

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

**The Administration's response to the issues raised  
at the first Bills Committee meeting on 24 October 2013 and  
the issues as set out in the letter from the Legal Service Division**

This paper responds to the issues raised at the first meeting of the Bills Committee on the Child Abduction Legislation (Miscellaneous Amendment) Bill 2013 (the Bill) held on 24 October 2013 and the other issues set out in the letter dated 5 September 2013 from the Assistant Legal Adviser to the Administration.

**Issues raised in the letter dated 5 September 2013 from the Legal Service Division of the Legislative Council Secretariat**

2. Our responses to the respective issues raised are at Annex.

**Support and assistance available to a child who had been abducted to a non-Contracting party**

3. At present, the Department of Justice (DoJ), as the Central Authority in Hong Kong provides assistance to parents whose child had been abducted to a Contracting party under the Convention on the Civil Aspects of International Child Abduction (the Hague Convention). Where a child is reported to have been abducted from Hong Kong into a non-Contracting party, for example the Mainland or Taiwan, the Police will assess if the safety of the child is endangered and whether the child is a "missing person". If the child is assessed to be a "missing person" or there is reason to believe that the safety of the child is endangered, and the child is confirmed to have entered the Mainland or Taiwan, the Police will contact the relevant authorities thereat to request them to locate and protect the child as appropriate.

## **Implementation of court orders issued in Hong Kong in relation to the Child Abduction and Custody Ordinance (Cap.512) in the Mainland and Taiwan**

4. At present, the Hague Convention does not apply to the Mainland and Taiwan. As far as we understand, the current Mainland law does not expressly provide for the recognition in the Mainland of a divorce, maintenance or custody order granted by the Hong Kong courts, or for its enforcement in the Mainland. The Department of Justice will continue to discuss with the Mainland the relevant issues concerning an arrangement for reciprocal recognition and enforcement of matrimonial judgments and orders between the two jurisdictions, and report progress to the Panel on Administration of Justice and Legal Services as appropriate.

5. We are following up on Members' question on Taiwan and will respond in due course.

### **Enforcement of the proposed power to detain**

6. The recommendations put forward by the Law Reform Commission (LRC) in its Report on International Parental Child Abduction (the Report) aim at improving Hong Kong's current legal protection against parental child abduction in Hong Kong. Under the proposed new section 20 of the Bill, an authorized officer may detain a child if the officer reasonably suspects that the child is about to be, or is being removed out of Hong Kong in breach of a stop order of which the Director of Immigration has been notified.

7. Members have enquired how law enforcement agencies would determine whether a child who is leaving Hong Kong alone is being abducted within the meaning of the Bill. Under the proposed new section 20 of the Bill, authorized officers would assess whether the child is about to be, or is being removed out of Hong Kong in breach of a stop order of which the Director of Immigration has been notified. If the relevant conditions prescribed in the section are satisfied, the power to detain the child under the proposed new section 20 will be invoked irrespective of whether the child is leaving Hong Kong alone or is accompanied by another person.

## **Definition of a child under the Amendment Bill**

8. Under the proposed new section 15, a child includes a child of the family as defined by section 2(1) of the Matrimonial Proceedings and Property Ordinance (Cap.192). Under Cap.192, “child of the family”, in relation to the parties to a marriage, means “a child <sup>1</sup> of both those parties; and any other child who has been treated by both those parties as a child of their family”. Moreover, the proposed new section 15(2) of the Bill, applies to a child who is under the age of 18 if a court order concerning the rights of custody of or access to the child is in force; or proceedings concerning those rights are pending in a court. As such, “child” in relation to the proposed new section 15 covers any child, whether born within or out of wedlock, adopted or natural child, who is under the age of 18.

9. Under the proposed new sections 16 and 17 of the Bill, the Court of First Instance may make a location order relating to a child’s whereabouts and a recovery order relating to a child’s return for proceedings under the Hague Convention. According to the provisions of the Hague Convention, these two proposed new sections are applicable to a child under the age of 16 <sup>2</sup>.

