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

Purpose

This paper reports on the deliberations of the Bills Committee on Child Abduction Legislation (Miscellaneous Amendments) Bill 2013 ("the Bill").

Background

2. The issue of guardianship and custody of children was referred to the Law Reform Commission ("LRC") by the then Attorney General and the then Chief Justice in 1995. 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. In April 2002, LRC published the Report on International Parental Child Abduction ("the LRC Report") which was the second in a series of four reports published by LRC on guardianship and custody of children in Hong Kong.

3. Having examined the provisions of Hong Kong's civil and criminal law relating to child abduction as well as the relevant statutory provisions which apply to other common law jurisdictions, and taking into account the findings of its consultation exercise, LRC made six recommendations in the Report to further enhance the protection for children against abduction and improve existing legislation. The LRC's recommendations are summarised below -

- (a) *Recommendation 1* : A provision in primary legislation should be made to restrict the removal of a child from the jurisdiction without consent of the parent who has custody, or control of the child's residence, or with whom the child has regular contact.
- (b) *Recommendation 2* : The court should be empowered to order the

disclosure of the whereabouts or location of the child (i.e. the location order).

- (c) *Recommendation 3* : The court should be empowered to make recovery orders requiring the return of a child.
- (d) *Recommendation 4* : Provisions should be introduced to empower (i) immigration officers to hold a child suspected of being removed from the jurisdiction in breach of a court order until police officers arrive to take the child to a place of safety; and (ii) police officers to hold such child 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 ("SWD") can be notified.
- (e) *Recommendation 5* : The retention of the status quo in relation to whether the court should be able to order the surrender of passports of a child or the persons concerned (i.e. there is no need to empower the court making such order in Hong Kong).
- (f) *Recommendation 6* : It should be parents' responsibility to notify the Immigration Department ("ImmD") that a court order has been made prohibiting the removal of their child from Hong Kong. It should be at the discretion of the parents whether ImmD should be notified of such order or not. If one parent has notified ImmD of such order, it should be mandatory that the parent shall inform the other parent of the fact of notification.

4. According to the Administration, it generally agreed with the principles advocated by LRC, and was prepared to take forward all the recommendations with slight modifications; and except for Recommendation 5, legislative amendments are required to implement the LRC's recommendations.

The Bill

5. The Bill seeks to expand the scope of application of the Child Abduction and Custody Ordinance (Cap. 512) ("CACO") to strengthen the powers of the courts and law enforcement agencies in combating child abduction and to provide for better implementing the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on 25 October 1980 ("the Hague Convention")¹, and for related matters.

¹ The Hague Convention is implemented in Hong Kong by CACO which came into effect on 1 September 1997.

6. The legislative amendments in the Bill are based on the recommendations made in the LRC Report. The main amendments to CACO are as follows -

- (a) empowering the Court of First Instance ("CFI") to make a prohibition order against removing a child out of Hong Kong without consent, a location order requiring information about a child's whereabouts and a recovery order for return of a child;
- (b) requiring a parent who has notified the Director of Immigration ("D of Imm") that a prohibition order or a recovery order had been made by the court to inform the other parent as far as practicable that such notification has been given; and
- (c) empowering 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.

7. The Bill will come into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

The Bills Committee

8. At the House Committee meeting on 4 October 2013, Members formed a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**. Under the chairmanship of Hon Dennis KWOK, the Bills Committee has held six meetings with the Administration to study the Bill. The Bills Committee has also invited public views on the Bill. A list of organisations which have provided written submissions to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

Proposed three-part structure of CACO

9. Clause 9 of the Bill adds new provisions to CACO to, among others, empower CFI to make the following orders to tackle the problem of cross-border child abduction -

- (a) a prohibition order against removing a child out of Hong Kong

without consent (proposed new section 15)²;

- (b) a location order requiring information about a child's whereabouts or other circumstances relevant to locating the child (proposed new section 16)³;
- (c) a recovery order, which may require the return or delivery of a child to a specified person, and may authorise a police officer to recover the child and exercise certain powers for finding the child (proposed new section 17)⁴; and
- (d) an 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 (proposed new section 18).

