

For information

Legislative Council Panel on Welfare Services

**Proposed Legislative Amendments to the
Rules of the High Court (Cap 4A) and the
Rules of the District Court (Cap 336H) in relation to the
Child Abduction Legislation (Miscellaneous Amendments) Ordinance 2014**

Purpose

This paper briefs Members on the proposed legislative amendments to the Rules of the High Court (Cap 4A) and the Rules of the District Court (Cap 336H) to provide for procedures regulating applications for the new court orders under the Child Abduction Legislation (Miscellaneous Amendments) Ordinance 2014 (the Amendment Ordinance) and to effect other related miscellaneous and technical amendments.

Background

2. The Child Abduction Legislation (Miscellaneous Amendments) Bill 2013, which aims at amending the Child Abduction and Custody Ordinance (Cap 512) (CACO) and other enactments to provide for combating child abduction and for better implementing the Convention on the Civil Aspects of International Child Abduction (the Convention) and for related matters, was passed by the Legislative Council on 20 November 2014 and has been enacted as the Amendment Ordinance. The Amendment Ordinance will come into operation on a day to be appointed by the Secretary for Labour and Welfare, and it is proposed to bring into effect the Amendment Ordinance and the proposed amendments to Cap 4A and Cap 336H on the same day.

Proposal and justifications

New court orders under the Amendment Ordinance

3. The Amendment Ordinance introduces the following new court orders to CACO:

- (a) Location order: A new section 15 is added to Part 2 of CACO to empower the Court of First Instance of the High Court to order the disclosure of the whereabouts or location of the relevant child, subject to the proceeding(s) under the Convention;
- (b) “Mirror order”¹: A new section 16 is added to Part 2 of CACO to empower the Court of First Instance of the High Court to make a “mirror order” prohibiting the removal of a child from Hong Kong except to the child’s habitual residence or other jurisdictions specified in an order made by a judicial or administrative authority of a Contracting State to the Convention;
- (c) Recovery order: A new section 17 is added to Part 2 of CACO to empower the Court of First Instance of the High Court to make a recovery order relating to the return of a child subject to the Convention proceeding(s); and
- (d) Prohibition order: A new section 21 is added to Part 3 of CACO to empower the Court of First Instance of the High Court or District Court to make an order prohibiting the removal of a child out of Hong Kong without consent.

Power of the Rules Committees under CACO

4. The Amendment Ordinance adds section 12(1) and section 24 to CACO to empower the High Court Rules Committee and District Court Rules Committee (the Rules Committees) to make rules of court as appears to the Rules Committees to be necessary or expedient. Cap 4A and Cap 336H have to be amended by the Rules Committees to regulate the applications for the four new court orders.

¹ A “mirror order” is an order granted by a court which reflects the terms of an order granted by a court of another jurisdiction. The new section 16 added to Part 2 of CACO empowers the Court of First Instance of the High Court to make an order, which has the effect of a “mirror order”, to prohibit a child from being removed from Hong Kong except to his habitual residence to enable a person to exercise access rights in Hong Kong or when the child is in transit in Hong Kong.

Proposed Amendments to Cap 4A

5. Order 121 of Cap 4A currently governs the application procedures for the orders/applications under the existing CACO. It is necessary to amend Order 121 of Cap 4A to set out the application procedures for the new court orders as referred to in paragraph 3(a) to (d) above. The details are at **Annex 1**.

Proposed Amendments to Cap 336H

6. Before the Amendment Ordinance commences operation, CACO falls within the exclusive jurisdiction of the Court of First Instance of the High Court. The existing Cap 336H does not concern the implementation of CACO. The new prohibition order pursuant to the Amendment Ordinance is under the jurisdiction of both the Court of First Instance of the High Court and the District Court. It is necessary to introduce a new Order to Cap 336H to provide for the application procedures for the prohibition order. The details are at **Annex 2**.

