

**Legislative Council Panel on Welfare Services**

**The Reports of the Law Reform Commission of Hong Kong  
on Guardianship of Children and  
International Parental Child Abduction**

**Purpose**

This paper briefs Members on the Administration's position on the findings of and recommendations made by the Law Reform Commission of Hong Kong (LRC) in its Report on Guardianship of Children, and its Report on International Parental Child Abduction.

**Background**

2. In April 1995, the then Attorney General and Chief Justice requested the LRC to "consider the law relating to guardianship and custody of children, and to recommend such changes as may be thought appropriate". A sub-committee was set up under the LRC for this purpose. In 1998, the sub-committee published a consultation paper on Guardianship and Custody, setting out its reform proposals. Following the consultation, the LRC published a set of four reports between 2002 and 2005, namely:

- (a) Guardianship of Children;
- (b) International Parental Child Abduction;
- (c) The Family Dispute Resolution Process; and
- (d) Child Custody and Access.

3. The four reports have made a total of 124 reform recommendations. They fall under the areas of responsibilities of a number of bureaux, departments and enforcement agencies and involve amendments to various pieces of legislation. The implementation of some of the recommendations is intertwined and carries far-reaching implications, and careful consideration is necessary.

4. The examination of the Report on the Family Dispute Resolution Process within the Administration is led by the Home Affairs Bureau, whereas the Labour and Welfare Bureau (LWB) is responsible for coordinating the study and follow-up on the other three reports. LWB has recently completed examining the Report on Guardianship of Children and the Report on International Parental Child Abduction, and has issued the Administration's response to the recommendations to the Chairman of the LRC. In brief, having consulted relevant bureaux and departments, we have accepted in principle all the recommendations of the two reports, and are prepared to take them forward, either in full or in a modified form. The LRC's main concerns and the Administration's considerations and response are summarised in the ensuing paragraphs for Members' reference.

#### The Report on Guardianship of Children

5. In the Report on Guardianship of Children, the term "guardianship" refers to "the bundle of rights, duties and authority of a parent towards a child" and "the legal status under which a person exercises parental rights and authority for a child following the death of one or both the child's parents.". Accordingly, the report mainly focuses on issues relating to guardians appointed by parents and the court for minors<sup>1</sup> pursuant to the Guardianship of Minors Ordinance (Cap. 13). Appointment of guardians under Cap. 13 is a private arrangement which does not require registration with or involvement of any Government department. The LRC acknowledged that similar to overseas experience, it is difficult to obtain any information on the numbers of children subject to testamentary or court appointed guardianship in Hong Kong.

6. The Report of Guardianship of Children is premised on LRC's belief that "Children are born dependent, and so provision must be made for their daily care and upbringing as they move from infancy through childhood to adulthood." The LRC held the view that in the event that one or both of a child's parents dies, appointment of guardians will be beneficial to the child as it can help achieve continuation of the provision for the child's daily care and upbringing. For the purpose of encouraging parents to make guardianship arrangements for their children, the report reviews the relevant legislation and makes nine recommendations to simplify the law and procedures for appointing guardians. It seeks in particular to address the following issues –

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<sup>1</sup> For the purposes of Cap. 13, a minor is a child who has not yet attained 18 years of age.

- (a) appointment of a guardian currently requires the making of a deed or a will pursuant to section 6(1) of Cap. 13. The technicalities involved in the process may discourage parents from appointing guardians for their children;
- (b) there is no requirement for a parent who appoints a guardian for his/her child to seek the consent of, or to simply inform, the appointee;
- (c) there is no provision in the law for a guardian to withdraw from acting as a guardian after taking office;
- (d) the guardian appointment made by a deceased parent can be easily nullified by the surviving parent as the law allows the latter to veto the taking office of a guardian appointed by the former;
- (e) there is no requirement for parents to take into account the views of their children in appointing a guardian for him;
- (f) the guardian appointment takes effect automatically in all circumstances once the appointing parent dies, regardless of whether it is a suitable arrangement (e.g. when the child only lived with the surviving parent and the appointing parent no longer took care of the child before passing away);
- (g) a person may only apply to the court to be a guardian of a child if the child has: (i) no parent; (ii) no guardian of the person; and (iii) no other person having parental rights with respect to him. In other words, as long as a minor has a parent or a guardian, no other person (including a person who has been taking care of the child, e.g. a grandparent or another relative of the minor) can apply to the court to be the guardian of the child; and
- (h) a guardian cannot appoint another guardian to take care of the child in the event of his/her death.