Clause 9 also seeks to include new provisions to deal with the notification of a stop order (i.e. a prohibition order or recovery order), or of a pending application for a prohibition order, to be given to D of Imm and other parties (proposed new section 19)⁵, and to empower a police officer or immigration officer to detain a child being removed out of Hong Kong on satisfaction of the specified conditions (proposed new section 20)⁶.

10. The Bills Committee notes that the object of the existing CACO is to give effect to the Hague Convention and that CFI has the jurisdiction under section 6 of CACO to hear and determine an application under the Hague Convention. Pointing out that most proceedings concerning custody or access order are dealt with in the Family Court, members have suggested that the Family Court should also be empowered to grant a prohibition order under the proposed new section 15 of CACO.

11. In the light of members' views, the Administration has consulted the Judiciary on the above suggestion. According to the Administration, the Judiciary notes that CACO is currently under the exclusive jurisdiction of CFI and that the Bill includes new and general provisions to prevent parental child abduction cases that do not concern the operation of the Hague Convention. In this context, the Judiciary has questioned whether the extension of the power

² The proposed new section 15 of CACO relates to Recommendation 1 made in the LRC Report.

³ The proposed new section 16 of CACO relates to Recommendation 2 made in the LRC Report.

⁴ The proposed new section 17 of CACO relates to Recommendation 3 made in the LRC Report.

⁵ The proposed new section 19 of CACO relates to Recommendation 6 made in the LRC Report.

⁶ The proposed new section 20 of CACO relates to Recommendation 4 made in the LRC Report.

to the District Court ("DC") to make prohibition orders under CACO would cause confusion to legally qualified and lay court users. Having regard to the Judiciary's concern, the Administration proposes to amend the Bill with a view to introducing a three-part structure of CACO to clearly differentiate provisions relating to Hague Convention cases from those governing cases that do not concern the operation of the Hague Convention. The gist of each proposed part is as follows -

Part	Scope
Part 1 : Preliminary	Interpretations
Part 2 : Provisions giving effect to the Hague Convention	Includes existing provisions of CACO and the proposed provisions in the Bill relating to the handling of Hague Convention cases (e.g. the proposed location and recovery orders). Matters contained in Part 2 fall under the exclusive jurisdiction of CFI.
Part 3 : Other provisions combating child abduction in Hong Kong	Includes the proposed new provisions to combat parental child abduction that do not concern the operation of the Hague Convention (e.g. notification of prohibition order, and the power to detain a child being removed out of Hong Kong in breach of a prohibition order). Both CFI and DC will have jurisdiction for matters contained in Part 3.

The Administration has advised that the Judiciary agrees with the proposal to divide CACO into three distinct parts for greater clarity. Members express support for the proposed three-part structure of CACO. The Administration will move Committee Stage amendments ("CSAs") to the Bill to this effect.

12. The Administration has further proposed that, after taking into account members' views and having consulted the Judiciary, DC be empowered to grant a prohibition order for parental child abduction cases that do not concern the operation of the Hague Convention. As both CFI and DC will have the power to make prohibition orders under the proposed Part 3 of CACO, for the sake of clarity, the Administration will add a definition for "court" in the proposed revised section 22(8) to set out the different circumstances under which CFI or

DC may make a prohibition order. The Administration will also add a new section 25 to the proposed Part 3 of CACO such that the Rules Committee constituted under section 55 of the High Court Ordinance (Cap. 4) ("HCO") or the District Court Rules Committee constituted under section 17 of the District Court Ordinance (Cap. 336) may make rules of court for giving effect to the proposed Part 3 of CACO as appears to the Committees to be necessary or expedient. According to the Administration, DC (including Family Court) may make a court order under relevant sections of CACO. Members support the Administration's proposals.

Making a prohibition order, location order and recovery order in the relevant proceedings

Applicability of and application for a prohibition order

13. At present, there is no provision in CACO 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 proposed new section 15(3) of CACO of the gazetted version of the Bill provides that a person must not remove the child out of Hong Kong without consent if there is a court order or there are proceedings pending in court. The proposed new section 18 of CACO of the gazetted version of the Bill seeks to empower CFI to make a mirror-order prohibiting removal of a child 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.

