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

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper sets out the background of the Child Abduction Legislation (Miscellaneous Amendments) Bill 2013 and gives a brief account of the discussions by the Panel on Welfare Services ("the Panel") on the Administration's proposal to amend the Child Abduction and Custody Ordinance (Cap. 512) and other enactments for implementing the recommendations of the Report on International Parental Child Abduction ("the Report") published by the Law Reform Commission of Hong Kong ("LRC") in 2002.

Background

2. The issue of guardianship and custody of children was referred to LRC by the then Attorney General and the Chief Justice in April 1995. The LRC appointed a Subcommittee on Guardianship and Custody in May 1996 to consider the law relating to guardianship and custody of children, and to make proposals to LRC. The Subcommittee published in 1998 a consultation paper which recommended changes to the law relating to guardianship and custody of children, non-adversarial dispute resolution processes, and the law on child abduction.

3. LRC published the Report in April 2002. The Report made six recommendations to further enhance the protection for children against abduction and improve existing legislation. According to the Administration, it generally agreed with the principles advocated by LRC, and was prepared to take forward all the six recommendations, with one

of the recommendations in a modified form. The recommendations of LRC and the Administration's responses to individual recommendations are in **Appendix I**.

Discussions by the Panel

4. When the Panel was briefed at its meeting on 8 February 2010 on the Administration's response to the Report, members noted that the Report focused on measures to prevent parental abduction in the first place. The major issues identified included –

- (a) current legislative provisions enabling a parent to apply for an order prohibiting the other parent from removing their child from Hong Kong were contained in subsidiary legislation only. Moreover, the parents must be involved in divorce or separation proceedings already. Furthermore, there was no provision in law which explicitly provided that parental consent was required before a child could be removed out of Hong Kong;
- (b) the existing legislation did 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 did not have the power to detain or hold a child who was reasonably suspected to be, or was being, removed from Hong Kong in breach of a court order. They only had the power to stop the child from leaving Hong Kong; and
- (d) it was at the discretion of the parents as to whether to notify ImmD that a court order had been made prohibiting the removal of the child from Hong Kong. The parent was not required to inform the other parent upon making the notification, giving rise to cases where the latter was not aware of the notification until arriving at the departure area and being stopped by the immigration officers.

5. Members noted that the Administration proposed 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 could apply for the injunction pursuant to the law to cover all parents, regardless of whether they were 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 ImmD and the Police to hold a child where :
 - (i) there was a stop order issued by the court prohibiting the child in question from leaving Hong Kong; or
 - (ii) where an application for stop order had been made to the court and the application was pending; and
- (d) to advise parents of their obligations to notify ImmD and the other parents of the court order prohibiting the removal of their child from Hong Kong without their consent.

6. Concerns were raised over parental abduction cases in which the child was removed out of Hong Kong to the Mainland, and the cooperation between the Hong Kong Special Administrative Region Government and the Mainland authorities in international parental child abduction.

7. According to the Administration, Mainland was not a contracting member of the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"). There was no evidence showing that there was a large number of parental abduction cases between Hong Kong and the Mainland. In the past three years before 2010, only one criminal case involving parental abduction to the Mainland was recorded. While there were some 700 cases concerning the removal of the child from Hong Kong in breach of a court order prohibiting the child in question from leaving Hong Kong every year, most of them were reported during the festive seasons. It was believed that the parents involved might not be aware of the court order until arriving at the departure area and being stopped by immigration officers.

These cases could be stopped and handled effectively by the existing arrangements for enforcing the court orders.

8. Members noted that international parental child abduction cases would be tackled by the Administration in accordance with the domestic legislation if a child was removed from Hong Kong to a place which was not a contracting state to the Hague Convention.

Relevant papers

9. A list of the relevant papers available on the Legislative Council website is in **Appendix II**.

Council Business Division 2
Legislative Council Secretariat
23 October 2013

**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
Recommendation 1 – Removal of the child from the jurisdiction		
<p>It is provided in the law¹ 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>

¹ 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>Recommendation 2 – Disclosure of whereabouts / location orders Recommendation 3 – Recovery orders</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
Recommendation 4 – Power to hold a child so that he can be returned to the custodial parent or taken to a place of safety		
<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"> ● 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 ● 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 potential court order.

Existing Situation	The Recommendation	Response from the Administration
		<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"> ● where there is a stop order issued by the court prohibiting the child in question from leaving Hong Kong; or ● where an application for stop order has been made to the court and the application is pending. <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>

Existing Situation	The Recommendation	Response from the Administration
		<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>Recommendation 5 – Surrender of passports</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.		
Recommendation 6 – Notification of court order to Immigration		
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 ² . There is also no requirement for the other parent to be	<p>(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;</p> <p>(b) It should be at the discretion of the parents whether the ImmD is notified or not; and</p>	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.

² 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.”

Existing Situation	The Recommendation	Response from the Administration
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.	

Appendix II

**Relevant papers on
the Report on International Parental Child Abduction
published by the Law Reform Commission of Hong Kong**

Committee	Date of meeting	Paper
Panel on Welfare Services	8 February 2010 (Item V)	Agenda Minutes

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