



立法會秘書處 法律事務部
LEGAL SERVICE DIVISION
LEGISLATIVE COUNCIL SECRETARIAT

來函檔號 YOUR REF :
本函檔號 OUR REF : LS/B/23/12-13
電話 TELEPHONE : 3919 3511

傳真 FAX : 2877 5029
電郵 E-MAIL : wkyick@legco.gov.hk

By Fax (2524 7635)

5 September 2013

Ms Veronica TSE
AS for Labour & Welfare (Welfare) 1A
Labour and Welfare Bureau
Division 1
11/F West Wing,
Central Government Offices,
2 Tim Mei Avenue,
Tamar, Hong Kong

Dear Ms TSE,

Child Abduction Legislation (Miscellaneous Amendments) Bill 2013

We are scrutinizing the legal and drafting aspects of the captioned Bill and have the following questions for your clarification-

New section 15 of the Child Abduction and Custody Ordinance (Cap. 512) (CACO)

Under the new section 15(3) of the CACO, a person must not remove a child out of Hong Kong without the consent of the other parent or an appropriate party, if a court order concerning the rights of custody or access to the child is in force or if proceedings concerning those rights are pending in a court. It is noted that unlike the UK Child Abduction Act 1984, removing a child without appropriate consent is not proposed to be an offence under the Bill. In the circumstances, what sanction is available for contravening the requirement under the new section 15?

New sections 15 to 18 of the CACO

- (a) Regarding the Court of First Instance's (CFI) proposed powers to make a prohibition order, location order and recovery order under the new sections 15 to 18 of the CACO, does the CFI also have the powers to vary, suspend or discharge those orders? It is noted that while new section 19(7) refers to variation, discharge and suspension of a prohibition order or recovery order, there is no provision in the Bill empowering the CFI to do so. Should such empowering provision be included in the Bill?
- (b) Apart from the procedure for application for an order under the new section 18 of the CACO, is it necessary to make provisions in the Rules of the High Court (Cap. 4 sub. leg. A) to provide for the procedure for applications under the new sections 15 to 17?

New section 20 of the CACO

The new section 20 of the CACO seeks to empower immigration officers and police officers to detain a child who is reasonably suspected to be, or is being, removed from Hong Kong in breach of a court order (the relevant child). As regards the power of detention in the new section of the CACO, kindly clarify the following matters-

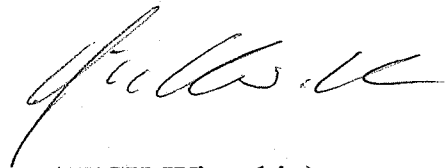
- (a) Article 37(b) of the Convention on the Rights of the Child (the Child Convention), to which Hong Kong SAR is a party, provides that *the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.* Article 31 of the Basic Law (BL) provides that *Hong Kong residents shall have freedom of movement within the Hong Kong Special Administrative Region and freedom of emigration to other countries and regions. They shall have freedom to travel and to enter or leave the Region. Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization.* Article 8(1) and (2) of the Hong Kong Bill of Rights (HKBoR) provides that *(1) everyone lawfully within Hong Kong shall, within Hong Kong, have the right to liberty of movement and freedom to choose his residence and (2) everyone shall be free to leave Hong Kong.* In the circumstances, please clarify whether and how the proposed power of detention under the new section 20 of the CACO could be justified on the ground that it is consistent with the above provisions in the BL and the HKBoR.

- (b) In relation to the requirement of the Child Convention on "last resort", before proposing the power to detain a child under the new section 20 of the CACO, what alternative measures (whether administrative or legislative measures), if any, have been considered by the Administration? Is there any reason(s) why the alternative measures have not been adopted in place of the power to detain a child?
- (c) Will there be any remedies available to the relevant parent or the relevant child if the detention turns out to be a wrongful one (e.g. the intended overseas travel of the relevant child has the oral consent of another parent)?
- (d) It is noted that the Bill does not expressly empower an authorized officer to arrest the relevant child (or the accompanied parent). The police's power of arrest under section 50 of the Police Force Ordinance (Cap. 232) does not seem applicable as no criminal offence is created in relation to section 20 or other provisions in the CACO. In the circumstances, please clarify how the proposed detention under the new section 20 could be effected if the relevant child resists or just runs/walks away together with the accompanied parent. Is it contemplated that reasonable force could be used by an authorized officer in effecting the detention? If so, should this be provided expressly in the Bill?
- (e) Article 5(4) of HKBoR provides that *anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful*. Similarly, Article 37(d) of the Child Convention provides that *every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action*. It is noted that the Bill does not provide for proceedings specifically for challenging the lawfulness of the proposed detention. Apart from judicial review, will the Administration consider introducing specific proceedings relating to the new section 20 of the CACO to provide an aggrieved party a speedier access to courts?

- (f) Is there any reason why no time limit is provided for the detention of the relevant child by a police officer under the new section 20? Please refer to section 34E of the Protection of Children and Juveniles Ordinance (Cap. 213) which provides that within 48 hours after a child (or juvenile) is taken to a place of refuge, an application to a juvenile court shall be made.
- (g) Please clarify the follow-up actions that could be taken by the Director of Social Welfare in relation to the relevant child under the new section 20(6)(b) and (8)(b).
- (h) When a child is kept in a place of safety (as defined in clause 4 of the Bill) under the new section 20(6) and (8), what responsibilities does the person in charge of the place have? Should these responsibilities be stipulated in the Bill?

It is appreciated that your reply in both languages could reach us as soon as possible, preferably by 27 September 2013.

Yours sincerely,



(YICK Wing-kin)
Assistant Legal Adviser

cc DoJ (Attn.: Ms Shandy LIU, Sr Asst Law Draftsman (By Fax: 2869 1302))
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