14. Members have enquired how the situation can be dealt with where there is no court order or no proceedings pending in court. The Administration has explained that under the proposed new section 15 of the gazetted version of the Bill, 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. As long as a person files a divorce petition under the relevant matrimonial ordinances⁷ 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 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 new section 15 of CACO.

⁷ 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).

15. Members have also expressed concern about whether the lead time for seeking legal aid for matrimonial proceedings would have prolonged an application of a prohibition order preventing the removal of a child out of Hong Kong without appropriate consent.

16. The Administration has pointed out that 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. According to the Administration, there are urgent cases whereby legal aid is granted on the same day of the application. As an additional safeguard, the Director of Legal Aid is empowered under Regulation 7 of the Legal Aid Regulations (Cap. 91 sub. leg. A) 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 Administration has added that application for legal aid is not expected to obstruct the application for a prohibition order in those cases.

17. The Law Society of Hong Kong ("the Law Society") has pointed out in its submission to the Bills Committee that the proposed new section 18 of the gazetted version of the Bill is restricted to circumstances which only enable a person to exercise his rights of access to the child who has been taken to Hong Kong temporarily under an order of the home state of the child. There could be other situations in which a child is legitimately brought to Hong Kong on a temporary basis, such as an overseas travel. It has suggested that the scope of application of the proposed new section 18 be expanded to cover "any other purposes" and that the application may be made by persons other than the Secretary for Justice ("SJ").

18. The Administration has advised that in the light of the experience of the Department of Justice ("DoJ") in dealing with relevant cases as the Central Authority of the Hague Convention in Hong Kong, it is not envisaged that there will be cases under the proposed new section 18(2)(a) of the gazetted version of the Bill, i.e. where the relevant order of a Contracting State is made for a purpose other than to enable a person in Hong Kong to exercise the rights of access to the child. As a general rule in dealing with cases under the Hague Convention, it is expected that the Central Authority of the other Contracting State would contact DoJ for assistance in those cases. Thus, it would be

sufficient for SJ to make such application under the proposed new section 18.

Applicability of a location order

19. The Law Society has suggested in its submission that a location order should be available to require the person concerned to disclose information, not only on a child, but also on a person who has wrongfully abducted the child.

20. The Administration has explained that the location order under the new section 16 of CACO of the gazetted version of the Bill is proposed for better handling of Hague Convention cases. It has further clarified that "applicable information" is defined under the proposed new section 16 as "information about the child's whereabouts or other circumstances relevant to locating the child". In other words, should the court consider such information (e.g. about a person who has wrongfully abducted the child) relevant to locating the child, the court is empowered to order such disclosure under the proposed new section 16(2)(a).

21. Some members have expressed concern that the 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 of the child) or to the disadvantage of the child. These members have suggested that limitations or conditions on the use of information provided to the court should be imposed. Taking into account the concern of members, the Administration has proposed to add a provision in the proposed revised section 16 to the effect that the court may provide in a location order that applicable information provided in compliance with a location order may only be used for the proceedings for the return of the child under the Hague Convention that have commenced, or are about to be commenced, in Hong Kong or in another Contracting State.

Applicability of a recovery order

22. Under the proposed new section 17 of CACO of the gazetted version of the Bill, CFI may authorise or direct a police officer to recover the child and exercise certain powers for finding the child. Members note the Law Society's view that the proposed new section 17 should be revisited to cover immigration officers and also to empower the law enforcement agencies to stop and detain the abductor.

23. The Administration has advised that the recovery order under the proposed new section 17 is applicable in proceedings under the Hague Convention that are commenced in Hong Kong for the return of a child to another Contracting State. It seeks to empower CFI to make a recovery order,

which may require the return or delivery of a child to a specified person, and may authorise a police officer to recover the child and exercise certain powers for finding the child. The Administration has explained that under the proposed new section 20 the gazetted version of the Bill, if a recovery order is made and is served to D of Imm, an authorised officer may exercise the power to detain a child if the officer reasonably suspects that the child is about to be, or is being removed out of Hong Kong. The child would be detained and would be returned to the person specified in the recovery order. The Administration has pointed out that CFI may authorise or direct the Director of Social Welfare ("DSW") to take follow-up actions that DSW considers appropriate, if the specified person cannot be contacted within a reasonable time.

