

**Bills Committee on the Child Abduction Legislation  
(Miscellaneous Amendments) Bill 2013**

**The Administration's response to the issues raised  
at the Bills Committee meeting on 21 January and 11 February 2014**

This paper responds to the issues raised at the meeting of the Bills Committee on the Child Abduction Legislation (Miscellaneous Amendment) Bill 2013 (the Bill) held on 21 January and 11 February 2014. Subject to members' further comments, relevant amendments of the Bill will be made as Committee Stage Amendments to the Bill.

**Criminalisation of parental child abduction**

2. In relation to the proposed section 15(3) of the Child Abduction and Custody Ordinance (Cap.512) (CACO), members asked the Administration to reconsider whether to criminalise the act of parental child abduction. Before giving its recommendations in the Report on International Parental Child Abduction, the Law Reform Commission (LRC) considered the existing criminal law and civil law in preventing the removal of a child from Hong Kong<sup>1</sup>, including relevant provisions in the Crimes Ordinance (Cap.200)<sup>2</sup>, the Offence against the Person Ordinance (Cap.212)<sup>3</sup> and the Protection of Children and Juveniles Ordinance (Cap.213)<sup>4</sup>, and pointed out that a parent can be found guilty of kidnapping his own child and false imprisonment under common law<sup>5</sup>. LRC also quoted a judgment of the House of Lords in *R v D*<sup>6</sup> that “the conduct of such parents [who snatch their own children in defiance of a court order relating to their custody or care and control] should be dealt

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<sup>1</sup> Chapter 2 of the LRC Report on International parental child abduction (the LRC Report)

<sup>2</sup> Section 126(1) of the Crimes Ordinance (Cap.200) provides that “A person who, without lawful authority or excuse, takes an unmarried girl under the age of 16 out of the possession of her parent or guardian against the will of the parent or guardian shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 10 years.

<sup>3</sup> Section 43(1) of the Offences against the Person Ordinance (Cap.212) provides that subject to a proviso, “A person who unlawfully, by any means, leads or takes away...any child under the age of 14 years, with intent to deprive any parent, guardian or other person having the lawful care or charge of such child of the possession of such child...shall be guilty of any offence triable upon indictment, and shall be liable to imprisonment for 7 years.”

<sup>4</sup> Section 26 of the Protection of Children and Juveniles Ordinance (Cap.213) provides that “Any person who unlawfully takes or causes to be taken any child or juvenile out of the possession and against the will of the father or mother or of any other person having the lawful care or charge of such child or juvenile shall be guilty of an offence punishable on conviction on indictment by imprisonment for 2 years.”

<sup>5</sup> Paragraph 2.27 of the LRC Report

<sup>6</sup> [1984] 1 AC 778

with as a contempt of court, rather than as the subject matter of a criminal prosecution”. LRC did not consider that prosecuting parents for the common law offence of kidnapping would be useful, except in the most blatant cases.<sup>7</sup> As to other offences, LRC opined that prosecution would not be useful or appropriate ways to deal with cases of child abduction arising from parental disputes<sup>8</sup>; or if the child is voluntarily accompanying the abducting parent, there may be difficulties in sustaining a prosecution.<sup>9</sup> LRC maintained the view that criminal law can have only a very limited role to play if the person taking the child is one of the child’s parents<sup>10</sup>.

3. In the LRC Consultation Paper on Guardianship and Custody, LRC suggested that parental child abduction should not be criminalized on the lines of the UK Child Abduction Act 1984, where “a person connected with a child under the age of sixteen commits an offence if he takes or sends the child out of the United Kingdom without the appropriate consent”. Following public consultation, LRC reaffirmed in the Report that parental child abduction should not be so criminalized and proposed other recommendations to foil the attempt to remove the child from Hong Kong. We agree with LRC. The proposed section 15 of CACO which allows relevant persons to apply for a prohibition order to prohibit the removal of the child out of Hong Kong and the proposed power to detain a child when he or she is about to be removed under section 20 of CACO is a proportionate step to prevent the child from being taken away from the appropriate person. Similar to other court orders, any attempt to breach the prohibition order may constitute contempt of court, sanction of which ranges from a fine to a term of imprisonment.

