

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

**INTERNATIONAL PARENTAL
CHILD ABDUCTION**

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April 2002

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Report

International parental child abduction

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PREFACE

1. Recommendations made by the Law Reform Commission of Hong Kong have brought about key changes to our laws affecting the family. The Commission's 1991 report on illegitimacy,¹ which proposed reforms to regularise the status of children, was implemented in 1993 in the Parent and Child Ordinance (Cap 429).² Two years later, the Commission's proposals for a new divorce regime³ resulted in major changes to the Matrimonial Causes Ordinance (Cap 179).⁴ One area which has remained largely untouched however, despite major developments overseas, is Hong Kong's law on the guardianship and custody of children, which dates back to the late 1970s.

2. In recent years, Hong Kong, like many other jurisdictions, has seen a dramatic rise in its rate of divorce.⁵ The serious impact that the legal process itself is recognised to have on families undergoing divorce, particularly where arrangements for children must be made, has led jurisdictions like the United Kingdom and Australia to comprehensively recast their laws in this area.⁶ Other jurisdictions are also now considering what reforms may be necessary.⁷

3. The topic of guardianship and custody of children was referred to the Law Reform Commission by the Attorney General and the Chief Justice in April 1995 in the following broad terms:

“to consider the law relating to guardianship and custody of children, and to recommend such changes as may be thought appropriate.”

¹ HKLRC, *Illegitimacy*, Topic 28, December 1991.

² Ordinance No 17 of 1993.

³ HKLRC, *Grounds for Divorce and Time Restrictions on Petitions for Divorce Within Three Years of Marriage*, Topic 29, November 1992.

⁴ *Ie*, the Matrimonial Causes (Amendment) Ordinance (Ord No 29 of 1995).

⁵ In 1972, 354 divorce decrees absolute were granted in Hong Kong. By 1980, the figure had risen to 2,087. In 1990, 5,551 decrees absolute were granted, and in 2000, the figure had soared to 13,058. (Figures supplied by the Judiciary of the HKSAR.)

⁶ In England, the Children Act 1989; in Scotland, the Children (Scotland) Act 1995; and in Australia, the Family Law Reform Act 1995. (Though see also a recent follow-up study on the Australian reforms by University of Sydney and Family Court of Australia, *The Family Law Reform Act 1995: The First Three Years* (Jan 2001).)

⁷ *Ie*, (New Zealand) NZ Ministry of Justice consultation paper, *Responsibilities for Children – Especially When Parents Part: The Laws About Guardianship, Custody and Access*, (Aug 2000); (Canada) Canadian Parliamentary Special Joint Committee on Child Custody and Access, *For the Sake of the Children* (Dec 1998), The Government of Canada's Response to the Report (May 1999), Dept of Justice Canada, *Federal Provincial Territorial Consultations on Custody, Access and Child Support in Canada* (Mar 2001).

4. In May 1996, the Commission appointed a sub-committee chaired by the Hon Mrs Miriam Lau to consider the terms of reference and to make proposals to the Law Reform Commission for reform. The members of the sub-committee are:

Hon Ms Miriam Lau, JP Chairperson	Sole Practitioner Miriam Lau & Co
H H Judge de Souza Deputy Chairman	Judge District Court
Miss Rosa Choi	Assistant Principal Legal Aid Counsel Legal Aid Department
Ms Bebe Chu	Partner Stevenson, Wong & Co, Solicitors
Ms Robyn Hooworth (up to 28 August 2001)	Mediator
Mr Anthony Hung	Partner Lau, Kwong & Hung, Solicitors
Ms Jacqueline Leong, SC	Barrister
Dr Athena Liu	Associate Professor Faculty of Law University of Hong Kong
Mr Thomas Mulvey, JP	Director Hong Kong Family Welfare Society
Mrs Cecilia Tong	Regional Officer (Retired) Social Welfare Department
Ms June Wee	Barrister
Miss Wong Lai-cheung	Counsellor

5. The first secretary to the sub-committee was Ms Paula Scully, who was appointed Chairperson of the Guardianship Board of Hong Kong in February 1999. Ms Scully was succeeded as sub-committee secretary by Ms Michelle Ainsworth, who was appointed Deputy Secretary of the Commission in April 2000.

6. In the course of its detailed consideration of the law and practice in this area, the sub-committee identified a number of key topics for review. These included the approach of the law and the courts to custody and access arrangements for children, guardianship arrangements for children on the death of one or both parents, international parental child abduction and the use of alternative dispute resolution processes in family cases.

7. The sub-committee published an extensive consultation paper on *Guardianship and Custody* in December 1998 addressing these topics and setting out a wide range of proposals for reform. Fifty-one submissions were received during the three-month consultation exercise. Those who responded included members of the legal profession, social workers, welfare organisations, youth groups, women's groups, counsellors, mediators, educational institutions, government departments and private individuals. The list of respondents is at Annex 1. We are grateful to all those who commented on the consultation paper.

8. In January 2002, we published our report on *Guardianship of Children*, the first in our series of four reports under this reference. This report, the second in the series, covers the international parental child abduction aspect of the reference.⁸

9. Chapter 1 of this report looks at the serious and harrowing problem of parental child abduction, in both its social and international contexts. Chapters 2 to 4 of the report examine how child abduction cases are currently dealt with in Hong Kong, under both our local criminal and civil law and under our international convention obligations. Relevant legislative provisions in other jurisdictions are considered in Chapter 5. Chapters 6 to 8 set out the sub-committee's conclusions and recommendations for reform.

⁸ In due course we will be publishing two further reports under this reference, one on custody and access and the other on mediation.

Chapter 1

The problem of parental child abduction

The legal context

1.1 When a child is taken away without consent or lawful authority from a person who has the right to care for him, the child has been abducted. When a child is removed in these circumstances across an international border, this constitutes international child abduction.¹ The focus of this report is international *parental* child abduction.² 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.

1.2 With the ease and frequency of foreign travel and the relaxation of cross-border controls, combined with the upsurge in international marriages and the resulting complications of children with dual nationality and dual passports, the act of removing a child to another jurisdiction has become relatively easy in recent times.³ Up until the 1980s however, 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.⁴

“This state of international ‘anarchy’ operated as an encouragement to would-be abductors who, by appropriate forum shopping, could hope to take their children from one jurisdiction to another and there obtain judgment in their favour.”⁵

¹ A Hutchinson, R Roberts & H Setright, *International Parental Child Abduction* (1998, Family Law) at 3.

² Other types of child abduction, such as kidnapping for ransom, abduction of children for sexual or other unlawful purposes, or baby-snatching by a stranger who attempts to keep the child as her own (see Dr S Edwards, “The Child Abduction Agony” (1990) *New Law Journal* 59), are not the subject of this report.

³ S Davis, J Rosenblatt & T Galbraith, *International Child Abduction* (1993, Sweet & Maxwell) at vii.

⁴ NV Lowe & G Douglas, *Bromley’s Family Law* (9th ed, 1998, Butterworths) at 479. (This remains largely the case today in respect of child abductions to countries where the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction is not in force: see the discussion below in Chapter 4.)

⁵ Lowe & Douglas, above, at 479.

1.3 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.⁶ As one judge has commented, “[a]nyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child’s life. Such roots can grow rapidly.”⁷ Another has observed that “the pull of gravity from the country of origin diminishes at an accelerating speed with the passage of time.”⁸ 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.⁹ One writer has commented:

*“[t]o adopt a rule that has that result is contrary both to justice and common sense.”*¹⁰

1.4 With divorce rates rising dramatically¹¹ and the numbers of abduction cases increasing,¹² “the law has been hard-pressed to find a satisfactory solution.”¹³ However, as a result of a Canadian initiative,¹⁴ the Hague Conference on Private International Law ratified the Convention on the Civil Aspects of International Child Abduction (“the Hague Convention”) on 25 October 1980. This Convention heralded a new *international* approach to combating parental child abduction.¹⁵

1.5 The Convention’s stated aims are to secure the prompt and safe return of children who have been wrongfully removed from one Convention

⁶ B Davis, “The New Rules on International Child Abduction: Looking Forward to the Past” (1990) 1 Australian Journal of Family Law 31, at 33-34.

⁷ Mr Justice Wall, “English Judicial Attitudes to the Hague and European Conventions on International Child Abduction,” paper presented at the International Federation of Women Lawyers (FIDA) Convention, Hong Kong, 1996, at 1.

⁸ By Ormrod LJ in *re R (Minors)* (1981) 2 FLR 416, at 427.

⁹ B Davis, above, at 34.

¹⁰ *Idem.*

¹¹ See, for example, the Hong Kong statistics noted in the Preface, above, at footnote 5.

¹² See statistics given in the following studies: N Lowe & A Perry, “International Child Abduction: The English Experience” (1999) 48 International and Comparative Law Quarterly 127; and Prof N Lowe, S Armstrong & A Mathias, “A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction” (2001) Preliminary Document No 3 of March 2001 for the attention of the Special Commission, Hague Conference on Private International Law. The findings of these two studies are discussed in more detail later in this chapter.

¹³ Davis, Rosenblatt & Galbraith, above, at vii.

¹⁴ Prof JD McClean, “Migratory divorce in a mobile society - child stealing, forum shopping and the child’s interests,” paper delivered at 7th Commonwealth Law Conference, 18-23 September 1983, Hong Kong.

¹⁵ Dr Athena Liu, *Family Law for the Hong Kong SAR* (1999, HKU Press) at 334.

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.¹⁶ The Convention is currently in force in 72 jurisdictions,¹⁷ including the Hong Kong SAR.¹⁸ The details of the Hague Convention and its operation are examined further in Chapter 3.

The social consequences of child abduction

1.6 The parent who snatches a child away from the other parent presents a difficult problem in family law.¹⁹ What legal standard should be applied to what is ordinarily an intra-family dispute? Should a parent's abduction of his own child be considered a criminal act?²⁰

1.7 The merits of who should be awarded custody of the children in family proceedings are often not clear-cut. Practical welfare considerations and a wish to maintain the status quo for the children as far as possible usually play a large part in the court's decision. This can be further

¹⁶ See Preamble to the Hague Convention. The Convention has been described as "a hot pursuit remedy," with its aim of concluding cases for the return of children, at both first instance and on appeal, within six weeks: see *Re C (Abduction: Grave Risk of Physical or Psychological Harm)* [1999] 2 FLR 478, at 488, *per* Thorpe LJ. In most jurisdictions, however, this objective is rarely met in practice: see discussion below at para 1.13; though the Hong Kong SAR appears to be an exception: see para 1.19 below.

¹⁷ These include the following states and territories: Argentina, Australia, Austria, The Bahamas, Belarus, Belgium, Belize, Bosnia and Herzegovina, Brazil, Burkina Faso, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark (except the Faroe Islands and Greenland), Ecuador, El Salvador, Estonia, Fiji, Finland, France, Fyrom (the former Yugoslav Republic of Macedonia), Georgia, Germany, Greece, Guatemala, Honduras, Hong Kong SAR of China, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Luxembourg, Macau SAR of China, Malta, Mauritius, Mexico, Republic of Moldova, Monaco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Saint Kitts and Nevis, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Trinidad and Tobago, Turkey, Turkmenistan, United Kingdom, United States of America, Uruguay, Uzbekistan, Venezuela, Yugoslavia and Zimbabwe. List provided as at 22 March 2001: refer website of the Hague Conference on Private International Law, "Hague Conventions: Signatures, Ratifications and Assessions," at: <www.hcch.net/e/status/statmtrx.html>. Note that the Convention may not necessarily be in force between all 72 states and territories at the same time. For the Hong Kong SAR position, see note 18 below.

¹⁸ By virtue of the Child Abduction and Custody Ordinance (Cap 512). The Hague Convention first came into force as between Hong Kong and a number of contracting states and territories to the Convention on 1 September 1997: see Child Abduction and Custody (Parties to Convention) Order, LN 36 of 1998 which was made under section 4 of the CACO. For the current position on those contracting states and territories with which the Convention has come into force with the Hong Kong SAR, see the most recent order made under section 4: the Child Abduction and Custody (Parties to Convention) Order, LN 302 of 1999. For further information on parental child abduction and the HKSAR, see (from mid-2002) the website on this topic included on the Department of Justice Homepage at <www.info.gov.hk/justice/>.

¹⁹ Dr Liu, above, at 333.

²⁰ D Bedingfield, *The Child in Need: Children, the State and the Law* (1998, Family Law) at 435. Note that in some jurisdictions parental child abduction *has* been criminalised: see Chapter 5, below. For our own position on this issue, see Chapter 6, paras 6.9 *et seq*, below.

complicated in a situation where the parents come from different homelands. One of the parents may find themselves left with little support in a foreign country when the marriage breaks down, so may feel they have no choice but to return "home" even though their children are to remain behind with the other parent.²¹ In other cases, the court may award custody of the children to a parent who subsequently re-locates overseas, away from the access parent. In both situations, the right to maintain contact with the children may become "little more than a legal fiction"²² for one of the parents. It has been commented that the temptation to resort to self-help in such cases "may be overwhelming."²³

1.8 Although the numbers of cases involved are not yet large,²⁴ international parental child abduction is a problem of immense *emotional* proportions which is fraught with practical difficulties.²⁵

*"[I]t is hard to imagine anything more chilling than for a mother to return home to find her children have disappeared and then to receive a telephone call from the father saying that they are all in South America. The children in these cases will have suffered the trauma of the breakdown of their parents' marriage. They are then uprooted from all that is familiar and important to them. Their world is turned upside down, and they become strangers in a foreign land. However resilient the child, that experience must be confusing, frightening, and, in the long run, damaging."*²⁶

1.9 Children who have been abducted by family members are sometimes physically and almost always psychologically harmed as a result of their abduction.²⁷ Many children in these situations are told that the other parent is dead or no longer loves them. They are often given new names by their abductor-parents and are instructed not to reveal their real names or where they have come from. Because of the harmful effects on children,

²¹ For a more detailed discussion, see papers by Mr Justice Kay, Family Court of Australia: "The Hague Convention - Order or Chaos?" (1994) Family Law Conference, Adelaide; and, "The Hague Convention – An update on a paper first delivered to Family Law Conference in Adelaide 1994" (1997) Family Law Conference, San Francisco.

²² B Davis, above, at 33.

²³ *Idem*.

²⁴ Eg, in the Hong Kong SAR's case, there have been, since 1997, only 18 cases of parental child abduction reported to the authorities where the children have been taken out of Hong Kong to another jurisdiction. In the same period there have also been 19 reported cases of children being abducted into Hong Kong from elsewhere. (Figures provided by the Hong Kong SAR Central Authority under the Hague Convention.) Figures world-wide for cases of parental child abduction are on the increase, with 1,080 cases documented in 1999: see Lowe, Armstrong & Mathias, above.

²⁵ Davis, Rosenblatt & Galbraith, above, at vii.

²⁶ Hansard House of Lords Debate, Vol 460 col 1257, *per* Lord Meston (5 March 1985, regarding the then UK Child Abduction and Custody Bill).

²⁷ Mr Justice Kay, "The Hague Convention – An update on a paper first delivered to Family Law Conference in Adelaide 1994," above, at 1.

parental child abduction has been characterized in some quarters as a form of child abuse.²⁸

1.10 Parents whose children have been abducted (the "left-behind" parents) will likely suffer great emotional and financial hardships in their efforts to locate the children and resolve the situation. Traumatic and expensive litigation may ensue as they try to obtain the return of the children or the enforcement of court orders.²⁹ As we have noted above, unless international co-operation arrangements such as the Hague Convention can be invoked, issues will arise as to which court should hear the merits of the case for custody. Will it be the court of the child's usual place of residence, which may have already granted custody to the left-behind parent, or the court of the country to which the child has lately been taken?