Other miscellaneous and technical amendments

7. Having regard to the advice of the Department of Justice, we propose that several miscellaneous and technical amendments be made to support the smooth implementation of CACO. Details are as follows –

- (a) In respect of the application for a declaration relating to section 10 of CACO under Order 121, Rule 4 of Cap 4A, since it is required only when a child has been wrongfully removed out of Hong Kong (which means that the other party, usually the abducting parent, is not within Hong Kong's jurisdiction), we propose that the aforementioned application could be made ex parte;
- (b) In respect of the service of originating summons outside Hong Kong, court's leave is currently required in accordance with Order 11 of Cap 4A and Order 11 of Cap 336H. To align with the practice of general matrimonial causes (i.e. Rule 109 of the Matrimonial Causes Rules (Cap 179A)), we propose to amend the rules to the effect that court's leave is not required when serving an originating summons outside Hong Kong under CACO;

- (c) To facilitate the applications for orders or declaration under CACO by originating summons, we propose to prescribe a new dedicated expedited form and a new ex-parte form under Cap 4A and Cap 336H for proceedings under CACO. They will be modelled on Forms No. 10 and No. 11 under Cap 4A and Cap 336H, except that the time for acknowledging service of an originating summons within jurisdiction will be within 7 days, and that the time for acknowledging service outside jurisdiction will be within 14 days²;
- (d) The procedures on fixing time in Order 28, Rules 2 and 3 under Cap 4A and Cap 336H contain provisions applicable to originating summons in Form No. 10, in Appendix A of the two sets of court rules, and ex parte originating summons. We propose that the existing procedures applicable to originating summons in Form No. 10 and ex parte originating summons equally apply to the new forms as referred to in (c) above; and
- (e) We propose to make miscellaneous amendments to align the Chinese and English versions of Order 121 of Cap 4A.

8. We have consulted the Judiciary and the Rules Committees on the proposed amendments to Cap 4A and Cap 336H as summarised in paragraphs 5 to 7 above.

Way Forward

9. Members are invited to note the content of this paper. Subject to Members' views, if any, we will proceed to seek the final approval from the Rules Committees for the proposed amendments to Cap 4A and Cap 336H, and will then table the proposed amendments at the Legislative Council after the summer recess for negative vetting in accordance with the established legislative procedures.

Labour and Welfare Bureau
July 2015

² This will tie in with Order 121, Rule 6 of Cap 4A.

Amendments to the Rules of the High Court (Cap 4A)

Order 121 of Cap 4A currently sets out the rules regulating any orders/applications stipulated under the existing CACO. We propose to stipulate court procedures for applying for the new court orders. All such applications under Part 2 and Part 3 of CACO may be commenced by originating summons in the expedited form as set out in CACO. All applications for location order, “mirror order” and recovery order under Part 2 may also be made by summons in extant proceedings commenced in Hong Kong Court.

2. The gist of the proposed amendments to Order 121 of Cap 4A is set out below –

Part 2 of CACO – Provisions giving effect to the Convention

(a) Location order

Any application for a location order under the new section 15 of CACO must be supported by an affidavit sworn by (i) the applicant or (ii) a person duly authorised to swear it on behalf of the applicant. The application may be made ex parte. The affidavit shall be filed at the same time as the application except that, in a case of urgency, the affidavit may be filed as soon as possible after the application or in such time as directed by the court.

(b) “Mirror order”

The application procedures for obtaining a “mirror order” pursuant to the new section 16 of CACO are stipulated in section 17, Part 3, of the Amendment Ordinance (relevant extract at Enclosure). The proposed amendments therefore focus on the application procedures for variation, discharge or suspension for such order (pursuant to the new section 16(4) of CACO).

Any application for variation, discharge or suspension of a “mirror order” made under the new section 16 of CACO must be supported by an affidavit sworn by (i) the applicant or (ii) a person duly authorised to swear it on behalf of the applicant. The application may be made ex parte. The affidavit shall be filed at the same time as the application except that, in a case of urgency, the affidavit may be filed as soon as possible after the application or in such time as directed by the court.

(c) Recovery order

Any application for a recovery order under the new section 17 of CACO must be supported by an affidavit sworn by (i) the applicant or (ii) a person duly authorised to swear it on behalf of the applicant. The application may be made ex parte. The affidavit shall be filed at the same time as the application except that, in a case of urgency, the affidavit may be filed as soon as possible after the application or in such time as directed by the court.

Part 3 of CACO – Other provisions combating child abduction in Hong Kong

(d) Prohibition order

Any application for a prohibition order under the new section 21 of CACO must be supported by an affidavit sworn by (i) the applicant or (ii) a person duly authorised to swear it on behalf of the applicant. The application may be made ex parte. The affidavit shall be filed at the same time as the application except that, in a case of urgency, the affidavit may be filed as soon as possible after the application or in such time as directed by the court.

Any application for variation, discharge or suspension of a prohibition order made under the new section 21 of CACO must be supported by an affidavit sworn by (i) the applicant or (ii) a person duly authorised to swear it on behalf of the applicant.

The application may be made ex parte. The affidavit shall be filed at the same time as the application except that, in a case of urgency, the affidavit may be filed as soon as possible after the application or in such time as directed by the court.