7. In considering the recommendations made in the report, the Administration's primary concern is the well-being of the child. From this perspective, we agree that the legal procedures for appointing

guardians should be simplified so as to encourage more parents to take the positive steps of making guardianship arrangements for their children. We are prepared to take forward all of the nine recommendations of the report and have considered further enhancements for some of them. The measures proposed to be taken include the following –

- (a) to simplify the procedures for appointing guardians, and obviating the need to make formal wills and deeds by requiring only a document in writing with signature of the appointing parent attested by two witnesses, and to produce a standard form for appointing guardians;
- (b) to require the appointing parent to seek the consent of the appointed guardian before the appointment can take effect. Further to the LRC's recommendation, we consider it advisable for the surviving parent to be informed when the guardian takes office/ applies to the court to take office;
- (c) to allow a guardian to withdraw from acting as a guardian after taking office. We consider that the disclaimer of the guardian should also be notified to the surviving parent. Furthermore, legislative and/or administrative measures should be put in place to ensure that the interests of the child would be well protected following the guardian's withdrawal of his/her appointment;
- (d) to remove the power of the surviving parent to veto the taking office of a guardian appointed by the deceased parent;
- (e) to enshrine in law the principle that parents should take into account the views of the child in appointing guardians. In this regard, we will explain to parents / guardians the need to take into account the views of the child and require them to declare whether they have done so in the standard form for appointing guardians;
- (f) to alter the existing arrangement to cater for situations where it is not preferable for a guardian appointment to take effect automatically upon the death of the appointing parent;
- (g) to relax the restriction on application to be a guardian of a child; and

- (h) to empower a guardian to make guardianship appointment for the child.

The Administration's detailed responses to the individual recommendations of the report are at **Annex A**.

### The Report on International Parental Child Abduction

8. The Report on International Parental Child Abduction advocates law reforms to tackle more effectively the problem of international parental child abduction, which occurs when a child is taken out of Hong Kong by his/her own parent(s) without the consent or lawful authority from a person or institution that has the right to care for him. In Hong Kong, international parental child abduction is tackled mainly through a legal regime under the civil legislative framework comprising the following measures and remedies –

- injunction made by the court to prohibit the removal of a child without the consent of the other parent or a written undertaking to bring the child back to the territory;
- implementation of the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention)<sup>2</sup>, which provides an effective international mechanism for the swift return of children wrongfully removed from their place of habitual residence to another contracting state in violation of custodial rights;
- wardship jurisdiction of the court pursuant to the High Court Ordinance (Cap. 4) which brings a child under the protection of the court. Wardship can be used to prevent a child from being removed from Hong Kong without the consent of the court, to secure the return of a child, and, through a “seek and find order”, to bring to court persons who seem to know where

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<sup>2</sup> The Hague Convention provides a framework for cooperation amongst contracting states in international parental child abduction and access cases, including tracing children abducted (by parents or others) across borders, securing their prompt and safe return to their habitual residence for the otherwise “left-behind” parent or custodian, and facilitating the exercise of access rights by non-custodian parents. It is implemented in Hong Kong by the Child Abduction and Custody Ordinance (Cap. 512).

a child is; and

- the various powers given to the court, the Director of Social Welfare and the Police under the Protection of Children and Juveniles Ordinance (Cap. 213) for the purpose of protecting children.