*"[H]istorically courts have been jealous of their jurisdiction to decide matters regarding litigants who are present within that jurisdiction. The urge to refuse to cede jurisdiction is especially strong in family disputes where mother and father are from different cultures as well as countries. Both cultures, when applying the legal test of "best interests of the child", apply it in an ethnocentric way ... Each culture [considers] its own way of ordering family relations when deciding cases such as this."*³⁰

The situation internationally

1.11 Two recent research studies have analysed and 'profiled' parental child abduction cases in detail, and how these are handled under the Hague Convention.³¹ According to the most recent of these studies, cases involving approximately 1,080 children were actioned under the Convention in

²⁸ P M Hoff, "Parental Kidnapping: Prevention and Remedies," in *Parental Abduction Training and Dissemination Project* (May 1997, ABA Centre on Children and the Law) at 1.

²⁹ Mr Justice Kay, above, at 1.

³⁰ Bedingfield, above, at 435. Another writer goes further: "*the welfare principle is vague and indeterminate; more a sociological standard than a juridical one. It provides answers which can be used to justify almost any conclusion a judge wants to reach. And it is even worse in cases of international child abduction. In such cases the welfare principle may be no more than a cloak for the particular cultural values of the country of refuge, which, in effect, imposes those values on the community from which the children were removed*": see B Davis, above, at 34. Davis notes (at his footnote 21) the contrasting cases of *In the Marriage of F and K Raja Bahrin* (1986) 11 Fam LR 233 (where the decision of the Australian Family Court appeared to be based on the fear that the wife would not receive justice from the Kadil court in Malaysia) and *Reihana* (1980) 6 Fam LR 134 and *Schwarz* (1985) 10 Fam LR 235 (where the Court had no such fears with respect to the civil courts in New Zealand or the rabbinical courts in Israel).

³¹ Lowe & Perry, above (study published in 1999 detailing Hague Convention figures for 1996); and Lowe, Armstrong & Mathias, above (study published in 2001 detailing Hague Convention figures for 1999). Note: the first study concerned cases handled by the Central Authority for England and Wales under the Hague Convention, which has the second largest caseload – after the USA – of all the Hague Convention's contracting states.

1999.³² Obviously, the number of child abduction cases varied greatly from jurisdiction to jurisdiction. The relevant authorities in the USA and England and Wales handled by far the largest numbers of “incoming” applications (where the child was abducted *into* that jurisdiction) and “outgoing” applications (where the child was abducted *out of* that jurisdiction), with a combined total of almost 50% of all Hague Convention cases handled world-wide.³³

1.12 In terms of the usual mode of abduction of the child, the commentators on the 1996 statistics observed:

“In the popular consciousness the words ‘child abduction’ conjure up images of children snatched from school or from their homes, bundled into a car and whisked away to some distant land, usually by their fathers. According to our findings, however, such images are false. In our sample, fathers were responsible for only 27 per cent of the abductions, while the children’s mother was the abductor in 70 per cent of the cases, with grandparents and ‘others’ making up the remaining 3 per cent. Although our information on the nature of the abduction was limited, the child was ‘snatched’ or taken from school in only 4 per cent of the cases, while by contrast, 24 per cent of the cases involved one or other parent taking the child on holiday and failing to return.”³⁴

1.13 As to perceivable trends, the statistics from these studies indicated that:

- the vast majority of applications under the Hague Convention were for the return of the child, not enforcement of access arrangements (for example, there was a ratio of 84% to 16% return to access applications made in 1999);³⁵
- the majority of the abducted children (56% for 1996) were six years old or younger, with the majority of cases (59% for 1996) involving

³² The figure of 1,080 cases did not represent the full picture however, as it did not include abductions to non-Convention countries or abductions actioned through other international arrangements or by way of application made directly to domestic courts: Lowe, Armstrong & Mathias, above, at 5.

³³ Eg, authorities in England and Wales reportedly handled 329 cases in total under the Hague Convention in 1999. This included 149 incoming applications which represented 20% of the world total: Lowe, Armstrong & Mathias, above, at 5-6.

³⁴ Lowe & Perry, above, at 132-133, who note however that, “it may well be that different patterns exist among abductions to non-Convention countries.” Compare also the Hong Kong SAR position, at para 1.16 below.

³⁵ Lowe, Armstrong & Mathias, above, at 5.

single children, not sibling groups.³⁶ The majority (53.3% for 1999) were boys;³⁷

- in 1996, the vast majority (97%) of the cases analysed revealed that the "taking person" (abductor) was one of the parents, while others included grandparents, aunts, uncles and, in one case, the child's nanny.³⁸ In 1999, 70% of the taking persons globally were women,³⁹ which compares to a figure of less than 50% in the early days of the Convention.⁴⁰ (It has been commented that this may be indicative of an increasing trend for abductions to be perpetrated by mothers escaping domestic violence situations with their children⁴¹);
- almost 50% of the cases involved a taking person who was of the same nationality as the state applied to for return ("the requested state"). This tends to suggest that many of these taking persons were "going home";⁴²
- globally, just over half the applications in 1999 (50.2%) resulted in return of the child, either by judicial return (32.2%) or voluntary return (18%);⁴³
- according to the 1999 figures, dispositions (cases completed) within six weeks were relatively rare, though they were more likely where the case was settled voluntarily.⁴⁴ The processing time for access applications was considerably longer than for return applications, with a global mean figure of 97 days (ie, just under 14 weeks) for judicial returns, compared to 60% of access applications taking over 6 months.⁴⁵

³⁶ Lowe & Perry, above, at 132.

³⁷ Lowe, Armstrong & Mathias, above, at 11.

³⁸ Lowe & Perry, above, at 132.

³⁹ Lowe, Armstrong & Mathias, above, at 7; though see para 1.16, below, regarding the HKSAR.

⁴⁰ Lowe & Perry, above, at 133.

⁴¹ *Idem*.

⁴² Lowe, Armstrong & Mathias, above, at 8.

⁴³ Lowe, Armstrong & Mathias, above, at 12. However, the authors of the study note (at 13) that for some jurisdictions the figures varied greatly from the global norms: "All 4 applications to Hong Kong resulted in judicial return. 8 out of 10 applications to Scotland ended in a voluntary return, 3 out of 4 applications received by Colombia were rejected, and 7 out of 9 applications to Austria were judicially refused."

⁴⁴ Lowe, Armstrong & Mathias, above, at 29.

⁴⁵ Lowe, Armstrong & Mathias, above, at 29-30.

The situation in the Hong Kong SAR

1.14 Figures available for the period since 1 September 1997,⁴⁶ when the Hague Convention was extended to the Hong Kong SAR, indicate that there have been 19 incoming and 18 outgoing cases of child abduction involving the Hong Kong SAR notified to the authorities. The other jurisdictions concerned have included Argentina, Australia, Brazil, Canada, France, Germany, Luxembourg, New Zealand, Panama, Switzerland, Taiwan, the United Kingdom and the USA. A more detailed profile of the incoming and outgoing cases for the year 1999 is noted below.

1.15 *The applications.* Altogether the Central Authority for the Hong Kong SAR under the Hague Convention handled six new applications in 1999. Four were incoming applications for the return of children abducted from other jurisdictions and brought into Hong Kong. Two of these applications came from England and Wales, the other two came from the USA and Canada respectively. There were no incoming access applications. There were also two outgoing applications made for the return of children abducted from Hong Kong to other jurisdictions.

1.16 *The taking persons.* All the taking persons were male. This is in stark contrast to the global norm, where 70% of taking persons were female.⁴⁷ In two applications, the taking person was a national of the requested state. In the other two applications, the taking person had a different nationality.

1.17 *The children.* There were applications for four children in total abducted into Hong Kong in 1999. Each application was for a single child and no sibling groups were involved. Two of the children were under 4 years old and the other two were aged between 5 and 9 years old. Two of the children were male and two were female.

1.18 *The outcomes.* In 1999, all of the incoming applications made to Hong Kong from other jurisdictions resulted in a judicial return, whereas globally, only 32.2% of applications ended in judicial return. Hong Kong was the *only* contracting state in the analysis where all incoming applications resulted in a judicial return.

1.19 In 1999, the average length of time for a judicial return of a child abducted into the Hong Kong SAR from another jurisdiction was, remarkably, only 26 days. This is well within the six-week time limit implied in Article 11(2)

⁴⁶ Supplied by the Civil Division of the Department of Justice, which is designated as the Central Authority for the HKSAR for the purposes of the Hague Convention. For further information on parental child abduction and the HKSAR, see (from mid-2002) the website on this topic included on the Department of Justice Homepage at <www.info.gov.hk/justice/>.

⁴⁷ Bosnia and Herzegovina (where there were three cases) was the only other contracting state in the analysis where all the taking persons were male. Conversely, in applications to Hungary (where there were eight cases) and Iceland (where there were four cases), all the taking persons were female.

of the Convention and compares extremely favourably with the handling time taken in other jurisdictions (the global norm for judicial returns in 1999 being 87 days).

The aim of this report

1.20 Parental abduction of children across international lines might be considered by some as a form of child abuse. The child suffers the trauma of being taken away from his home, from his custodial parent and other family members, and of being taken to a foreign country with which he may have little or no connection. Added to this, his abduction will be an extremely harrowing experience for the child's left-behind family, particularly the left-behind parent.

1.21 It is to be hoped that as more countries accede to the Hague Convention on the Civil Aspects of International Child Abduction, and as the provisions and practices under the Convention are developed further,⁴⁸ this mechanism will become increasingly successful in combatting international parental child abduction, both from the point of view of returning abducted children and in providing an effective deterrent to would-be child abductors.

1.22 The objective of this report is to consider ways in which the current civil and criminal law in Hong Kong might be strengthened, so as to better assist the parties who are immediately affected by child abduction and the lawyers and relevant authorities handling their cases. It should be noted that this report focuses on the constituents of the law in this area rather than on the mechanics of how the law is to be enforced.

1.23 Unfortunately, even with the best legal provisions in place, the law itself can never be expected to prevent the abduction of children in every case. What the law should strive to achieve, however, is to minimise its likelihood as far as possible.

1.24 Our recommendations and observations for reform of the law in this area are outlined in Chapters 6 to 8 of the report.

⁴⁸ Since its inception in 1980, there have been four meetings of the Special Commission set up to review the operation of the Hague Convention. At these meetings, contracting states and interested individuals and organisations make reports, and offer recommendations as to how the operations of the Convention could be improved. The most recent meeting of the Special Commission took place on 22-28 March 2001.

Chapter 2

Preventing the abduction of a child from the Hong Kong SAR

Introduction

*"The best chance of recovering the child is to prevent him from leaving the jurisdiction in the first place. To this end, the innocent party may invoke both the criminal and the civil law."*¹

2.1 As we have seen in the previous chapters, when custody battles ensue, there are now international mechanisms in place to help locate and return children who are unlawfully taken from their home jurisdictions by the other parent. These mechanisms, such as the Hague Convention on the Civil Aspects of International Child Abduction, are proving to be successful in a significant number of cases, with the global rate of "judicial returns" (where the court intervenes to order the return of the child) estimated to be over 30 per cent of total cases, and voluntary returns at nearly 20 per cent.²

2.2 From the left-behind parent's point of view however, it is far preferable to foil the attempt to remove the child from the jurisdiction before it can take place, although "prevention requires foresight and anticipation"³ and swift action in taking any necessary practical⁴ and legal steps.⁵

¹ NV Lowe and G Douglas, *Bromley's Family Law* (9th ed, 1998, Butterworths) at 479.

² See Prof N Lowe, S Armstrong and A Mathias, "A Statistical Analysis of Applications made in 1999 under the Hague Convention of 25 October 1980 on the Civil Aspects of Child Abduction," (2001) Preliminary Document No 3 of March 2001 for the attention of the Special Commission, Hague Conference on Private International Law, at 11. In the analysis, the precise figure for judicial returns for 1999 was given as 32.2% (ie, 239 out of a total of 743 cases dealt with under the Hague Convention in that year). The figure given for voluntary returns was a further 18% (ie, 134 cases out of the 743 total).

³ Dr Athena Liu, *Family Law for the Hong Kong SAR* (1999, HKU Press) at 333.

⁴ In terms of practical preventative measures which can be taken, the US Department of State Bureau of Consular Affairs has included the following advice in its publication, *International Parental Child Abduction* (1996, 10th ed) at 1-2: "Be alert to the possibility [of child abduction] and be prepared - keep a list of the other parent's relatives, friends, and business associates both here and abroad. Keep a record of important information on the other parent including these numbers: passport, social security, bank account, driver's license, and auto license. In addition, keep a written description of your child, including hair and eye color, height, weight, and any special physical characteristics. Take color photographs of your child every six months ... this information could be vital in locating your child."

⁵ For further information on practical and legal measures which can be taken in the context of Hong Kong, see (from mid-2002) the website on parental child abduction included on the Department of Justice Homepage at www.info.gov.hk/justice/.

2.3 This chapter begins with a brief overview of Hong Kong's current law relating to child custody and access. It then examines the various means available under the civil and criminal law to prevent the abduction of a child from the Hong Kong SAR or to seek his return once he has left the jurisdiction.

Custody of children generally in Hong Kong

2.4 Hong Kong's substantive law on the guardianship and custody of children is contained in a variety of ordinances, including the Guardianship of Minors Ordinance (Cap 13), the Matrimonial Proceedings and Property Ordinance (Cap 192), the Matrimonial Causes Ordinance (Cap 179) and the Separation and Maintenance Orders Ordinance (Cap 16). The Guardianship of Minors Ordinance, which governs court proceedings relating to the custody and upbringing of children,⁶ puts into statutory form the well-established principle that, in all proceedings concerning children in the HKSAR, the welfare of the child is to be the first and paramount consideration of the courts.⁷

2.5 All of the duties, rights and authority that a parent has in respect of his or her child are comprised in the legal status of "guardianship." When a child's parents are married, they both share guardianship of the child and so have equal parental rights and authority.⁸ When the father is not married to the mother, he is not a guardian unless he has acquired parental rights and authority over the child by court order.⁹

2.6 When a marriage breaks down, the orders available to the court in relation to the arrangements for children include custody orders and access orders.¹⁰ The most common custody order in Hong Kong is for "sole custody."

"The effect of the order is to transfer most, if not all, parental rights and authority to the custodial parent exclusively. The non-custodial parent, however, retains rights qua parent (or guardian), e.g., the right to succeed on the child's intestacy, the

⁶ The Guardianship of Minors Ordinance (Cap 13) ("GMO") also governs the provision of maintenance for children, the custody rights of fathers in relation to illegitimate children (Part V, GMO) and the administration of property owned by or held in trust for children (Parts III and IV, GMO).

⁷ Section 3, GMO.

⁸ Section 3, GMO. See also Dr Liu, above, at 275.

⁹ Section 3, GMO.

¹⁰ For the relevant statutory provisions, see especially: section 10, GMO; section 19, Matrimonial Proceedings and Property Ordinance (Cap 192); and section 5, Separation and Maintenance Orders Ordinance (Cap 16).

