

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

Discussion on Criminalization of Parental Child Abduction

Some members of the Bills Committee on the Child Abduction Legislation (Miscellaneous Amendment) Bill 2013 (the Bill) have asked the Administration to consider whether to criminalise the act of parental child abduction. This paper summarizes the views of the Law Reform Commission of Hong Kong (LRC) in the Report on International Parental Child Abduction on this issue, as well as the Administration's proposal.

Background - The LRC Report

2. In 1995, the then Attorney General and the then Chief Justice referred to LRC the topic of guardianship and custody of children. A sub-committee¹ was subsequently set up to review the subject and an extensive consultation paper on Guardianship and Custody was published in 1998, setting out proposals for reform. Fifty-one submissions² were received during the three-month consultation exercise. Taking into account the views of the respondents, LRC published the Report on International Parental Child Abduction (the Report) in 2002, the second in a series of four reports on guardianship and custody of children.

3. The Report focuses on international parental child abduction, which usually occurs when a relationship between two parents breaks down and one of them, often in the face of a court order that he or she is unhappy with, takes the law into his or her own hands and absconds with the child to another jurisdiction. At present, the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) provides an effective international mechanism to secure the prompt and safe return of children who have been wrongfully removed from one Contracting State to another. The Hague Convention, to which Hong Kong is a party, is given the force of law in Hong Kong by the Child

¹ In May 1996, LRC appointed a sub-committee chaired by Ms Miriam Lau to make proposals to LRC for reform. Members of the sub-committee include District Court Judge, Professor of the Faculty of Law of the University of Hong Kong; Director of the Hong Kong Family Welfare Society; solicitors and barristers, and representative from the Legal Aid Department etc. The list is at [Annex 1](#).

² Those who responded included members of the legal profession, social workers, welfare organizations, youth groups, women's groups, counsellors, mediators, educational institutions, government departments and private individuals. The list is at [Annex 2](#).

Abduction and Custody Ordinance. Having examined Hong Kong's civil and criminal law relating to child abduction (please refer to paragraphs 6 to 7 below) as well as the law which apply in other common law jurisdictions, and taking into account the findings of its consultation exercise, LRC sets out its recommendations in the Report, four out of the six recommendations relate to the prevention of removal of a child out of Hong Kong, while the other two seeks to enhance the operation of the Hague Convention in Hong Kong.

4. The Administration issued its response to the Report to the Chairman of LRC in October 2009, agreeing in-principle to all the recommendations of the Report³. The Administration also briefed the Legislative Council Panel on Welfare Services on our acceptance of the Report in February 2010. The Panel was generally positive on our stance.

LRC's view on criminalisation of parental child abduction

5. LRC has considered at length in the Report the option of creating a new criminal offence to deal with parental child abduction along the lines of the UK Child Abduction Act 1984, under which "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"⁴. The more common consent required will be that of the other parent. Even if there is no court order, the Act prohibits removal of the

³ As stated in the response, the Government accepted in-principle all the recommendations of the Report except for a slight modification to Recommendation 4 whereby specific circumstances will be spelt out in the provision under which the Immigration Department and the Police would be empowered to hold the child, i.e. where there is a stop order issued by the court prohibiting the child in question from leaving Hong Kong, or where an application for such an order has been made to the court.

⁴ Section 1 of the UK Child Abduction Act 1984. A person "connected with a child" is: a parent (including an unmarried father if there are reasonable grounds for believing he is the father); a guardian; a special guardian; any person with a residence order in their favour; and any person with the custody of the child. "Appropriate consent" means the consent of: the mother; the father (with parental responsibility); a guardian; a special guardian; any person with a residence order in force in their favour; and any person with custody of the child (section 1(2)(a)). "Appropriate consent" can include the court's consent where it is required under Part II of the Children Act 1989 (section 1(2)(b), (c))(for example, where a residence order under section 13 of the UK Children Act 1989 is in force). However, a person with a residence order in force with respect to the child does not commit a criminal offence if he or she takes the child out of the UK for less than one month, unless this is in breach of another court order (section 1(4)). It is a defence under the Act if the accused believed that the other person consented to the abduction, or would have consented had he or she been aware of all the circumstances; or the accused was unable to communicate with the other person despite taking reasonable steps to do so (section 1(5)). It is also a defence if the other person unreasonably refused consent to the child being taken out of the UK (but this defence does not apply if the person refusing consent has a residence order in his or her favour; or the person taking or sending the child out of the UK did so in breach of a court order) (section 1(5A)).

child if the parent does not have the consent of the other parent⁵.