### **Provision to empower the Court of First Instance (CFI) to vary orders made under CACO**

4. The Assistant Legal Adviser and members suggested to include new provisions to empower the CFI specifically to vary, suspend or discharge orders made under the proposed section 15 to 18 of CACO. Having regard to provisions of similar effect in other matrimonial ordinances and having consulted the Judiciary, we agree to include empowering provisions for the relevant courts to vary, suspend or

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<sup>7</sup> Paragraph 2.28 of the LRC Report

<sup>8</sup> Paragraph 2.31 of the LRC Report

<sup>9</sup> Paragraph 2.32 of the LRC Report

<sup>10</sup> Paragraph 6.10 of the LRC Report

discharge a prohibition order and a mirror-order made under section 15 and 18 of CACO. This would cater for situations where due to material change in circumstances the relevant party would like the court to vary, discharge or suspend the relevant order previously made.

5. As regards location orders and recovery orders made under sections 16 and 17 of CACO, the aim is to locate and recover a child in the Convention on the Civil Aspects of International Child Abduction (the Hague Convention) cases as soon as practicable upon the making of the order. It is not envisaged that such orders would need to be varied, discharged or suspended. Moreover, if the parties could apply for variation, suspension or discharge of these orders even after an *inter partes* hearing<sup>11</sup>, the abducting party may make use of this procedure to unnecessarily prolong the period for finding the child. This will go against the best interest of the child and frustrate our obligation as a Contracting Party to the Hague Convention to act expeditiously in proceedings for the return of children<sup>12</sup>.

### **Workflow of the application of a prohibition order**

6. Under the proposed section 15 of CACO, a person with a custody or access order in hand or each party to pending proceedings concerning those rights may apply for a prohibition order to prohibit the removal of the child out of Hong Kong without appropriate consent. The court's jurisdiction to make orders in relation to children for custody and access can be found in relevant provisions in the Guardianship of Minors Ordinance (Cap.13), the Matrimonial Proceedings and Property Ordinance (Cap.192), the Matrimonial Causes Ordinance (Cap.179) and the Separation and Maintenance Orders Ordinance (Cap.16)<sup>13</sup>. As long as a person files a divorce petition under the relevant matrimonial ordinances and applies for a custody or access order within the main suit, or issues an originating summons to apply for a custody or access order where there

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<sup>11</sup> An *inter partes* hearing is unlikely to be held for recovery order as such order is usually made when the abducting parent fails to return the child to his habitual residence pursuant to a return order and disappears with the child. The party should appeal against the return order if he objects to the recovery order.

<sup>12</sup> Under Article 11 of the Hague Convention, a Contracting Party is obliged to reach a decision in a return proceeding within six weeks from the date of its commencement. High Court judges handling Hague Convention cases have been following this time frame strictly.

<sup>13</sup> While there is also power to make custody order under the Separation and Maintenance Orders Ordinance (Cap.16), LRC noted in its other Report of the Child Custody and Access that the Ordinance is apparently rarely used today.

are no divorce proceedings, even before the court has made a custody or access order, he/she may apply for a prohibition order under the proposed section 15 of CACO.

7. Once the applicant files an application for a prohibition order to the Court Registry or should a prohibition order be made by the Court, under the proposed section 19(3), the applicant may notify the Immigration Department (ImmD) of the pending application or the prohibition order made. If the relevant conditions under the proposed section 20(2) are satisfied, an authorized officer may detain a child. A flow chart summarizing the above is at **Annex A** for reference.

8. As to the lead time for seeking legal aid for application of a prohibition order, we understand that one may apply for legal aid in civil cases (including matrimonial/divorce cases) by submitting relevant forms and documents on means and merits. Upon passing the means and merits tests, legal aid will be granted to the applicants. For urgent cases currently handled by the Legal Aid Department (LAD) such as injunction proceedings, cases relating to domestic violence, cases with an imminent time bar, applications in relation to the Hague Convention, or in the future, applications for the proposed prohibition order under CACO, upon receipt of the legal aid application, so long as the necessary information on the means of the applicant and the merits of the proposed court application are available, LAD will make a determination forthwith. At present, there are urgent cases whereby legal aid is granted on the same day of the application.

9. As an additional safeguard, the Director of Legal Aid is empowered under Regulation 7 of the Legal Aid Regulations (Cap.91A) to issue an emergency certificate if he is satisfied that the applicant is likely to fulfill the conditions for legal aid and that it is in the interest of justice that the applicant should, as a matter of urgency, be granted legal aid. The application for legal aid is not expected to obstruct the application for a prohibition order in those cases.