*right as a guardian on the death of the other parent, the right to appoint a testamentary guardian, and to veto adoption."*¹¹

2.7 Under a sole custody order, the child lives with the 'custodial parent' who has the duty to ensure, protect and promote the best interests of the child, as well as the right to make the major decisions concerning his upbringing. These decisions would include those relating to his education, religion and major medical treatment.¹²

2.8 Other types of custody orders include "split orders," where custody of the child is given to one parent and the daily care and control is given to the other, and joint custody orders, where custody is given to both parents but the daily care and control is given to just one of them. This latter type of custody order *"symbolises divorced or separated parents playing a joint role in the upbringing of the child"*,¹³ as both parents remain entitled to decide important matters affecting him. It has been noted that these two types of custody order are, at the present time, rare in Hong Kong.¹⁴

2.9 Generally, the non-custodial parent is granted "access," which means the right to maintain contact with the child. Different types of access are possible, depending on the particular circumstances of the case.¹⁵

*"An order for reasonable access leaves the parties to agree on how access is to be arranged. The court may order staying access, that is, the parent with access can have the child staying with him or her during the weekends or holidays. Where the parties cannot agree on access arrangements, an order for defined access can be made, detailing access arrangements. Sometimes the court may order that access be supervised (e.g. by the custodial parent or a third party, such as a social welfare officer) or impose conditions on access."*¹⁶

2.10 Custody orders or access orders continue to have effect unless a court discharges them.¹⁷

¹¹ See Dr Liu, above, at 276.

¹² *Idem.*

¹³ Dr Liu, above, at 279.

¹⁴ Dr Liu, above, at 278-279.

¹⁵ Dr Liu, above, at 276.

¹⁶ Dr Liu, above, at 276-277.

¹⁷ For a more detailed analysis of the types of orders available in Hong Kong, see Dr Liu, above, at 275-288.

Preventing the removal of the child from Hong Kong - civil law

Injunctions

2.11 A Hong Kong custody or access order normally provides that a child should not be removed from the jurisdiction unless the consent of the other parent has been obtained, or a written undertaking given to bring the child back to the territory.¹⁸

2.12 Order 90, rule 5(3) of the Rules of the District Court (Cap 336, subsidiary legislation) provides that an application for an injunction may be made *ex parte* by the parent of a child to restrain the other parent or any other person from removing the child from Hong Kong or out of the applicant's custody, care or control.¹⁹

2.13 Rule 94(2) of the Matrimonial Causes Rules (Cap 179, subsidiary legislation) also allows for an *ex parte* application to be made to the court to prevent removal of a child, as follows:

“(2) *A petitioner or respondent ... may apply at any time for an order prohibiting the removal of any child of the family under 18 out of Hong Kong or out of the custody, care or control of any person named in the application without the leave of the court except on such terms as may be specified in the order.*”

2.14 A significant limitation of the injunction remedy, however, is that although it may be granted to an applicant *ex parte*, it must still be served on the respondent to be effective. This may be difficult to achieve if the respondent is actively avoiding receipt of service.²⁰

Wardship

2.15 In Hong Kong, an order of wardship can be sought from the Court of First Instance of the High Court.²¹ Wardship proceedings are unique

¹⁸ E Francis and S Warren, *Divorce and Separation in Hong Kong* (1995, OUP) at 88.

¹⁹ See *Chiu Kwai-fun v Lam Hing Keung* (1985) High Court Misc Proceedings No 968 of 1985. The rule applies to proceedings under the GMO (Cap 13) and the Separation and Maintenance Orders Ordinance (Cap 16). See also the English cases: *B v B (Injunction: Restraint on Leaving Jurisdiction)* [1997] 2 FLR 148, at 153; and *Re A-K (Minors) (Foreign Passport: Jurisdiction)* [1997] 2 FLR 569, at 572 (CA), where the scope of the inherent jurisdiction of the court in potential abduction cases is discussed.

²⁰ See, for example, the comments of Waung J in *S v S* [1998] 2 HKC 316, at 325-326.

²¹ Pursuant to section 26, High Court Ordinance (Cap 4). See also Order 90, Rules of the High Court (Cap 4, subsidiary legislation).

in civil proceedings in that they are not concerned with the resolution of rights between litigants²² but in doing whatever is necessary for the welfare of the child. In theory there is no limit on the court's power to make orders in this respect.²³ Consequently, wardship has been described as "the pre-eminent jurisdiction for dealing with abducted children."²⁴

2.16 In general, wardship operates in the following way:

*"Once warded, the ward comes under the guardianship of the court (the whole bundle of rights), and a ring of protection is immediately thrown around the ward. So long as the minor remains a ward, no major decisions affecting the child can be taken without the consent of the judge."*²⁵

2.17 The unique advantage of wardship in 'time of the essence' situations like parental child abduction - is that the child becomes a ward of the court immediately upon the making of the application. This occurs when the summons is issued to ward the child.²⁶ Another advantage of wardship is that it can be used to prevent the child from being removed from the jurisdiction until the consent of the court has been obtained, as to do so would constitute contempt of court.²⁷

2.18 Wardship has also been used to secure the return of a child already abducted,²⁸ and to provide a remedy for non-parents who would otherwise have no legal standing in relation to an abducted child.²⁹

Seek and find order

2.19 Also within the context of wardship, the English Court of Appeal, in *Re B (Child Abduction: Wardship: Power to detain)*³⁰ noted that the court was entitled to make a 'seek and find order' under its inherent jurisdiction. The court stated that a seek and find order, supported by a bench warrant, was a useful method of bringing to court a parent, other relative or friend who

²² Dr Liu, above, at 324.

²³ See *Re B (Child Abduction: Wardship: Power to Detain)* [1994] 2 FLR 479, at 483 (CA); *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64, at 81; *Re X (A Minor) (Wardship Jurisdiction)* [1975] Fam 47, at 61. See also Dr Liu, above, at 326.

²⁴ Lowe & Douglas, above, at 483.

²⁵ Dr Liu, above, at 324.

²⁶ *Idem*.

²⁷ *Re J* (1913) 29 TLR 456.

²⁸ See *Lee Wai-chu v Lee Yim-chuen* (1984) Misc Proceedings No 2678 of 1983; *Chiu Kwai-fun v Lam Hing-keung* (1985) Misc Proceedings No 968 of 1985. For a detailed examination of the wardship jurisdiction in the HKSAR, see Dr Liu, above, at 321-332.

²⁹ See *Trance v Walli* (1988) High Ct Misc Proceedings No 905 of 1988 and *Re Mark Leung* (1985) High Ct Misc Proceedings No 142 of 1985, both referred to in Dr Liu, above, at 327.

³⁰ [1994] 2 FLR 479.

was believed to have the child or know of his whereabouts and to be party to his removal or retention. The court added, however, that once the person had appeared before the judge, the purpose of the bench warrant was effected. Consequently, unless the person was in contempt of court, there was no power to continue to detain him so as to provide an incentive for someone under his control to disclose the whereabouts of the child, or to compel him or his associates to produce the child.³¹

Habeas corpus

2.20 The legislation dealing with writs of habeas corpus is contained in section 22A of the High Court Ordinance (Cap 4). A writ of habeas corpus can be applied for where it is alleged that a person is being unlawfully detained. The Court of First Instance can then order that the body of the person be produced and the grounds for his detention be certified by the person detaining him. If the person to whom the order is directed fails to comply or appear before the court, then the court may order his arrest and the police will then bring him to court. As habeas corpus has generally been invoked in cases of persons unlawfully detained by the police or in a prison, it does not appear to be an appropriate remedy to bring a parent and child before the court.

Protection of Children and Juveniles Ordinance (Cap 213)

2.21 The Protection of Children and Juveniles Ordinance (Cap 213) provides civil and criminal remedies for the protection of children. Under section 26 of the Ordinance, it is an offence, punishable by two years imprisonment, for any person to take a child or juvenile unlawfully out of the possession of, and against the will of, the parent or guardian.³²

2.22 Section 35 of the Ordinance, which deals with protecting children and juveniles from moral or physical danger, gives power to the Director of Social Welfare to make an order regarding control or custody where the child is about to be taken out of Hong Kong by force, threats, false pretences and other forms of coercion. Historically, this section was designed to prevent prostitution, but it does give power to the Director to intervene in an emergency case if a child is being kidnapped and the police are hampered by their lack of powers.

2.23 Section 44(1) of the Ordinance gives a power of entry and search to the Director *“for the purpose of ascertaining whether there is therein any child or juvenile who is or may be liable to be dealt with under the provisions of this Ordinance.”* The Director is also empowered under section

³¹ *Ibid*, per Butler Sloss LJ, at 482-485.

³² This section originated in section 55 of the (UK) Offences against the Person Act 1861.

44 *"to remove any such child or juvenile to a place of refuge, a hospital or such other place as he may consider appropriate."* He must first have secured a warrant from a magistrate. Within 48 hours, the child must be brought before the Juvenile court under section 34(1) or 34C.³³

2.24 These provisions may be useful where a custodial parent is trying to trace a child who is suspected of having been abducted by the non-custodial parent. The difficulty is that the Director cannot exercise these powers unless he would have grounds for taking care and protection proceedings or other proceedings.

2.25 Similarly, another related provision is section 34E of the Ordinance, which allows a police officer³⁴ to detain a child who is suspected of being "in need of care or protection"³⁵ and to deliver him to a "place of refuge"³⁶ or to such other place as he may consider appropriate. A child is deemed to be in need of care or protection if: he has been or is being assaulted, ill-treated, neglected or sexually abused; or his health, development or welfare is being neglected or avoidably impaired; or he is beyond control to the extent that harm may be caused to himself or others.

2.26 Where the child's health, development or welfare is at risk (which is the circumstance likely to be closest to the parental child abduction situation), the police may only act if the child has already been subject to recent investigation by the Director of Social Welfare (as to whether he may be in need of care or protection) and Social Welfare has called for an assessment of the child to be carried out:³⁷

³³ Section 44(4A).

³⁴ Of the rank of station sergeant or above, or another person authorised in writing by the Director of Social Welfare: see section 34E(1) of the Protection of Children and Juveniles Ordinance (Cap 213) ("PCJO").

³⁵ Pursuant to section 34(2) PCJO.

³⁶ The places of refuge designated for the purposes of the PCJO are listed in the schedule to the Protection of Children and Juveniles (Place of Refuge) Order (Cap 213, subsidiary legislation). Section 34E(5) provides that where a child is detained in a place of refuge, the person in charge has "the like control over the child or juvenile as the parents and shall be responsible for his maintenance."

A child may be detained in a place of refuge for up to 48 hours until he can be brought before the juvenile court: section 34E(2) and 34E(3) PCJO. The court can order that the detention be extended for up to 28 days in the first instance while further inquiries are made about the child. (Additional extensions of the detention may also be granted, but the aggregate must not exceed 56 days continuous detention.) See section 34E(4) PCJO.

³⁷ See sections 34E(1A) and 45A PCJO. In such cases, the police may act where: (a) the child has, within the preceding two weeks been assessed, or (b) a notice has been served within the preceding month calling for the child to be brought for an assessment but the notice has not been complied with, or (c) the Director of Social Welfare is unable to ascertain the identity or whereabouts of any person on whom the notice calling for an assessment can be served.

Preventing the removal of the child from Hong Kong – criminal law

Kidnapping

2.27 Theoretically, at common law a parent can be found guilty of kidnapping his own child. The House of Lords in *R v D*³⁸ held that the common law offence of kidnapping in relation to children under 14 remained unaffected by the statutory offence of child stealing, so that where the ingredients of the offence, namely the taking or carrying away of one person by another by force or fraud without the consent of that other person and without lawful excuse, were proved, an offence was committed. However, their Lordships did not want to encourage prosecution for this offence:

*“[I]n general, it is desirable, as a matter of policy, that the conduct of such parents [who snatch their own children in defiance of a court order relating to their custody or care and control] should be dealt with as a contempt of court, rather than as the subject matter of a criminal prosecution. The latter method of dealing with the problem should, in my view, only be used in exceptional cases, where the conduct of the parent concerned is so bad that an ordinary right-thinking person would immediately and without hesitation regard it as criminal in nature.”*³⁹

2.28 We do not consider that prosecuting parents for the common law offence of kidnapping would be useful, except in the most blatant cases.⁴⁰

Child stealing

2.29 If a child, under 14 years of age, is taken away from his parent or guardian, a person can be charged with child stealing contrary to section 56 of the Offences against the Person Act 1861. This has been incorporated into Hong Kong law by section 43 of the Offences against the Person Ordinance (Cap 212). As it is a serious offence, a police officer has the power to arrest any person whom he suspects of committing this offence.

2.30 However, the English Court of Appeal explained in *R v D*,⁴¹ that Parliament had intended in 1861 that neither a father nor a mother should be

³⁸ [1984] 1 AC 778.

³⁹ *Ibid*, at 806, *per* Lord Brandon.

⁴⁰ Also, there may be policy considerations if a prosecution were to be initiated against a person temporarily staying in Hong Kong, as the forum of dispute between the parents should preferably be their country of habitual residence.

⁴¹ *Ibid*, at 790.

prosecuted for child stealing, as it had inserted a proviso giving a defence to a person claiming *bona fide* possession of the child.

2.31 Section 126 of the Crimes Ordinance (Cap 200) provides for an offence of abduction of a girl under 16 against the will of her parent or guardian. The likely purpose of this provision was to stop girls from being kidnapped and forced into prostitution. It is therefore apparent that prosecution either for this offence or for child stealing would not be useful or appropriate ways to deal with cases of child abduction arising from parental disputes.

False imprisonment

2.32 A prosecution for false imprisonment was successfully brought in the *R v D*⁴² case. This offence is committed when a person unlawfully and intentionally or recklessly restrains the freedom of movement of another from a particular place. If the child is voluntarily accompanying the abducting parent however, as is likely to be the case in the majority of parental child abduction situations, there may be difficulties in sustaining a prosecution even though the removal of the child may have been unlawful under custody orders or under the Hague Convention.

Contempt of court orders

2.33 The only remedy for breach of a custody order or an access order is contempt of court.⁴³ (Breaches of orders made by the court pursuant to its wardship jurisdiction also constitute contempt of court.) Contempt is only useful if the offender is still within the jurisdiction and the original order which he breached was served on him prior to the making of the application for committal for contempt. Unfortunately, by the time all this is done, he may have already left the jurisdiction with the child.

Powers to arrest or detain

2.34 The police cannot stop or detain a person unless he acts in a suspicious manner and is suspected of having committed an offence or has actually committed an offence.⁴⁴ The police have no power to enforce an

⁴² [1984] 1 AC 778. (See above.)

⁴³ For the rules on committal for contempt, see Order 52, Rules of the High Court (Cap 4, subsidiary legislation). In addition (as noted above in relation to the seek and find order) the courts have ruled that they have no power to detain a parent so as to provide an incentive for someone under his control to reveal the whereabouts of a child, or to compel him or his associates to produce the child: see *Re B (Child Abduction: Wardship: Power to detain)* [1994] 2 FLR 479.