9. The LRC Report noted Hong Kong's positive performance under the Hague Convention<sup>3</sup> in ensuring speedy return of children abducted into Hong Kong. Focusing on measures to prevent parental abduction in the first place, the report makes six recommendations to further enhance the protection for children against abduction and improve the existing legislation. The major issues identified include –

- (a) legislative provisions enabling a parent to apply for an order prohibiting the other parent from removing their child from Hong Kong are contained in subsidiary legislation only<sup>4</sup>. Moreover, the parents must be involved in divorce or separation proceedings already. Furthermore, there is no provision in law which explicitly provides that parental consent is required before a child can be removed out of Hong Kong;
- (b) the existing legislation does not provide the court with explicit and specific powers to order (i) the disclosure of the whereabouts or location of a child; and (ii) the return of a child;
- (c) the Immigration Department (ImmD) and the Police do not have the power to detain or hold a child who is reasonably suspected to be, or is being, removed from Hong Kong in breach of a court order. They only have the power to stop the child from leaving Hong Kong; and
- (d) it is at the discretion of the parents as to whether to notify the ImmD that a court order has been made prohibiting the

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<sup>3</sup> In terms of achieving positive outcomes and ensuring speedy return of the abducted child, as reported in paragraphs 1.18 and 1.19 of the Report.

<sup>4</sup> Rule 94(2) of the Matrimonial Causes Rules (Cap. 179, subsidiary legislation) allows an application to the court to prevent removal. A similar provision is contained in Order 90, Rule 5(3) of the Rules of the District Court (Cap. 336, subsidiary legislation).

removal of the child from Hong Kong. The parent is not required to inform the other parent upon making the notification, giving rise to cases where the latter is not aware of the notification until arriving at the departure area and being stopped by the immigration officers.

10. In considering the recommendations of the report, the Administration's primary concern is the well-being of the child who is the subject of international parental child abduction. We have examined carefully how this objective can best be achieved in an effective and practicable manner, having regard to the advice of various stakeholders. Having examined the issues identified in the report and relevant legislation in other common law jurisdictions, the Administration generally agrees with the principles advocated by the LRC, and is prepared to take forward all the six recommendations, with one (viz Recommendation 4) in a modified form. We propose to enhance the preventive measures and remedies in respect of parental child abduction in the following ways –

- (a) to extend the scope of eligible parents who can apply for the injunction pursuant to the law to cover all parents, regardless of whether they are involved in any divorce / matrimonial proceedings;
- (b) to expressly empower the court to order the disclosure of the whereabouts or location of the child and the recovery of the child;
- (c) to empower the ImmD and Police to hold a child where (i) there is a stop order issued by the court prohibiting the child in question from leaving Hong Kong; or (ii) where an application for stop order has been made to the court and the application is pending; and
- (d) to advise parents of their obligations to notify the ImmD and the other parents of the court order prohibiting the removal of their child from Hong Kong without their consent.

The Administration's detailed responses to the individual recommendations of the LRC report are at **Annex B**.

The Report on Child Custody and Access

11. Apart from the Report on Guardianship of Children and the Report on International Parental Child Abduction, LWB is also responsible for following up the Report on Child Custody and Access, which recommends, among other things, that Hong Kong should follow jurisdictions like England and Wales and Australia in applying the joint parental responsibility model to the Family Law. Specific recommendations include abolition and replacement of the existing custody orders with residence orders. It follows that the parent granted the residence order would only have the right to reside with the concerned child and make decisions relating to the day-to-day care of the child. For major decisions affecting the child, he would have to notify or obtain the prior consent of the other parent.

12. The proposed new model of joint parental responsibility seeks to enable both parents to remain actively involved in the lives of their children after divorce. This will fundamentally change the concept of “custody” underpinning the existing Family Law, which is deeply rooted in our local culture, and will have far-reaching implications on children and family on various fronts. Some stakeholders such as the social welfare sector and women’s groups have raised concerns about the implementation details and possible abuses. As such, in deciding on whether and how to adopt the recommendations of the report, there is a need for us to examine the recommendations carefully and consult more stakeholders having regard to overseas experiences and local developments. We will continue with our efforts in consulting relevant stakeholders and conducting overseas researches to facilitate our consideration and formulation of the way forward.

### **Way Forward**

13. We are now reviewing the relevant legislation to identify amendments required for implementing the proposed reforms to the arrangements on guardianship and parental abduction outlined above. Subject to Members’ comments on our proposed measures, we will work out the detailed amendment proposals in consultation with relevant bureaux/departments and proceed with the legislative exercise to implement the recommendations.

