obtaining a court order that specifically addressed the issue of whether Child B should travel internationally.

The APO contacted the Federal Magistrates Court in an attempt to resolve the matter but a new order had been issued and proceedings were ongoing. The APO also attempted to obtain the new order from Ms A but was unable to do so.

The APO again refused the application on the basis that the matter was best dealt with by a court.

Ordinarily the APO may have approved the application under special circumstances on the basis of the domestic violence order. In this instance, the APO was prevented from considering special circumstances as the legal proceedings may have affected the rights of the child to travel.

We concluded that the APO's decision was made in accordance with the law. We note that if Ms A was better informed when she lodged her initial application, she could have:

- delayed her application until she had obtained a court order permitting international travel, or
- submitted a domestic violence order with her initial application to allow for consideration of special circumstances.

**Case study: Ms C -Clarity of information**

Ms C complained that the APO sought consent for the grant of a passport for one child but not for the other child from the father of her two children. Ms C's greater concern was that she had refused consent for the APO to contact the father due to past family violence.

The APO's understanding was that Ms C had provided consent to contact the non-applicant parent during a telephone conversation. The APO's note of the conversation is 'it is recorded that she was fearful of Mr D, and was reluctant to grant consent for the APO to contact him, but that "if we have to contact him she does not mind"'. The APO supported this view by noting that Ms C advised she had attempted to contact the father through social media.

The APO's record of this conversation is not clear especially since Ms C had indicated her reluctance for contact with the father. It is unclear from the record if the APO officer advised Ms C that if she did not give her consent what her other options might have been, so she could make an informed decision regarding consent.

This case highlights:

- a lack of information provided to applicants about the documentation they need to provide in support of an application for a child passport when consent is an issue, and
- inadequate record-keeping.

## **4 Obtaining a court order to facilitate international travel**

4.1 The APO is not in a position to resolve disputes between parents and therefore can refuse to make a decision on the basis that a matter is best determined by a court. In these cases, it is proper for the APO to refuse to exercise its discretion and refer the applicant to a court. However, there is significant financial and personal cost involved in obtaining a court order which the APO should be cognisant of when exercising that discretion.

4.2 In instances where the APO could reasonably refuse an application, because the parent has sought special circumstances consideration and the delegate has decided the special circumstances are not met, i.e. they are not 'special enough', the APO could reject the application rather than refusing to make a decision. This would allow the applicant to seek a review with the Administrative Appeals Tribunal to determine whether the special circumstances are so special as to warrant the grant of a passport for the child.

**Case study: Ms E - A court should decide**

Ms E applied for passports for her two children, Child F and Child G, on 24 August 2012. She had not sought consent for the passports from the children's father, Mr H, and requested the APO not contact him. Ms E was aware that s 11(2) of the Act prohibited the APO from issuing passports to the children, unless it was satisfied that it had, and should exercise, the discretion to do so under s 11(2).

Ms E's application therefore addressed the possibility that special circumstances, as



specified in cl 2.1(3) of the Determination for the purposes of s 11(2)(a) of the Act, existed in her case.

In particular, s 2.1(3)(d) provides that it is a special circumstance that there has been no contact between the child and the non-consenting parent for a substantial period before the application is made. In her application, Ms E stated that Mr H had had no contact with the children for approximately three years, and that in 2010 a Family Court psychologist had recommended that Child F and Child G not be forced to spend time with their father.

Section 2.1(3)(e) provided at the relevant time that it was a special circumstance that an application was made on or behalf of a child who was at least 16 years old, and who had had no contact with the non-consenting parent for at least two years before the application was made. The older child, Child G, was 17 years old at the time of Ms E's application.

Section 2.1(3)(g) provides that it is a special circumstance when a family violence order has been issued against the non-consenting parent. Ms E provided copies of three Violence Restraining Orders issued by the local Magistrate's Court on 3 December 2010, preventing Mr H from contacting Ms E and each child.

Therefore, notwithstanding s 11(1), it appears that the APO had the discretion to grant passports to the children without consent from Mr H.

However, the APO refused to exercise its discretion under s 11(2) because the matter should be dealt with by a court as provided for in s 11(3). The decision letter provided no information about the APO's assessment of whether the available evidence adequately supported Ms E's claim that special circumstances existed, and did not explain why it considered that a court should deal with the matter.

In its response to our office, the APO advised that the delegate did consider the question whether special circumstances existed, but was unable to test the evidence about this due to Ms E's request that the APO not contact Mr H.

We acknowledge that it was reasonable for the APO to seek to test assertions about lack of contact from a non-consenting parent, and that the easiest way to do so is by contacting the non-consenting parent to obtain their views, and any evidence they may have, about this issue. However, we do not understand the APO's position to be that it can never be satisfied that the special circumstances specified in cls 2.1(3)(d), (e) or (g) of the Determination exist without it contacting the non-consenting parent. In this case, it is not apparent from the information available to the Ombudsman's office what testing of the evidence the APO did undertake, and whether it considered requesting additional evidence from Ms E to verify her claims of no contact.