**Labour and Welfare Bureau**  
**December 2013**

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<sup>1</sup> Under its definition in section 2(1) of Cap.192, “child”, “in relation to one or both parties to a marriage”, includes “an illegitimate or adopted child of that party or, as the case may be, of both parties”.

<sup>2</sup> Article 4 of the Hague Convention which is stipulated in Schedule 1 of the Child Abduction and Custody Ordinance (Cap.512), states that “The Convention shall cease to apply when the child attains the age of sixteen years.”

**The Administration's response to the issues raised by  
the Legal Service Division of the Legislative Council Secretariat  
in the letter dated 5 September 2013**

<b>Issue</b>	<b>The Administration's response</b>
<b>1. New section 15 of the Child Abduction and Custody Ordinance (Cap. 512) (CACO)</b>	
<p>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 right 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?</p>	<p>As recommended by the Law Reform Commission (LRC) in its Report on International Parental Child Abduction (the Report), the new section 15(3) proposed to be added to the CACO is modelled on sections 2(3) and 2(6) of the Children (Scotland) Act 1995. While LRC noted that it is a criminal offence under the UK Child Abduction Act 1984 for a person connected with a child to remove the child out of the UK without appropriate consent, LRC maintained the view that parental child abduction in Hong Kong should not be criminalised.</p> <p>The proposed new section 15(3) is intended to be enforced through an application for a prohibition order under the proposed new section 15(4). Similar to other court orders, breach of a prohibition order may constitute contempt of court, sanction of which ranges from a fine to a term of imprisonment.</p>

Issue	The Administration's response
<b>2. New section 15 to 18 of the CACO</b>	
<p>(a) Regarding the Court of First Instance's (CFI's) 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 has 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?</p>	<p>Order 121 of the Rules of the High Court (Cap. 4 sub. leg. A) (RHC) governs applications under the CACO. In the absence of specific provisions, the general rules in the RHC will apply to regulate the practice and procedure to be followed in the High Court<sup>3</sup>. Applications under the new sections 15 to 18 to be added to the CACO are to be made <i>ex parte</i>. Under Order 32, rule 6 of the RHC, the court may set aside an order made <i>ex parte</i>. Further, according to the judgment of the High Court in <i>Seapower Resources International Ltd. and Others v. Lau Pak Shing and Others</i>, HCA 10715/1993, it is a matter of discretion of the court which granted the <i>ex parte</i> order whether to vary or discharge the <i>ex parte</i> order.</p> <p>We therefore consider it not necessary to include additional provisions in the Bill concerning the CFI's power to vary or discharge a prohibition order, location order or recovery order.</p>
<p>(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</p>	<p>Under section 12 of the CACO, the Rules Committee of the High Court "may make rules of court for giving effect to this Ordinance as appears to the Committee to be necessary or expedient." Order 121 of the RHC contains rules which deal specifically with applications for return of a child and declaration of wrongful removal under the Convention on the Civil Aspects of International Child Abduction (the Hague Convention). It is envisaged that additional rules or</p>

<sup>3</sup> Order 1, rule 2(2) of the RHC

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<p>applications under the new sections 15 to 17?</p>	<p>further amendments to Order 121 will be made to deal with the procedure for applications for the new orders under the proposed new sections 15, 16 and 17. The Bill, if enacted, will only come into operation on a day appointed by the Secretary for Labour and Welfare. The Administration will keep in view that Rules Committee has made the necessary rules before the new provisions are brought into force.</p>
<p><b>3. New section 20 of the CACO</b></p>	
<p>(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 <i>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.</i> Article 31 of the Basic Law (BL) provides that <i>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</i></p>	<p>Under BL 31, holders of valid travel documents are free to leave Hong Kong without special authorization unless restrained by law. According to Article 8(3) of the HKBoR, the right to liberty of movement and freedom to leave Hong Kong may be subject to restrictions which are provided by law, are necessary to protect the rights and freedoms of others and are consistent with the other rights recognized in the HKBoR.</p> <p>The power to detain a child will be expressly provided by law under the proposed new section 20 of the Bill. The power will not be exercised unless the relevant conditions prescribed in the section are satisfied. In particular, the power will only be exercised by an authorized officer who reasonably suspects that the child is about to be, or is being, removed out of Hong Kong in breach of a stop order, or a pending application for a prohibition order, of which the Director of Immigration has been notified.</p> <p>We consider that the exercise of the power to detain a child will be a reasonable restriction on the right to liberty of movement of the child so as to give effect to a</p>

