

Legislative Council Brief

Child Abduction Legislation (Miscellaneous Amendments) Bill 2013

INTRODUCTION

At the meeting of the Executive Council on 9 July 2013, the Council ADVISED and the Chief Executive ORDERED that the proposed Child Abduction Legislation (Miscellaneous Amendments) Bill 2013 (the Bill), at **Annex A**, should be introduced into the Legislative Council (LegCo).

A

JUSTIFICATIONS

The LRC Report

2. In 1995, the then Attorney General and the then Chief Justice referred to LRC the topic of guardianship and custody of children. The Report on International Parental Child Abduction, published in April 2002, was the second in a series of four reports published by LRC on guardianship and custody of children. The first report in this series on Guardianship of Children, published in January 2002, concerned the law governing the appointment of guardians for children in the event of the death of one or both parents. The recommendations were followed up by the Labour and Welfare Bureau (LWB), resulting in the enactment of the Guardianship of Minors (Amendment) Bill 2012. The third report on the Family Dispute Resolution Process, published in March 2003, considered the various approaches that may be adopted in resolving family disputes and is being followed up by the Home Affairs Bureau. The fourth report on Child Custody and Access, published in March 2005, concerned the implementation of a new parental responsibility model to replace the existing custody and access arrangements in family law. The Government has decided to take steps to work out the legislative proposals and other implementation arrangements.

3. The Report on International Parental Child Abduction (the Report) focuses on international parental child abduction. This situation usually occurs when a relationship between two parents

breaks down and one of them, often in the face of a court order that he or she is unhappy with, takes the law into his or her own hands and absconds with the child to another jurisdiction. At present, the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention) provides an effective international mechanism to secure the prompt and safe return of children who have been wrongfully removed from one contracting State to another, and to ensure that the rights of custody and access under the law of one Contracting State are effectively respected in other Contracting States. The Hague Convention, to which Hong Kong is a party, is given the force of law in Hong Kong by the Child Abduction and Custody Ordinance (Chapter 512). The objective of the Report is to consider ways of improving the civil and criminal law protection against child abduction so as to better support the operation of the Hague Convention in Hong Kong.

4. The Report notes Hong Kong's positive performance under the Hague Convention in ensuring the speedy return of children abducted into Hong Kong, and considers the legal position for cases where either the child has been abducted to a non-Convention jurisdiction or has been abducted from a non-Convention jurisdiction into Hong Kong. LRC notes various measures available under the civil and criminal law to prevent abduction of a child from Hong Kong, or to seek his return once the child has been taken out of Hong Kong. At present, a custody or access order normally provides that a child should not be removed from Hong Kong unless the consent of the other parent has been obtained, or a written undertaking given to bring the child back to the territory. The Matrimonial Causes Rules (Chapter 179, sub. leg. A) allow a party involved in divorce or separation proceedings to apply for an injunction prohibiting the other parent from removing the child from Hong Kong. In certain cases where the child is made a ward of court under the High Court Ordinance (Chapter 4) or in need of care or protection order under the Protection of Children and Juveniles Ordinance (Chapter 213), provisions in relevant ordinances may be invoked to prevent the child from being abducted.

5. Having examined the provisions of Hong Kong's civil and criminal law relating to child abduction as well as the relevant civil and criminal statutory provisions which apply in other common law jurisdictions, and taking into account the findings of its consultation exercise, LRC sets out its recommendations for reform, which focus on prevention of the abduction of a child from Hong Kong, accepting that "the best chance of recovering the child is to prevent him from leaving the jurisdiction in the first place." With this in view, LRC is concerned that –

- (a) the only legislative provisions which deal specifically with the removal of a child from Hong Kong at present are contained in subsidiary legislation only¹. There is no provision in law which explicitly provides that parental consent is required before a child can be removed out of Hong Kong;
- (b) the Immigration Department (ImmD) and the Police do not have the power to hold a child who is reasonably suspected to be, or is being, removed from Hong Kong in breach of a court order. They only have the power to stop the child and turn the child away from the checkpoint.² The present arrangement is insufficient as this leaves 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 interests of the child; and
- (c) while it is at the discretion of the parents whether to notify ImmD that a court order has been made prohibiting the removal of the child from Hong Kong, the parent is not required to inform the other parent upon making the notification, giving rise to cases where the latter is not aware of the notification until arriving at the departure area and being stopped by the immigration officers.

6. Four out of the six recommendations (viz Recommendations 1, 4, 5 and 6) put forward by LRC relate to the prevention of removal of a child out of Hong Kong. They are –

- (a) Recommendation 1 : Removal of the child from the jurisdiction
 - (i) There should be a provision in primary legislation to restrict the removal of a child from Hong Kong without the consent of the parent who has custody, or control of the child's residence, or with whom the child has regular contact. Provisions along the lines of section 2(3) and (6) of the

¹ Rule 94(2) of the Matrimonial Causes Rules (Chapter 179, sub. leg. A) allows an application to the court to prevent removal. A similar provision is contained in Order 90, rule 5(3) of the Rules of the District Court (Chapter 336, sub. leg. H).