⁴⁴ Section 54 of the Police Force Ordinance (Cap 232).

injunction as it is a civil remedy; however, they may have a power of arrest if a breach of the peace is committed when an *ex parte* order of the court, such as an injunction, is being served on the respondent. The police also have a power of arrest if a person has already been committed for contempt of court. Any person who breaches an injunction may be committed for contempt and a person who has knowledge of an injunction and assists in its breach may also be guilty of contempt.⁴⁵

2.35 There does not seem to be a limit on the term of imprisonment that the District Court and the Court of First Instance may impose for contempt, though section 21A of the High Court Ordinance (Cap 4) provides for committal for a maximum of three months for enforcement of a civil claim for the payment of money.

2.36 The Immigration Department can only prevent a child being removed from Hong Kong when they have a sealed copy of the order prohibiting removal in their hands. They cannot stop someone leaving Hong Kong if no order prohibiting removal has been made, provided he has a valid travel document.

2.37 There are powers under section 26 of the Immigration Ordinance (Cap 115) for a chief immigration officer to detain a person for not more than 48 hours if he is satisfied that inquiries are necessary for the purposes of the Immigration Ordinance, and that the person may abscond if not detained. However, this is not a general power to detain for inquiries.

⁴⁵ *Seaward v Paterson* [1897] 1 Ch 545.

Chapter 3

Child abduction amongst Hague Convention countries

Introduction

3.1 As we saw in Chapter 1, it appears that global factors, such as the dramatic rise in divorce rates, the increase in marriages involving parties from different cultures and countries, and the freedom of movement and speed of modern travel, have all contributed to the growing number of international child abduction cases being reported each year. As we have also seen, the Hague Convention on the Civil Aspects of Child Abduction (“the Hague Convention”) was introduced in 1980 as a world-wide initiative to combat this problem.¹

3.2 The aim of the Hague Convention is to provide a uniform international machinery for tracing abducted children, securing their prompt and safe return and for organising or securing access arrangements for otherwise ‘left-behind’ parents.² This chapter examines the scope and operation of the Convention.

Overview of the Hague Convention

Relevant provisions

3.3 The Hague Convention was adopted by the Hague Conference on Private International Law on 25 October 1980. It was subsequently

¹ Another 1980 convention, the European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children (more commonly called the Luxembourg Convention) was prepared under the auspices of the Council of Europe on 20 May 1980. Under this convention, custody decisions which are enforceable in the state of origin, are enforceable in the other contracting states.

² Dr Athena Liu, *Family Law for the Hong Kong SAR* (1999, HKU Press) at 334.

implemented in Hong Kong by the Child Abduction and Custody Ordinance (Cap 512) which came into effect on 1 September 1997.³

Contracting states

3.4 The Convention is currently in force in the Hong Kong SAR and 71 other jurisdictions.⁴

The Central Authority

Return of the child

3.5 A contracting state must designate a central authority for the purposes of the Hague Convention⁵ to take all appropriate measures to obtain the voluntary return of a child abducted from or to that state.⁶ In Hong Kong, the Central Authority is the Secretary for Justice.⁷ If the Central Authority fails to reach an amicable settlement for the return of the child, it must initiate or facilitate the issuing of proceedings to obtain an order for the return of the child.⁸ Article 11 of the Convention gives the right to the Central Authority or the applicant to request reasons for delay if the judicial or administrative authority of the contracting state has not reached a decision within six weeks.

Access rights

3.6 Article 21 of the Convention puts an obligation on the Central Authority to promote “*the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject.*” The Central Authority also has a duty to take such steps to remove, as far as possible, all obstacles to the exercise of such rights. An application for access may be presented to the Central Authority in the same way as an application for the return of a child. The Hague Convention does not however prevent an application being made directly to the court rather than to the Central Authority.⁹

³ Pursuant to the Child Abduction and Custody (Parties to Convention) Order, made under section 4 of the Ordinance (Cap 512): see LN 36 of 1998. See further, Chapter 1, above, footnote 18.

⁴ See Chapter 1, para 1.5, above (especially footnote 17). See also for further information the website of the Hague Conference on Private International Law, “Hague Conventions: Signatures, Ratifications and Accessions,” at <www.hcch.net/e/status/statmtrx.html>.

⁵ Article 6 of the Convention.

⁶ Article 10 of the Convention.

⁷ In fact, the functions of the Central Authority are discharged by the Civil Division of the Department of Justice of the Hong Kong SAR Government. For further information on parental child abduction and the HKSAR, see (from mid-2002) the website on this topic included on the Department of Justice Homepage at <www.info.gov.hk/justice/>.

⁸ Article 7(f) of the Convention.

⁹ Article 29.

Legal aid

3.7 Article 7 provides that central authorities shall co-operate with each other to secure the prompt return of the child. Article 7(g) provides that central authorities shall take all appropriate measures “*where the circumstances so require, to provide or facilitate ... legal aid and advice, including the participation of legal counsel and advisers*”. Article 25 provides that persons from contracting states shall be entitled to legal aid and advice in any other contracting state on the same conditions as if they themselves were nationals of and habitually resident in that state. However, Hong Kong has entered a reservation, as it is entitled to do under Article 26.3,¹⁰ so that the costs are not obliged to be borne by the Secretary for Justice¹¹ “*or any other authority in Hong Kong except so far as they fall to be so borne by virtue of the grant of legal aid under the Legal Aid Ordinance (Cap 91)*”.¹²

Cases to which Convention applies

Wrongful removal or retention in breach of rights of custody

3.8 As noted above, the Hague Convention aims to ensure that a child who has been abducted to a contracting state will be returned safely and promptly to the country of his habitual residence.¹³

3.9 The removal or retention of the child is wrongful where it is in breach of custody rights arising in the other contracting state by operation of law or by reason of an agreement.¹⁴ The rights of custody are not limited to the parent with physical custody, but include the right of a parent who does not have custody to give or refuse consent to the removal of the child from the jurisdiction.¹⁵ Custody rights do not belong exclusively to parents, but can

¹⁰ Section 13 of the Child Abduction and Custody Ordinance (Cap 512).

¹¹ It is usually the Central Authority that represents the innocent party in the proceedings, though Article 29 of the Convention allows any person, institution or body to apply directly to court.

¹² This would mean that the Secretary for Justice is entitled to claim the costs of representing the applicant from him unless he fell within the means and merits test of the Hong Kong Legal Aid Scheme. For discussion of proposals to improve legal aid availability in Hong Kong for Hague applicants, see Chapter 7, below.

¹³ For a recent Hong Kong authority on the meaning of “habitual residence,” see *Re N (A Child)* [2001] 2 HKLRD 377, *per* Hartmann J.

¹⁴ Article 3 of the Convention. An example would be a separation agreement or other similar agreement.

¹⁵ This is the effect of Article 5. For example, if there is a custody order in favour of the mother and it includes an order not to remove the child from the jurisdiction of habitual residence without the consent of the father or the court, then if this order is breached by the mother, the father can use the Hague Convention to seek the return of the child.

also be attributed to an institution, or any body, either jointly or alone.¹⁶ Rights of access include the right to take a child for a limited period of time to a place other than the child's habitual residence.¹⁷

Habitual residence

3.10 Habitual residence is not defined in the Hague Convention.¹⁸ It is to be decided as a matter of fact by reference to the relevant evidence of the particular case.¹⁹ In order to establish habitual residence, the residence must be "for a settled purpose continued for an appreciable time."²⁰ The habitual residence of young children whose parents are living together is the same as the habitual residence of the parents themselves, and neither parent can change this without the consent of the other parent or an order of the court.²¹ However, a child whose parent has sole legal custody will have the same habitual residence as that parent.²²

Wrongful retention

3.11 The Hague Convention is not limited to wrongful removal; it extends to cover wrongful retention,²³ as where, for example, a child is not returned to the custodial parent by the parent exercising rights of access.

Exceptions to mandatory return

3.12 Although the general approach of the Hague Convention is to require the summary return of the child to his place of habitual residence, there are a number of grounds where refusal to return the child may be justified. These include where:

- (1) the person claiming return of the child was not actually exercising their custody rights, or had consented to or subsequently acquiesced in the child's removal or retention,²⁴

¹⁶ This would be where there was a care or protection order in favour of the equivalent to the Director of Social Welfare.

¹⁷ Article 5(b) of the Convention.

¹⁸ Hartmann J elaborated on the reasons for this in his judgment in *Re N (A Child)*, above, at 385-6.

¹⁹ *Re N (A Child)*, above, at 387.

²⁰ Dr Liu, above, at 336.

²¹ *Re N (A Child)*, above, at 386.

²² Dr Liu, above, at 337.

²³ Article 3.

²⁴ Article 13(a). This can be active or passive. The latter occurs when there is such a lapse of time as to amount to acquiescence.

- (2) there is a grave risk that the return of the child would expose him to physical or psychological harm or otherwise place the child in an intolerable situation,²⁵ and
- (3) if the child objects to being returned and has reached an age and a degree of maturity at which it is appropriate to take account of his views.²⁶

Consent or acquiescence

3.13 The court is not bound to order the child's return if, at the time of the child's removal or retention, the 'wronged parent' had consented to, or subsequently acquiesced in, his removal or retention.²⁷ The crucial issue is the actual state of mind of the wronged parent at the relevant time, which may be indicated by his contemporaneous words and actions.²⁸ The onus of proving consent or acquiescence is on the abducting parent.²⁹

Grave risk of harm or intolerable situation

3.14 The court may refuse to order the child's return where it is established that there is a grave risk that his return would expose him to physical or psychological harm, or otherwise place him in an intolerable position.³⁰ It appears that in most Hague Convention countries, these words are taken literally and there is a very high threshold before this defence will be accepted.³¹ An analysis of practice for the Special Commission of the Hague Conference reported:

“allegations of misbehaviour on the part of the parent left behind, such as alcoholism, cruel behaviour or drug use, have been swept aside and left to be considered by the court in the state of the child’s habitual residence after his or her return. This implies substantial trust in the process of the courts in that country and in the co-operation between the central authorities of the two

²⁵ Article 13(b).

²⁶ Article 13.

²⁷ Dr Liu, above, at 339.

²⁸ *Idem*. For an example of where acquiescence was proven, see *AZ (A minor: Abduction: Acquiescence)* [1993] 1 FLR 682.

²⁹ Dr Liu, above, at 339.

³⁰ *Ibid*, at 339-340.

³¹ A Hutchinson, R Roberts & H Setright, *International Parental Child Abduction* (1998, Family Law) at 5. Referring to the Hong Kong case of *S v S* [1998] 2 HKC 316, Dr Liu, above, at 340, notes that, “*The risk of physical or psychological harm must be substantial and actual.*” See also the cases of *N v N (Abduction: Article 13 defence)* [1995] 1 FLR 107 (allegations of sexual abuse) and *Re HB (Abduction: Children’s objections)* [1997] 1 FLR 392 (allegations of ill-treatment) where, despite the allegations made, the children were ordered to be returned. Compare the recent Hong Kong case of *D v G* [2002] 1 HKLRD 52 (CA).

countries, who can also help to ensure the child's safety during and following the return".³²

Child's objection

3.15 In a case where a child objects to being returned, the court may refuse to order his return if the child has attained an age and degree of maturity at which it is appropriate to take account of his views.³³ However, *"the objection imports a strength of feeling going far beyond the usual ascertainment of the wishes or preference of a child in a custody dispute"*³⁴ and is not decisive. It has also been noted that as the purpose of the Hague Convention is to ensure the speedy return of children to the country from which they were wrongfully removed, *"the discretion under this head must be used only in exceptional circumstances."*³⁵

Removal for more than one year

3.16 If an application for the return of a child is made after one year, return may be refused on the grounds that the child is now settled in his new environment.³⁶ It should be noted that the court orders the return of the child to the country concerned, not to the custody of the applicant.³⁷

Powers of the court under the Convention

3.17 As noted above, the Hague Convention is given the force of law in Hong Kong by virtue of the Child Abduction and Custody Ordinance (Cap 512). There are also procedural rules relating to the Ordinance laid down in Order 121 of the Rules of the High Court (Cap 4, subsidiary legislation).

3.18 Section 7 of the Ordinance confers powers on the court to give interim directions in Hague Convention cases. The section states:

"Where an application has been made to the Court of First Instance under the Convention, the Court of First Instance may, at any time before the application is determined, give any interim direction as it thinks fit for the purpose of securing the welfare of

³² McClean, "Progress in dealing with International Child Abduction," 18th Commonwealth Law Ministers Meeting Papers (Nov 1993), at para 10.

³³ Dr Liu, above, at 340.

³⁴ *Ibid*, at 341, referring to the judgment in *Re R (A minor: Abduction)* [1992] 1 FLR 105.

³⁵ *Idem*.

³⁶ Article 12.

³⁷ *Re A (A Minor)(abduction)* [1988] 1 FLR 365.

the child concerned or of preventing changes in the circumstances relevant to the determination of the application."

3.19 The English equivalent to this provision, section 5 of the Child Abduction and Custody Act 1985, has been interpreted as granting wide powers to the court, including a power to restrain a party from leaving the jurisdiction and a power to require the surrender of passports.³⁸

Observations on the Convention

3.20 A Special Commission reviewed the operation of the Hague Convention in January 1993. The Commonwealth Secretariat and 44 countries were represented. It concluded that even though the Hague Convention was working well, delay in legal proceedings was causing problems. The absence of legal aid, together with high legal fees, caused further difficulty.³⁹

3.21 A previous review meeting in 1989 encouraged states:

*"contemplating becoming parties to the convention ... to organise their legal and procedural structures in such a way as to ensure the effective operation of the convention and to give their central authorities adequate powers to play a dynamic role, as well as the qualified personnel and resources, including modern means of communication, needed in order expeditiously to handle requests for return of children or for access."*⁴⁰

3.22 McClean suggested that the very existence of the Hague Convention increases the number of voluntary returns.⁴¹ For example, the United States reported that in the first three years of the implementation of the Convention there, there was a significant rate of voluntary returns equal to almost 60% of the number of court ordered returns for incoming applications, and nearly 33% of the court ordered returns for outgoing applications.

3.23 It was noted that a balance had to be struck between the principle of giving respect to the comity of nations, by enforcing custody orders or rights, and the local court's views on the welfare of the child. Article

³⁸ See *B v B (Injunction: Restraint on Leaving Jurisdiction)* [1997] 3 All ER 258.

³⁹ McClean (1993), above, at para 14. The third Special Commission in 1997 (see *below*) would note that the United States had developed an International Child Abduction Attorney Network (ICAAN) which offers *pro bono* representation for applications under the Hague Convention there.

⁴⁰ *Ibid*, at para 15.

⁴¹ *Idem*.

19 provides that a decision relating to the return of the child is not to be taken as a determination on the merits of any custody issue.

3.24 It was also noted that there has been a failure in the past by the common law courts to develop a consistent approach to the handling of international child abduction cases. One of the reasons for this is that such cases are “fact-sensitive”. It is therefore difficult to elicit general principles from these cases.⁴²

3.25 Another limitation is that the Hague Convention only applies to wrongful removal or retention occurring after its entry into force in a contracting state. Thus in Hong Kong's case, wrongful removals or retentions occurring prior to 1 September 1997 do not come within the protection of the Convention.

3.26 McClean observed that there are some qualifications to the primacy of the welfare principle:

- (1) If two parents who are separated or divorced live in different continents, then the reality is that the *“custody decision must often mean complete and final loss of the child to one of the parties, for access may be impracticable and wholly unsatisfactory”*,⁴³
- (2) the welfare principle is not some international standard but instead a set of values of a particular legal system. Appealing to the welfare principle may encourage a court to deal with the merits of the case instead of accepting the foreign court's decision,⁴⁴ and
- (3) there is a dilemma for the court. If the court is going to fully examine all the factors contained in the welfare principle,⁴⁵ it will have to gather evidence from the country of habitual residence, whose social work agencies may not have the necessary resources to investigate. Thus there will be delay which may prejudice the welfare of the child.