Whether CFI should be empowered to vary orders made under CACO

24. Noting that there is no provision in the Bill empowering CFI to vary, suspend or discharge a prohibition order, location order or recovery order made under the proposed new sections 15 to 18 of the gazetted version of the Bill, members have examined the need to empower CFI to do so and whether such empowering provision should be included in the Bill.

25. The Administration has explained that Order 121 of the Rules of the High Court (Cap. 4 sub. leg. A) ("RHC") governs applications under CACO. In the absence of specific provisions, the general rules in RHC will apply to regulate the practices and procedures to be followed in the High Court. Applications under the proposed new sections 15 to 18 to be added to CACO may be made *ex parte*. According to the judgment of the High Court in *Seapower Resources International Ltd and Others v Lau Pak Shing and Others*, HCA 10715/1993, it is a matter of discretion of the court which granted the *ex parte* order whether to vary or discharge the *ex parte* order. Further, Order 32, rule 6 of the RHC provides that the court may set aside an order made *ex parte*. The jurisdiction under Order 32, rule 6 also enables the court to vary the order. The Administration therefore considers it not necessary to include additional provisions in the Bill concerning CFI's power to vary or discharge a prohibition order, location order or recovery order.

26. Notwithstanding the Administration's explanation, some members have maintained the view that the Administration should consider providing explicitly in the Bill such empowering provision, because CFI would need to make the relevant orders in *inter parte* hearing. The Administration has subsequently advised that taking into account members' views and having regard to the provisions of similar effect in other matrimonial ordinances, it has consulted the Judiciary on the suggestion to include a new provision to

empower CFI specifically to vary, suspend or discharge orders made by it under CACO. According to the Administration, the Judiciary agrees to the suggestion. In the circumstances, the Administration will move CSAs to respectively add new provisions to the proposed revised section 18, and the proposed section 22(4) and (5)⁸ under the proposed Part 3, to state specifically that the court that made the order may vary, suspend or discharge a mirror order or a prohibition order made under the relevant sections. In the view of the Administration, the proposed amendments 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. As regards location orders and recovery orders made under CACO, the Administration has pointed out that the aim is to locate and recover a child in 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, the Administration has advised that parties to a child in the Hague Convention cases involve only the abducting parent and the left-behind parent, if the parties could apply for variation, suspension or discharge of the location order and recovery order even after an *inter parte* hearing, the abducting party may make use of this procedure to unnecessarily prolong the period for finding the child. This will go against the best interests of the child and frustrate the obligation to the Hague Convention to act expeditiously in proceedings for the return of children. Therefore, the aforementioned CSAs would not apply to the location and recovery orders.

Notification of prohibition orders and recovery orders to D of Imm

27. The proposed new section 19 of CACO of the gazetted version of the Bill provides for details and requirements relating to the notification of prohibition orders or recovery orders to D of Imm (including notification of the pending applications for such orders).

28. Members note that once an application for a prohibition order has been filed with CFI or should a prohibition order be made by CFI, under the proposed new section 19(3), the parent who files the application may notify ImmD to prevent the removal of the child from Hong Kong without appropriate consent. Taking into account members' concern and with reference to the court practice, the Administration will move CSAs to the Bill to the effect that a pending application for a prohibition order is one for which the application concerned has already been filed and a hearing date has been fixed with the

⁸ Under the proposed three-part structure of CACO, the proposed new section 15 of the gazetted version of the Bill is deleted and is reproduced in the new section 22 under the proposed Part 3 for parental child abduction cases not invoking the operation of the Hague Convention in the proposed Part 3 of CACO.

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. The Administration will incorporate the abovementioned amendment in the proposed new section 19A and new section 23 of CACO⁹.

29. Some members have enquired about the practical arrangement of notifying ImmD of a court order under CACO to prohibit the removal of a child out of Hong Kong without consent. Some members have suggested that a mechanism should be established for notifying ImmD of the name of a child whose family is involved in domestic violence or a child on whom an application for a court order concerning the rights of custody or a court order prohibiting removal of the child out of Hong Kong without appropriate consent has been submitted or is pending determination by the court.

