

THE LAW REFORM COMMISSION OF HONG KONG

International Parental Child Abduction Report

Executive Summary

Introduction

1. "Child abduction" means the taking away of a child without consent or lawful authority from a person who has the right to care for him. When a child is removed in these circumstances across an international border, this constitutes international child abduction. The focus of this report is 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 their own hands and absconds with the children to another country.

2. The common law rules of private international law provide that the welfare of the child is to be the paramount consideration in any proceedings concerning children. This can be interpreted by the foreign court to mean, not that the child should be returned promptly to his home jurisdiction in recognition of pre-existing legal custody arrangements, but that the child should *not* be returned given the new circumstances of the case. The implication from this is that the abducting parent can accrue an advantage by covering his tracks and postponing a determination of the custody dispute for as long as possible.

3. Up until the 1980s, there was little international co-operation on parental child abduction, and custody and access orders made in one jurisdiction were generally neither recognised nor enforceable in another. On 25 October 1980, however, the Hague Conference on Private International Law ratified the Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"). This Convention heralded a new international approach to combating parental child abduction.

4. The Hague Convention's stated aims are to secure the prompt and safe return of children who have been wrongfully removed from one Convention country to another, and to ensure that rights of custody and access under the law of one contracting state are effectively respected in the other contracting states. The Convention is currently in force in 72 jurisdictions, including the Hong Kong SAR.

5. The objective of this report is to consider ways of improving our civil and criminal law protections against child abduction so as to better support the operation of the Hague Convention in Hong Kong.

Background to the report

6. This report is the second in a series of four reports being published by the Law Reform Commission under its reference on guardianship and custody of children. These reports follow detailed consideration by the Commission of responses to a consultation paper issued by the Guardianship and Custody Sub-committee in December 1998. The first report under this reference, on guardianship of children, was published in January 2002. The two remaining reports, on custody and access and mediation, are expected to be released later in the year.

Chapter 1 - The problem of parental child abduction

7. Chapter 1 of the report looks at the problem of parental child abduction in both its legal and social contexts. It gives an overview of the legal situation pre- and post- the Hague Convention, and explores the possible reasons for this as yet small, but growing, international problem. It examines the painful consequences for the families of children who have been abducted across international lines, and reviews the global facts and figures available, as well as statistics on Hong Kong's situation.

Chapter 2 - Preventing the abduction of a child from the HKSAR

8. Chapter 2 examines the various means available under the civil and criminal law in Hong Kong to prevent the abduction of a child from the HKSAR, or to seek his return once he has been taken out of the jurisdiction.

Chapter 3 - Child abduction amongst Hague Convention Countries

9. Chapter 3 looks at the operation of the Hague Convention and how cases are handled under it. In particular, it explains the Convention's rationale of 'mandatory return' of the child, to ensure that the custody and access orders of its respective contracting states are recognised.

Chapter 4 - Abduction involving non-Convention countries

10. Chapter 4 considers the legal position for cases where either the child has been abducted from the HKSAR to a non-Convention country, or has been abducted from a non-Convention country into the HKSAR. In such cases, the left-parent must initiate legal proceedings, using all available non-Convention means, to secure the child's return. However, the abduction of the child in breach of the original country's court order may be treated as an irrelevant consideration when the later court is considering the welfare of the child under the prevailing local laws.

Chapter 5 - Legislation in other jurisdictions

11. Chapter 5 examines relevant civil and criminal statutory provisions which apply in other common law jurisdictions, including England, Scotland, Ireland and Australia. As will be seen, a range of specific powers is commonly granted to the courts, and in some cases to the authorities, to help provide a remedy in child abduction cases.

Chapter 6 - Recommendations for reform

12. In Chapter 2, we examined the provisions of Hong Kong's civil and criminal law relating to child abduction. In this chapter, we review the relevant findings of our consultation exercise and set out our conclusions and recommendations for reform in this area.

13. **Removal of the child from the jurisdiction.** The only legislative provisions which deal specifically with the removal of a child from Hong Kong are contained in subsidiary legislation. Rule 94(2) of the Matrimonial Causes Rules (Cap 179, subsidiary legislation) 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 (Cap 336, subsidiary legislation).