² At present, if a parent who is involved in a divorce or judicial separation proceedings would like to prohibit the removal of any child of the family out of Hong Kong without the leave of the court except on terms specified in the order (e.g. with the consent of the child's parent), he or she may apply to the court for an order. Upon the making of court order, he or she may inform the ImmD of the order, and the name of the child who is the subject of the order will be placed on a "stop list". ImmD will then be able to identify the child at immigration checkpoint and can stop the child from leaving Hong Kong in violation of the court order.

Children (Scotland) Act 1995 should be adopted;

- (ii) This section would apply in cases where proceedings have already been issued or court orders have already been made concerning the child;
 - (iii) This section would also extend to any child of the family; and
 - (iv) Rule 94(2) of the Matrimonial Causes Rules (Chapter 179, sub. leg. A), which allows an application to the court to prevent removal of the child, should also be enacted into primary legislation.
- (b) Recommendation 4: Power to hold a child so that the child can be returned to the custodial parent or taken to a place of safety
- (i) The introduction of a provision along similar lines to section 37 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991 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
 - (ii) 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.

However, LRC did not propose to go so far as to have a general power of arrest.

- (c) Recommendation 5: Surrender of passport

The retention of the status quo in relation to whether the Court should be able to order the surrender of passports.

- (d) Recommendation 6: Notification of court order to Immigration

- (i) 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;
- (ii) It should be at the discretion of the parents whether the ImmD is notified or not; and

- (iii) If one parent does notify the ImmD of the order, however, it should be mandatory that that parent inform the other parent of the fact of notification.

7. The other two LRC recommendations (viz Recommendations 2 and 3) seek to address the present position where in implementing the Hague Convention, the Court has no explicit and specific power to require a person to disclose the whereabouts of a child and to require the return of a child. The recommendations are –

(a) Recommendation 2: Disclosure of whereabouts/location orders

- (i) To provide for 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 Custody Orders Act 1991 and section 67J of the Australian Family Law Act 1975; and
- (ii) The adoption of an additional provision specifying who should be entitled to apply for a location order, as in section 67K of the Australian Family Law Act 1975.

(b) Recommendation 3: Recovery orders

The adoption of provisions on recovery orders similar to those in section 67Q of the Australian Family Law Act 1975.

8. Other than the six recommendations referred to in paragraphs 8 and 9 above, LRC has made three observations in the Report in relation to the operation of the Hague Convention to address existing difficulties when handling Hague Convention cases. They are –

(a) Observation 1: Legal aid position

- (i) In order to assist the Central Authority to duly discharge its obligations under the Hague Convention, it would be helpful if special arrangements could be made, or the current arrangements strengthened, to promote the expeditious processing of legal aid applications in Hague Convention cases;
- (ii) Notwithstanding the current provision relating to costs in Hague Convention cases³, the Administration may need to

³ Section 13 of the Child Abduction and Custody Ordinance (Cap.512) provides that costs shall not be borne by the Secretary for Justice or any other authority in Hong Kong except so far as they fall to be

consider whether Hong Kong should follow the lead of those Contracting states which offer legal aid without a means test to all incoming Hague Convention applicants. This would help ensure that their cases could be handled as speedily as possible;

- (iii) As an alternative, it might be considered appropriate for legal aid to be granted in Hong Kong on the strength of the legal aid authority in the requesting State confirming that the applicant is eligible for legal aid in that jurisdiction.

(b) Observation 2: Stay of custody proceedings in Hong Kong

The effectiveness of the current provisions in Hong Kong relating to the stay of custody proceedings pending the outcome of Hague Convention applications may need to be reviewed, to determine whether further strengthening of these provisions is required.

(c) Observation 3: Confidentiality of Hague proceedings

In order to better protect the interests of children, it may be necessary to consider whether specific legislative provisions are required to prohibit not only the publication of information relating to Hague Convention proceedings but also to prohibit the searching and inspection of the court file in these proceedings by members of the public.

Proposed legislative amendments

9. The Administration having completed the examination of the Report, issued its response to the Report to the Chairman of LRC in October 2009. As stated in that response, the Administration has accepted in principle all the recommendations of the Report except for a slight modification to Recommendation 4 whereby specific circumstances will be spelt out in the provision under which ImmD and the Police would be empowered to hold the child, i.e. where there is a stop order issued by the court prohibiting the child in question from leaving Hong Kong, or where an application for such an order has been made to the court. Except for Recommendation 5 and Observation 1, legislative amendments are required to implement all the other recommendations (Recommendation 1-4 and 6) and observations (Observation 2 and 3). Such amendments concern the Child Abduction and Custody Ordinance (Chapter 512) (CACO) and some other Ordinances and Rules. The Department of Justice, as the

so borne by virtue of the grant of legal aid under the Legal Aid Ordinance (Cap.91).

Central Authority in Hong Kong, has taken the opportunity to suggest a few amendments to CACO and the related court rules (Rules of the High Court (Chapter 4, sub. leg. A) with a view to enhancing the clarity of relevant provisions and providing the Central Authority in Hong Kong and the Court with the necessary power to handle abduction cases more effectively. For example, to empower the Central Authority in Hong Kong to require certain persons to provide information relevant for the purposes of preventing harm to the child; to empower the Court to require attendance of either or both parents at the court hearing to facilitate their reaching an agreement; and to provide a clear legal basis for the Central Authority in Hong Kong to apply for a court order in relevant international abduction cases, etc..