3.27 There was a third meeting of the Special Commission in March 1997 to review the operation of the Hague Convention. The Commission noted that the majority of the cases under the Hague Convention were children removed by their mothers from their own country of habitual residence. Indications were that this was based on allegations of hardship

⁴² McClean, “International Abduction of Children - towards an effective legal response,” Conference Papers of the Ninth Commonwealth Law Conference (1990) at 301.

⁴³ McClean (1990), above, at 302.

⁴⁴ *Idem*.

⁴⁵ McClean (1990), above, is referring to the list of factors appearing in section 3 of the English Children Act 1989.

and domestic violence by the father of the child. In response, the contracting states and their Central Authorities expressed a general willingness to accept responsibility for the safety of children returned under the convention and “*to increase co-operation between courts and Central Authorities to ensure the protection of returning children and parents*”.⁴⁶

3.28 The Commission noted the increase in shared arrangements for children so that there may be no difference in reality between a joint custody order and liberal access arrangements. Yet the former would lead to a remedy for breach of rights of custody and the latter would not, except as a breach of access.

3.29 The most recent meeting of the Special Commission took place in March 2001.⁴⁷ It highlighted the key role of the central authorities in making the Convention function, and urged that they be given a mandate that is sufficiently broad, and the qualified personnel and resources (including modern means of communication) to act dynamically and to carry out their functions effectively.⁴⁸ There should be ready exchange of information between contracting states to assist with locating abducted children, and to assist generally with central authorities carrying out their roles. The effecting of voluntary returns should be encouraged as far as possible.⁴⁹ The obligation on contracting states to process Hague Convention cases as expeditiously as possible, and to incorporate appropriate rules and judicial practices in their own court systems to facilitate this, was emphasised. Also highlighted was the need to adopt a consistent approach to judicial interpretation of the key concepts used in the Convention.⁵⁰

⁴⁶ *Report on the Third Meeting of the Special Commission to discuss the operation of the Hague Convention on the Civil Aspects of International Child Abduction*, Hague, 17 - 21 March 1997.

⁴⁷ See, *Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (22 - 28 March 2001)* (April 2001) Permanent Bureau of the Hague Conference of Private International Law (available at <www.hcch.net/>).

⁴⁸ *Ibid*, at 4.

⁴⁹ *Ibid*, at 5.

⁵⁰ *Ibid*, at 9-10.

Chapter 4

Abduction involving non-Convention countries

Abduction of children from the HKSAR to a non-Convention country

4.1 If a child is removed from Hong Kong to a country which is not subject to the Hague Convention, "*the chances of recovering the child may be slim.*"¹ Unless the parent who has abducted the child returns him voluntarily, the only legal means to recover the child would be to initiate legal proceedings in the jurisdiction to which the child has been taken.² This would need to be done as quickly as possible, so that the abducting parent does not gain the advantage of the child establishing new roots in the foreign jurisdiction before the case is decided upon by that jurisdiction's courts.³ Where there is delay, the court will most likely disregard the abduction and any foreign custody orders on the grounds that the welfare of the child is best served by him staying in the (new) jurisdiction.

4.2 From a practical point of view, the left-behind parent in Hong Kong needs to obtain legal advice as soon as possible regarding the laws and practices of the country concerned.⁴ In particular, they would need to establish what their parental rights are under the law of the foreign jurisdiction, and what customary practices exist there in relation to child care and control which might influence the local court in deciding the issue of custody. The law in some foreign jurisdictions is based on family, religious or cultural traditions. There are also jurisdictions where the law may not give equal parental or individual rights to women and men. Such factors will usually have a bearing on the outcome of a child custody case, especially if one parent is from a different social, cultural or religious background, and intends, if granted custody, to remove a child from these traditions. The left-behind parent will

¹ N Lowe & G Douglas, *Bromley's Family Law* (9th ed, 1998, Butterworths) at 483. See also Dr Athena Liu, *Family Law for the Hong Kong SAR* (1999, HKU Press) at 342.

² Lowe & Douglas, above, at 483.

³ B Davis, "The New Rules on International Child Abduction: Looking Forward to the Past" (1990) 1 *Australian Journal of Family Law* 31, at 33-34.

⁴ The Law Society of Hong Kong may be able to assist by providing details of lawyers in foreign jurisdictions who correspond in English. Details of Cantonese-speaking lawyers, or those who read and write in Chinese, may also be available from the Law Society for overseas cities such as London, Toronto, Vancouver and Sydney.

also need to be aware that the overseas legal proceedings may be protracted and expensive.

4.3 It should be noted that the Hague Convention does not apply in the mainland of the People's Republic of China, which should be treated as a non-Convention jurisdiction. Therefore, court orders made under the guardianship or custody laws of Hong Kong or under the Hague Convention do not have the force of law in the mainland of the PRC and cannot be enforced there. Where a child is taken from the Hong Kong SAR into the mainland, the Hong Kong SAR Government can only seek the co-operation of the mainland authorities to help find the child and encourage the abductor-parent to return him to his jurisdiction of habitual residence.

Abduction of children from a non-Convention country into the HKSAR

4.4 Where a child is abducted into Hong Kong from a country where the Hague Convention does not apply,⁵ the return of the child is usually only achieved through either the abducting parent voluntarily returning the child, or by the left-behind parent initiating legal proceedings in Hong Kong.⁶ In such cases, the wardship jurisdiction of the court is usually invoked.

4.5 As we saw in Chapter 2, in Hong Kong, an order of wardship can be obtained from the Court of First Instance of the High Court. The power is contained in section 26 of the High Court Ordinance (Cap 4). Wardship can be used to prevent a child from being removed from the jurisdiction of Hong Kong without the consent of the court.⁷ As noted previously, the advantage of wardship is that the child becomes a ward as from the making of the application, which occurs when the summons is issued to ward the child.

4.6 Once the child has been made a ward of the court, the court will then consider whether to hear the full merits of the application regarding custody or access, or whether to make a summary order for the immediate return of the child to the place from which he was abducted.⁸ In deciding this, the court weighs various factors, but the welfare of the child is always the paramount consideration.⁹

⁵ And thus the Child Abduction and Custody Ordinance (Cap 512).

⁶ Dr Athena Liu, *Family Law for the Hong Kong SAR* (1999, HKU Press) at 342.

⁷ It is a contempt of court to remove a ward from the jurisdiction of the court: *Re J* (1913) 29 TLR 456.

⁸ Lowe & Douglas, above, at 483.

⁹ Dr Liu, above, at 342. (Though see the rather scathing comments regarding the use of the welfare principle in this context, by B Davis, above, at 34.)

4.7 A number of English cases have held that even for non-Convention situations, it is appropriate to apply the general principles of the Hague Convention, in that:

*"[I]t is normally in the interests of children that parents or others should not abduct them, and that any decision relating to custody is best decided in the jurisdiction in which the children have hitherto been habitually resident."*¹⁰

4.8 Weighed against this, however, the court must consider the risks to the child of being separated from one parent and entrusted to the care of the other whose capabilities and fitness to act as a single parent may be in doubt, in surroundings which may be unfavourable in themselves, and of the child *"being subjected to a regime of law under which the protection of [his] interests may be open to question."*¹¹

¹⁰ Dr Liu, above, at 342.

¹¹ Dr Liu, above, at 343.

Chapter 5

Legislation in other jurisdictions

Introduction

5.1 This chapter reviews some of the legislative provisions available in other jurisdictions to combat international child abduction. (In the subsequent chapters of this report, a number of these are considered as models for the introduction of similar legislation here in Hong Kong.)

England and Wales

*"It has been estimated that as many as four children a week are abducted and taken to another part of the United Kingdom, and it is clear that in excess of 200 a year are taken abroad."*¹

Child Abduction Act 1984

5.2 Since the existing criminal law was unsatisfactory in providing a remedy for the unlawful removal of a child, the UK Child Abduction Act 1984 was enacted to fill that gap. Under section 1 of the Act, it is an offence for a person connected with the child to take or send a child under the age of 16 out of the United Kingdom without appropriate consent. Because it is an offence to *attempt* to take a child out of the United Kingdom, the police can arrest anyone they reasonably suspect of the attempt without a warrant.²

5.3 Subject to limited defences under section 1(5), the consent is required of each person who is the child's mother, father (if he has parental responsibility for the child), guardian, and any person in whose favour a residence (custody) order is in force, or who has custody of the child. The court can grant leave by virtue of section 13(3) of the English Children Act 1989. The more common consent will be that of the other parent. Even if

¹ N Lowe & G Douglas, *Bromley's Family Law* (9th ed, 1998, Butterworths), at 479.

² Lowe & Douglas, above, at 480.

there is no court order, the Act prohibits removal if the parent does not have the necessary consents.

5.4 The defences provided for are that the offender believed the other person consented, or would consent if he was aware of all the relevant circumstances, or that the person taking the child has taken all reasonable steps to communicate with the other person but has been unable to communicate with him, or the other person has unreasonably refused his consent. The latter does not apply if there is a custody order in existence.

5.5 Section 13 of the English Children Act 1989 provides that the consent of any other person who has parental responsibility is required only if the child is removed for longer than one month. However, no offence would be committed if the child is removed for up to one month by a person in whose favour there is a residence (custody) order if they have not obtained the consent of the other parent who has parental responsibility for the child. This was designed to allow parents to take the child on holiday without the necessity of going back to court if the other parent did not agree.

Prohibited steps order

5.6 The English courts can also order a "prohibited steps" order at any time in matrimonial proceedings under section 8(1) of the English Children Act 1989. In the present context, this is equivalent to an injunction prohibiting a person in whose favour a residence order is made from taking the child abroad, particularly in cases where abduction is feared.

5.7 Failure or refusal to return the child to the jurisdiction once this period has expired will constitute a wrongful retention of the child for the purpose of the Hague Convention. If such an order is in existence, then taking the child out of the jurisdiction for any period of time is an offence.

Passports

5.8 Section 37 of the UK Family Law Act 1986 provides that when there is a court order prohibiting removal of a child from the United Kingdom, the court may require the surrender of any United Kingdom passport relating to the child.³ The text of section 37(1) states:

"(1) Where there is in force an order prohibiting or otherwise restricting the removal of a child from the United Kingdom or from any specified part of it, the court by which the order was in fact made, or by which it is treated under

³ The United Kingdom Passport Agency provides procedures for lodging objections to the issue of passports for the child.

section 36 of this Act as having been made, may require any person to surrender any United Kingdom passport which has been issued to, or contains particulars of, the child."

Power to order disclosure of child's whereabouts

5.9 Section 33 of the UK Family Law Act 1986⁴ provides that the court can order any person whom it has reason to believe may have relevant information on a child's whereabouts to disclose it to the court where there is inadequate information as to the location of the child. A person is not excused from complying with the order by reason of the fact that to do so may incriminate him or his spouse of an offence, but any statement or admission made is not admissible against either of them in proceedings for any offence except perjury. The court has power to summon witnesses to appear before it to reveal the child's whereabouts, and if the witness refuses to answer, he is guilty of contempt and can be punished by fine or imprisonment. The relevant provisions of section 33 state:

- "(1) Where in proceedings for or relating to a [custody order] in respect of a child there is not available to the court adequate information as to where the child is, the court may order any person who it has reason to believe may have relevant information to disclose it to the court.*
- (2) A person shall not be excused from complying with an order under subsection (1) above by reason that to do so may incriminate him or his spouse of an offence; but a statement or admission made in compliance with such an order shall not be admissible in evidence against either of them in proceedings for any offence other than perjury."*

5.10 Rule 6.16 of the UK Family Proceedings Rules 1991 gives the court power to order the child's whereabouts to be disclosed.⁵ The court can order any person who has information to attend and give evidence. If the child has been made a ward of court, then a refusal to disclose his whereabouts would amount to a contempt of court.⁶

5.11 It would seem that the power to order disclosure extends to solicitors who have confidential information of such whereabouts. There have been several English judgments ordering solicitors to disclose any information

⁴ As amended by Schedule 13, paras 62 and 63 of the English Children Act 1989.

⁵ This rule appears to apply specifically to proceedings under the 1980 *European Convention on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children*.

⁶ *Mustafa v Mustafa* (1967) The Times, 11 and 13 September.

which might lead to the tracing of the child. In *Re B (Abduction: Disclosure)*,⁷ the court ordered the father's solicitors to disclose the whereabouts of their client and all documents in their possession (including those that might come into their possession in the future) relating to their client's whereabouts.

5.12 The court noted that a balance had to be struck between the duty owed by the solicitor to his client, a duty based on the welfare of the children and a duty to comply with a court order. In any event, the information held by the solicitor would not be privileged as it would be overridden by the child's interests.

Recovery orders

5.13 Section 34 of the UK Family Law Act 1986 provides power to make an order for recovery of the child where a child has not been given up to the lawful custodian by the person who is in breach of a custody order. The police are authorised to take charge of the child and deliver him to the custodian. They also have authority to enter and search any premises where there is reason to believe the child may be found and to use such force as may be necessary to give effect to the order.⁸ The relevant provisions of section 34 state:

"(1) *Where –*

- (a) *a person is required by a [custody order], or an order for the enforcement of a [custody order], to give up a child to another person ("the person concerned"), and*
- (b) *the court which made the order imposing the requirement is satisfied that the child has not been given up in accordance with the order,*

the court may make an order authorising an officer of the court or a constable to take charge of the child and deliver him to the person concerned.

(2) *The authority conferred by subsection (1) above includes authority –*

- (a) *to enter and search any premises where the person acting in pursuance of the order has reason to believe the child may be found, and*

⁷ [1995] 1 FLR 774, CA.

⁸ Section 34(2), UK Family Law Act 1986.

- (b) *to use such force as may be necessary to give effect to the purpose of the order. ...*
- (4) *This section is without prejudice to any power conferred on a court by or under any other enactment or rule of law."*

Scotland

5.14 In Scotland, section 2 of the Children (Scotland) Act 1995 sets out the scope of parental rights over children and how these may be exercised. In the context of child abduction, provisions within section 2 state:

- "(3) *Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of a person described in subsection (6) below. ...*
- (6) *The description of a person referred to in subsection (3) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a right [of custody or access]; except that, where both the child's parents are persons so described, the consent required for his removal or retention shall be that of them both."*

5.15 In relation to the criminalising of parental child abduction, the Scottish Law Commission reported in 1987, having had the opportunity of reviewing the UK Child Abduction Act 1984.⁹ They proposed an offence of taking or sending a child abroad in contravention of a court order.¹⁰ The Scottish Law Commission also recommended that the court should be able to make an order prohibiting removal of the child by any person in those instances where the court would have power to make a custody order.

5.16 They recommended that a police constable would have the power to arrest without warrant anyone whom he reasonably suspected of attempting to commit, committing or having committed the proposed offences.¹¹ Section 7 of the Child Abduction Act 1984 already gave a power of arrest for an offence committed in Scotland of taking or sending a child out of the United Kingdom.

⁹ Scottish Law Commission, *Child Abduction* (1987: Scot Law Com No 102).

¹⁰ *Ibid*, at para 6.18.

¹¹ *Ibid*, at para 7.9.