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<p><i>restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization.</i> Article 8(1) and (2) of the Hong Kong Bill of Rights (HKBoR) provides that (1) <i>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.</i> 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.</p>	<p>prohibition order or recovery order. Stopping a child from being abducted and keeping the child in a place of safety pending the arrival of the appropriate person is a proportionate measure to prevent contravention of the relevant court order and protect parents' lawful rights of custody of, or access to, the child. The proposed measures also serve to safeguard the child's interest, preventing the child from being taken away from the custodial parent and home jurisdiction. We therefore consider that the proposal to keep the child temporarily in a place of safety while awaiting the arrival of the appropriate person is in conformity with the HKBoR and the BL.</p>
<p>(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</p>	<p>At present, Immigration Officers 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. LRC considered such arrangement insufficient as it may leave the abducting parent free to make further attempts to leave Hong Kong with the child by other means and such situation is clearly not in the best interest of the child. Balancing the possible short-term trauma to the child of being held by the</p>

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<p>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?</p>	<p>authorities in a place of safety pending the arrival of the other parent and the long-term trauma to the child of being taken away, possibly permanently, from the custodial parent and the home jurisdiction, LRC considered that detaining the child may be necessary to prevent the child from being removed from the jurisdiction.</p>
<p>(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)?</p>	<p>An authorized officer's power to detain under the proposed new section 20 of the Bill may only be invoked if the child is being removed out of Hong Kong in breach of a stop order, or a pending application for a prohibition order, of which the Director of Immigration has been notified and on satisfaction of the specified conditions as stipulated in section 20(2). Under the proposed new section 19 (9), the notification must be given in a manner and form specified by, and accompanied by supporting documents required by the Director. A prohibition order is made subject to terms specified in the order. If the order contains a term that the child can be removed out of Hong Kong with the consent of the custodial parent, then the other parent who would like to take the child out of Hong Kong will need to obtain the custodial parent's written consent and ask the Court to certify that the terms specified in the prohibition order have been complied with (new s.19(7)(e)). That other parent should then give notification to the Director of Immigration according to the proposed new section 19.</p> <p>Anyone detained in Hong Kong may pursue <i>habeas corpus</i> application under section 22A of the High Court Ordinance (Cap.4) (HCO) seeking release from what they allege to be an unlawful detention. Any person aggrieved by an administrative decision may also seek to challenge that decision by way of an</p>



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	application for judicial review under section 21K of HCO.
<p>(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?</p>	<p>The policy intent of the proposed power to detain is to prohibit a child from being wrongfully removed from Hong Kong, so that the child can be returned to the appropriate person. LRC does not propose in the Report to go so far as to have a general power of arrest.</p> <p>If the power to detain is invoked, it is envisaged that the child would normally be stopped at an Immigration Department checkpoint at the Airport, or a ferry pier or land border crossing point. The police would initially take the child to a suitably comfortable and secure room at a nearby police post or police station, e.g. an interview room, office or waiting room for further follow-up actions. As proposed by LRC, female officers would also be called in to assist in those cases and explain to the child about the situation. We do not anticipate strong resistance from the child in those cases.</p> <p>Section 40(1) of the Interpretation and General Clauses Ordinance (Cap.1) provides that: "Where any Ordinance confers upon any person power to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.". Further, at common law, a statutory power will be construed as impliedly authorizing everything that can fairly be regarded as incidental or consequential to the power itself; and this doctrine is not applied narrowly. In the unlikely event that the child resists an authorized officer executing the functions under the proposed new section 20 of the Bill, reasonable force may</p>