THE BILL

10. The key provisions of the Bill are set out as follows –

- (a) Part 1, clause 1, provides for the short title and commencement of the Bill. 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;
- (b) Part 2, clause 3, amends the long title of CACO to state clearly that the purpose of CACO is to combat child abduction so as to cover cases other than those falling within the Hague Convention and to provide for related matters;
- (c) Part 2, clause 4, adds the definition of relevant terms as appeared in the Bill into section 2 of CACO;
- (d) Part 2, clause 5, amends the existing section 6 of CACO to enable the Court of First Instance to have the jurisdiction to hear and determine an application under CACO;
- (e) Part 2, clause 6, substitutes the existing section 7 of CACO to expressly empower the Court of First Instance to require the personal attendance of any person (including parents of the child concerned) at the hearing of an application under CACO;
- (f) Part 2, clause 7, amends the existing section 8 of CACO to empower the Secretary for Justice to request written reports on matters relating to children with reference to the Secretary's functions as the Hong Kong Central Authority under Articles 7 and 21 of the Hague Convention, which require the cooperation of the Contracting States to secure the prompt return of, and the effective exercise of rights of access

to, children;

- (g) Part 2, clause 8, amends the existing section 9(1) of CACO to make a cross reference to the new section 18 added by clause 9 (as explained in (h) (iii) below);
- (h) Part 2, clause 9, adds new sections 15 to 21 to CACO –
 - (i) the new section 15 is proposed to implement Recommendation 1 (see paragraph 6(a) above). This section provides an express statement in the law that a person must not remove a child out of Hong Kong without the consent of a person (whether or not a parent of the child) who has the right of custody or access in relation to the child. The section would apply in cases where proceedings have already been started or court orders have already been made concerning any child of the family⁴. To prevent a person from breaching this restriction, the new section 15(4) provides that an application may be made to the Court of First Instance for an order prohibiting the removal of the child out of Hong Kong (prohibition order);
 - (ii) the new sections 16 and 17 are proposed to implement Recommendation 2 and 3 (see paragraph 7(a) and (b) above). These sections empower the Court of First Instance to make a location order relating to the child's whereabouts or a recovery order relating to the child's return or delivery to a specified person on application by a party to the applicable proceedings or the Secretary of Justice (in the capacity of the Central Authority of Hong Kong);
 - (iii) the new section 18 empowers the Court of First Instance to make an order prohibiting removal of 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;
 - (iv) the new section 19 provides the details of the notification of stop orders (i.e. prohibition orders and recover orders) and pending applications of prohibitions orders for the purposes of the new section 20. It implements LRC's

⁴ As defined in section 2(1) of the Matrimonial Proceedings and Property Ordinance (Chapter 192) as a child of both parties or a child who has been treated as a child of their family.

Recommendation 6 (see paragraph 6(d) above) that if the applicant chooses to notify the ImmD of a stop order or a pending application of a prohibition order, the applicant must as far as practicable inform other concerned parties of the fact of notification;

- (v) the new section 20 is proposed to implement Recommendation 4 (see paragraph 6(b) above). It empowers a police officer or immigration officer to detain a child being removed out of Hong Kong on satisfaction of the specified conditions. The child 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 party, or follow-up actions by the Director of Social Welfare;
- (vi) the new section 21 is proposed to implement Observation 2 (see paragraph 8(b) above) that local custody application in relation to a child is to be stayed pending the result of any proceedings for the return of the child under the Hague Convention;
- (i) Part 3, clause 12, amends Order 121 of the Rules of the High Court (Chapter 4, sub. leg. A) to –
 - (i) replace rule 10 to implement the new section 21 added to CACO concerning the stay of custody application pending the result of proceedings under the Hague Convention;
 - (ii) add the new rule 12 concerning an application for an order made under the new section 18 of CACO (please refer to (h)(iii) above);
 - (iii) add the new rule 13, which restricts the inspection, and obtaining of copies of court documents filed in proceedings under the Hague Convention.
- (j) Part 4, clause 14, adds a new section 48D to the Matrimonial Causes Ordinance (Chapter 179), which provides that a party to proceedings under the Ordinance may apply for a court order prohibiting the removal of a child of the family out of Hong Kong. This new section replaces rule 94(2) of the Matrimonial Causes Rules (Chapter 179, sub. leg. A), which is repealed by clause 16;
- (k) Part 5, clause 18, amends section 5 of the Judicial Proceedings (Regulation of Reports) Ordinance (Chapter 287)

to implement Observation 3 (see paragraph 8(c) above), for ensuring that the confidentiality of proceedings under CACO is protected.