6. Before LRC gave its recommendations in the Report, it considered the existing criminal law and civil law in preventing the removal of a child from Hong Kong⁶, including relevant provisions in the Crimes Ordinance (Cap.200)⁷, the Offences against the Person Ordinance (Cap.212)⁸ and the Protection of Children and Juveniles Ordinance (Cap.213)⁹, and pointed out that a parent could be found guilty of kidnapping his own child and false imprisonment under common law¹⁰. However, quoting a judgment of the House of Lords in *R v D*¹¹ 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 with as a contempt of court, rather than as the subject matter of a criminal prosecution”, LRC pointed out that the Lordships did not want to encourage prosecution for the common law offence of kidnapping and LRC did not consider that prosecuting parents for the common law offence of kidnapping would be useful, except in the most blatant cases¹².

7. 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 disputes¹³; or if the child is voluntarily accompanying the abducting parent, there may be difficulties in sustaining a prosecution.¹⁴ LRC maintained the view that criminal law could have only a very limited role to play if the person taking the child was one of the child’s parents¹⁵.

⁵ Paragraph 5.3 of the LRC Report.

⁶ Chapter 2 of the LRC Report.

⁷ 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.

⁸ 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.”

⁹ 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.”

¹⁰ Paragraph 2.27 of the LRC Report.

¹¹ [1984] 1 AC 778.

¹² Paragraph 2.28 of the LRC Report.

¹³ Paragraph 2.31 of the LRC Report.

¹⁴ Paragraph 2.32 of the LRC Report.

¹⁵ Paragraph 6.10 of the LRC Report.

8. In the LRC Consultation Paper on Guardianship and Custody, LRC suggested that parental child abduction in Hong Kong should not be criminalised along the lines of the UK Child Abduction Act 1984. The respondents did not query or comment adversely on this suggestion specifically during the consultation. Following public consultation, LRC reaffirmed in the Report that parental child abduction should not be so criminalised and new criminal offences could only be justified if there was a serious problem of children being abducted either within, to or from Hong Kong¹⁶. LRC then proposed other recommendations (please refer to paragraph 9) to foil the attempt to remove the child from Hong Kong.

LRC's recommendation – proposed power to detain a child to return him/her to the custodial parent

9. At present, the Immigration Department (ImmD) and the Police can only stop and turn away a child departing from Hong Kong at the checkpoints when they are aware of a court order prohibiting removal. Balancing the possible short-term trauma to the child of being held by the authorities in a place of safety pending the arrival of the other parent, etc. and the longer-term trauma to the child of being taken away, possibly permanently, from the custodial parent and home jurisdiction, LRC recommended, amongst other suggestions, to empower the holding of a child who was reasonably suspected to be or was being removed from the jurisdiction in breach of a court order so that he/she could be returned to the custodial parent¹⁷. It would be a preventive measure to foil the attempt to remove the child from Hong Kong.

¹⁶ Paragraph 6.10 of the LRC Report.

¹⁷ Paragraph 6.27 of the LRC Report.

The Administration's proposal

10. The Administration agrees with the views and recommendations of LRC as set out in paragraphs 5 to 9 above. The Bill seeks to implement LRC's recommendations, amongst others, to empower the court to make a prohibition order against the removal of a child out of Hong Kong without appropriate consent; and in order to effect the prohibition order, to empower immigration officers and the Police to detain a child who is reasonably suspected to be, or is being removed from Hong Kong in breach of such a prohibition order.

Proposed power to detain as an enhancement to prevent parental child abduction

11. The Administration proposes under the Bill that 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. Should a parent notify ImmD that a prohibition order has been made or an application is pending, details of the order or the application (including the name of the child) will be entered into the record of the ImmD. If an immigration officer at checkpoints reasonably suspects that the child is about to be, or is being removed out of Hong Kong in violation of the prohibition order or a pending application, the officer may detain the child and, as soon as practicable, transfer the child into the charge of the Police who will return the child to the custodial parent/appropriate person as soon as practicable. ImmD and the Police will arrange female officers to handle these cases as far as practicable in order to alleviate the child's anxiety. While awaiting the arrival of the custodial parent/appropriate person, the child will be kept in a place of safety and the Administration will take appropriate measures to ensure that the best interest and welfare of the child will be protected, e.g., by providing food and drinks, and arranging medical treatment as appropriate.