30. According to the Administration, the policy intent is that if a prohibition order has been made, or an application for a prohibition order is pending, the applicant may notify ImmD of the order or the pending application to invoke the power to detain the child. The Administration has advised that upon the granting of a court order prohibiting the removal of a child out of Hong Kong, the parent concerned may inform ImmD of the order. The personal particulars of the child who is the subject of the order will then be placed on the ImmD's computer system. When a child is presented for departure examination at the control point, the immigration officer will, as a matter of operational procedure, examine the travel document of the child, verify his/her identity by comparing the facial appearance against the photo affixed on the travel document, and verify the child's personal particulars against the computer record to identify whether the child is the subject of the order. In case of doubt, the child and/or the accompanying person will be examined to ascertain the identity of the child, and whether the necessary leave of the court is obtained or terms specified in the order are fulfilled. If the immigration officer considers that the child is being removed out of Hong Kong in breach of the relevant order, the officer will not allow the child to depart.

Detention of a child being removed out of Hong Kong in breach of a prohibition order

31. The proposed new section 20 of CACO of the gazetted version of the Bill seeks to empower immigration officers and police officers to detain a child who

⁹ Under the proposed three-part structure of CACO, the proposed new section 19 of the gazetted version of the Bill is deleted and reproduced in a new section 19A governing the notification of recovery order for Hague Convention cases, and the provisions concerning notification of prohibition order for parental child abduction cases not invoking the operation of the Hague Convention is moved and added to the new section 23 in the proposed Part 3 of CACO. No changes are proposed to the notification arrangements for both orders as set out in the proposed new section 19A.

is reasonably suspected to be, or is being, removed from Hong Kong in breach of a court order of which D of Imm has been notified. The child detained would, as soon as practicable, be taken to and kept in a place of safety until the arrival of, and the return of the child to an appropriate person, or until follow-up actions are taken by DSW.

32. Noting that the Bill does not expressly empower an authorised officer to arrest the relevant child (or the accompanied parent), members have expressed concern whether the proposed power of detention under CACO is consistent with the relevant provisions in the Basic Law and the Hong Kong Bill of Rights about the freedom of Hong Kong residents to travel and to enter or leave Hong Kong. Concern has also been raised about how law enforcement agencies would determine whether a child who is apparently leaving Hong Kong alone is being abducted within the meaning of the Bill. Members have also observed that Article 37(b) of the Convention on the Rights of the Child, to which Hong Kong 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." Some members have asked why the Administration has not adopted other alternative measures in place of the power to detain a child and whether it is contemplated that force could be used by an authorised officer in effecting the detention if the relevant child runs away or resists such detention.

33. The Administration has explained that the policy intent of the proposed power to detain is to prohibit a child, irrespective of whether the child is leaving Hong Kong alone or is accompanied by another person, from being wrongfully removed from Hong Kong, so that the child can be returned to the appropriate person. The Administration has stressed that the power to detain a child will not be exercised unless the relevant conditions prescribed in the proposed new section 20¹⁰ of the gazetted version of the Bill are satisfied. It is envisaged that the child would normally be stopped at an ImmD 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 until the arrival of and return to the appropriate person. Female officers would also be called in to assist in those cases and explain to the child about the situation. ImmD, the Police and SWD have looked into and coordinated among themselves on the workflow and arrangements of the enforcement of a recovery order or a prohibition order. Details will be set out in administrative guidelines to ensure suitable coordination among the departments concerned. The gist of the administrative guidelines is in

¹⁰ Under the proposed three-part structure of CACO, the proposed new section 20 is deleted, reproduced and renumbered as new section 20A governing Hague Convention cases in the proposed Part 2 of CACO, and a similar provision is also reproduced in the new section 24 in the proposed Part 3 of CACO for parental child abduction cases not invoking the operation of the Hague Convention.

Appendix III. Members have called on the Administration to provide the stakeholders with the administrative guidelines to facilitate their understanding of the process and procedures concerned.