LEGISLATIVE TIMETABLE

11. The legislative timetable will be –

Publication in the Gazette	12 July 2013
First Reading and commencement of Second Reading Debate	17 July 2013
Resumption of Second Reading Debate, Committee Stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

12. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It does not affect the current binding effect of CACO, Ordinances and Rules amended by the Bill. The proposal has no economic, productivity or environmental implications. As for the financial and civil service implications, the concerned agencies will endeavor to absorb additional workload, if any, within their existing resources. Where necessary, they will seek additional resources through the established mechanism. Besides, under the established arrangements agreed between the Judiciary and the Financial Services and the Treasury Bureau, LWB will provide any such additional resources to the Judiciary, through the established resource allocation mechanism as necessary.

13. As regards family implications, as noted by LRC, when a child is abducted, he/she suffers the trauma of being taken away from his/her home from the custodial parent and other family members. LRC is also concerned that such abduction will be a harrowing experience for the child's left-behind family. The proposal, which aims to prevent children from being abducted by their parents from Hong Kong, will prevent such occurrence. The proposal will therefore also have positive sustainability impact on family solidarity.

PUBLIC CONSULTATION AND PUBLICITY

14. Consultation was conducted by LRC in 1998 on its reform proposals in relation to guardianship and custody of children before the

Report was published and the views received from the consultees had been taken into account by LRC in finalising its recommendations. We briefed LegCo Panel on Welfare Services on our acceptance of the Report, as referred to in paragraph 9 above, at its meeting held on 8 February 2010. The Panel was generally positive on our stance.

15. We shall publish the Bill in the Gazette on 12 July 2013 and introduce the Bill into the LegCo on 17 July 2013. A press release will be issued before the gazettal of the Bill. A line-to-take will be prepared and a spokesperson will be available to handle media and public enquiries.

ENQUIRY

16. Any enquiry on this brief can be addressed to Ms. Veronica Tse, Assistant Secretary for Labour and Welfare at 2810 3932.

Labour and Welfare Bureau
July 2013

Child Abduction Legislation (Miscellaneous Amendments) Bill 2013

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A BILL

To

Amend the Child Abduction and Custody Ordinance and other enactments to provide for combating child abduction and for better implementing the Convention on the Civil Aspects of International Child Abduction, and for related matters.

Enacted by the Legislative Council.

Part 1

Preliminary

1. Short title and commencement

- (1) This Ordinance may be cited as the Child Abduction Legislation (Miscellaneous Amendments) Ordinance 2013.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

Part 2**Amendments to Child Abduction and Custody Ordinance****2. Child Abduction and Custody Ordinance amended**

The Child Abduction and Custody Ordinance (Cap. 512) is amended as set out in this Part.

3. Long title amended

(1) Long title, after “An Ordinance”—

Add

“to combat child abduction;”.

(2) Long title, before the full stop—

Add

“; and to provide for related matters”.

4. Section 2 amended (interpretation)

(1) Section 2, English text, definition of *Rules Committee*—

Repeal

“(Cap. 4).”

Substitute

“(Cap. 4);”.

(2) Section 2—

Add in alphabetical order

“*application under this Ordinance* (根據本條例提出的申請)
means—

(a) an application under the Convention; or

(b) an application under section 15, 16, 17 or 18;

place of safety (安全地方) includes a place listed in the Schedule to the Protection of Children and Juveniles (Places of Refuge) Order (Cap. 213 sub. leg. B);

prohibition order (禁止離境令) means an order made under section 15(4);

recovery order (返還令) means an order made under section 17(2);

stop order (截停令) means a prohibition order or recovery order.”.

5. Section 6 amended (judicial authorities)

Section 6—

Repeal

“the Convention”

Substitute

“this Ordinance”.

6. Section 7 substituted

Section 7—

Repeal the section

Substitute

“7. Powers of Court of First Instance in applications under this Ordinance

(1) Before an application under this Ordinance is determined, the Court of First Instance may do one or more of the following—

(a) give an interim direction as the Court thinks fit for securing the welfare of the child concerned, or for

preventing changes in the circumstances relevant to determining the application;

- (b) require the personal attendance of a person specified by the Court, including either or both of the parents of the child, at the hearing of the application.

- (2) This section does not affect the powers and discretions of the Court of First Instance that are exercisable apart from this section.”.

7. Section 8 amended (reports)

Section 8—

Repeal

everything before “may—”

Substitute

“For discharging a Central Authority’s functions in relation to a child under Articles 7 and 21 of the Convention, the Secretary for Justice”.

8. Section 9 amended (proof of documents and evidence)

Section 9(1), after “For the purposes of”—

Add

“section 18, and”.

9. Sections 15 to 21 added

After section 14—

Add

“15. Court of First Instance may make order prohibiting removal of child out of Hong Kong without consent

- (1) In this section—

child (兒童) includes a child of the family as defined by section 2(1) of the Matrimonial Proceedings and Property Ordinance (Cap. 192).

- (2) This section applies to a child who is under the age of 18 if—

- (a) a court order concerning the rights of custody of or access to the child is in force; or
- (b) proceedings concerning those rights are pending in a court.

- (3) A person must not remove the child out of Hong Kong without the consent of the following persons (whether or not a parent of the child)—

- (a) if a court order concerning the rights of custody of or access to the child is in force—the person, or each of the persons, who has and is exercising those rights under the order; or
- (b) if proceedings concerning those rights are pending in a court—each party to the proceedings.