Issue	The Administration's response
	<p>be used to restrain the movement of the child in order to take the child to a place of safety pending the child's return to the appropriate person.</p>
<p>(e) Article 5(4) of HKBoR provides that <i>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.</i> Similarly, Article 37(d) of the Child Convention provides that <i>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.</i> It is noted that the Bill does not provide for proceedings specifically for challenging the lawfulness of the proposed detention.</p>	<p>In addition to the remedy of judicial review against an authorized officer's exercise of the power to detain a child, the child and his or her parent or legal guardian who is aggrieved by the detention may have recourse to the courts by way of the prerogative writ of <i>habeas corpus</i> to challenge the lawfulness of the detention.</p> <p>In <i>Yau Kwong Man v Secretary for Security</i> HCAL 1595/2001, 9 September 2002, the Court of First Instance held that the rights intended to be protected by Article 5(4) of the HKBoR are the rights contained in the prerogative writ of <i>habeas corpus</i> and that, in respect of the 'lawfulness' of the continued detention of the applicants (who were young offenders) and those in their position, <i>habeas corpus</i> proceedings may be employed effectively and fully to protect their rights both under the BL and Hong Kong's municipal statutes (see paragraphs 115 to 127 of the judgment). In <i>A v Director of Immigration</i>, CACV 314/2007, 18 July 2008, at paragraph 70, the Court of Appeal agreed with Hartmann J in HCAL 100/2006 that proceedings by way either of judicial review or <i>habeas corpus</i> are capable of adequately meeting the requirements of Article 5(4) of the HKBoR.</p>

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<p>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?</p>	
<p>(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.</p>	<p>The aim of the proposed power to detain is to return the child to the appropriate person so as to prevent any contravention of the relevant court order. Upon detaining a child at the immigration checkpoint, the police officer must as soon as practicable take the child to, and keep the child in a place of safety for return to the appropriate person. If the appropriate person cannot be contacted within a reasonable time, the Director of Social Welfare is to take follow-up actions as appropriate. Administrative guidelines will be issued to facilitate interdepartmental coordination in the implementation of the provisions of the Bill and other relevant arrangements.</p>
<p>(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).</p>	<p>Follow-up actions that could be taken by the Director of Social Welfare may include: liaising with the custodial parent, providing the Police with relevant information to facilitate the return of child to the appropriate person if the abducted child is involved in cases known to Social Welfare Department; providing counselling to the child and the family; facilitating discussions among parents over the care arrangements of the child, etc..</p>

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	<p>If the court has made a recovery order under the proposed new s.17 and includes directions about the day-to-day care of the child under the proposed new s.17(2)(g), the Director of Social Welfare will comply with those directions.</p>
<p>(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?</p>	<p>Under the proposed new section 20(6) and (8), a child is to be kept in a place of safety until the arrival of and return of the child to the appropriate person. It is envisaged that a Police Officer would initially take the child to a suitably comfortable and secure room at a nearby police post or police station, e.g. an interview room, office or waiting room for further follow-up actions. The Police would be responsible for providing a reasonable level of care and protection to the child, including food, drink, security, shelter and facilitating medical treatment as appropriate.</p> <p>In the unlikely event that the appropriate person cannot be contacted within a reasonable time and the child is admitted to a place listed in the Schedule to the Protection of Children and Juveniles (Place of Refuge) Order (Cap. 213 sub. leg. B), the persons in charge of the place will provide day-to-day care to and take care of the welfare of the child until the child is returned to the appropriate person.</p> <p>Administrative guidelines will be issued to facilitate interdepartmental coordination in the implementation of the provisions of the Bill and other relevant arrangements.</p>