5.17 The Scottish Law Commission also proposed an offence of taking or detaining a child from any person having lawful control. Excluded would be those acting with lawful authority or reasonable excuse.¹² Those with lawful authority would include those with a right of custody and those with a right of access acting within the scope of that right of access. As yet, their criminal law recommendations in this area do not appear to have not been implemented.

Ireland

Power to order disclosure

5.18 Section 36 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991 expanded on the power to order disclosure of the child's whereabouts under section 33 of the UK Family Law Act 1986¹³ by extending it to Hague Convention cases. Section 36 provides:

"(1) *Where —*

(a) *in proceedings for the return of a child under Part II of this Act [relating to the Hague Convention] ...*

there is not available to the Court adequate information as to the whereabouts of the child, the Court may order any person who, it has reason to believe, may have relevant information to disclose it to the Court.

(2) *Any person who is the subject of an order under subsection (1) of this section may, notwithstanding production of the child, be ordered to disclose any information that is relevant to proceedings under Part II [relating to the Hague Convention] ...*

(3) *Where —*

(a) *in proceedings in a Contracting State other than the State for the return of a child under the Hague Convention ...*

or where such proceedings are about to be commenced, there is not available to the authorities in the Contracting

¹² *Ibid*, at para 4.30.

¹³ See para 5.9, above.

State adequate information as to the whereabouts of the child, the Court may, on application made to it by any person, if it is satisfied that the applicant has an interest in the matter and that the child has been taken from or sent or kept out of the State without the consent of any of the persons having the right to determine the child's place of residence under the law of the State, order any person who, it has reason to believe, may have relevant information to disclose it to the Court.

- (4) Any person who is the subject of an order under subsection (3) of this section may, notwithstanding production of the child in the Contracting State, be ordered to disclose any information that is relevant to proceedings in that state.*
- (5) A person shall not be excused from complying with any order under this section by reason that to do so may incriminate him or his spouse of an offence; but a statement or admission made in compliance with any such order shall not be admissible in evidence against either of them in proceedings for an offence other than perjury."*

Police power to detain the child

5.19 Section 37(1) of the Irish Child Abduction and Enforcement of Custody Orders Act 1991 gives power to the police to detain a child whom they reasonably suspect is about to be, or is being, removed from the State in breach of any one of a range of orders, including custody and access orders, orders made pursuant to wardship proceedings, and return orders or interim directions orders made pursuant to Hague Convention applications. Significantly, section 37(1) states that it applies also:

"while proceedings for one of those orders are pending or an application for one of those orders is about to be made."

5.20 Section 37(2) continues:

"(2) Where a child is detained under this section a [police officer] shall as soon as possible –

- (a) return the child to the custody of a person (not being a health board) in favour of whom a court has made an order referred to in subsection (1) of this section unless the [officer] has reasonable*

grounds for believing that such person will act in breach of such order, or

- (b) where the child has been in the care of a health board, return the child to that board, or*
 - (c) in a case other than one to which paragraph (a) or (b) of this subsection applies, or where the [officer] is of the belief referred to in the said paragraph (a), deliver the child into the care of the health board for the area in which the child is for the time being.*
- (3) Where a [police officer] delivers into the care of a health board a child in accordance with subsection (2)(c) of this section, he shall as soon as possible inform or cause to be informed*
- (a) a parent of the child, or*
 - (b) a person acting in loco parentis, or*
 - (c) the Central Authority ... of such delivery.*
- (4) Where any child is delivered into the care of a health board in accordance with subsection (2)(c) of this section the health board shall arrange suitable care and accommodation for the child, which may include placing the child in foster care or residential care, pending the determination of an application under subsection (5) of this section by the health board.*
- (5) Where a child is delivered into the care of a health board under subsection (2)(c) of this section the health board shall apply at the next sitting of the District Court or, in the event that the next sitting is not due to be held within three days of the date on which the child is delivered into the care of the health board, at a specially arranged sitting of the District Court held within the said three days, for directions as to the child's release from such care or otherwise in relation to the child's care and the District Court may make such order as it thinks proper in the circumstances regarding custody of and, where appropriate, access to, the child, taking into account any order referred to in subsection (1) of this section relating to the child and without prejudice to proceedings that may be pending or any application that is about to be made for one of those orders in relation to the child. ..."*

5.21 In summary, when the police detain the child, he must be returned to the custody of the person in favour of whom the court has made

the order, unless the police have reasonable grounds for believing that that person will act in breach of this order. Where the child is not to be returned to a person with custody, the police can deliver the child to the health board. The health board then has an obligation to bring the matter before the court to obtain orders concerning the child's custody.

Criminal law on abduction

5.22 In 1985, the Irish Law Reform Commission had recommended that an offence of parental child abduction should be formulated which did not place unrealistic restrictions on those having charge of children.¹⁴ The Commission recommended that the offence would be committed by anyone taking or sending or keeping a child out of the jurisdiction in defiance of a court order, or without the consent of each parent or guardian of the child, unless the leave of the court had been obtained. They also suggested various defences similar to those available under the English legislation. Parental child abduction is now an offence in Ireland under section 16 of the Non-fatal Offences Against the Person Act 1997.

Australia

Powers of entry, search and recovery

5.23 Prior to the introduction of the Australian Family Law Reform Act 1995, section 64(9) of the Australian Family Law Act 1975 provided that where a custody order in respect of a child was in force, the court could issue a warrant which gave powers of entry, search and recovery of a child who had been abducted. Similar powers were given where an access order was in force.

5.24 Section 67N of the Australian Family Law Act 1975 gives power to request information on the location of the child from the records of a government department provided a warrant has been issued. That section also allows the court to order a person to provide information to the Registrar of the court. The court is not given power to order the production of actual records or information on the grounds of protection of privacy. This section applies not only to children who are abducted in the formal sense, but includes children illegally removed from a party who is entitled to custody or access.

5.25 A report by the Australian Family Law Council¹⁵ expressed concern about the use of *ex parte* warrants, especially where the parent had

¹⁴ Irish Law Reform Commission, *Report on the Hague Convention on the Civil Aspects of International Child Abduction and some related matters* (1985, Report No 12).

¹⁵ Family Law Council of Australia, *The UK Children Act 1989* (1994), at para 75.

removed a child from the family home due to domestic violence. A parent who removes a child from the home because of violence and goes into hiding can be forced to reveal the whereabouts of the child. The Council suggested that the issues of privacy, restricted use of records, protection against violence and measures to protect information given to the court, all needed to be addressed in amending the Family Law Act provisions.

5.26 The Family Law Council referred to section 50 of the English Children Act 1989 which gives power to the court to issue a recovery order. Any person who has parental responsibility for the child or the police can apply. The court gives a direction to a person to produce the child on request to any authorised person. This authorised person can then remove the child. Any person with information as to the child's whereabouts must disclose it if requested to do so. Section 50 also authorises search and entry of a premises to find the child.¹⁶

5.27 The Family Law Council suggested that these provisions of the English Act were inadequate as they did not deal with the need to protect women against violent husbands or the issue of privacy of records kept by government agencies.¹⁷ Instead, the Council proposed that there would be an application for a declaration that the applicant was a person with parental responsibility. Then, that person would seek a "location order" to have government agencies search their records to locate the address. The order would also give directions in relation to the short term care of the child until issues of residence and contact were resolved. The court could prohibit the abducting party from "moving on".¹⁸

Location order

5.28 Section 67J(1) of the Australian Family Law Act 1975 defines a location order as an order of the court requiring a person to provide information on the child's location.¹⁹ Section 67L provides that the child's best interests are the paramount consideration in making such an order. Section 67K sets out the persons who may apply for a location order. The provisions of section 67J and 67K are as follows:

67J "(1) A location order is an order made by a court requiring:

¹⁶ However, the report does not refer to the fact that section 50 only applies to children who are in care, or the subject of an emergency protection order, or in police protection.

¹⁷ *Ibid*, at para 79.

¹⁸ *Ibid*, at para 81.

¹⁹ As inserted by the Australian Family Law Reform Act 1995, which repealed the existing Part V11 of the 1975 Act.

- (a) *a person to provide the Registrar of the court with information that the person has or obtains about the child's location; or*
- (b) *the Secretary of a Department, or an appropriate authority of a Commonwealth instrumentality, to provide the Registrar of the court with information about the child's location that is contained in or comes into the records of the Department or instrumentality."*

67K *"A location order in relation to a child may be applied for by:*

- (a) *a person who has a residence order in relation to the child; or*
- (b) *a person who has a contact order in relation to the child; or*
- (c) *a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development; or*
- (ca) *a grandparent of the child; or*²⁰
- (d) *any other person concerned with the care, welfare or development of the child."*

5.29 The court can make a "Commonwealth information order" under section 67N of the Act to seek information on the child's location which may be contained in government records.²¹ Subsection (6) provides that a location order stays in force for 12 months or such longer period as the court considers appropriate. The person to whom it applies must provide the information sought by the order as soon as practicable, or as soon as practicable after the person obtains it.²²

²⁰ Added by section 57 of the Australian Family Law Amendment Act 2000 (No 143, 2000).

²¹ This is "commonwealth" in the sense of jurisdiction over states and territories of Australia and not the wider Commonwealth.

²² See Australian Family Law Act 1975, section 67N(5).

Recovery order

5.30 A recovery order is dealt with in Section 67Q of the Australian Family Law Act 1975. This 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 the child. A recovery order also gives directions about the day-to-day care of the child until he is returned or delivered to another person. The persons who can apply for a recovery order are similar to those for a location order. The order can also authorise the arrest without warrant of a person who again removes or takes possession of a child. Section 67Q states:

"A recovery order is an order made by a court doing all or any of the following:

- (a) requiring the return of a child to:*
 - (i) a parent of the child; or*
 - (ii) a person who has a residence order or a contact order in relation to the child; or*
 - (iii) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development;*
- (b) authorising or directing a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to stop and search any vehicle, vessel or aircraft, and to enter and search any premises or place, for the purpose of finding a child;*
- (c) authorising or directing a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to recover a child;*
- (d) authorising or directing a person to whom a child is returned, or who recovers a child, to deliver the child to:*
 - (i) a parent of the child; or*
 - (ii) a person who has a residence order or a contact order in relation to the child; or*
 - (iii) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development; or*
 - (iv) some other person on behalf of a person described in subparagraph (i), (ii) or (iii);*

- (e) *giving directions about the day-to-day care of a child until the child is returned or delivered to another person;*
- (f) *prohibiting a person from again removing or taking possession of a child;*
- (g) *authorising or directing a person to arrest, without warrant, a person who again removes or takes possession of a child."*

Taking a child overseas

5.31 Section 65Y of the Australian Family Law Act 1975 deals with parental obligations if a residence order, contact order or care order has been made:

- "(1) If a residence order, a contact order or a care order (the 'Part VII order') is in force, a person who was a party to the proceedings in which the order was made, or a person who is acting on behalf of, or at the request of, a party, must not take or send the child concerned from Australia to a place outside Australia except as permitted by subsection (2). Penalty: Imprisonment for 3 years; and*
- (2) Subsection (1) does not prohibit taking or sending the child from Australia to a place outside Australia if:*
 - (a) it is done with the consent in writing (authenticated as prescribed) of each person in whose favour the Part VII order was made; or*
 - (b) it is done in accordance with an order of a court made, under this Part or under a law of a State or Territory, at the time of, or after, the making of the Part VII order".*

5.32 Section 65Z provides for similar obligations if proceedings for the making of a residence order, contact order or care order are pending.

Amendments to comply with the Hague Convention

5.33 The Australian Family Law Council recommended that, to comply with the *Hague Convention on the Civil Aspects of International Child Abduction*, there should be a deeming provision under which a "parenting order" would be

regarded as a “custody” order for the purposes of child abductions.²³ Section 42 of the Australian Family Law Reform Act 1995 provides that: for the purposes of the Hague Convention, each parent is regarded as having custody of the child; and a person who has a residence order in relation to a child should be regarded as having custody of the child. A person who, under a specific issues order, is responsible for the day-to-day care, welfare and development of the child should also be regarded as having custody of the child. A person who has a contact order should be regarded as having a right of access to the child.

Passports

5.34 Section 67ZD of the Australian Family Law Act 1975 provides:

“If a court having jurisdiction under this part considers that there is a possibility that a child may be removed from Australia, it may order the passport of the child and of any other person concerned to be delivered up to the court upon such conditions as the court thinks appropriate.”

Criminal law on abduction

5.35 In 1997, the Family Law Council of Australia issued a discussion paper on the criminalisation of the law on parental child abduction.²⁴ This looked at the proposition that it should be a criminal offence to remove a child even where there was no family law order in force. The Council noted that countries which had criminal offences for child abduction could make use of Interpol and extradition laws to secure the return of the child. They also noted that in cases of domestic abduction, “the police are understandably reluctant to assist in circumstances where the events do not constitute a criminal offence.”²⁵

5.36 On the other hand, the Council considered that making parental child abduction a criminal offence could be seen as an undue intrusion into the domain of the family and that the consequences of a criminal conviction could be severe.²⁶ They suggested that exceptions and defences would need to be provided for; for example, where the parent taking the child was fleeing the other parent because of violence. (It should be noted that the Council's final report on this subject concluded that criminalisation of parental child abduction should not be recommended.²⁷)

²³ Family Law Council of Australia, *The UK Children Act 1989*, above.

²⁴ Family Law Council of Australia, *Parental Child Abduction* (Feb 1997).

²⁵ *Ibid*, para 1.12.

²⁶ *Ibid*, para 4.06.

²⁷ See Family Law Council of Australia, *Parental Child Abduction* (Jan 1998; Commonwealth of Australia), at paras 4.33 to 4.34.

Chapter 6

Recommendations for reform

Introduction

6.1 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.

Removal of the child from the jurisdiction

6.2 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)¹ allows an application to the court to prevent removal. The rule states:

"A petitioner or respondent, or in case of a joint application, either of the joint applicants concerned may apply at any time for an order prohibiting the removal of any child of the family under 18 out of Hong Kong or out of the custody, care or control of any person named in the application without the leave of the court except on such terms as may be specified in the order. Unless otherwise directed, an application under this paragraph may be made ex parte."

6.3 A similar provision is contained in Order 90, Rule 5(3) of the Rules of the District Court (Cap 336, subsidiary legislation).

6.4 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

¹ See further Chapter 2, above, at para 2.13.

or having to give notice. This provision may be problematic in Hong Kong with the ease and frequency of travel out of the jurisdiction.

6.5 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 1995,² which state:

"(3) *Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of a person described in subsection (6) below. ...*

(6) *The description of a person referred to in subsection (3) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a right [of custody or access]; except that, where both the child's parents are persons so described, the consent required for his removal or retention shall be that of them both."*

6.6 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.³

6.7 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.

6.8 There was no opposition to these proposals from the respondents to the consultation paper. **The Hong Kong Bar Association** further agreed with our view that it would be inappropriate to allow for a one month removal of the child without consent, as was the case in the United Kingdom, "*bearing in mind the ease and frequency of travel in Hong Kong and the difficulties of enforcement once the child has left the jurisdiction.*" **The Hong Kong Family Welfare Society** noted that these provisions should include a non-parent who is granted the custody or access order with respect to the child.

6.9 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

² See Chapter 5, above, at para 5.14, and Annex 2, below at para 2.