- (4) To prevent a person from breaching subsection (3), a person specified in subsection (3)(a) or (b) may apply to the Court of First Instance for an order prohibiting the removal of the child out of Hong Kong except—

- (a) with the leave of the Court; or
- (b) on compliance with the terms specified in the order.

- (5) Unless otherwise directed by the Court of First Instance, the application may be made ex parte.

- (6) This section does not affect—
- (a) other powers of the Court of First Instance under this Ordinance; or
 - (b) the effect of any other court order.

16. Court of First Instance may make location order relating to child's whereabouts

- (1) In this section—

applicable information (適用資料), in relation to a child, means information about the child's whereabouts or other circumstances relevant to locating the child;

applicable proceedings (適用程序) means proceedings for the return of a child under the Convention that are commenced, or about to be commenced, in Hong Kong or in another Contracting State.

- (2) For any applicable proceedings relating to a child, the Court of First Instance may, on application, make a location order providing for one or more of the following—
- (a) requiring a person to provide the Court with applicable information that the person has or may reasonably obtain about the child;
 - (b) requiring a public officer to provide the Court with applicable information that the officer has or may reasonably obtain in an official capacity about the child.
- (3) Any of the following persons may apply for a location order—
- (a) a party to the applicable proceedings;
 - (b) the Secretary for Justice.

- (4) Unless otherwise directed by the Court of First Instance, the application may be made ex parte.
- (5) The Court of First Instance may make a location order despite the production of the child before a judicial or administrative authority, or the Central Authority, of Hong Kong or another Contracting State.
- (6) A person to whom a location order applies must comply with it, regardless of whether or not—
 - (a) there is any restriction imposed by a law or agreement concerning the disclosure of applicable information; or
 - (b) the applicable information provided under the order is subject to legal professional privilege.
- (7) A person is not excused from complying with a location order only because doing so may incriminate the person or the person's spouse.
- (8) However, a statement made by a person in compliance with a location order is not admissible in evidence against the person, or against the person's spouse, in proceedings for an offence other than perjury.

17. Court of First Instance may make recovery order relating to child's return

- (1) In this section—

applicable proceedings (適用程序) means proceedings under the Convention that are commenced in Hong Kong for the return of a child to another Contracting State.

- (2) For any applicable proceedings relating to a child, the Court of First Instance may, on application, make a recovery order providing for one or more of the following—

- (a) requiring a person to return or deliver the child to another person specified by the Court (*specified person*);
 - (b) authorizing or directing a police officer to do one or more of the following for finding the child (and to do so with the assistance the officer requires and by force if necessary)—
 - (i) stop and search a vehicle, vessel or aircraft;
 - (ii) enter and search a place;
 - (c) authorizing or directing a police officer to recover the child (and to do so with the assistance the officer requires and by force if necessary);
 - (d) authorizing or directing a police officer to return or deliver the recovered child to the specified person;
 - (e) authorizing or directing a police officer to take the recovered child to, and keep the child in, a place of safety until the return or delivery of the child to the specified person;
 - (f) if the specified person cannot be contacted within a reasonable time—authorizing or directing the Director of Social Welfare to take the follow-up actions that the Director considers appropriate;
 - (g) giving directions about the day-to-day care of the child until the return or delivery of the child to the specified person.
- (3) Any of the following persons may apply for a recovery order—
- (a) a party to the applicable proceedings;
 - (b) the Secretary for Justice.

- (4) Unless otherwise directed by the Court of First Instance, the application may be made *ex parte*.

18. Court of First Instance may make order prohibiting removal of child from Hong Kong except to habitual residence, etc.

- (1) In this section—

home state (本國), in relation to a child, means the Contracting State of the child's habitual residence.

- (2) This section applies to a child if—

- (a) a judicial or administrative authority of the child's home state has made an order providing for the child to be taken to Hong Kong temporarily (whether or not also to another jurisdiction) for enabling a person to exercise the rights of access to the child; or
- (b) all of the following conditions are met—
 - (i) a judicial or administrative authority of a Contracting State has made a decision or other determination that the child has been wrongfully removed to or retained in that State within the meaning of Article 3 of the Convention;
 - (ii) that authority has made an order providing for the return of the child to the child's home state via Hong Kong (whether or not also via another jurisdiction);
 - (iii) the child is in, or will be entering, Hong Kong in transit on return to the child's home state.

- (3) The Court of First Instance may, on application by the Secretary for Justice, make an order prohibiting the

removal of the child from Hong Kong to a jurisdiction other than—

- (a) the child's home state; or
 - (b) another jurisdiction as may be specified in the order mentioned in subsection (2)(a) or (b)(ii).
- (4) The Secretary for Justice may make an application under this section on request by the Central Authority of a Contracting State.
- (5) Unless otherwise directed by the Court of First Instance, the application may be made *ex parte*.

19. Notification of stop orders, etc.

- (1) In this section—

Director (處長) means the Director of Immigration.

- (2) This section applies if—

- (a) a stop order has been made in relation to a child; or
- (b) an application for a prohibition order in relation to a child is pending.