34. The Administration has further advised that it does not anticipate strong resistance from the child in the case of being detained under CACO. The Administration has also pointed out that 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 authorising 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 authorised officer executing the functions proposed under the Bill, reasonable force may 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.

35. In the view of the Administration, 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 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 interests, preventing the child from being taken away from the custodial parent and home jurisdiction. The Administration therefore considers 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 Hong Kong Bill of Rights and the Basic Law.

36. Some members have expressed concern whether there are remedies available to the relevant parent or relevant child if the detention turns out to be a wrongful one. The Administration has pointed out that if a child or his parent or legal guardian is aggrieved by the detention under the Bill, they may have recourse to the courts by way of the prerogative writ of *habeas corpus* to challenge the lawfulness of the detention. Under section 22A of HCO, an application may be made to CFI for the person alleged to be detained, or by any other person on that person's behalf. As *habeas corpus* can generally be invoked in cases of persons being unlawfully detained, the Administration does not consider it necessary to set out the right of the child (or his/her parent or legal guardian) to pursue *habeas corpus* application under section 22A of HCO.

Moreover, any person aggrieved by an administrative decision may also seek to challenge that decision by way of an application for judicial review under section 21K of HCO.

Keeping of a child in a place of safety

37. A new definition of "place of safety" is added to section 2 of CACO under clause 4 of the gazetted version of the Bill. Members have expressed concern about the scope of a place of safety and how the welfare of the child concerned would be safeguarded.

38. According to the Administration, 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 (e.g. an interview room, office or waiting room in a nearby police post or police station) for return to the appropriate person. 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. In the unlikely event that the appropriate person cannot be contacted within a reasonable time, the child will be 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. Members have requested the Administration to set out the appropriate arrangements for the child being kept in a place of safety in the administrative guidelines. The Administration has assured members that administrative guidelines will be issued to facilitate interdepartmental coordination in the implementation of the provisions of the Bill and other relevant arrangements.

Definition of a child

39. Members have noted that the meaning of a child is not defined in the Bill nor CACO. They have expressed concern about the implementation of the Bill in the absence of such a definition. Specifically, some members have sought clarification on the age limit of a child for the purpose of the Bill. Some members have also enquired whether the Bill is applicable to a child born out of wedlock and an adopted child.

40. The Administration has explained that under the proposed new section 15 of CACO of the gazetted version of the Bill, a child includes "a child of the family as defined by section 2(1) of the Matrimonial Proceedings and Property Ordinance (Cap. 192)" ("MPPO"). Under MPPO, "child of the family", in relation to the parties to a marriage, means a child of both those parties; and any

other child who has been treated by both those parties as a child of their family". The term "child" is defined under section 2(1) of MPPO, which stipulates that "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". The Administration has further explained that the proposed new section 15(2) of CACO of the gazetted version 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, a "child" in relation to the proposed new section 15 covers any child, born within or out of wedlock, adopted or natural child, who is under the age of 18.

41. Members, however, have observed that Article 4 of the Hague Convention states that "The Convention shall cease to apply when the child attains the age of sixteen years." They have enquired about the age discrepancy in respect of a child under the Bill and the Hague Convention. The Administration has advised that under the proposed new sections 16 and 17¹¹ of CACO of the gazetted version of the Bill, CFI 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. In the light of the provisions of the Hague Convention, these two proposed new sections are applicable to a child under the age of 16 only.

42. In view of the introduction of the proposed three-part structure of CACO, the Administration has subsequently advised that it will add the definition of "child" in the proposed revised section 22(8) for the purpose of the proposed Part 3 of CACO, cross-referencing to various ordinances¹² currently empowering CFI and DC to make orders concerning the custody of and access to a child. According to the Administration, although different expressions are used in the respective ordinances to refer to a "child" under the age of 18, the term is proposed to adopt the same meaning as the equivalent in the respective ordinances, and this would ensure that the existing terminology denoting a person under the age of 18 and the definition of "child" in the relevant ordinances is not affected.

¹¹ The Administration proposes to move amendments to delete the proposed new section 17 of the gazetted version of the Bill and reproduce it as the new section 18A.