³ This is defined in section 2 of the Matrimonial Proceedings and Property Ordinance (Cap 192) as a child of both parties or a child who has been treated as a child of their family.

send the child out of the United Kingdom without appropriate consent.⁴ As it is an offence to attempt to do so, the police can arrest anyone they reasonably suspect of the attempt without a warrant.

6.10 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.⁵ 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.⁶

Recommendation 1

We recommend that 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 express a preference for the Scottish provisions, and would recommend that provisions along the lines of section 2(3) and 2(6) of the Children (Scotland) Act 1995 be adopted.

We propose that this section would apply in cases where proceedings have already been issued or court orders made concerning the child. It would also extend to any child of the family.

We also recommend that 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 be enacted into primary legislation.

Disclosure of whereabouts/location orders

6.11 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.

⁴ See section 1, UK Child Abduction Act 1984.

⁵ See the statistical information on Hong Kong-related child abduction cases in Chapter 1.

⁶ See also Dr Athena Liu, *Family Law for the Hong Kong SAR* (1999, HKU Press) at 333.

6.12 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. 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.⁷ The provisions of section 36 state:

"(1) *Where —*

(a) *in proceedings for the return of a child under Part II of this Act [relating to the Hague Convention] ...*

there is not available to the Court adequate information as to the whereabouts of the child, the Court may order any person who, it has reason to believe, may have relevant information to disclose it to the Court.

(2) *Any person who is the subject of an order under subsection (1) of this section may, notwithstanding production of the child, be ordered to disclose any information that is relevant to proceedings under Part II [relating to the Hague Convention] ...*

(3) *Where —*

(a) *in proceedings in a Contracting State other than the State for the return of a child under the Hague Convention ...*

or where such proceedings are about to be commenced, there is not available to the authorities in the Contracting State adequate information as to the whereabouts of the child, the Court may, on application made to it by any person, if it is satisfied that the applicant has an interest in the matter and that the child has been taken from or sent or kept out of the State without the consent of any of the persons having the right to determine the child's place of residence under the law of the State, order any person who, it has reason to believe, may have relevant information to disclose it to the Court.

(4) *Any person who is the subject of an order under subsection (3) of this section may, notwithstanding production of the child in the Contracting State, be*

⁷ See further Chapter 5, above, at para 5.18, and Annex 2, below, at para 3.

ordered to disclose any information that is relevant to proceedings in that state.

- (5) *A person shall not be excused from complying with any order under this section by reason that to do so may incriminate him or his spouse of an offence; but a statement or admission made in compliance with any such order shall not be admissible in evidence against either of them in proceedings for an offence other than perjury."*

6.13 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.⁸ These provisions state:

67J *"(1) A location order is an order made by a court requiring:*

- (a) a person to provide the Registrar of the court with information that the person has or obtains about the child's location; or*
- (b) the Secretary of a Department, or an appropriate authority of a Commonwealth instrumentality, to provide the Registrar of the court with information about the child's location that is contained in or comes into the records of the Department or instrumentality."*

67K *"A location order in relation to a child may be applied for by:*

- (a) a person who has a residence order in relation to the child; or*
- (b) a person who has a contact order in relation to the child; or*
- (c) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development; or*

⁸

See further Chapter 5, above, at para 5.28, and Annex 2, below, at para 3.

- (ca) *a grandparent of the child; or*⁹
- (d) *any other person concerned with the care, welfare or development of the child."*

6.14 The introduction of provisions along these lines was widely supported by the respondents to the consultation paper. **The Civil Division of the Department of Justice**, which carries out the functions of the Hague Convention Central Authority for the Hong Kong SAR, noted that the Irish whereabouts order and the Australian location order largely overlapped and should be combined. We endorse this view. They also felt that there should be statutory penalties for non-compliance with the location order.

6.15 We generally confirm the proposals in our consultation paper in this area, though we agree that where the whereabouts and location order provisions overlap, they should be combined into one section.

Recommendation 2

We recommend 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. We also recommend adoption of an additional provision specifying who should be entitled to apply for a location order, as in section 67K of the Australian Act.

Recovery orders

6.16 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 1975¹⁰ were to be preferred. Section 67Q states:

"A recovery order is an order made by a court doing all or any of the following:

⁹ Added by section 57 of the Australian Family Law Amendment Act 2000 (No 143, 2000).

¹⁰ See further Chapter 5, above, at para 5.29, and Annex 2, below, at para 4.

- (a) *requiring the return of a child to:*
 - (i) *a parent of the child; or*
 - (ii) *a person who has a residence order or a contact order in relation to the child; or*
 - (iii) *a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development;*
- (b) *authorising or directing a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to stop and search any vehicle, vessel or aircraft, and to enter and search any premises or place, for the purpose of finding a child;*
- (c) *authorising or directing a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to recover a child;*
- (d) *authorising or directing a person to whom a child is returned, or who recovers a child, to deliver the child to:*
 - (i) *a parent of the child; or*
 - (ii) *a person who has a residence order or a contact order in relation to the child; or*
 - (iii) *a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development; or*
 - (iv) *some other person on behalf of a person described in subparagraph (i), (ii) or (iii);*
- (e) *giving directions about the day-to-day care of a child until the child is returned or delivered to another person;*
- (f) *prohibiting a person from again removing or taking possession of a child;*
- (g) *authorising or directing a person to arrest, without warrant, a person who again removes or takes possession of a child."*

6.17 As with the whereabouts and location order proposals, these suggested provisions were widely supported by the respondents to the consultation paper. The **Civil Division of the Department of Justice** raised the following concerns, however. They noted that there may be practical difficulties 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, and neither the HKSAR Central Authority, nor a representative from the Requesting State, can come to Hong Kong to accompany the child. The **Civil Division** said that these matters raised funding issues on which the relevant policy bureau and the Social Welfare Department should be consulted before recovery orders were introduced. The **Social Welfare Department** echoed these views. We note these concerns, and consider that these are matters for the Administration to address at such time as the proposals may be implemented.

Recommendation 3

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

Power to hold a child so that he can be returned to the custodial parent or taken to a place of safety

6.18 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.¹¹

6.19 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 situations¹² to prevent the child from being removed from the jurisdiction.

6.20 We proposed as a model for this provision section 37 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991,¹³ which states:

¹¹ See Chapter 2, above, at paras 2.36 to 2.37.

¹² 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.

¹³ See Chapter 5, above, at paras 5.19 to 5.20, and Annex 2, below, at para 5.

“(1) A [police officer] shall have power to detain a child who he reasonably suspects is about to be or is being removed from the State in breach of any of the following orders of a court in the State –

- (a) an order regarding the custody of, or right of access to, the child (whether or not such an order contains an order prohibiting the removal of the child from the jurisdiction without leave of the court) or any order relating to the child made by the court in the exercise of its jurisdiction relating to wardship of a child ...*
- (c) An order made under section 12 of this Act [the court's powers to make interim orders] or an order made for return of the child under Part II of this Act [relating to the Hague Convention] ...*

or while proceedings for one of those orders are pending or an application for one of those orders is about to be made.

(2) Where a child is detained under this section a [police officer] shall as soon as possible –

- (a) return the child to the custody of a person (not being a health board) in favour of whom a court has made an order referred to in subsection (1) of this section unless the [officer] has reasonable grounds for believing that such person will act in breach of such order, or*
- (b) where the child has been in the care of a health board, return the child to that board, or*
- (c) in a case other than one to which paragraph (a) or (b) of this subsection applies, or where the [officer] is of the belief referred to in the said paragraph (a), deliver the child into the care of the health board for the area in which the child is for the time being.*

(3) Where a [police officer] delivers into the care of a health board a child in accordance with subsection (2)(c) of this section, he shall as soon as possible inform or cause to be informed

- (a) *a parent of the child, or*
 - (b) *a person acting in loco parentis, or*
 - (c) *the Central Authority ... of such delivery.*
- (4) *Where any child is delivered into the care of a health board in accordance with subsection (2)(c) of this section the health board shall arrange suitable care and accommodation for the child, which may include placing the child in foster care or residential care, pending the determination of an application under subsection (5) of this section by the health board.*
- (5) *Where a child is delivered into the care of a health board under subsection (2)(c) of this section the health board shall apply at the next sitting of the District Court or, in the event that the next sitting is not due to be held within three days of the date on which the child is delivered into the care of the health board, at a specially arranged sitting of the District Court held within the said three days, for directions as to the child's release from such care or otherwise in relation to the child's care and the District Court may make such order as it thinks proper in the circumstances regarding custody of and, where appropriate, access to, the child, taking into account any order referred to in subsection (1) of this section relating to the child and without prejudice to proceedings that may be pending or any application that is about to be made for one of those orders in relation to the child. ..."*

6.21 The introduction of a power to hold the child suspected of being abducted proved to be a controversial proposal, with a number of concerns and objections being raised by respondents to the consultation paper. **The Immigration Department** were not in favour of having this power for themselves. They noted that the existing powers of arrest, detention and the granting of bail conferred on immigration officers were for the purposes of the prevention and detection of immigration-related crime. In their view, it would not be appropriate for them to resort to a power to detain as a means of enforcing a civil judgment or order. If, however, the power to hold the child were to be conferred upon the police, they indicated that they would certainly be prepared to assist the police in carrying out this responsibility on any occasion necessary.

6.22 **The Civil Division of the Department of Justice**, which, as noted above, carries out the functions of the Hague Convention Central Authority for the Hong Kong SAR, felt that granting the power to hold the child was too drastic a step, particularly considering how frightening the experience would be for any child held by the authorities. Civil Division of the Department of Justice felt that there was not sufficient justification to warrant this

additional power when stop orders could be obtained quickly - within the same day *ex parte* from the duty judge - and were effective in preventing the child from being removed from the jurisdiction by placing his name on the Immigration Department's 'stop list.'

6.23 **The Law Faculty of the University of Hong Kong and the Law Society of Hong Kong Family Law Committee** noted that the term "detain" meant "to keep in confinement or under restraint." They commented that detention therefore "*implies a restriction on the liberty of an innocent person which contradicts basic human rights principles.*" They proposed that the power to "detain" should be avoided altogether and substituted by a more neutral power to take the child to "a place of safety." The Law Faculty of HKU also urged the Government to consider establishing appropriate places of safety for such children to be held.

6.24 **Ms Heather Douglas of the City University of Hong Kong**, who also did not support the proposal, queried the basis of the "reasonable suspicion" referred to in the suggested legislation. Ms Douglas noted that if a parent was trying to leave Hong Kong by an illegal method as was mentioned in the consultation paper, then presumably the police would be able to stop the parent, and hence the child, because of their reliance on that illegal method.

6.25 Some contrary views to these were also expressed. **The Official Solicitor's Office** supported the proposal, as did the **Hong Kong Young Legal Professionals Association**. **The Hong Kong Bar Association** 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. **ReSource The Counselling Centre** agreed with the proposed power to hold the child and also suggested that there should be a power to detain, and even arrest, the parent attempting to remove the child from Hong Kong. In their view, not only would this be a deterrent to a parent embarking on a plan of abduction, but it might also avoid the situation where a thwarted parent leaves the child at the airport "*with only immigration officers for company.*"

6.26 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 suggest that this power is in some ways analogous to the power contained in section 34E of the Protection of Children and Juveniles Ordinance (Cap 213),¹⁴ which allows a police officer to detain a child who is suspected of being in need of care or protection and to deliver him to a place of refuge, or to such other place as he may consider appropriate. We would suggest that in the types of situations where this

¹⁴ See discussion of this provision in Chapter 2, above, at paras 2.25 to 2.26.

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.

6.27 It is this principle of the child being held under protection so that he can be returned to the custodial parent, or taken to a place of safety so that further directions can be sought from the court, which must be kept in view. 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. 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, and the longer-term trauma to the child of being taken away, possibly permanently, from his custodial parent and his home jurisdiction.

6.28 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.

Recommendation 4

We recommend 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. We also recommend 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.

Surrender of passports

6.29 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.¹⁵ 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.

6.30 In the Irish case of the *State (KM & RD) v the Minister for Foreign Affairs*¹⁶ the High Court treated the denial of a passport as a breach of the right to travel, which was a personal right under Article 40.3 of the Irish Constitution.¹⁷ In another case, *Cosgrove v Ireland and Others*,¹⁸ the High Court held that a father's rights as joint guardian under the Guardianship of Infants Act 1964 had been breached as a passport had been issued for the child despite the father's objection. Section 37 of the UK Family Law Act 1986¹⁹ provides that when there is a court order prohibiting removal of a child from the United Kingdom, the court may require any person to surrender any passport which has been issued to or contains particulars of the child.

6.31 It would seem that refusing to issue a passport at the request of a parent may be in breach of the freedom of movement guaranteed by Article 31 of the Basic Law which provides that:

"Hong Kong residents shall have freedom to travel and to enter or leave the Region. Unless restrained by law, holders of valid travel documents shall be free to leave the Region without special authorization".

6.32 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,²⁰ 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

¹⁵ See Chapter 2, above, at para 2.36, and this chapter, above, at para 6.18.

¹⁶ [1979] IR 73.

¹⁷ "The State guarantees to respect, defend and vindicate the personal rights of the citizen."

¹⁸ [1982] ILRM 48.

¹⁹ For text of the provision, see Chapter 5, above, at para 5.8.

²⁰ The English Court of Appeal in *In re A-K (Minors)(Foreign Passport: Jurisdiction)* [1997] 2 FLR 569, held that it was well within the jurisdiction of the High Court to order the surrender of a foreign passport in order to protect the interests of children. The court had ordered that the husband's passport be held by his own solicitor and not released except with the mother's agreement or order of the court. See also the discussion in Chapter 3, above, at paras 3.18 to 3.19.

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.

6.33 We therefore recommended in the consultation paper the retention of the status quo in relation to the surrender of passports in these cases, though a minority of members of the sub-committee recommended legislating a power to order the surrender of all passports, Chinese re-entry permits and travel documents, where the court had made, or was making, an order prohibiting removal of the child. We noted in the consultation paper that the Australian section 67ZD of the Family Law Act 1995,²¹ 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.

6.34 On consultation, the only respondent to raise any objections to our proposed approach was the **Hong Kong Bar Association**. The Association agreed with the sub-committee minority view, and felt that, although not likely to be often used, the court should have the express power to order the surrender of passports in appropriate cases.

Recommendation 5

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.

Notification of court order to the Immigration Department

6.35 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.

6.36 In some cases, a parent does not inform the department, as the parents are able to agree informally between themselves as to whether the

²¹ For text of the provision, see Chapter 5, above, at para 5.34.

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.

6.37 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.

6.38 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.

6.39 This approach was supported by all but one of the respondents to the consultation paper, who felt that all divorces involving children should be treated as potential abduction cases, and that the names of the children involved should automatically be lodged with the Hague Convention authorities in the relevant jurisdictions. They would then be in a position to take prompt, appropriate action if an abduction situation were to arise.

6.40 Having considered the issues, we endorse our earlier view and that of the majority of the respondents to the consultation paper.

Recommendation 6

We recommend that 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. It should be at the discretion of the parents whether the Immigration Department is notified or not. However, 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.

Chapter 7

Further observations

Introduction

7.1 During the course of our recent deliberations, 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 here to bring them to the attention of the Administration.

Legal aid position

7.2 Unlike certain other jurisdictions, Hong Kong does not have any special system of legal aid for dealing with Hague Convention cases.¹ 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.

7.3 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.

