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**Paper for the House Committee Meeting  
on 4 October 2013**

**Legal Service Division Report on  
Child Abduction Legislation (Miscellaneous Amendments) Bill 2013**

**I. SUMMARY**

1. **The Bill** 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 (the Convention). The legislative amendments in the Bill are based on the recommendations made in the report of the Law Reform Commission of Hong Kong (LRC) on International Parental Child Abduction (the Report).

The main amendments to the CACO are as follows:-

- (a) empowering the Court of First Instance 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 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.

2. **Public Consultation** Public consultation was conducted by LRC in 1998 before the Report was published. According to the LegCo Brief, the views received from the consultees had been taken into account by LRC in finalizing its recommendations
3. **Consultation with LegCo Panel** The Panel on Welfare Services was consulted on 8 February 2010 on the legislative amendments to implement the recommendations of the Report. Various concerns were expressed by members.
4. **Conclusion** In the light of concerns raised at the above Panel meeting, Members may consider whether to set up a Bills Committee to study the Bill in detail.

## II. REPORT

The date of First Reading of the Bill is 17 July 2013. Members may refer to the LegCo Brief (File reference: LWB CR 2/4841/02) issued by Labour and Welfare Bureau in July 2013 for further details.

### Object of the Bill

2. The Bill seeks to amend the Child Abduction and Custody Ordinance (Cap. 512) (CACO) and other enactments 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 Convention). The main amendments proposed in the Bill are based on the recommendations made in the Report on International Parental Child Abduction (the Report) of the Law Reform Commission of Hong Kong (LRC).

### Background

3. The law relating to guardianship and custody of children had been considered by LRC on referral by the then Attorney General and the then Chief Justice in 1995. In April 2002, LRC published the Report which was the second in a series of four reports published by LRC on guardianship and custody of children in Hong Kong. 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 Convention in Hong Kong.

4. The Convention is implemented in Hong Kong by the CACO which came into effect on 1 September 1997. Under the Convention, the removal or retention of a child is wrongful where it is in breach of custody rights arising in a contracting state (by operation of law or by reason of an agreement) in which the child concerned was habitually resident immediately before the removal<sup>1</sup>. Such rights include the right of a parent who does not have physical custody of the child to give or refuse consent to the removal of the child from the contracting state concerned<sup>2</sup>. The Convention does not apply to children who have attained the age of sixteen years<sup>3</sup>. Section 5 of the CACO provides that the functions under the Convention of a Central Authority shall be discharged by the Secretary for Justice. In the Report, LRC identified certain issues of concern. These include the lack of an express restriction in primary legislation against the removal of child without consent, the lack of explicit powers of the courts to require a parent to

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<sup>1</sup> See Article 3 of the Convention.

<sup>2</sup> See Article 5 of the Convention.

<sup>3</sup> See Article 4 of the Convention.

disclose the whereabouts of a child or to require the return of a child, and the effectiveness of enforcement in combating child abduction.

5. To address the above issues, LRC has made several recommendations in the Report, 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. The LRC's recommendations are summarized below:-

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.

Recommendation 2 - The courts should be empowered to order the disclosure of the whereabouts or location of the child (location order).

Recommendation 3 - The courts should be empowered to make recovery orders requiring the return of a child.

Recommendation 4 - Provisions should be introduced to empower (a) 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 (b) 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 can be notified.

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 courts making such order in Hong Kong).

Recommendation 6 - It should be parents' responsibility to notify the Immigration Department 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 the Immigration Department should be notified of such order or not. If one parent has notified the Immigration Department of such order, it should be mandatory that the parent shall inform the other parent of the fact of notification.

6. According to paragraph 9 of the LegCo Brief, in response to the Report, the Administration has in principle accepted all the recommendations of the Report with slight modifications; and except for Recommendation 5, legislative amendments are required to implement the LRC's recommendations.

## Provisions of the Bill

7. The Bill seeks to expand the scope of application of the CACO to provide for combating child abduction generally in order to implement the LRC's recommendations made in the Report. It also introduces related and consequential amendments to the Rules of the High Court (Cap. 4 sub. leg. A), the Matrimonial Causes Ordinance (Cap. 179) and the Judicial Proceedings (Regulation of Reports) Ordinance (Cap. 287).

### A. Amendments to the CACO

#### Empowering the Court of First Instance to make prohibition order, location order and recovery order in the relevant proceedings

8. At present, there is no provision in the 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 Bill seeks to add new section 15 to the CACO<sup>4</sup> to expressly provide for such restriction. The new section would apply to a child<sup>5</sup> under the age of 18 and in cases where proceedings have already been started or court orders have already been made concerning the child. To prevent a person from breaching this proposed restriction, the new section 15(4) provides that an application may be made to the Court of First Instance (CFI) for an order prohibiting the removal of the child out of Hong Kong except with the leave of the CFI or on compliance with the terms specified in the court order. The Bill, however, does not propose criminal sanction for breaching the restriction.

9. The new section 16<sup>6</sup> empowers the CFI to make a location order to require a person or a public officer to provide the Court with information on the whereabouts of a child in the proceedings for the return of the child under the Convention that are commenced in Hong Kong or in another Contracting State.