¹² The ordinances include the Guardianship of Minor Ordinance (Cap. 13), the Separation and Maintenance Orders Ordinance (Cap. 16), the Matrimonial Causes Ordinance (Cap. 179) and the Matrimonial Proceedings and Property Ordinance (Cap. 196). Application for custody/access may also be made in wardship proceedings brought under the High Court Ordinance (Cap. 4).

Recognition and enforcement of Hong Kong matrimonial court orders and the Hague Convention in the Mainland, Taiwan and Macao

43. Having regard to the increasing number of cross-boundary families, members have expressed concern about the support and assistance available to a child who has been abducted to the Mainland, Taiwan and any jurisdiction which is not a Contracting State to the Hague Convention. Some members have also expressed concern about the implementation of court orders issued in Hong Kong in relation to CACO in these places.

44. The Administration has advised that the current Mainland law does not expressly provide for the recognition on the Mainland of a divorce, maintenance or custody order granted by the Hong Kong courts, or for its enforcement on the Mainland. Nonetheless, there have been precedents whereby the courts in Taiwan recognised and enforced matrimonial judgments made in Hong Kong. The Administration has further advised that DoJ will continue to discuss with the Mainland authorities 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.

45. The Administration has further advised that 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. The Police may also pass the contacts for the parents' follow-up with the relevant authorities. As in other cases of Hong Kong residents in distress outside Hong Kong, the left-behind parent may also contact ImmD for assistance.

46. As both Hong Kong and Macao are Contracting Parties to the Hague Convention, members have enquired about the arrangements for the handling of parental child abduction cases between both places. The Administration has advised that mutual arrangements for handling of parental child abduction involving the Hong Kong Special Administrative Region and the Macao Special Administrative Region will be discussed. Nonetheless, the Administration has pointed out that since the return to the motherland, Hong Kong has not made such request for Macao's assistance so far or vice versa.

Criminalisation of parental child abduction

47. Under the proposed new section 15(3) of CACO of the gazetted version of the Bill, 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. Some members have noted with concern that contravening the requirement was not a criminal offence and have asked the Administration to reconsider whether to criminalise such act. These members have also suggested to invite written views from relevant organisations and groups as to whether there would be a need to criminalise the act of parental child abduction.

48. The Administration has explained that while LRC noted that it is a criminal offence under the United Kingdom ("UK") Child Abduction Act 1984 for a person connected with a child to remove the child out of UK without appropriate consent, LRC considered that parental child abduction should not be so criminalised along the lines of the UK Child Abduction Act 1984, and proposed other recommendations to foil the attempt to remove the child from Hong Kong. Before coming to such conclusion, LRC considered the existing criminal law and civil law in preventing the removal of a child from Hong Kong, including relevant provisions in the Crimes Ordinance (Cap. 200), the Offence against the Person Ordinance (Cap. 212) and the Protection of Children and Juveniles Ordinance (Cap. 213), and pointed out that a parent can be found guilty of kidnapping his own child and false imprisonment under common law; LRC also quoted a judgment of the House of Lords in *R v D*, [1984] 1 AC 778, 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 did not consider that prosecuting parents for the common law offence of kidnapping would be useful, except in the most blatant cases. As to other offences, LRC opined that prosecution would not be a useful or appropriate way to deal with cases of child abduction arising from parental disputes; or if the child is voluntarily accompanying the abducting parent, there may be difficulties in sustaining a prosecution. LRC therefore 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.

49. The Administration has further advised that it agrees with LRC that parental child abduction should not be criminalised along the lines of the UK Child Abduction Act 1984. The proposed power to detain a child when he or she is about to be removed out of Hong Kong in breach of a prohibition order is an improvement to the existing regime in, as well as a proportionate step to,

preventing the unlawful removal of a child by his/her parent. 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. 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. In view of this, the Administration does not consider it necessary to criminalise the act of parental child abduction at this stage.

50. Members generally consider the Administration's explanation acceptable. The Administration has added that it will keep track of the experience of implementing the Bill and reviewing the issue of criminalisation of parental child abduction in the context of the changing circumstances.