14. In England, section 13(1) and (2) of the English Children Act 1989 makes it an automatic condition of a residence (custody) order that the child should not be removed from the United Kingdom for longer than one month without the written consent of any person with parental responsibility or the leave of the court. The person with a residence order may remove the child for less than one month without seeking permission of the other parent or having to give notice. This provision may be problematic in Hong Kong with the ease and frequency of travel out of the jurisdiction.

15. We proposed in the consultation paper that there should be a provision in primary legislation to restrict the removal of a child without the consent of the parent who has control of the child's residence or with whom

the child has regular contact. We expressed a preference for the adoption of provisions along the lines of section 2(3) and (6) of the Children (Scotland) Act 1995. We proposed that this new provision would apply in cases where proceedings had already been issued or court orders had already been made concerning the child. It would also extend to any child of the family. We also proposed that Rule 94(2) of the Matrimonial Causes Rules (Cap 179, subsidiary legislation), which allows an application to the court to prevent removal, should be enacted into primary legislation. There was no opposition to these proposals from the respondents to the consultation paper.

16. **We recommend that:**

- (a) there should be a provision in primary legislation to restrict the removal of a child from the jurisdiction without the consent of the parent who has custody, or control of the child's residence, or with whom the child has regular contact. We recommend that provisions along the lines of section 2(3) and (6) of the Children (Scotland) Act 1995 be adopted;**
- (b) this section would apply in cases where proceedings have already been issued or court orders have already been made concerning the child;**
- (c) this section would also extend to any child of the family; and**
- (d) Rule 94(2) of the Matrimonial Causes Rules (Cap 179, subsidiary legislation), which allows an application to the court to prevent removal of the child, should also be enacted into primary legislation. (*Recommendation 1*)**

17. It was noted in Chapter 5 that under the UK Child Abduction Act 1984, it is a criminal offence for a person connected with a child to take or send the child out of the United Kingdom without appropriate consent. As it is an offence to attempt to do so, the police can arrest anyone they reasonably suspect of the attempt without a warrant.

18. In the consultation paper, we expressed the view that in Hong Kong parental child abduction should *not* be so criminalised. Our reasoning was that new criminal offences could only be justified if there was a serious problem of children being abducted either within, to or from Hong Kong, and that at present, there was no evidence that this was the case. We maintain this view and reiterate the more usual common law approach that, although a very serious situation and highly traumatic for the child and the left-behind family, if the person taking the child is one of the child's parents, the criminal law can have only a very limited role to play in the case.

19. **Disclosure of whereabouts/location orders.** A "whereabouts" order (the term used in the Irish legislation) or "location order" (the term used in the Australian legislation) requires a person to provide information on the location of a child. Section 36 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991 expanded on the power of the Irish courts to order disclosure of the whereabouts of the child by extending it to cases under the Hague Convention on the Civil Aspects of International Child Abduction.

20. In the consultation paper, we recommended a power for the Hong Kong courts to order the disclosure of the whereabouts of the child along the lines of section 36 of the Irish Act. We also favoured for adoption in Hong Kong the location order provisions contained in section 67J of the Australian Family Law Act 1975, including the additional section 67K provisions specifying who should be entitled to apply for a location order. The introduction of provisions along these lines was widely supported by the respondents to the consultation paper.

21. **We recommend:**

- (a) **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**
- (b) **the adoption of an additional provision specifying who should be entitled to apply for a location order, as in section 67K of the Australian Act. (*Recommendation 2*)**

22. **Recovery orders.** A recovery order requires the return of the child, grants stop and search powers to recover the child and deliver him to the appropriate person, and prohibits a person from removing a child. In the consultation paper, we examined the recovery order provisions in both Australia and the United Kingdom and concluded that the Australian provisions in section 67Q of the Australian Family Law Act 1975 were to be preferred.