## **Workflow and arrangements of the enforcement of a stop order**

10. Under the proposed section 20 of CACO, an authorized officer may detain a child if a notification has been duly made and the officer reasonably suspects that the child is about to be, or is being, removed out of Hong Kong. The child will then be kept in a place of safety until the arrival of and return to the appropriate person. ImmD, the Police and Social Welfare Department (SWD) have looked into and coordinated among themselves on the workflow and arrangements of the enforcement of a stop order. Details will be set out in administrative guidelines to ensure suitable coordination among the departments concerned. The gist of the guidelines is provided at **Annex B**.

## **Engagement of social workers to facilitate understanding of the Bill**

11. Some casework units and relevant service branches within SWD and the operators of the places of refuge have been consulted and their views have been incorporated when designing the implementation arrangements and preparing the relevant guidelines. Sharing sessions and training programmes will also be organised for frontline staff of the relevant units of SWD and related non-governmental organizations before the commencement of the Bill to facilitate their understanding of the process and procedures under the provisions in the Bill.

## **Clause 9 – proposed section 15 of CACO**

12. Under the proposed section 15 of CACO, the CFI is empowered to make an order prohibiting removal of a child out of Hong Kong. Noting that most proceedings concerning custody or access right are dealt with in the Family Court, members considered that the Family Court has the expertise to deal with such cases and suggested to empower it to grant an order under section 15 of CACO. Taking into account members' views, we are consulting the Judiciary on the details of the suggestion.

## Clause 9 – proposed section 16 of CACO

13. Members suggested that the Administration should consider amending the Chinese text "按理可取得的" in the proposed section 16(2) to better reflect the English wording of "may reasonably obtain". Taking into account the comments of the Bills Committee, we propose to amend it to read "是可在合理情況下取得的".

14. Members further suggested amending the proposed section 16(6)(b) to confine the scope of the information subject to legal professional privilege and to impose limitations or conditions on the use of such information. When looking into the relevant legislations in England, LRC noted that the power to order disclosure extends to solicitors who have confidential information of such whereabouts.<sup>14</sup> LRC referred to the case of *Re B (Abduction: Disclosure)*<sup>15</sup> where the Court noted that a balance had to be struck between the duty owed by the solicitor to his client, a duty based on the welfare of the child and a duty to comply with a court order and concluded that the information held by the solicitor would not be privileged as it would be overridden by the child's interests. Under the proposed section 16(2), the kind of information which a person is required to provide to the Court under a location order is limited to "applicable information" as defined as "information about the child's whereabouts or other circumstances relevant to locating the child". We consider that the scope of "applicable information" is well defined under the proposed section 16.

15. Members were concerned that such information provided to the Court under a location order may be used by relevant parties in other court proceedings (e.g. proceedings concerning custody or access right of the child) or to the disadvantage of the child. Members suggested that limitations or conditions on the use of information provided to the Court should be imposed. We are consulting the Judiciary on the suggestion.

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<sup>14</sup> Paragraph 5.11-5.12 of the LRC Report

<sup>15</sup> [1995] 1 FLR 774, CA

## **Clause 9 – proposed section 17 of CACO**

16. The proposed section 17(2)(f) provides that a recovery order made by the CFI may authorize or direct the Director of Social Welfare to carry out certain follow-up actions. As to members' suggestion to review the drafting of the proposed section 17(2)(f) to spell out clearly that the authorization or direction under the subsection was given by the CFI, we have looked into the provision and noted that unlike other authorizations and directions that may be given by the order under other paragraphs in section 17(2), the making of this authorization or direction is subject to an important condition, i.e. if the specified person cannot be contacted within a reasonable time in the first place. The English text of the provision puts this condition at the front in paragraph (f) so that it is distinguished from other paragraphs. The Chinese text also follows the same structure so as to reflect the policy intent accurately. We propose to maintain the current drafting of the provision.

## **Clause 9 – proposed section 18 of CACO**

17. Members suggested the Administration to consider simplifying the Chinese text "指將該兒童帶往該國或在該國扣留該兒童" in the proposed section 18(2)(b)(i). We now propose to amend it to read "指將該兒童帶往或扣留於該國".

18. On the proposed section 18(3) of CACO, we have reviewed the existing drafting in relation to "home state". The proposed section 18 aims to empower the CFI to make a "mirror-order" prohibiting a child from being removed 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 Hague Convention. "Home state" is defined as the "Contracting State of the child's habitual residence". The term "Contracting State" is used in the Hague Convention and is defined in section 4 of CACO. The existing drafting has provided a clear reference point for the provision and reflects the policy intent.