Views of the child and legal representation for children under CACO

51. Some members have expressed concern about whether the views of the child concerned can be brought to the court's attention. The Administration has explained that in family and matrimonial proceedings, the views of the child can be brought to the court's attention in a number of ways, including by being included in a social welfare officer's report; by appointment of a separate representative; by interviewing the child, etc. As stated in the "Guidance on Meeting Children" and the "Guidance on Separate Representation for Children in Matrimonial and Family Proceedings" issued by the Chief Justice in May and July 2012 respectively, which apply to children proceedings including proceedings under CACO, the court may at its discretion, meet with the child or appoint either the Official Solicitor or a guardian *ad litem* for any child where it is considered that such separate representation is appropriate. At present, when a defence under Article 13 of the Hague Convention has been raised (i.e. the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views), the court may order Official Solicitor to represent the child for parental child abduction cases under the Hague Convention. Similarly, should the court consider that meeting with the child or separate representation is in the best interests of the child in proceedings under the Bill, it may so order as appropriate.

Consequential and related amendments to other legislation

52. Parts 3 to 5 of the Bill set out the consequential and related amendments to existing ordinances. Under Part 3 of the Bill, Order 121 of RHC is to be amended to implement the proposed new section 21 of CACO regarding the stay of custody application pending the result of proceedings under the Hague Convention and to provide for the procedures for an application for a prohibition order under the proposed new section 18 of CACO. To better

protect the interests of children, a new rule is added to Order 121 to restrict the inspection and obtaining of copies of court documents filed in proceedings under CACO.

53. Under the existing rule 94(2) of the Matrimonial Causes Rules (Cap. 179 sub. leg. A), a party to the matrimonial proceedings may apply for an order prohibiting the removal of any child of the family, who is under the age of 18, out of Hong Kong. In line with the proposal in the proposed new section 15 of CACO, Part 4 of the Bill proposes to repeal rule 94(2) under subsidiary legislation and enact the provision in that rule into the principal Ordinance, i.e. the Matrimonial Causes Ordinance (Cap. 179).

54. Part 5 of the Bill seeks 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 proceedings under CACO. Taking into account members' views about the proposed section 5(1A) of Cap 287, the Administration has agreed to amend the provision to make it clear that the identity of the persons referred to in the judgment are kept anonymous for publication of the relevant proceedings.

55. Members have raised no other queries on the above consequential and related amendments to other legislation. Members also note that, consequent upon the introduction of the proposed three-part structure of CACO, the Administration will move CSAs to these three Parts of the Bill on cross-referencing to CACO.

Committee Stage amendments

56. Apart from CSAs to be moved by the Administration as elaborated in paragraphs 11, 12, 21, 26, 28, 42, 54 and 55 above, the Administration will, after taking into account members' suggestions, propose some technical and textual amendments to improve the clarity of the Bill.

Resumption of Second Reading debate

57. Subject to CSAs proposed by the Administration, the Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill.

Consultation with the House Committee

58. The Bills Committee reported its deliberations to the House Committee on 10 October 2014.

Council Business Division 2
Legislative Council Secretariat
12 November 2014

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

Membership list

Chairman Hon Dennis KWOK

Members Hon Albert HO Chun-yan
Hon TAM Yiu-chung, GBS, JP
Hon Ronny TONG Ka-wah, SC
Hon Cyd HO Sau-lan, JP
Hon Paul TSE Wai-chun, JP
Hon WONG Yuk-man
Dr Hon Fernando CHEUNG Chiu-hung

(Total : 8 members)

Clerk Miss Betty MA

Legal adviser Mr YICK Wing-kin

Date 2 July 2014

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

List of organisations which have provided written views to the Bills Committee

1. Against Child Abuse
2. Hong Kong Committee on Children's Rights
3. The Law Society of Hong Kong

Workflow and arrangement of the enforcement of a stop order under the proposed section 20¹ 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.

¹ Under the proposed three-part structure of CACO, the proposed new section 20 is deleted, reproduced and renumbered as new section 20A governing Hague Convention cases in the proposed Part 2 of CACO, and a similar provision is also reproduced in the new section 24 in the proposed Part 3 of CACO for parental child abduction cases not invoking the operation of the Hague Convention.

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 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.²

² In general, the Administration does 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.