### **Advice Sought**



14. Members are invited to note the content of this paper.

**Labour and Welfare Bureau**  
**February 2010**

**Administration's Response to  
The Report of the Law Reform Commission of Hong Kong  
on Guardianship of Children**

**Overall Response:**

The Law Reform Commission of Hong Kong (LRC) has published the Report on Guardianship of Children (the Report) in relation to the law (mainly the Guardianship of Minors Ordinance (Cap. 13)) which governs the appointment of guardians for children in the event of the death of one or both parents. It has made nine law reform recommendations.

2. In considering the recommendations, our primary concern is the well-being of the child. We have examined carefully how this objective can best be achieved in an effective and practicable manner, having regard to the advice of various stakeholders. The Administration agrees with the LRC that the legal procedures for parents to appoint guardians for their children should be simplified and that the relevant provisions can be improved to address the shortcomings of the existing regime, so as to encourage more parents to take the positive step of making guardianship arrangements for their children. We are prepared to take forward all the recommendations. Our detailed responses to the individual recommendations are set out in the ensuing sections.

**Responses to Specific Recommendations:**

<b>Existing Situation</b>	<b>LRC's Recommendations</b>	<b>Response from the Administration</b>
<b>Recommendation 1 – Appointment of guardians</b>		
<p>A parent who wishes to appoint a guardian needs to do so by making a deed or will pursuant to section 6(1) of the Guardianship of Minors Ordinance (Cap. 13).</p> <p>There is no requirement for obtaining the consent of the appointee, or notifying him of the appointment before the appointment takes effect.</p>	<p>(a) A provision similar to section 5(5) of the English Children Act 1989 that parents who have parental rights and authority may appoint guardians by a document in writing, with their signature attested by two witnesses, without the need to make a formal will or deed, should be adopted;</p> <p>(b) A standard form for the appointment of a guardian, which should explain briefly a guardian's responsibilities and be signed by the proposed guardian, should be introduced. (These forms could be made available, for example, at the Legal Aid Department and the District Offices where the Free</p>	<p>We accept Recommendation 1. We agree that the procedures for appointing guardians can be simplified to facilitate parents who wish to make guardianship arrangements for their children. We also agree with the LRC that it is necessary to seek the consent of the appointed guardian before an appointment takes effect.</p> <p>In addition, further to the LRC's recommendation, we consider it advisable for the surviving parent to be informed when the guardian takes office / applies to the court to take office.</p> <p>Details of the legislative amendments and administrative arrangements to implement</p>

Existing Situation	LRC's Recommendations	Response from the Administration
	<p>Legal Advice Scheme of the Duty Lawyer Service operates, and on the Internet); and</p> <p>(c) The guardian should have to accept office as guardian expressly or impliedly if he has not formally consented to act as guardian. This could also be achieved by the completion of a form.</p>	<p>Recommendation 1 will be worked out in consultation with stakeholders.</p>
<b>Recommendation 2 – Disclaimer</b>		
<p>A guardian may refuse to take office after the death of the appointing parent, but there is no provision allowing a guardian to withdraw from acting as a guardian after taking office.</p>	<p>(a) There should be a system for withdrawing from acting as a guardian similar to the system for appointing a guardian. If the proposed guardian has already consented to act, by signing the appropriate form, then he would have to formally disclaim if he did not want to act at a later</p>	<p>We accept Recommendation 2. On Recommendation 2(b), we consider that the disclaimer should also be notified to the surviving parent as he/she also has an interest in the guardianship arrangement.</p> <p>In introducing the formal disclaimer system as recommended, there will</p>