23. As with the whereabouts and location order proposals, these suggested provisions were widely supported by the respondents to the consultation paper. Some respondents noted that there may be practical difficulties and funding implications when a recovery order is made and the child is recovered, in terms of how the child is to be looked after (by whom and where) and then delivered back to the applicant parent if they are overseas. We note these concerns and consider that these are matters for the Administration to address at such time as the proposals may be implemented.

24. **We recommend the adoption of provisions on recovery orders similar to those in section 67Q of the Australian Family Law Act 1975.** (*Recommendation 3*)

25. **Power to hold a child so that he can be returned to the custodial parent or taken to a place of safety.** As we saw in Chapter 2, the Immigration Department of the Hong Kong SAR can prevent a parent and child departing from Hong Kong when they are aware of a court order prohibiting removal (this is referred to as the 'stop order' procedure), but cannot arrest or detain them. If no order prohibiting removal has been made, or if one has been made but has not yet been advised to Immigration, then Immigration cannot stop a child from leaving Hong Kong if the child has a valid travel document.

26. In the consultation paper, we advocated providing the power to the authorities to detain a child whom they reasonably suspected was about to be, or was being, removed from the jurisdiction in breach of court orders. We felt that this power to hold the child, until the other parent and/or the court could be notified may be necessary in certain emergency situations¹ to prevent the child from being removed from the jurisdiction. We proposed as a model for this provision section 37 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991.

27. The introduction of a power to hold the child suspected of being abducted proved to be a controversial proposal with the respondents to the consultation paper. Some felt that granting the power to the authorities to hold the child was too drastic a step, particularly considering how frightening the experience might be for the child. Others wondered whether the proposed power went far enough, and suggested that introducing a power of arrest in relation to the abducting parent might be considered.

28. After considering all of the comments made by our consultees, we still generally advocate our original reform proposals under this head. However, we are mindful of the human rights concerns expressed and must emphasise that the rationale for the proposed power is to *protect* a child who is being abducted. We believe that it is not sufficient for the abducting parent and the child simply to be stopped and turned away from the immigration checkpoint because this leaves the abducting parent free to make further attempts to leave Hong Kong with the child by other means. This situation is clearly not in the best interests of the child.

29. As the research and statistics indicate, once the child has been taken out of the jurisdiction, it may be very difficult to trace his whereabouts and obtain his return. A balance therefore needs to be struck between the possible short-term trauma to the child of being held by the authorities in a place of safety pending the arrival of the other parent or Social Welfare, etc,

1 For example, where the formal stop order procedure has not been effected in time and the abducting parent has already passed through the immigration checkpoint with the child.

and the longer-term trauma to the child of being taken away, possibly permanently, from his custodial parent and his home jurisdiction. We would also suggest that in the types of situations where this power might be used, the child could, for example, be held initially at the first-aid clinic at the airport until the custodial parent or an officer from the Social Welfare Department could arrive to take the child. We would also suggest that, wherever possible, female officers from the police and Immigration should be called in to handle or assist in these cases.

30. We therefore endorse our earlier approach and leave the issue to the Law Draftsman as to how to emphasise the protective nature of the proposed power in the implementing legislation.

31. **We recommend:**

- (a) **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**
- (b) **that 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, we do not propose to go so far as to have a general power of arrest. (*Recommendation 4*)

32. **Surrender of passports.** As we have noted earlier, the immigration authorities cannot in general prevent a person leaving the jurisdiction if he is holding a valid travel document. It is therefore significant whether, in potential child abduction cases, the authorities or the courts have powers either to prevent the issue of passports or to order their surrender.

33. In the consultation paper, we accepted that the court has the inherent power to order the surrender of passports where there is a real risk that the child will be unlawfully removed from Hong Kong, and that magistrates can order the surrender of all passports, Chinese re-entry permits and travel documents when they release persons on bail. We also noted, however, that Hong Kong is in a unique position that makes it difficult to legislate in this area. Hong Kong residents tend to travel in and out of Hong Kong, whether to the mainland or elsewhere, with more frequency than residents of other jurisdictions, and there is only an identity card control between Hong Kong and the mainland for Chinese permanent residents. It is therefore possible for certain persons to leave Hong Kong for another

jurisdiction without a passport. We observed that it would be difficult for a court to order the surrender of a Hong Kong SAR identity card given the requirements imposed on HKSAR residents to carry such a card.