- (3) For the purposes of section 20—

- (a) an applicant for a prohibition order may notify the Director that the order has been made or the application is pending;
- (b) an applicant for a recovery order may notify the Director that the order has been made; and
- (c) an applicant for a stop order that has been revived after suspension may notify the Director that the order has been revived.

- (4) If an applicant has given a notification under subsection (3), and the notification relates to a prohibition order that has been made, or revived after suspension, or is under

application, the applicant must as far as practicable inform the following persons that the notification has been given—

- (a) if a court order concerning the rights of custody of or access to the child is in force—the person, or each of the persons, who has and is exercising those rights under the order; or
 - (b) if proceedings concerning those rights are pending in a court—each party to the proceedings.
- (5) If an applicant has given a notification under subsection (3), and the notification relates to a recovery order that has been made, or revived after suspension, the applicant must as far as practicable inform each party to the related applicable proceedings mentioned in section 17 that the notification has been given.
- (6) A failure to comply with subsection (4) or (5) does not affect the validity of a stop order or the operation of section 20.
- (7) Subsection (8) applies if—
- (a) a stop order has been varied by the Court of First Instance;
 - (b) a stop order has been discharged or suspended by the Court of First Instance;
 - (c) an application for a prohibition order has been rejected or withdrawn;
 - (d) for a stop order that is a prohibition order—the Court of First Instance has granted the leave under section 15(4)(a); or
 - (e) for a stop order that is a prohibition order made subject to an exception mentioned in section 15(4)(b)—the Court of First Instance has certified

that the terms specified in the order have been complied with.

- (8) For the purposes of section 20, an applicant for a stop order who has given a notification under subsection (3) must, or a person affected by the order or the application may, notify the Director about the matter mentioned in subsection (7)(a), (b), (c), (d) or (e) (whichever is applicable).
- (9) The notification under subsection (3) or (8) must be—
- (a) given in a manner and form specified by the Director; and
 - (b) accompanied by the supporting documents required by the Director.

20. Authorized officer may detain child being removed out of Hong Kong in breach of stop order, etc.

- (1) In this section—

authorized officer (獲授權人員) means—

- (a) a police officer; or
- (b) an immigration officer;

immigration officer (入境事務人員) means the holder of a rank specified in Schedule 1 to the Immigration Service Ordinance (Cap. 331).

- (2) An authorized officer may detain a child if the following conditions are met—
- (a) the officer is satisfied that—
 - (i) a notification has been given under section 19(3), or a notification about the matter mentioned in section 19(7)(a) has been given

under section 19(8), in relation to the child; and

- (ii) no notification about any of the matters mentioned in section 19(7)(b) to (e) has been given under section 19(8) in relation to the child; and
 - (b) the officer reasonably suspects that the child is about to be, or is being, removed out of Hong Kong.
- (3) To avoid doubt—
- (a) the mere fact that any of the matters mentioned in section 19(7)(b) to (e) exists does not render unlawful the exercise of the power by an authorized officer under subsection (2) if the officer is unaware of that fact; and
 - (b) if the officer has detained a child under subsection (2), the officer may continue to do so for as long as it is necessary for the officer to discharge the functions under subsection (4), (6), (7) or (8), regardless of whether the condition in subsection (2)(b) continues to be met.
- (4) If the authorized officer who exercises the power under subsection (2) is an immigration officer, the officer must as soon as practicable transfer the child concerned into the charge of a police officer.
- (5) Subsections (6), (7) and (8) apply if—
- (a) the authorized officer who exercises the power under subsection (2) is a police officer; or
 - (b) the child concerned is transferred into the charge of the police officer under subsection (4).

- (6) If the stop order made or under application is a prohibition order—
- (a) the police officer must as soon as practicable take the child to, and keep the child in, a place of safety until—
 - (i) the arrival of, and the return of the child to, the person specified in subsection (7); or
 - (ii) in any other case—the Director of Social Welfare is to take the follow-up actions that the Director considers appropriate; and
 - (b) if the person specified in subsection (7) cannot be contacted within a reasonable time, the Director of Social Welfare is to take the follow-up actions that the Director considers appropriate.
- (7) For subsection (6)(a)(i) and (b), the following person is specified—
- (a) the person who—
 - (i) has the sole rights of custody of the child under a court order; and
 - (ii) is not the person who attempts to remove the child out of Hong Kong;
 - (b) if 2 or more persons have joint rights of custody of the child under a court order, and one of them attempts to remove the child out of Hong Kong—the other person, or one of the other persons; or
 - (c) if proceedings concerning the rights of custody of the child are pending in a court—the applicant for the prohibition order.
- (8) If the stop order made is a recovery order—

- (a) the police officer must as soon as practicable take the child to, and keep the child in, a place of safety until the return or delivery of the child to a person specified in the recovery order; and
- (b) if that person cannot be contacted within a reasonable time, the Director of Social Welfare is to take the follow-up actions that the Director considers appropriate.

21. Stay of custody application pending determination of proceedings under the Convention

- (1) In this section—

custody application (管養權申請), in relation to a child, means an application relating to the merits of rights of custody of the child;

rights of custody (管養權) has the same meaning as in the provisions of the Convention set out in Schedule 1;

specified authority (指明當局) includes the Court of First Instance, the District Court, and a juvenile court within the meaning of the Juvenile Offenders Ordinance (Cap. 226).