## **Clause 9 – proposed section 19 of CACO**

19. The proposed section 19 of CACO denotes the notification arrangements of a stop order for the purpose of the proposed section 20. The policy intent is that if a stop order has been made, or an application for a prohibition order is pending, the applicant may notify the ImmD of the order or the pending application to invoke the power to detain the child. Members were concerned if the proposed section 19 might be abused.

20. Taking into account members' concern and with reference to the court practice, we propose to amend section 19 to the effect that a pending application for a prohibition order is refined to one for which the application concerned has already been filed and a hearing date has been fixed with the court. This would ensure that only a case whereby the applicant has a genuine intention for it to be heard before the court is to be covered by the provision.

21. Members suggested the deletion of the words "給予" from the proposed section 19(9)(a). This proposed section provides that the notification must be given in a manner and form specified by the Director of Immigration. We consider that "給予" is required in order to reflect the policy intent.

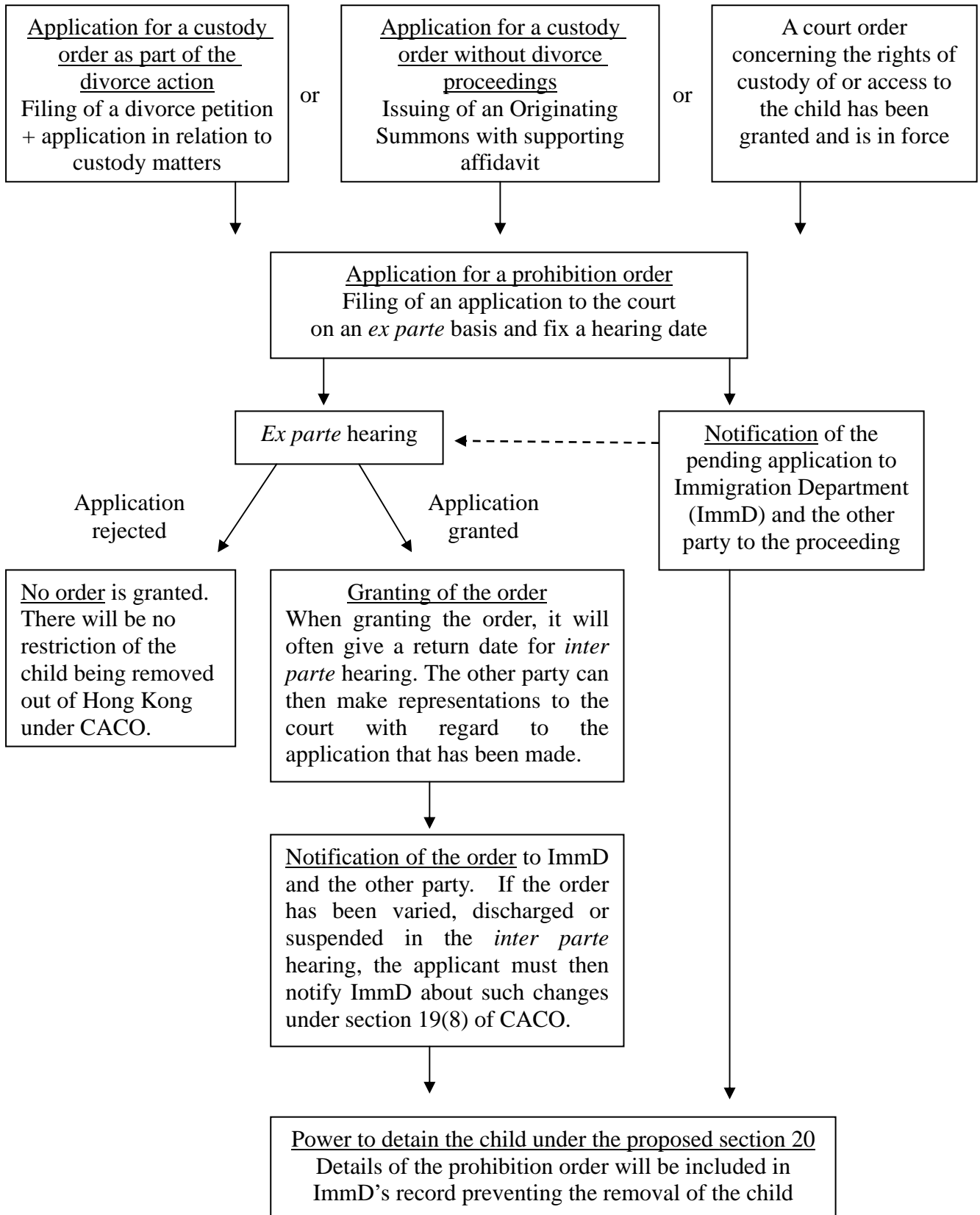
## **Clause 18 – Section 5 of the Judicial Proceedings (Regulation of Reports) Ordinance (Cap.287)**