7.4 The Central Authority has also found that recovering costs from overseas applicants is rarely straightforward and often proves to be a time-consuming process.

¹ 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.

7.5 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. The counsel for the Central Authority submit that, **in order to assist the Central Authority to duly discharge its obligations under the Hague Convention, it would be most 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.**²

7.6 Counsel for the Central Authority also submit that, **notwithstanding the current provision relating to costs in Hague Convention cases,**³ **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.

7.7 **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.**⁴

7.8 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. The Central Authority counsel note that **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.**

² 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.

³ I.e., 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.

⁴ This is the approach adopted by some provinces in Canada, eg, British Columbia.

Stay of custody proceedings in Hong Kong

7.9 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. Article 16 of the Convention states:

“After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this convention or unless an application under this Convention is not lodged within a reasonable time following receipt of the notice” (emphasis added).

7.10 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. Order 121 rule 10(3) states:

“The Registrar, upon receipt of such notice and affidavit, shall as soon as practicable, provide the relevant authority with copies thereof.”

7.11 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.⁵

7.12 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.**

⁵ It appears that Order 121 rule 10 is largely modelled on UK legislation. However, rule 6.11 of the UK Family Proceedings Rules 1991 expressly directs stay of proceedings where an Article 16 notice has been given.

Confidentiality of Hague proceedings

7.13 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.

7.14 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.⁶ 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,⁷ 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.

7.15 While it may be argued that Hague Convention cases are also cases relating to the guardianship, custody, maintenance or upbringing of a child, there may be doubts as to whether they ought to be so regarded, given that the prime concern of Hague Convention proceedings is to return the child to his place of habitual residence without looking into custody and related issues.⁸

7.16 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.⁹ It would, however, save court time and put the matter beyond doubt if specific legislative provisions could be introduced to cover the matter. The Central Authority counsel therefore propose that, **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.**

⁶ Pursuant to Order 63, rule 4(1)(a) of the Rules of the High Court (Cap 4, subsidiary legislation).

⁷ As we have noted earlier in this report, Hague Convention proceedings have only been available in Hong Kong since 1 September 1997: see Chapter 3, above, at para 3.3.

⁸ Save in very exceptional circumstances as laid down in Article 13 of the Hague Convention.

⁹ The Hong Kong Central Authority has, since September 2001, committed to applying for such an order in every incoming child abduction case.

Chapter 8

Summary of recommendations

(The recommendations of this report are to be found in Chapter 6. The further observations noted below are to be found in Chapter 7.)

Recommendation 1

(Removal of the child from the jurisdiction)

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 1995¹ 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),² which allows an application to the court to prevent removal of the child, should also be enacted into primary legislation.**

Recommendation 2

(Disclosure of whereabouts / location orders)

We recommend:

¹ See Chapter 6, above, at paras 6.5, and Annex 2, below, at para 2. See also Chapter 5, above, at para 5.14.

² See Chapter 6, above, at paras 6.2. See also Chapter 2, above, at para 2.13.

- (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 1991³ and section 67J of the Australian Family Law Act 1975;⁴ 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.⁵

Recommendation 3

(Recovery orders)

We recommend the adoption of provisions on recovery orders similar to those in section 67Q of the Australian Family Law Act 1975.⁶

Recommendation 4

(Power to hold a child so that he can be returned to the custodial parent or taken to a place of safety)

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 1991,⁷ 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

³ See Chapter 6, above, at para 6.12, and Annex 2, below, at para 3. See also Chapter 5, above, at para 5.18.

⁴ See Chapter 6, above, at para 6.13, and Annex 2, below, at para 3. See also Chapter 5, above, at para 5.28.

⁵ See Chapter 6, above, at paras 6.13, and Annex 2, below, at para 3. See also Chapter 5, above, at para 5.28.

⁶ See Chapter 6, above, at para 6.16, and Annex 2, below, at para 4. See also Chapter 5, above, at para 5.29.

⁷ See Chapter 6, above, at para 6.20, and Annex 2, below, at para 5. See also Chapter 5, above, at paras 5.19 to 5.20.

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 5

(Surrender of passports)

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 1975⁸ for Hong Kong.

Recommendation 6

(Notification of court order to Immigration)

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.**

⁸ See Chapter 5, above, at para 5.34.

Further observations

(Though not proposed as formal recommendations, we wish to draw to the attention of the Administration certain further issues relating to child abduction, which may require consideration for reform.⁹)

(Legal aid position)

- (a) In order to assist the Central Authority to duly discharge its obligations under the Hague Convention, it would be most 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.¹⁰
- (b) Notwithstanding the current provision relating to costs in Hague Convention cases,¹¹ 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.
- (c) 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.
- (d) It would also 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.¹²

⁹ As noted in Chapter 7, these observations reflect concerns which have been expressed to us by the HKSAR Central Authority counsel under the Hague Convention. As this information was received subsequent to the publication of our consultation paper, we have not sought the views of the public on these issues.

¹⁰ 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 cases as expeditiously as possible, and that in practice, delay may be rare.

¹¹ I.e., 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.

¹² See Chapter 7, above, at paras 7.2 to 7.8.

(Stay of custody proceedings in Hong Kong)

- (e) 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.¹³**

(Confidentiality of Hague proceedings)

- (f) 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.¹⁴**

¹³ See Chapter 7, above, at paras 7.9 to 7.12.

¹⁴ See Chapter 7, above, at paras 7.13 to 7.16.

**List of the Respondents to the Consultation Paper
on Guardianship and Custody**

1. Against Child Abuse
2. Association for the Advancement of Feminism
3. Mr J J A Bosch and Ms SFM Wortmann
4. Caritas Family Service Project on Extramarital Affairs
5. Caritas – Hong Kong (Social Work Services)
6. Caritas – Hong Kong Family Service
7. Ms CHAN Tsz-ying, Hong Kong Family Welfare Society
8. Dr N Y Chau
9. Ms CHENG Mui-hung
10. Chinese YMCA of Hong Kong
11. Ms CHUNG Yuen-yee
12. City University of Hong Kong, Department of Public and Social Administration
13. Department of Justice, Civil Division
14. Department of Justice, Prosecutions Division
15. Director of Legal Aid
16. Director of Health
17. Director of Home Affairs
18. Director of Immigration
19. Director of Social Welfare
20. Ms Heather Douglas, Assistant Professor
City University of Hong Kong, School of Law
21. Ms Andrea Gutwirth
22. Harmony House
23. Haven of Hope Christian Service
24. Hong Kong Association for the Survivors of Women Abuse
25. Hong Kong Bar Association
26. Hong Kong Family Welfare Society
27. Hong Kong Federation of Women
28. Hong Kong Federation of Women Lawyers

29. Hong Kong Student Aid Society
30. Hong Kong Women Development Association
31. Hong Kong Young Legal Professionals Association Limited
32. Hong Kong Young Women's Christian Association
33. Judiciary Administrator
34. Ms Helen Kong, Hastings & Co
35. Miss LO Lau-oi, Hong Kong Family Welfare Society
36. Official Solicitor
37. ReSource The Counselling Centre
38. Secretary for Home Affairs
39. Secretary for Housing
40. St John's Cathedral Counselling Service
41. The Boys' & Girls' Clubs Association of Hong Kong
42. The Hong Kong Catholic Marriage Advisory Council
43. The Hong Kong Committee on Children's Rights
44. The Hong Kong Council of Social Service
45. The Hong Kong Family Law Association
46. The Hong Kong Mediation Council
47. The Hong Kong Psychological Society
48. The Law Society of Hong Kong
49. The University of Hong Kong, Department of Social Work and Social Administration
50. The University of Hong Kong, Faculty of Law
51. Ms TSANG Wan-wai

Relevant legislative provisions from other jurisdictions

1. This Annex sets out the relevant sections from the comparative statutes, the Children Act (Scotland) 1995, the Australian Family Law Act 1975 and the Irish Child Abduction and Enforcement of Custody Orders Act 1991, which are referred to in the recommendations of this report contained in Chapters 6 and 8.

Recommendation 1 - Removal of the child from the jurisdiction

2. In Chapter 6, we recommend the enactment into primary legislation of a provision to restrict the removal of a child from the jurisdiction without the consent of the parent who has 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 should be adopted. The text of these provisions is set out below.

Children (Scotland) Act 1995, section 2(3) and (6):

- “(3) Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of a person described in subsection (6) below.*
- (6) The description of a person referred to in subsection (3) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a right mentioned in paragraph (a) or (c) of subsection (1) above; except that, where both the child's parents are persons so described, the consent required for his removal or retention shall be that of them both.”*

Recommendation 2 - Whereabouts/location order

3. In Chapter 6, we recommend the enactment of a power to order the disclosure of the whereabouts/location of the child along the lines as section 36 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991 and section 67J of the Australian Family Law Act 1975. We also recommend the adoption of a provision specifying who should be entitled to apply for a whereabouts/location order, as in section 67K of the Australian Family Law Act 1975. Each of these provisions is set out below.

Irish Child Abduction and Enforcement of Custody Orders Act 1991, section 36:

"(1) Where —

(a) *in proceedings for the return of a child under Part II of this Act [relating to the Hague Convention] ...*

there is not available to the Court adequate information as to the whereabouts of the child, the Court may order any person who, it has reason to believe, may have relevant information to disclose it to the Court.

(2) *Any person who is the subject of an order under subsection (1) of this section may, notwithstanding production of the child, be ordered to disclose any information that is relevant to proceedings under Part II or III of this Act.*

(3) Where —

(a) *in proceedings in a Contracting State other than the State for the return of a child under the Hague Convention ...*

or where such proceedings are about to be commenced, there is not available to the authorities in the Contracting State adequate information as to the whereabouts of the child, the Court may, on application made to it by any person, if it is satisfied that the applicant has an interest in the matter and that the child has been taken from or sent or kept out of the State without the consent of any of the persons having the right to determine the child's place of residence under the law of the State, order any person who, it has reason to believe, may have relevant information to disclose it to the Court.

- (4) *Any person who is the subject of an order under subsection (3) of this section may, notwithstanding production of the child in the Contracting State, be ordered to disclose any information that is relevant to proceedings in that state.*
- (5) *A person shall not be excused from complying with any order under this section by reason that to do so may incriminate him or his spouse of an offence; but a statement or admission made in compliance with any such order shall not be admissible in evidence against either of them in proceedings for an offence other than perjury."*

Australian Family Law Act 1975, section 67J:

- "(1) a location order is an order made by a court requiring:*
- (a) a person to provide the Registrar of the court with information that the person has or obtains about the child's location; or*
 - (b) the Secretary of a Government Department, or an appropriate authority of a Commonwealth instrumentality, to provide the Registrar of the court with information about the child's location that is contained in or comes into the records of the Department or instrumentality."*

Australian Family Law Act 1975, section 67K:

- "A location order in relation to a child may be applied for by:*
- (a) a person who has a residence order in relation to the child; or*
 - (b) a person who has a contact order in relation to the child; or*
 - (c) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development; or*
 - (ca) a grandparent of the child, or*

- (d) *any other person concerned with the care, welfare or development of the child.”*

Recommendation 3 - Recovery orders

4. In Chapter 6, we recommend the adoption of provisions similar to those in section 67Q of the Australian Family Law Act 1975 relating to recovery orders. The text of the section is set out below.

Australian Family Law Act 1975, section 67Q:

“A recovery order is an order made by a court doing all or any of the following:

- (a) requiring the return of a child to:*
 - (i) a parent of the child; or*
 - (ii) a person who has a residence order or a contact order in relation to the child; or*
 - (iii) a person who has a specific issues order in relation to the child under which the person is responsible for the child's long-term or day-to-day care, welfare and development;*
- (b) authorising or directing a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to stop and search any vehicle, vessel or aircraft, and to enter and search any premises or place, for the purpose of finding a child;*
- (c) authorising or directing a person or persons, with such assistance as he or she requires or they require, and if necessary by force, to recover a child;*
- (d) authorising or directing a person to whom a child is returned, or who recovers a child, to deliver the child to:*
 - (i) a parent of the child; or*
 - (ii) a person who has a residence order or a contact order in relation to the child; or*
 - (iii) a person who has a specific issues order in relation to the child under which the person is*

- responsible for the child's long-term or day-to-day care, welfare and development; or;*
- (iv) some other person on behalf of a person described in subparagraph (i), (ii) or (iii);*
 - (e) giving directions about the day-to-day care of a child until the child is returned or delivered to another person;*
 - (f) prohibiting a person from again removing or taking possession of a child;*
 - (g) authorising or directing a person to arrest, without warrant, a person who again removes or takes possession of a child.”*

Recommendation 4 – Power to hold the child so that he can be returned to the custodial parent or taken to a place of safety

5. In Chapter 6, we recommend that the authorities should be given a power to detain a child whom they reasonably suspect is about to be, or is being, removed from the jurisdiction in breach of court orders, so that the child can be returned to the custodial parent or taken to a place of safety until the court and/or the custodial parent and/or the Social Welfare Department can be notified. Section 37 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991 is proposed as a model for these provisions. The text of the section is set out below.

Irish Child Abduction and Enforcement of Custody Orders Act 1991, section 37:

- “(1) A [police officer] shall have power to detain a child who he reasonably suspects is about to be or is being removed from the State in breach of any of the following orders of a court in the State –*
- (a) an order regarding the custody of, or right of access to, the child (whether or not such an order contains an order prohibiting the removal of the child from the jurisdiction without leave of the court) or any order relating to the child made by the court in the exercise of its jurisdiction relating to wardship of a child ...*

- (c) *an order made under section 12 of this Act [the court's powers to make interim orders] or an order made for return of the child under Part II of this Act [relating to the Hague Convention] ...*

or while proceedings for one of those orders are pending or an application for one of those orders is about to be made.

- (2) *Where a child is detained under this section a [police officer] shall as soon as possible –*

- (a) *return the child to the custody of a person (not being a health board) in favour of whom a court has made an order referred to in subsection (1) of this section unless the [officer] has reasonable grounds for believing that such person will act in breach of such order, or*

- (b) *where the child has been in the care of a health board, return the child to that board, or*

- (c) *in a case other than one to which paragraph (a) or (b) of this subsection applies, or where the [officer] is of the belief referred to in the said paragraph (a), deliver the child into the care of the health board for the area in which the child is for the time being.*

- (3) *Where a [police officer] delivers into the care of a health board a child in accordance with subsection (2)(c) of this section, he shall as soon as possible inform or cause to be informed*

- (a) *a parent of the child, or*
- (b) *a person acting in loco parentis, or*
- (c) *the Central Authority ... of such delivery.*

- (4) *Where any child is delivered into the care of a health board in accordance with subsection (2)(c) of this section the health board shall arrange suitable care and accommodation for the child, which may include placing the child in foster care or residential care, pending the determination of an application under subsection (5) of this section by the health board.*

- (5) *Where a child is delivered into the care of a health board under subsection (2)(c) of this section the health board shall apply at the next sitting of the District Court or, in the*

event that the next sitting is not due to be held within three days of the date on which the child is delivered into the care of the health board, at a specially arranged sitting of the District Court held within the said three days, for directions as to the child's release from such care or otherwise in relation to the child's care and the District Court may make such order as it thinks proper in the circumstances regarding custody of and, where appropriate, access to, the child, taking into account any order referred to in subsection (1) of this section relating to the child and without prejudice to proceedings that may be pending or any application that is about to be made for one of those orders in relation to the child. ..."