- (2) If a party to proceedings under the Convention in relation to a child knows that a custody application in relation to that child is pending in a specified authority, that party must file in the Registry of the High Court a notice containing a statement that sets out—
- (a) the nature of the custody application; and
 - (b) that specified authority.
- (3) On receipt of that notice, the Registrar of the High Court must—

- (a) give the specified authority notification of the proceedings under the Convention; and
- (b) subsequently give that authority notification of the result of those proceedings.
- (4) On receipt by the specified authority of the notification under subsection (3)(a)—
 - (a) all further proceedings in the custody application are to be stayed until the final determination or final disposal of the proceedings under the Convention; and
 - (b) the specified authority must give the parties to that application notice of the stay.”.

10. Schedule 1 amended (Convention on the Civil Aspects of International Child Abduction)

Schedule 1—

Repeal

“[s. 3]”

Substitute

“[ss. 3 & 21]”.

Part 3

Amendments to Rules of the High Court

11. Rules of the High Court amended

The Rules of the High Court (Cap. 4 sub. leg. A) are amended as set out in this Part.

12. Order 121 amended (Child Abduction and Custody Ordinance (Cap. 512))

(1) Order 121, rule 2(1)—

Repeal

“Subject to”

Substitute

“Except as provided in the Ordinance and in”.

(2) Order 121—

Repeal rule 10

Substitute

“10. Stay of custody application pending determination of proceedings under the Convention (O. 121, r. 10)

(1) A notice filed under section 21(2) by a party to proceedings under the Convention must be verified by an affidavit sworn by that party or a person duly authorized to swear it on behalf of that party.

(2) The affidavit must be filed at the same time as the notice.”.

(3) Order 121, after rule 11—

Add

“12. Application for an order under section 18 (O. 121, r. 12)

- (1) An application for an order under section 18 must be supported by an affidavit sworn by—
 - (a) the applicant; or
 - (b) a person duly authorized to swear it on behalf of the applicant.
- (2) The affidavit must, as far as possible, state the following—
 - (a) the particulars of the request made by the requesting Contracting State;
 - (b) the particulars of any relevant order, decision or determination of a judicial or administrative authority of the requesting Contracting State;
 - (c) the particulars of the travel arrangements of the child and accompanying persons, including the dates of arrival and departure, flight details and contact details while they are in Hong Kong; and
 - (d) if the child is in, or is being taken to, Hong Kong temporarily for enabling a person to exercise the rights of access to the child—
 - (i) the facts and basis for believing that the child may be wrongfully removed from Hong Kong to a jurisdiction other than the one mentioned in section 18(3)(a) or (b); or
 - (ii) the particulars of any consent given by that person to the making of the order sought.
- (3) In addition, the affidavit must, as far as possible, exhibit the following—

- (a) a copy of the relevant order, decision or determination of the judicial or administrative authority of the requesting Contracting State; and
 - (b) all other relevant documents.
- (4) The affidavit must be filed at the same time as the application.
- (5) However, for an urgent case, the affidavit may be filed as soon as possible after the application.

13. Searching for, inspecting and obtaining copies of documents filed in proceedings under the Ordinance (O. 121, r. 13)

- (1) Unless otherwise directed by the Court, a party to any proceedings under the Ordinance or the party's solicitor, or the Secretary for Justice, may do one or more of the following—
 - (a) have a search in the Registry made for a document filed in the Registry in those proceedings;
 - (b) inspect or obtain a copy of the document.
- (2) Except as provided in paragraph (1), if a document is filed in the Registry in any proceedings under the Ordinance (other than an order made in open court)—
 - (a) the document is not open to inspection by any person without leave of the Court; and
 - (b) no copy of the document, or of an extract from the document, may be taken by, or issued to, any person without leave of the Court.”

Part 4

Amendments to Matrimonial Causes Ordinance and its Subsidiary Legislation

Division 1—Matrimonial Causes Ordinance

13. Matrimonial Causes Ordinance amended

The Matrimonial Causes Ordinance (Cap. 179) is amended as set out in this Division.

14. Section 48D added

In Part VII, after section 48C—

Add

“48D. Order for prohibiting removal of child out of Hong Kong

- (1) This section applies to a child of the family as defined by section 2(1) of the Matrimonial Proceedings and Property Ordinance (Cap. 192) who is under the age of 18.
- (2) If a parent of the child is a party to any proceedings under this Ordinance, that parent may apply to the court for an order prohibiting the removal of the child out of Hong Kong, or out of the custody, care or control of a person named in the application, except—
 - (a) with the leave of the court; or
 - (b) on compliance with the terms specified in the order.
- (3) Unless otherwise directed by the court, the application may be made ex parte.”.

Division 2—Matrimonial Causes Rules

15. Matrimonial Causes Rules amended

The Matrimonial Causes Rules (Cap. 179 sub. leg. A) are amended as set out in this Division.

16. Rule 94 amended (removal of child out of Hong Kong, etc.)

Rule 94—

Repeal paragraph (2).