22. The Bill proposes to amend section 5 of the Judicial Proceedings (Regulation of Reports) Ordinance (Cap.287) to prohibit the publication of information about, and the searching and inspection by the public of court files of, Hague Convention proceedings, so as to implement LRC's observations regarding the confidentiality of these proceedings. Taking into account members' views about the proposed section 5(1A), we suggest to revise the provision to the effect that persons referred to in the judgment are kept anonymous for publication.

**Labour and Welfare Bureau**  
**March 2014**



**Application for a prohibition order to restrict the removal of a child from Hong Kong under the proposed section 15 of the Child Abduction and Custody Ordinance (Cap.512) (CACO)**



**Workflow and arrangement of the enforcement of a stop order  
under the proposed section 20 of the  
Child Abduction and Custody Ordinance (Cap.512)**

This paper provides the gist of the workflow and arrangement of the enforcement of a stop order under the proposed section 20 of the Child Abduction and Custody Ordinance (CACO). Relevant details will be set out in the administrative guidelines of the respective departments to ensure suitable coordination amongst the departments.

**Follow-up actions to be taken by the Immigration Department**

2. When a child is being detained by an Immigration Officer at the control point, he/she will first be placed in an interview room, accompanied by a female officer as far as practicable. The officer will immediately notify the Police about the stopped child and pass the relevant information (e.g. copy of the relevant court order, information and contact details of the appropriate person etc.) to the Police for follow-up. Depending on the actual circumstances at the scene, the officer will inform the accompanying parent/guardian, and as well as the child depending on his/her age and maturity, about the procedures to follow (including the right to seek legal assistance if necessary). The officer will also ensure the safety, security and welfare of the child until the arrival of the Police.

**Follow-up actions to be taken by the Police**

3. The Police will attempt to contact the custodial parent by telephone, and if unsuccessful will visit his / her contact address(es), to inform him/her that the child has been stopped and request them to collect the child as soon as practicable. In most cases, it is envisaged that a Police Officer (a female officer as far as practicable) of the nearest Police Station will arrive at the control point in 15-30 minutes to take over the child.

4. The Police will then escort the child to and keep the child in a suitably comfortable and secure room, e.g. an interview room, office or

waiting room at the nearest Police Station to await the arrival of the appropriate person. Whilst detained thereat, the Police will ensure the safety, security and welfare of the child, including provision of food and drink and arranging medical treatment as appropriate.

### **Follow-up actions to be taken by the Social Welfare Department**

5. In cases where the appropriate person cannot be contacted within a reasonable time or the child has to be detained overnight, the Police will take the child to a place listed in the Schedule to the Protection of Children and Juveniles (Place of Refuge) Order (Cap.213 sub.leg. B) and the Social Welfare Department (SWD) will be informed about the admission.

6. Once admitted, the place of refuge will be responsible for providing day-to-day care to the child, including provision of food and drink and arranging medical treatment as appropriate, and taking care of his/her welfare until the child is returned to the appropriate person. Under the proposed section 20(6) and (8), the Director of Social Welfare may take follow-up actions as appropriate, including liaising with the custodial parent, providing counseling to the child and the family, facilitating discussion among parents over the care arrangements of the child, etc.

### **Others**

7. When a child is being detained by the authorized officer, the accompanying parent who attempts to abduct the child may choose to accompany the child until the arrival of and return of the child to the appropriate person or until the child is admitted to a place of refuge. The Police and ImmD will call in female officers as far as practicable to handle such cases and explain to the child about the situation.<sup>1</sup>

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<sup>1</sup> In general, we do not anticipate strong resistance from the child. In the unlikely event that the child resists an authorized officer executing the functions under the proposed new section 20, and taking into account the best interest of the child, minimum force necessary to achieve the purpose may be used and must be reasonable in the circumstances. However, frontline officers will be reminded to exercise self-restraint and that force will not be used unless strictly necessary to achieve the lawful purpose.