10. The new section 17 empowers the CFI to make a recovery order in the proceedings under the Convention that are commenced in Hong Kong. The recovery order may require a person to return or deliver the child to a specified person. It may also authorize or direct a police officer to do certain acts, including stopping and searching a vehicle, vessel, or aircraft; entering and searching a place, taking the relevant child to and keeping the child in a place of

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<sup>4</sup> The new section 15 of the CACO relates to Recommendation 1 made in the LRC Report, see para. 6.2 to para. 6.10 of the Report.

<sup>5</sup> Under the new section 15 of the CACO, "child" includes a child of the family as defined by section 2(1) of the Matrimonial Proceedings and Property Ordinance (Cap. 192). According to section 2(1) of Cap. 192, "child of family", in relation to the parties to a marriage, means – (a) a child of both these parties; and (b) any other child who has been treated by both those parties as a child of their family.

<sup>6</sup> The new sections 16 and 17 of the CACO respectively relate to Recommendations 2 and 3 made in the LRC Report, see para. 6.11 to para. 6.17 of the Report.

safety. In addition, the CFI may authorize or direct the Director of Social Welfare to take follow-up actions that the Director considers appropriate, if the specified person cannot be contacted within a reasonable time.

11. The new section 18 empowers the CFI to make an order prohibiting the 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 Convention.

*Notification of prohibition orders and recovery orders to the Director of Immigration*

12. The new section 19 provides for details and requirements relating to the notification of prohibition orders or recovery orders to the Director of Immigration (including notification of the pending applications for such orders)<sup>7</sup>. Under the new section 19, an applicant for a prohibition order or a recovery order who has given a notification to the Director of Immigration in accordance with the section must as far as practicable inform the specified persons. These persons are those who have the rights of custody of or access to the child concerned or parties to the pending proceedings concerning those rights.

*Empowering immigration officers and police officers to detain a child being removed from Hong Kong in breach of a court order*

13. The new section 20 empowers an immigration officer and a police officer to detain a child who is reasonably suspected to be, or is being, removed from Hong Kong in breach of a court order<sup>8</sup> if the specified conditions are satisfied. The child detained under the new section 20 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 the Director of Social Welfare.

*Other amendments to the CACO*

14. The new section 21 provides that all further proceedings in the custody application in relation to a child are to be stayed until the final determination or final disposal of the proceedings under the Convention<sup>9</sup>. Other amendments to the CACO include expanding the CFI's jurisdiction under the CACO to cover applications under the new provisions added by the Bill, empowering the CFI to require personal attendance of the relevant parties at the

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<sup>7</sup> The new section 19 of the CACO relates to Recommendation 6 made in the LRC Report, see para. 6.35 to para. 6.40 of the Report.

<sup>8</sup> The new section 20 of the CACO relates to Recommendation 4 made in the LRC Report, see para. 6.18 to para. 6.28 of the Report.

<sup>9</sup> The proposed section 21 relates to LRC's observation on stay of the relevant custody proceedings, see para. 7.9 to para. 7.12 of the Report.

hearing of an application under the CACO, and empowering the Secretary for Justice to request written reports on matters relating to children with reference to the Secretary's functions as the Central Authority in Hong Kong under the Convention.

B. Consequential and related amendments to other legislation

Amendments to the Rules of the High Court (Cap. 4 sub. leg. A) (RHC)

15. Order 121 of the RHC is to be amended to implement the new section 21 of the CACO regarding the stay of custody application pending the result of proceedings under the Convention and to provide for the procedures for an application for a prohibition order under the new section 18 of the 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 the CACO<sup>10</sup>.

Amendments to the Matrimonial Causes Rules (Cap. 179 sub. leg. A) (MCR)

16. Under the existing rule 94(2) of the MCR, a party to the matrimonial proceedings may apply for an order prohibiting the removal of any child of the family, who is under 18, out of Hong Kong. In line with the proposal in the new section 15 of the CACO, the Bill proposes to repeal the above rule 94(2) and enact the provision in that rule into the principal Ordinance.

Amendments to the Judicial Proceedings (Regulation of Reports) Ordinance (Cap. 287)

17. The Bill also seeks to amend section 5 of Cap. 287 to provide for protection of the confidentiality of proceedings under the CACO.

**Commencement**

18. If passed, the Bill would come into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

**Public Consultation**

19. According to paragraph 14 of the LegCo Brief, public 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

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<sup>10</sup> The new rule relates to LRC's observation on confidentiality of the proceedings under the Convention, see para. 7.13 to 7.16 of the Report.

from the consultees had been taken into account by LRC in finalizing its recommendations.

### **Consultation with LegCo Panel**

20. The Clerk to the Panel on Welfare Services has advised that the Panel was consulted on the Administration's proposal to introduce legislative amendments to implement the recommendations of the LRC's Report on 8 February 2010. Concerns were expressed by members regarding parental abduction cases in which the child was removed out of Hong Kong to the Mainland, and the cooperation between the Hong Kong Special Administrative Region Government and the Mainland authorities in international parental child abduction.

### **Conclusion**

21. The Legal Service Division is scrutinizing the legal and drafting aspects of the Bill. In view of the concerns expressed by members of the Panel on Welfare Services on the legislative proposals, Members may wish to consider whether to set up a Bills Committee to study the Bill in detail.

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