Part 5

Amendments to Judicial Proceedings (Regulation of Reports) Ordinance

17. Judicial Proceedings (Regulation of Reports) Ordinance amended

The Judicial Proceedings (Regulation of Reports) Ordinance (Cap. 287) is amended as set out in this Part.

18. Section 5 amended (publication of information relating to proceedings in private)

(1) After section 5(1)(a)—

Add

“(ab) subject to subsection (1A), where the proceedings are brought under the Child Abduction and Custody Ordinance (Cap. 512);”.

(2) After section 5(1)—

Add

“(1A) The publication of a judgment of a competent court in proceedings under the Hague Convention on an anonymous basis is not of itself contempt of court if—

- (a) none of the parties to those proceedings objects to that publication; and
- (b) the court has made an order authorizing that publication.”.

(3) After section 5(3)—

Add

“(4) In subsection (1A)—

Hague Convention (《海牙公約》) means the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980.”.

Explanatory Memorandum

The object of this Bill is to amend the Child Abduction and Custody Ordinance (Cap. 512) (*CACO*) and other enactments to provide for combating child abduction and for better implementing the Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980 (*Convention*), and for related matters. The main amendments contained in the Bill are based on the recommendations made in the report of the Law Reform Commission of Hong Kong on International Parental Child Abduction (*LRC Report*).

Part 1—Preliminary

2. Clause 1 provides for the short title and commencement.

Part 2—Amendments to CACO

3. The purpose of the existing CACO is to give effect to the Convention in Hong Kong. As the Bill includes new provisions that deal with cases not arising from an application under the Convention, clause 3 widens the long title to the CACO to provide for combating child abduction generally.
4. Clause 4 adds new definitions of *application under this Ordinance*, *place of safety*, *prohibition order*, *recovery order* and *stop order* to section 2 of the CACO.
5. Section 6 of the CACO provides that the Court of First Instance (*CFI*) has the jurisdiction to hear and determine an application under the Convention. Clause 5 amends that section to expand that jurisdiction to cover applications under the new provisions added by the Bill.
6. Clause 6 re-enacts section 7 of the CACO to expressly empower the CFI to require a person (including parents of the child concerned)

to personally attend at the hearing of an application under the CACO.

7. Clause 7 amends section 8 of the CACO to empower the Secretary for Justice to request written reports on matters relating to children with reference to the Secretary's functions as a Central Authority under Articles 7 and 21 of the Convention. These Articles require the cooperation of Contracting States to secure the prompt return of children and the effective exercise of rights of access to them.
8. Section 9 of the CACO deals with the proof of documents for the purposes of the Convention. Clause 8 amends that section to include an additional cross-reference to the new section 18 added by clause 9.
9. For tackling the problem of cross-border child abduction, clause 9 adds new provisions to the CACO to empower the CFI to make the following orders—
- (a) a prohibition order against removing a child out of Hong Kong without consent (new section 15);
 - (b) a location order requiring information about a child's whereabouts or other circumstances relevant to locating the child (new section 16);
 - (c) a recovery order, which may require the return or delivery of a child to a specified person, and may authorize a police officer to recover the child and exercise certain powers for finding the child (new section 17); 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 Convention (new section 18).

10. The new section 19 deals with the notification of a stop order (defined as either a prohibition order under the new section 15(4), or a recovery order under the new section 17(2)), or of a pending application for a prohibition order, to be given to the Director of Immigration and other parties for the purposes of the new section 20.
11. The new section 20 empowers a police officer or immigration officer to detain a child being removed out of Hong Kong on satisfaction of the specified conditions. The child is to be taken to and kept in a place of safety until the return of the child to an appropriate party, or follow-up actions to be taken by the Director of Social Welfare.
12. The new section 21 provides that a local custody application in relation to a child is to be stayed pending the result of any proceedings for the return of the child under the Convention.

Part 3—Amendments to Rules of the High Court

13. Clause 12 amends Order 121 of the Rules of the High Court (Cap. 4 sub. leg. A) to do the following—
 - (a) make a consequential amendment to rule 2(1);
 - (b) replace rule 10 consequent on the addition of the new section 21 to the CACO by clause 9;
 - (c) add a new rule 12 for implementing the new section 18 added to the CACO by clause 9; and
 - (d) add a new rule 13 restricting the inspection, and obtaining of copies, of court documents filed in proceedings under the CACO.

Part 4—Amendments to Matrimonial Causes Ordinance and its subsidiary legislation

14. Clause 14 adds a new section 48D to the Matrimonial Causes Ordinance (Cap. 179), which provides that a party to proceedings under the Ordinance may apply for a court order prohibiting the removal of a child of the family out of Hong Kong. This new section replaces rule 94(2) of the Matrimonial Causes Rules (Cap. 179 sub. leg. A), which is repealed by clause 16, as recommended in the LRC Report.

Part 5—Amendments to Judicial Proceedings (Regulation of Reports) Ordinance

15. Clause 18 amends section 5 of the Judicial Proceedings (Regulation of Reports) Ordinance (Cap. 287) to ensure that the confidentiality of proceedings under the CACO is protected.