The 'Record of Approved Senior Officer Decision' form for Child F's application has the box for "Has an Australian family violence order issued against them" checked. However, the decision record later notes that this did not satisfy the criteria to grant the passport under cl 2.1(3)(g). The reasons for this conclusion were not spelt out.

A separate box, "Has had no contact with the child for a substantial period of time" was left unmarked, and nothing else in the document demonstrates that the APO considered whether the para 2.1(3)(d) special circumstance existed in Child F's case.

4.3 **SUGGESTION:** That the APO clearly detail in its decision letters what factors it considers make a case appropriate for being dealt with by a court, and how the APO assesses the supplied evidence that supports special circumstances.

## 5 INFORMATION ABOUT COURT ORDERS TO FACILITATE INTERNATIONAL TRAVEL

5.1 There is an inconsistency in the information provided on the APO website about court orders. From the link under the heading 'What happens if you cannot get consent?' is written:

<https://www.passports.gov.au/Web/Newppt/Consent.aspx>

If the consent of anyone with parental responsibility for the child cannot be obtained after all avenues have been exhausted, and there is no Australian court order permitting the child to travel internationally, you can request that the application be considered under the 'special circumstances' provided for under section 11(2) of the *Australian Passports Act 2005* and section 2.1 of the Australian Passports Determination 2005.

5.2 However, the brochure publication states at:

<https://www.passports.gov.au/Web/BrochuresWebPages/BrochureChildenParentalConsent.aspx>

The only way to guarantee the issue of a passport to a child without full parental consent is with an Australian court order that permits the child to travel internationally. Alternatively, you may request that your child's application be considered under the special circumstances set out in section 11(2) of the Australian Passport Act 2005 and section 2.1 of the Australian Passports Determination 2005.

5.3 It is not consistently clear that an applicant parent can obtain a court order that allows a child to travel internationally where the parents have not reached agreement. In some publications, such as the first link above and the B9 form, there is only a passing reference to 'a court order which allows the child to travel internationally'.

5.4 **SUGGESTION:** That the APO review the website information and ensure there is a consistent clear message that the only way to guarantee the issue of a passport to a child, without full parental consent, is with an Australian court order that permits the child to travel internationally, as in the brochure. It could also suggest that if such a court order was obtained prior to applying for the passport and submitted with the application, that the APO may be able to process the application more quickly.

## 6 TIME TAKEN TO PROCESS APPLICATIONS

6.1 Additional timeframes apply in many circumstances relating to a child passport application including:

- applicant parents are advised to allow an additional three - four weeks for an application that has been escalated to an Approved Senior Officer to be assessed (in addition to the normal 10 day working time)

- where a letter is sent to the non-applicant parent and there is no response within 10 working days or the letter is returned undelivered within 10 working days, the application may be approved on the grounds that the parent could not be contacted within a reasonable period of time provided and there are no other influencing factors that would support rejection, and
- clients may pay an additional fee for a priority application which provides a fully-valid passport within two working days.

6.2 In the publication 'Children and parental consent', the APO advises applicants that 'an additional three to four weeks is generally required to determine whether special circumstances exist'. This time is to make inquiries including contacting the non-consenting parent. The publication also states that the APO advises not to make firm travel arrangements or to pay for tickets before the application has been finalised.

6.3 The applicant parent is required to declare on the B9 form that they have read the 'Children and parental consent' publication and that they are aware that processing the application and considering special circumstances may take an additional three to four weeks.

6.4 The B8 form also requires that the applicant make a declaration that they are aware of the information in the 'Child and parental consent' publication; however it does not repeat the information about the additional three to four weeks processing time. The additional timeframe is still a relevant consideration in many cases where the mother has filled in a B8 form as the form is used to determine whether the biological father, unnamed on the child's birth certificate, retains parental responsibility and must be contacted to provide consent.

6.5 Should the other parent be assessed as having parental responsibility and refuses consent, consideration of special circumstances will usually then take place, potentially to consider whether sufficient time has passed since the last contact between the other parent and the child to allow the grant of a passport. In these cases, a reminder about the possibility of an additional processing timeframe is necessary to reduce the likelihood of complaints about delay.

6.6 In the complaints considered by this office, issues were raised about the time taken to process passport applications in eight instances.

6.7 **SUGGESTION:** That the APO update its forms to advise applicants of the possibility of additional processing time frames to manage expectations.

## 7 PRIORITY PROCESSING FEE

7.1 Managing expectations of parents is particularly relevant as applicants are unable to pay a priority processing fee where the application is required to be escalated to an Approved Senior Officer. The checks that are required by an Approved Senior Office take longer than the timeframe applicable in a priority application. This is not advertised on the 'Parental consent' publication or the B8 form; however it is noted on the B9 form. As discussed earlier, escalation to an Approved Senior Officer for consideration of special circumstances may still occur despite the applicant parent not expecting that consent from the other parent is required.