34. We therefore recommended in the consultation paper the retention of the status quo in relation to the surrender of passports in these cases. We noted that the Australian section 67ZD of the Family Law Act 1995, which gave power to the court to order the surrender of passports to the court, did not cover such situations as the length of time that the passport could be withheld. We therefore rejected the adoption of a similar proposal for Hong Kong. Our approach in the consultation paper was supported by most of the respondents.

35. **We recommend the retention of the status quo in relation to whether the court should be able to order the surrender of passports. We reject the adoption of a similar provision to section 67ZD of the Australian Family Law Act 1975 for Hong Kong.** *(Recommendation 5)*

36. **Notification of court order to the Immigration Department.** Practitioners have expressed concern at the variation in practice as to whether the Immigration Department is informed or not of the making of a court order prohibiting the removal of a child without the written consent of the other parent or the court. In some cases, a parent does not inform the department, as the parents are able to agree informally between themselves as to whether the child is removed for a holiday, without the necessity of varying the court order or having to correspond via solicitors. On the other hand, there are cases where a parent arrives at the departure area and is informed by immigration officials that he cannot depart with the child because the department has been notified of the order.

37. In considering this issue, we concluded that the Family Court Registry should not be under an obligation to notify the Immigration Department of the court order; neither should the Immigration Department be obliged to inform the other parent that they have received a copy of the court order. We recommended in the consultation paper that it should be the parents' responsibility to notify the Immigration Department that a court order had been made prohibiting the removal of the child from Hong Kong. We felt that it should be up to the discretion of the parents whether the Immigration Department was notified or not. However, we did emphasise that if one parent does notify the department of the order, it should be mandatory that they inform the other parent of the fact of notification. This approach was supported by most of the respondents to the consultation paper.

38. **We recommend that:**

- (a) **it should be the parents' responsibility to notify the Immigration Department that a court order has been made prohibiting the removal of the child from Hong Kong;**

- (b) it should be at the discretion of the parents whether the Immigration Department is notified or not; and
- (c) if one parent does notify the department of the order, however, it should be mandatory that that parent inform the other parent of the fact of notification. (*Recommendation 6*)

Chapter 7 - Further observations

39. **Introduction.** During the course of our recent deliberations under this reference, we received advice from counsel for the Hong Kong Central Authority under the Hague Convention as to certain further difficulties which have come to light in the handling of Hague Convention cases. The counsel concerned have suggested some possible solutions for these difficulties. We find much merit in their proposals. As this information was not available to us at the time of our earlier consultation exercise, these are not matters on which we have consulted the public. We nonetheless present these issues in this report to bring them to the attention of the Administration.

40. **Legal aid position.** Unlike certain other jurisdictions, Hong Kong does not have any special system of legal aid for dealing with Hague Convention cases.² Consequently, if an overseas Hague applicant wishes to apply for legal aid in Hong Kong, he will have to pass the same merit and means tests set by the Legal Aid Department as other general applicants for legal aid.

41. Counsel for the Central Authority have found that it is not uncommon for those who fail the legal aid means test to experience financial difficulties in trying to meet the relatively high legal costs incurred in pursuing Hague Convention cases in Hong Kong. Obviously, it would be most unfortunate if Hague Convention applicants were forced to withdraw cases to recover their children because of an inability to pay the legal costs involved. The Central Authority has also found that recovering costs from overseas applicants is rarely straightforward and often proves to be a time-consuming process.

42. There is also concern that the current system of applying for legal aid might not always be able to dispose of Hague Convention cases as expeditiously as the urgency of international abduction cases requires. As overseas applicants are rarely able to provide all the necessary supporting financial documents at one time, there can be considerable potential for delay in the processing of their legal aid applications. **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,**

² In England, for example, legal aid is automatically granted in incoming Hague Convention cases without the necessity of the Hague applicants passing a means test.

or the current arrangements strengthened, to promote the expeditious processing of legal aid applications in Hague Convention cases.³

43. **Notwithstanding the current provision relating to costs in Hague Convention cases,⁴ the Administration may need to 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.