Existing Situation	LRC's Recommendations	Response from the Administration
	<p>time;</p> <p>(b) The disclaimer should be formal, in writing, and notified to the executor or administrator of the estate; and</p> <p>(c) The Director of Social Welfare should be notified of the disclaimer if there is no executor, administrator or surviving parent, so that steps can be taken to protect the best interests of the child.</p>	<p>be a need to put in place legislative and/or administrative measures for ensuring that the interests of the child are well protected following the guardian's withdrawal of his/her appointment. Details of the provisions and measures will be worked out in consultation with stakeholders.</p>
<p><b>Recommendation 3 – Veto of surviving parent</b></p>		
<p>At present, a surviving parent has the power to veto the taking office of a guardian appointed by the deceased parent pursuant to section 6(2) of Cap. 13. There is no need to bring the case to the court before the surviving parent can</p>	<p>The right to veto of the surviving parent in section 6(2) of Cap. 13 should be removed. Then, either the surviving parent or the guardian could apply to a court under section 6(3) if there is a dispute between them on the best interests of</p>	<p>We have no objection to removing the veto power of the surviving parent under section 6(2) of Cap. 13 and deferring it to the court to decide on disputes relating to the right of guardianship over a child having regard to what is in the best</p>

<b>Existing Situation</b>	<b>LRC's Recommendations</b>	<b>Response from the Administration</b>
<p>exercise such a veto power. Upon exercising his/her veto power, the surviving parent will become the sole guardian of the child, rendering the appointment by the deceased parent nugatory.</p> <p>On the other hand, a guardian does not have any veto power. If he considers that the surviving parent is unfit to have the custody of the minor, or if his/her taking office is vetoed by the surviving parent, he may bring the case to the court.</p>	<p>the child.</p>	<p>interests of the child.</p>
<p><b>Recommendation 4 – Views of child on appointment of guardian</b></p>		
<p>The law has not specified that the views of the child should be taken into account by parents in appointing the guardian.</p>	<p>A provision similar to section 7(6) of the Children (Scotland) Act 1995 should be introduced, so that the views of the child on the appointment of the guardian may, so far as practicable, be taken into account.</p>	<p>We agree to enshrine in law the principle that parents should take into account the views of the child in appointing guardians. In the standard form for appointing guardians (as proposed under Recommendation 1), we shall</p>

Existing Situation	LRC's Recommendations	Response from the Administration
		<p>explain to parents / guardians the need to take into account the views of the child and require them to declare whether they have done so. Details of the provisions will be worked out in consultation with stakeholders. Reference will be made to the legislation of other jurisdictions.</p>
<p><b>Recommendation 5 – When appointment of guardian takes effect</b></p>		
<p>Guardian appointment takes effect automatically in all circumstances once the appointing parent dies, including in situations where the child only lived with the surviving parent before the appointing parent passed away.</p>	<p>(a) A testamentary guardian should be able to act on the death of the parent who appointed the testamentary guardian if the child was residing with that parent prior to his death. The appointment of the testamentary guardian would not take immediate effect on the death of the parent, but a pro-active step of obtaining the court's permission would have to be</p>	<p>We agree with the LRC that the existing arrangements would need to be changed to cater for situations where it is not preferable for a guardian appointment to take effect automatically upon the death of the appointing parent (e.g. where the appointing parent is the non-custodial parent).</p> <p>To cater for these situations, section 5(8) of the English Children</p>

Existing Situation	LRC's Recommendations	Response from the Administration
	<p>taken by the guardian; and</p> <p>(b) If a parent had obtained a custody order prior to his death, then a testamentary guardian appointed by that parent should be able to act automatically as testamentary guardian on that parent's death.</p>	<p>Act 1989 provides that the testamentary guardian may only assume parental responsibility after the death of the surviving parent, unless the deceased parent had a residence or custody order. Yet, as the LRC has pointed out, such a provision is undesirable in that the testamentary guardian cannot act if the deceased parent, before his/her death, had had the child living with him exclusively (by informal agreement, for instance) but had not applied to court for a residence or custody order. We therefore agree with the LRC that direct adoption of the English provision is not preferable.</p> <p>We shall work out the details of the proposed provisions in consultation with stakeholders and make reference to the legislation of other jurisdictions.</p>



