

**Administration's detailed response to
The Law Reform Commission report on
International Parental Child Abduction**

Recommendation 1 – Removal of the child from the jurisdiction

The LRC recommended 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. The LRC recommended that provisions along the lines of section 2(3) and (6) of the Children (Scotland) Act 1995 be adopted;
- (b) This section would apply in cases where proceedings have already been issued or court orders have already been made concerning the child;
- (c) This section would also extend to any child of the family; and
- (d) Rule 94(2) of the Matrimonial Causes Rules (Cap. 179, subsidiary legislation), which allows an application to the court to prevent removal of the child, should also be enacted into primary legislation.

Response from the Administration:

Pursuant to the Matrimonial Causes Rules and the Rules of the District Court at present, a parent who is (a) a petitioner, respondent or joint applicant of a divorce proceedings; or (b) involved in a proceeding under the Guardianship of Minors Ordinance (Cap. 13) or the Separation and Maintenance Orders Ordinance (Cap. 16) can apply to the court for an injunction prohibiting the removal of any child by the other parent.

We agree that the scope of eligible parents who can apply for the injunction as provided in the law can be extended to cover all parents, regardless of whether they are involved in any divorce / matrimonial proceedings or not. We will work out the details of the provisions to effect such a change in consultation with relevant stakeholders and make reference to the legislation of other jurisdictions. We also have no in-principle objection to putting the existing injunction provisions (Rule 94(2) of Cap. 179A) into primary legislation as per recommendation (d).

Recommendation 2 – Disclosure of whereabouts / location orders

The LRC recommended that:

- (a) a power to order the disclosure of the whereabouts or location of the child along the lines of section 36 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991 and section 67J of the Australian Family Law Act 1975; and
- (b) the adoption of an additional provision specifying who should be entitled to apply for a location order, as in section 67K of the Australian Act.

Response from the Administration:

We accept the LRC's recommendation that the court should be empowered to order the disclosure of the whereabouts or location of the child. Details of the provisions will be worked out in consultation with relevant stakeholders. Reference will be made to the legislation of other jurisdictions.

Recommendation 3 – Recovery orders

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

Response from the Administration:

We accept the LRC's recommendation that the court should be empowered to make recovery orders. Details of the provisions will be worked out in consultation with relevant stakeholders. Reference will be made to the legislation of other jurisdictions.

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

The LRC recommended:

- (a) the introduction of a provision along similar lines to section 37 of the Irish Child Abduction and Enforcement of Custody Orders Act 1991, to empower the police to hold a child whom they reasonably suspect is about to be or is being removed from the jurisdiction in breach of a court order, so that the child can be taken to a place of safety while the court and/or the other parent and/or the Social Welfare Department can be notified; and

- (b) that in such cases, immigration officers should be empowered to hold the child suspected of being abducted until the police arrive to take the child to a place of safety.

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

Response from the Administration:

Recommendation 4 will add value to the existing arrangements in two ways, namely –

- It will enable the enforcement agencies to hold a child, not just to stop him from leaving Hong Kong. This can deter repeated abduction attempts and will be particularly helpful to left-behind parents who do not know the whereabouts of their child; and
- It will extend the protection to children who are not (or not yet) the subject of a stop order issued by the court, but are being removed from Hong Kong in breach of a **potential** court order.

Having balanced the need to strengthen protection to children against abduction and enforcement feasibility, we propose to accept Recommendation 4 in a modified form, under which police and immigration officers would be empowered to hold the child in the following situations -

- where there is a stop order issued by the court prohibiting the child in question from leaving Hong Kong; or
- where an application for stop order has been made to the court and the application is pending.

If the custodial parent of a child held at an immigration checkpoint cannot be contacted within a reasonable period of time, he will be placed in a place of safety. There will also be a time limit for which the child can be held there for the purpose of contacting and notifying the custodial parent. In inward abduction cases under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), the Department of Justice, which discharges the function of the Hong Kong Central Authority, will be notified.

Recommendation 5 – Surrender of passports

The LRC recommended the retention of the status quo in relation to whether the court should be able to order the surrender of passports. The LRC rejected the adoption of a similar provision to section 67ZD of the Australian Family Law Act 1975 for Hong Kong.

Response from the Administration:

We agree with the LRC that the status quo should be maintained.

Recommendation 6 – Notification of court order to Immigration

The LRC recommended that:

- (a) it should be the parents' responsibility to notify the Immigration Department (ImmD) 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 ImmD 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.

Response from the Administration:

We accept recommendation 6. We will ensure that parents who apply for a court order to prohibit the removal of the child from Hong Kong will be advised of their obligations to inform the ImmD and the other parent.

Further observations

Observation 1 – 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.
- (b) Notwithstanding the current provision relating to costs in Hague Convention cases, 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.

Response from the Administration:

The Legal Aid Department (LAD) considers that there is no need to change the existing arrangements because -

- the LAD only receives a small number of applications relating to international parental child abduction, to which the LAD accords priority;
- the legal aid policy is to ensure that no one with reasonable grounds for taking legal action in a Hong Kong court is prevented from doing so because of a lack of means. Accordingly, legal aid will only be granted to applicants who pass both the means test and the merits test. This principle also applies to applications in relation to the Hague Convention;
- section 13 of the Child Abduction and Custody Ordinance ensures that, given the limited resources, applicants who could afford private litigation should not be subsidised by public funds; and
- legal aid applicants who are non-Hong Kong residents should also be subject to the means test conducted by the LAD.

Observation 2 – Stay of custody proceedings in Hong Kong

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

Response from the Administration:

We have reviewed the current provisions. Although no difficulties related to the stay of custody proceedings have been encountered so far, we agree that the relevant provisions can be amended to put beyond doubt that local custody proceedings will be stayed pending the outcome of Hague Convention return applications. Details of the provisions will be worked out in due course. Reference will be made to the legislation of other jurisdictions.

Observation 3 – Confidentiality of Hague proceedings

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

Response from the Administration:

We have reviewed the current provisions. Although, as noted in the Report, it may be argued that confidentiality is already provided to proceedings of Hague Convention cases by section 5(1)(a) of the Judicial Proceedings (Regulation of Reports) Ordinance (Cap. 287), we believe that it will be desirable to state more clearly the confidentiality requirements in law. Details of the provisions will be worked out in due course. Reference will be made to the legislation of other jurisdictions.

**The Labour and Welfare Bureau
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