44. **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.⁵**

45. Another matter raised in the context of legal aid, concerns the extent to which the Central Authority is kept informed of progress on Hague cases which are briefed out to private practitioners. When a Hague Convention applicant is granted legal aid, the solicitor assigned takes over the matter and has conduct of the case. As he is primarily accountable to the Legal Aid Department, whether the Hong Kong Central Authority is kept informed of the developments and outcomes in these cases depends largely on the goodwill of the assigned solicitor. **It would greatly assist the Central Authority to duly discharge its obligations under the Hague Convention if solicitors assigned to Hague Convention cases by the Director of Legal Aid were required to keep the Central Authority informed of the development and outcomes of these cases.**

46. **Stay of custody proceedings in Hong Kong.** Counsel for the HKSAR Central Authority have queried whether there may be a need to clarify the effect of Article 16 of the Hague Convention, which provides that custody determinations should not be made by a court in respect of a child who has become subject to a Hague Convention application until the outcome of that Hague Convention application is known.

47. The concern raised by the Central Authority is whether Article 16 and other related provisions (namely, Order 121, rule 10 of the Rules of the High Court (Cap 4, subsidiary legislation)), are effective in providing - as appears to have been intended - for the *stay* of pending custody proceedings once an Article 16 notice has been given.

3 We must point out, however, that we are advised that officers in the Legal Aid Department who process the legal aid applications are very mindful of the need to treat Hague Convention cases as expeditiously as possible, and that in practice, delay may be rare.

4 Ie, section 13 of the Child Abduction and Custody Ordinance (Cap 512), which provides that the costs of Hague applications shall not be borne by the Hong Kong authorities, except in cases where legal aid is granted.

5 This is the approach adopted by some provinces in Canada, eg, British Columbia.

48. Although the heading of rule 10 is “Stay of Proceedings,” counsel for the Central Authority note that no statement appears, either in the body of Order 121, or in the body of the principal Ordinance, that when an Article 16 notice has been given, custody proceedings in Hong Kong which relate to the subject child shall be stayed. If a stay is not granted, parties to the custody proceedings may have to continue with these in parallel with the Hague Convention proceedings. If subsequently the court orders the return of the child under the Hague Convention, this will have resulted in both a waste of the parties' efforts, as well as the court's time, in having to continue to pursue the custody proceedings. Accordingly, **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.**

49. **Confidentiality of Hague proceedings.** A further area of the law which counsel for the Central Authority have suggested may need some clarification is in relation to whether court file information pertaining to Hague Convention proceedings, which are necessarily sensitive in nature, may be automatically treated as confidential.

50. At present, the public may, upon payment of a prescribed fee, search for, inspect and obtain a copy of the originating process in a case filed in the court registry. However, section 5(1)(a) of the Judicial Proceedings (Regulation of Reports) Ordinance (Cap 287) prohibits the publication of information concerning proceedings which relate wholly or mainly to the guardianship, custody, maintenance or upbringing of children, or to rights of access to children, or to the wardship or adoption of children. Hague Convention proceedings, which have only become applicable in Hong Kong in recent years, are not expressly referred to in section 5. The issue therefore is whether documents filed with the court in Hague proceedings are protected in the same way from public scrutiny as documents filed in, for example, wardship proceedings.

51. There are certain administrative measures in place in the Court Registry to prevent the public from having access to the court file in Hague Convention proceedings. Also, those handling Hague Convention cases can ensure that confidentiality is preserved by (before the originating summons is filed with the Court Registry) applying for an express order prohibiting public search and inspection of documents related to the case.⁶ It would, however, save court time and put the matter beyond doubt if specific legislative provisions could be introduced to cover the matter. **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**

6 The Hong Kong Central Authority has, since September 2001, committed to applying for such an order in every incoming child abduction case.

but also to prohibit the searching and inspection of the court file in these proceedings by members of the public.