12. The proposed power to detain is an improvement to the existing regime in preventing the unlawful removal of a child out of Hong Kong by his/her parent. It is a proportionate step to prevent the child from being taken away from the person granted custody of the child, usually his/her parents. The new power can also prevent parents from making further attempts to leave Hong Kong with the child by other means or to hide with

the child.

Implications of criminalization

13. “Criminalisation” means the imposition of sanctions/penalties by the criminal law¹⁸. It is the process by which behaviors and individuals are transformed into crime and criminals¹⁹. We agree with LRC 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. For one, parental child abduction often arises from intra-family dispute which is normally dealt with under the civil law. Criminalization will involve investigation/intervention by the Police and both parents contesting in court may aggravate the hostility, tension and acrimony between the parents and further affect the parent-child relationship, which may not be in the best interest of the child. The consequences of an offence being “criminal” can be severe; for example, apart from the penalties imposed, a criminal record can affect the parents’ employment prospects and ability to immigrate.

Potential offences in exceptional circumstances

14. In exceptional circumstances, a parent who unlawfully removes his/her child out of Hong Kong in contravention of a court order may, depending on the circumstances of the case, be guilty of offences under existing statutory provisions²⁰ and common law²¹ in connection with his/her act of child abduction. Depending on the offence one commits, he/she may be liable on conviction on indictment of relevant statutory offences to imprisonment for two to 10 years. In deciding whether or not to prosecute a parent for abduction of his/her own child, the Department of Justice must consider whether there is sufficient evidence to justify the institution or continuation of proceedings; and whether it is in the general

¹⁸ In general, the criminal law exists to punish wrongdoing, remove dangerous criminals from circulation, and deter potential wrongdoers from offending; while the main objective of civil law is to compensate the victim. The standard of proof in criminal proceedings differs from that in civil proceedings. The standard of proof in civil proceedings including family cases (with the exception of committal proceedings) is “balance of probabilities” whereas the higher standard of proof of “beyond reasonable doubt” applies in criminal proceedings. Criminal proceedings are heard in open court whereas family cases are heard in chambers.

¹⁹ Several principles may underpin decisions about criminalisation, including the de minimis principle (i.e., the minimum criminalization); the general harm principle (i.e., conduct should only be criminalized when it is fair to do so, e.g., when harm has been done to others); moral approaches (i.e., the extent to which behaviors considered morally wrong in a given jurisdiction should be criminalized).

²⁰ Relevant provisions are set out in footnote 8, 9 and 10 above.

²¹ A person is liable to life imprisonment on conviction for child kidnapping under the common law.

public interest²² to conduct prosecution. Furthermore, any attempt to breach the proposed prohibition order may also constitute contempt of court, sanction of which ranges from a fine to a term of imprisonment.

Other assistance and support for affected parents

15. Apart from applying for a court order to prohibit the removal of a child out of Hong Kong without the appropriate consent, other measures are in place to assist parents and children facing the problem of parental child abduction. For example, if one side of the parent reports that his/her child is missing and suspects that the child is being abducted, the Police will ascertain the full circumstances from the parent, contact the child, the other parent and witnesses, and check with immigration records to see if the child has left Hong Kong. If the child is assessed to be a “missing person”, or there is reason to believe that the safety of the child is endangered, the Police will attempt to locate the child to ensure his/her safety. If the Police suspect that other criminal offences have been committed in the course of parental child abduction, the Police will investigate with a view to prosecuting the offender and ensuring the safety of the child.

16. Regardless of the presence of a court order on custody/access, welfare services are available for parents in dispute and their children. Parents with marital discord may approach social workers of the Social Welfare Department or non-governmental organizations for counseling services to assist them in improving their relationship and to reach consensus regarding the future arrangements of the child. Where parental child abduction is involved, social workers would facilitate discussion between the parents over the child’s care arrangements. Bearing in mind that the best interest of the child is always of the paramount consideration, social workers would render emotional support to the child and refer the child for clinical psychological service if there are signs of serious emotional disturbances.