Existing Situation	LRC's Recommendations	Response from the Administration
<b>Recommendation 6 – Court appointment of guardian</b>		
<p>Pursuant to section 7 of Cap. 13, a person may only apply to the court to be a guardian of a child if the child has (i) no parent, (ii) no guardian of the person <b>and</b> (iii) no other person having parental rights with respect to him.</p> <p>In other words, as long as a minor has a parent or a guardian, no other person (including a person who has been taking care of the child, e.g. a grandparent or another relative of the minor) can apply to the court to be the guardian of the child.</p>	<p>Section 7 of Cap. 13 should be repealed and a similar provision to section 5(1) of the English Children Act 1989, with regard to the appointment of a guardian, should be enacted.</p>	<p>Section 7 of Cap. 13 empowers the court to appoint an applicant who applies to be the guardian of a minor where the minor has no parent, no guardian of the person <b>and</b> no other person having parental rights with respect to him. We accept the LRC's recommendation that the scope of eligible applicants can be extended. Details of the provision will be worked out in consultation with stakeholders. Reference will be made to the legislation of other jurisdictions.</p>

Existing Situation	LRC's Recommendations	Response from the Administration
<b>Recommendation 7 – Appointment by guardian</b>		
<p>There is no provision allowing a guardian to appoint a guardian to act for him in the event of his/her death.</p>	<p>The adoption of a provision along the lines of section 5(4) of the English Children Act 1989 allowing a guardian to appoint a guardian for the child in the event of the guardian's death.</p>	<p>We accept Recommendation 7. We agree that, as a guardian is expected to assume full parental responsibility of the child, he should have the power to make guardianship arrangement for the benefit of the child and appoint a guardian to act for him in the event of his/her death. The standard form for appointing guardians (as proposed under Recommendation 1) can also be used for a guardian to make guardian appointment.</p>
<b>Recommendation 8 – Removal or replacement of guardian</b>		
<p>Section 8 of Cap. 13 provides that the High Court may remove or replace a testamentary guardian or any guardian appointed or acting under the Ordinance if it is satisfied that it is for the welfare of the child.</p>	<p>Section 8 of the Cap. 13 should be retained, but it should be amended to give similar powers to the District Court.</p>	<p>We accept Recommendation 8 as we agree with the LRC that the court should have the power to remove or replace a guardian in the interests of a child. Having consulted the Judiciary, we also have no objection</p>

Existing Situation	LRC's Recommendations	Response from the Administration
The District Court does not have similar powers.		to extending the powers to the District Court as recommended by the LRC.
<b>Recommendation 9 – Guardian of the estate</b>		
<p>Under section 18 of Cap. 13, the court has the power to appoint a person to be the guardian of a minor's estate only (but not a guardian of the person) either for general or a particular purpose. As the guardian of the minor's estate, he has the rights, powers and duties to receive and recover, in his/her own name and for the benefit of the minor, property of whatever description and wherever situated which the minor is entitled to receive or recover.</p> <p>The Official Solicitor can be appointed as the guardian of a minor's estate.</p>	The status quo should be retained in relation to the powers of the Official Solicitor to act as guardian of the estate.	The Official Solicitor is of the view that he has sufficient powers to act as the guardian of the estate of minors and that no change to the Official Solicitor Ordinance (Cap. 416) is necessary. We therefore accept Recommendation 9.

**Administration's Response to  
The Report of the Law Reform Commission of Hong Kong  
on International Parental Child Abduction**

**Overall Response:**

The Law Reform Commission of Hong Kong (LRC) has published a Report on International Parental Child Abduction (the Report) which recommends legislative amendments to prevent, and provide remedy for, international parental child abduction.

2. In considering the recommendations, the Administration's primary concern is the well-being of the child who is the subject of international parental child abduction. We have examined carefully how this objective can best be achieved in an effective and practicable manner, having regard to the advice of various stakeholders. The Administration generally agrees with the principles advocated by LRC, and is prepared to take forward all the recommendations, including Recommendation 4 which we plan to implement in a modified form. The Administration's detailed responses to the individual recommendations are set out in the ensuing sections.