Child Abduction Legislation (Miscellaneous Amendments) Ordinance 2014

Part 3
Section 16

Ord. No. 16 of 2014
A1637

Part 3

Amendments to Rules of the High Court

16. Rules of the High Court amended

The Rules of the High Court (Cap. 4 sub. leg. A) are amended as set out in this Part.

17. Order 121 amended (Child Abduction and Custody Ordinance (Cap. 512))

(1) Order 121, rule 2(1)—

Repeal

“Subject to”

Substitute

“Except as provided in the Ordinance and in”.

(2) Order 121—

Repeal rule 10

Substitute

“10. Stay of custody application pending determination of proceedings under the Convention (O. 121, r. 10)

(1) A notice filed under section 20(2) by a party to proceedings under the Convention must be verified by an affidavit sworn by that party or a person duly authorized to swear it on behalf of that party.

(2) The affidavit must be filed at the same time as the notice.”.

(3) Order 121, after rule 11—

Add

“12. Application for an order under section 16 (O. 121, r. 12)

- (1) An application for an order under section 16 must be supported by an affidavit sworn by—
 - (a) the applicant; or
 - (b) a person duly authorized to swear it on behalf of the applicant.
- (2) The affidavit must, as far as possible, state the following—
 - (a) the particulars of the request made by the requesting Contracting State;
 - (b) the particulars of any relevant order, decision or determination of a judicial or administrative authority of the requesting Contracting State;
 - (c) the particulars of the travel arrangements of the child and accompanying persons, including the dates of arrival and departure, and contact details while they are in Hong Kong; and
 - (d) if the child is in, or is being taken to, Hong Kong temporarily for enabling a person to exercise the rights of access to the child—
 - (i) the basis for believing that the child may be wrongfully removed from Hong Kong to a jurisdiction other than the one mentioned in section 16(3)(a) or (b); or
 - (ii) if that person consents to the making of the order sought—the particulars of the consent.
- (3) In addition, the affidavit must, as far as possible, exhibit the following—
 - (a) a copy of the relevant order, decision or determination of the judicial or administrative authority of the requesting Contracting State; and
 - (b) all other relevant documents.

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- (4) The affidavit must be filed at the same time as the application.
 - (5) However, for an urgent case, the affidavit may be filed as soon as possible after the application.

13. Searching for, inspecting and obtaining copies of documents filed in proceedings under the Ordinance (O. 121, r. 13)

- (1) Unless otherwise directed by the Court, a party to any proceedings under the Ordinance or the party's solicitor, or the Secretary for Justice, may do one or more of the following—
 - (a) have a search in the Registry made for a document filed in the Registry in those proceedings;
 - (b) inspect or obtain a copy of the document.
 - (2) Except as provided in paragraph (1), if a document is filed in the Registry in any proceedings under the Ordinance (other than an order made in open court)—
 - (a) the document is not open to inspection by any person without leave of the Court; and
 - (b) no copy of the document, or of an extract from the document, may be taken by, or issued to, any person without leave of the Court.”.
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Amendments to the Rules of the District Court (Cap 336H)

Currently (i.e. until the Amendment Ordinance is brought into operation), proceedings under CACO fall within the exclusive jurisdiction of the Court of First Instance of the High Court. Hence, there is no existing Order in Cap 336H regulating any orders/applications made under CACO. In this regard, we propose to introduce a new Order to Cap 336H specifically addressing the procedures for applications for the prohibition order which also falls within the jurisdiction of the District Court. All applications for the prohibition order may be commenced by originating summons in the expedited form as set out in Cap 336H.

2. The gist of the new Order to be introduced to Cap 336H is set out below –

(a) Application for prohibition order

Any application for a prohibition order under the new section 21 of CACO must be supported by an affidavit sworn by (i) the applicant or (ii) a person duly authorised to swear it on behalf of the applicant. The application may be made ex parte. The affidavit shall be filed at the same time as the application except that, in a case of urgency, the affidavit may be filed as soon as possible after the application or in such time as directed by the court.

(b) Application for variation, discharge or suspension of prohibition order

Any application for variation, discharge or suspension of a prohibition order made under the new section 21 of CACO must be supported by an affidavit sworn by (i) the applicant or (ii) a person duly authorised to swear it on behalf of the applicant. The application may be made ex parte. The affidavit shall be filed at the same time as the application except that, in a case of

urgency, the affidavit may be filed as soon as possible after the application or in such time as directed by the court.