²² According to the Prosecution Code of the Department of Justice, considerations relevant to “public interest” include the nature and circumstances of the offence, including any aggravating or extenuating circumstances; the seriousness of the offence; the level of the suspect’s culpability; the attitude, age, nature or physical or psychological condition of the suspect or the child involved and special circumstances that would affect the fairness of any proceedings, etc.

17. The aforementioned assistance will continue to be available to parents and children when the proposed prohibition order and power to detain come into effect.

Conclusion

18. In the LRC Consultation Paper on Guardianship and Custody, LRC suggested that parental child abduction should not be criminalised along the lines of the UK Child Abduction Act 1984. Following public consultation, LRC reaffirmed in its Report its view that parental child abduction should not be so criminalised. The Administration agrees with LRC. Moreover, the creation of such a specific criminal offence of parental child abduction is controversial. The Administration considers it appropriate to implement LRC's recommendations as in paragraph 9. The Administration will keep track of the experience of implementing the Bill in the context of the changing circumstances. The question of reviewing the issue of criminalisation of parental child abduction will be considered in that context.

Labour and Welfare Bureau
April 2014

Annex 1

LRC Sub-committee of Guardianship and Custody Membership (as at April 2002)

Hon Ms Miriam Lau, JP Chairperson	Sole Practitioner Miriam Lau & Co
H H Judge de Souza Deputy Chairman	Judge District Court
Miss Rosa Choi	Assistant Principal Legal Aid Counsel Legal Aid Department
Ms Bebe Chu	Partner Stevenson, Wong & Co., Solicitors
Ms Robyn Hooworth (up to 28 August 2001)	Mediator
Mr Anthony Hung	Partner Lau, Kwong & Hung, Solicitors
Ms Jacqueline Leong, SC	Barrister
Dr Athena Liu	Associate Professor Faculty of Law University of Hong Kong
Mr Thomas Mulvey, JP	Director Hong Kong Family Welfare Society
Mrs Cecilia Tong	Regional Officer Social Welfare Department
Ms June Wee	Barrister
Miss Wong Lai-cheung	Counsellor

**List of the Respondents to the Consultation Paper
on Guardianship and Custody**

1. Against Child Abuse
2. Association for the Advancement of Feminism
3. Mr J J A Bosch and Ms SFM Wortmann
4. Caritas Family Service Project on Extramarital Affairs
5. Caritas – Hong Kong (Social Work Services)
6. Caritas – Hong Kong Family Service
7. Ms CHAN Tsz-ying, Hong Kong Family Welfare Society
8. Dr N Y Chau
9. Ms CHENG Mui-hung
10. Chinese YMCA of Hong Kong
11. Ms CHUNG Yuen-yee
12. City University of Hong Kong, Department of Public and Social Administration
13. Department of Justice, Civil Division
14. Department of Justice, Prosecutions Division
15. Director of Legal Aid
16. Director of Health
17. Director of Home Affairs
18. Director of Immigration
19. Director of Social Welfare
20. Ms Heather Douglas, Assistant Professor
City University of Hong Kong, School of Law
21. Ms Andrea Gutwirth
22. Harmony House
23. Haven of Hope Christian Service
24. Hong Kong Association for the Survivors of Women Abuse
25. Hong Kong Bar Association
26. Hong Kong Family Welfare Society
27. Hong Kong Federation of Women

28. Hong Kong Federation of Women Lawyers
29. Hong Kong Student Aid Society
30. Hong Kong Women Development Association
31. Hong Kong Young Legal Professionals Association Limited
32. Hong Kong Young Women's Christian Association
33. Judiciary Administrator
34. Ms Helen Kong, Hastings & Co
35. Miss LO Lau-oi, Hong Kong Family Welfare Society
36. Official Solicitor
37. ReSource The Counselling Centre
38. Secretary for Home Affairs
39. Secretary for Housing
40. St John's Cathedral Counselling Service
41. The Boys' & Girls' Clubs Association of Hong Kong
42. The Hong Kong Catholic Marriage Advisory Council
43. The Hong Kong Committee on Children's Rights
44. The Hong Kong Council of Social Service
45. The Hong Kong Family Law Association
46. The Hong Kong Mediation Council
47. The Hong Kong Psychological Society
48. The Law Society of Hong Kong
49. The University of Hong Kong, Department of Social Work and Social Administration
50. The University of Hong Kong, Faculty of Law
51. Ms TSANG Wan-wai