**Responses to Specific Recommendations:**

Existing Situation	The Recommendation	Response from the Administration
<b>Recommendation 1 – Removal of the child from the jurisdiction</b>		
<p>It is provided in the law<sup>1</sup> that a parent may apply to the court for an injunction prohibiting the removal of any child of the family out of Hong Kong without his/her consent. The precondition for applying the injunction is that the applicant must be involved in a divorce or judicial separation proceeding.</p> <p>In practice, the custody or access orders made by the court in divorce or judicial separation proceedings usually contain the injunction, obviating the need for parents involved in the said proceedings to take an initiative to apply for the injunction.</p>	<p>(a) There should be a provision in primary legislation to restrict the removal of a child from the jurisdiction without the consent of the parent who has custody, or control of the child’s residence, or with whom the child has regular contact. The LRC recommended that provisions along the lines of section 2(3) and (6) of the Children (Scotland) Act 1995 be adopted;</p> <p>(b) This section would apply in cases where proceedings have already been issued or court orders have already been made</p>	<p>Pursuant to the Matrimonial Causes Rules and the Rules of the District Court at present, a parent who is (a) a petitioner, respondent or joint applicant of a divorce proceedings; or (b) involved in a proceeding under the Guardianship of Minors Ordinance (Cap. 13) or the Separation and Maintenance Orders Ordinance (Cap. 16) can apply to the court for an injunction prohibiting the removal of any child by the other parent.</p> <p>We agree that the scope of eligible parents who can apply for the injunction as provided in the law can be extended to cover all parents,</p>

<sup>1</sup> Rule 94(2) of the Matrimonial Causes Rules (Cap. 179, subsidiary legislation) and Order 90, rule 5(3) of the Rules of the District Court (Cap. 336, subsidiary legislation)

Existing Situation	The Recommendation	Response from the Administration
<p>There is no provision in the law which (i) provides explicitly that parental consent is required before a child can be removed out of Hong Kong; and (ii) enables a parent not involved in a divorce or judicial separation proceeding to apply for the injunction.</p>	<p>concerning the child;</p> <p>(c) This section would also extend to any child of the family; and</p> <p>(d) Rule 94(2) of the Matrimonial Causes Rules (Cap. 179), subsidiary legislation), which allows an application to the court to prevent removal of the child, should also be enacted into primary legislation.</p>	<p>regardless of whether they are involved in any divorce / matrimonial proceedings or not. We will work out the details of the provisions to effect such a change in consultation with relevant stakeholders and make reference to the legislation of other jurisdictions. We also have no in-principle objection to putting the existing injunction provisions (Rule 94(2) of Cap. 179A) into primary legislation as per recommendation (d).</p>
<p><b>Recommendation 2 – Disclosure of whereabouts / location orders</b>  <b>Recommendation 3 – Recovery orders</b></p>		
<p>There is no explicit provision in the law providing the court with specific powers to locate a child and to order his/her recovery. To do so, the court needs to rely on the indirect arrangement of using its wardship jurisdiction to bring the child under</p>	<p><u>Recommendation 2</u></p> <p>(a) There should be a power to order the disclosure of the whereabouts or location of the child along the lines of section 36 of the Irish Child Abduction and Enforcement of</p>	<p><u>Recommendation 2</u></p> <p>We accept the LRC’s recommendation that the court should be empowered to order the disclosure of the whereabouts or location of the child. Details of the provisions will be worked out in</p>

Existing Situation	The Recommendation	Response from the Administration
<p>its guardianship.</p>	<p>Custody Orders Act 1991 and section 67J of the Australian Family Law Act 1975; and</p> <p>(b) An additional provision specifying who should be entitled to apply for a location order, as in section 67K of the Australian Act, should be adopted.</p> <p><u>Recommendation 3</u> Provisions on recovery orders similar to those in section 67Q of the Australian Family Law Act 1975 should be adopted.</p>	<p>consultation with relevant stakeholders. Reference will be made to the legislation of other jurisdictions.</p> <p><u>Recommendation 3</u> We accept the LRC's recommendation that the court should be empowered to make recovery orders. Details of the provisions will be worked out in consultation with relevant stakeholders. Reference will be made to the legislation of other jurisdictions.</p>