***Case study: Ms I – Priority processing fee***

Ms I complained to us on 25 October 2012. She had planned to fly overseas on 1 November and the APO had only processed one of her two children's applications. Ms I paid a priority processing fee that the APO later acknowledged it should not have accepted. Ms I did not consider that the father would have parental responsibility as he had denied paternity when the child was born and had limited contact with the child. Ms I applied for a passport based on this expectation and assumed she would be able to pay a priority processing fee to expedite the application. Ms I advised us that the matter was resolved.

7.2 **SUGGESTION:** The APO should make it clearer in all relevant publications the circumstances where a passport application might be escalated to an Approved Senior Officer, that a priority processing fee cannot be paid and in those circumstances, there is likely to be an additional processing time.

## **8 SUMMARY**

The Ombudsman has formed the above views based on the various complaints the office has investigated. We thank the APO for its assistance to the Ombudsman's Office in preparing this issues paper and trust that this assists the APO when considering the current review of the legislation. We look forward to engaging with the APO to discuss the identified issues.



Australian Government  
Department of Foreign Affairs and Trade

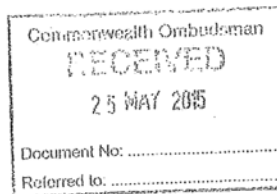
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20 May 2015

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Dear Ms Gibb

I refer to your letter dated 25 March 2015 providing the Ombudsman's Issues Paper on passport applications for a child where all parties with parental responsibility have not provided consent.

I welcome the suggestions made in the Issues Paper and agree that they will improve the level of service we provide to this group of passport applicants. I have attached a table outlining how and when we will implement the suggestions as part of the continual review of our policies and procedures.

I would like to thank the Ombudsman for the continued support on the proposed changes to the *Australian Passports Act 2005* and the *Australian Passports Determination 2005* relating to child passports. We are currently finalising our legislative amendments in preparation for submitting the Bill to Parliament, planned for this month.

I look forward to our continued cooperation in providing a high quality passport service to Australians.

Yours sincerely

Jennifer Rawson

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Response to Commonwealth Ombudsman Issues Paper

Processing passport applications where all parties with parental responsibility have not provided consent

Suggestion	Action to be taken
<p>Better information available to applicant parents about what constitutes 'parental responsibility' as well as options to provide evidence relating to special circumstances, would assist parents to lodge a more complete application to the APO the first time.</p>	<p>Information on parental responsibility will be revised on all material once the definition in the legislation is amended to better align with the <i>Family Law Act 1975</i>. The new legislation is scheduled to be tabled in the 2015 Winter sitting of Parliament.</p>
<p>That information on the policy and procedures, relevant to a member of the public lodging a more accurate and detailed application, be made publically available. In the interests of good public administration the APO should review the publicly-available information to provide greater clarity about the options available to parents applying for passports for children where consent from both parties with parental responsibility for a child has not been provided. More information in the 'Children and parental consent' publication about the conditions under which special circumstances are met, the impact of current court proceedings regarding permission for a child to travel, and what documentation applicants could provide to support their applications, especially where contacting the non-applicant parent might be an issue, would assist parents.</p>	<p>Work continues on the review of policy and procedures in this area. When finalised, more detailed information will be made available to the public, including through the 'Children and parental consent' publication and the passports website. Information provided on 'special circumstances' can only ever be indicative, as this provision covers all manner of variations and is applied on a case-by-case basis.</p>
<p>That the APO clearly detail in its decision letters what factors it considers make a case appropriate for being dealt with by a court, and how the APO assesses the supplied evidence that supports special circumstances.</p>	<p>This suggestion will be considered in the review of the relevant letters when refusing an application.</p>

Suggestion	Action to be taken
<p>That the APO review the website information and ensure there is a consistent clear message that the only way to guarantee the issue of a passport to a child , without full parental consent, is with an Australian court order that permits the child to travel internationally, as in the brochure. It could also suggest that if such a court order was obtained prior to applying for the passport and submitted with the application, the APO may be able to process the application more quickly.</p>	<p>To date, our capacity to update information on the passports website has been limited as the current website is old and all content is hard-coded. This suggestion will be taken up in the current complete update of website material. As part of this project the child passport pages will be updated (currently expected in the next few months).</p>
<p>That the APO update its forms to advise applicants of the possibility of additional processing time to manage expectations.</p>	<p>This information will be included on the relevant forms when the new forms are released (currently expected early 2016).</p>
<p>The APO should make it clearer in all relevant publications the circumstances where a passport application might be escalated to an Approved Senior Officer, that a priority processing fee cannot be paid and in those circumstances, there is likely to be an additional processing time.</p>	<p>This suggestion will be taken up in the reviews of all material as outlined above.</p>