Existing Situation	The Recommendation	Response from the Administration
<b>Recommendation 4 – Power to hold a child so that he can be returned to the custodial parent or taken to a place of safety</b>		
<p>The Immigration Department (ImmD) can stop a child from leaving Hong Kong when there is a court order prohibiting the removal of him without the consent of his/her parent or the leave of the court. They, however, do not have the power to hold the child.</p>	<p>(a) A provision along similar lines to section 37 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991 should be adopted to empower the police to hold a child whom they reasonably suspect is about to be or is being removed from the jurisdiction in breach of a court order, so that the child can be taken to a place of safety while the court and/or the other parent and/or the Social Welfare Department can be notified; and</p> <p>(b) In such cases, immigration officers should be empowered to hold the child suspected of being abducted until the police arrive to take the child to a place of safety.</p>	<p>Recommendation 4 will add value to the existing arrangements in two ways, namely –</p> <ul style="list-style-type: none"> <li>● It will enable the enforcement agencies to hold a child, not just to stop him from leaving Hong Kong. This can deter repeated abduction attempts and will be particularly helpful to left-behind parents who do not know the whereabouts of their child; and</li> <li>● It will extend the protection to children who are not (or not yet) the subject of a stop order issued by the court, but are being removed from Hong Kong in breach of a <b>potential</b> court order.</li> </ul>



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		<p>Having balanced the need to strengthen protection to children against abduction and enforcement feasibility, we propose to accept Recommendation 4 in a modified form, under which police and immigration officers would be empowered to hold the child in the following situations -</p> <ul style="list-style-type: none"> <li>● where there is a stop order issued by the court prohibiting the child in question from leaving Hong Kong; or</li> <li>● where an application for stop order has been made to the court and the application is pending.</li> </ul> <p>If the custodial parent of a child held at an immigration checkpoint cannot be contacted within a reasonable period of time, the child will be placed in a place of safety. There</p>

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		<p>will also be a time limit for which the child can be held there for the purpose of contacting and notifying the custodial parent. In inward abduction cases under the Hague Convention on the Civil Aspects of International Child Abduction, the Department of Justice, which discharges the function of the Hong Kong Central Authority, will be notified.</p>
<p><b>Recommendation 5 – Surrender of passports</b></p>		
<p>There is no legislative provision automatically requiring the surrender of passports, Chinese re-entry permits and other documents which may be used for travel e.g. HKID card when an order prohibiting removal of the child is made. In practice, the court has inherent power to order the surrender of passports where there is a real risk of</p>	<p>The status quo should be retained in relation to whether the court should be able to order the surrender of passports. The LRC rejected the adoption of a similar provision to section 67ZD of the Australian Family Law Act 1975 for Hong Kong.</p>	<p>We agree with the LRC that the status quo should be maintained.</p>

Existing Situation	The Recommendation	Response from the Administration
the child being unlawfully removed from Hong Kong e.g. where a child has been abducted from a foreign country into Hong Kong and may be removed out of the jurisdiction again.		
<b>Recommendation 6 – Notification of court order to Immigration</b>		
It is at the discretion of the applicant parent as to whether to notify the ImmD of the order made by the court prohibiting the removal of the child from Hong Kong. The applicant parent bears the responsibility of making the notification if they decide to do so. In practice, some parents choose not to do so for various reasons <sup>2</sup> . There is also no requirement for the other parent to be	(a) It should be the parents' responsibility to notify the ImmD that a court order has been made prohibiting the removal of the child from Hong Kong;  (b) It should be at the discretion of the parents whether the ImmD is notified or not; and	We accept recommendation 6. We will ensure that parents who apply for a court order to prohibit the removal of the child from Hong Kong will be advised of their obligations to inform the ImmD and the other parent.

<sup>2</sup> According to the report (s.6.36), “(i)n some cases, a parent does not inform the ImmD, as the parents are able to agree informally between themselves as to whether the child is removed for a holiday, without the necessity of varying the court order or having to correspond via solicitors.”

<b>Existing Situation</b>	<b>The Recommendation</b>	<b>Response from the Administration</b>
informed of the notification.	(c) If one parent does notify the department of the order, however, it should be mandatory that that parent inform the other parent of the fact of notification.	