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2 July 2010

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(including this page)

Dear Sirs

**PUBLIC CONSULTATION ON THE HAGUE CONVENTION ON CIVIL ASPECTS  
OF INTERNATIONAL CHILD ABDUCTION DRAFT BILL**

We refer to the e-mail dated 11 June 2010 from Ms Lydia Lok of the Ministry of Community Development, Youth and Sports ("MCYS") seeking the Law Society's views on the above-mentioned public consultation.

We enclose a copy of the feedback from the Law Society's Family Law Practice Committee for your attention.

Thank you for giving the Society the opportunity to give our views on the matter.

Yours faithfully



Alvin Chen  
Director, Representation and Law Reform

Encs.



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DATE: 2 July 2010

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~ THE LAW SOCIETY OF SINGAPORE ~

**FEEDBACK ON THE PUBLIC CONSULTATION OF THE HAGUE  
CONVENTION ON CIVIL ASPECTS OF INTERNATIONAL CHILD  
ABDUCTION DRAFT BILL**

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THE LAW SOCIETY  
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## **1 INTRODUCTION**

The Ministry of Community Development, Youth & Sports ("MCYS") invited the Law Society ("the Society") on 11 June 2010 to provide its views on the draft International Child Abduction Bill ("Bill") which seeks to give effect to the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention").

We thank the MCYS for this opportunity to give our views on the proposed draft Bill.

We now set out the feedback of the Society's Family Law Practice Committee ("the Committee") on the draft Bill.

## **2 PART 1 – PRELIMINARY**

### **2.1 Clause 2**

Clause 5 of the draft Bill provides that the Central Authority shall exercise certain functions under the HCCAICA. However, the term "Central Authority" is not defined in Clause 2 of the draft Bill.

The Committee is of the view that the term "Central Authority" should be defined in the Act to clarify the person or persons that may be appointed as the Central Authority. In this regard, the Committee notes that Article 6 of the Hague Convention on the designation of a Central Authority has not been incorporated in the Schedule to the Bill, even though the term "Central Authority" is referred to in the other Articles of the Hague Convention that are incorporated in the Schedule. The Committee would be grateful for a clarification on why the MCYS has decided not to provide for the designation of a Central Authority in the draft Bill.

### **2.2 Clause 4(2)**

Clause 4(2) of the draft Bill provides that the Hague Convention shall apply as between Singapore and a Contracting State only in relation to: (a) wrongful removals or retentions of children; or (b) breaches of access rights to children, occurring on or after the date of coming into force of the Hague Convention as between Singapore and any Contracting State specified in the order made under Clause 4(1).

The Committee notes that Article 35 of the Hague Convention, which provides that the Convention shall apply as between Contracting States only to wrongful removals or retentions occurring after its entry into force in those States, has not been incorporated in the Schedule to the Bill.

The Committee would be grateful for a clarification on whether Clause 4(2) has any retrospective effect, for example, can the Hague Convention apply to the scenario where the wrongful removal of the child occurs before the date of coming into force of the Hague Convention? If the answer is no, would the Hague Convention nevertheless apply on the basis that such wrongful removal constitutes wrongful retention if it continues after the date of coming into force of the Hague Convention?

### **3 PART II – CENTRAL AUTHORITY**

#### **3.1 Clause 6(2)**

Clause 6(2) of the draft Bill provides that “[a] person who claims that, in breach of *rights of custody under the law of Singapore*, a child has been wrongfully removed from Singapore or retained in a Contracting State within the meaning of the Convention may apply to the Central Authority ...”. [emphasis added]

The Committee notes that the term “rights of custody” is defined in Article 5(a) of the Hague Convention to “include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence”. Article 3 of the Hague Convention specifies the circumstances under which the removal or the retention of a child is considered wrongful, namely, where there is a breach of actually exercised custody rights under the law of the State in which the child was habitually resident immediately before the removal or retention. In addition, the context in which “rights of custody” may arise is extremely broad, namely, “by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State”.

To give clarity to the Singapore courts in interpreting the term “rights of custody” in Clause 6(2), the Committee is of the view that it may be necessary to define the term in Clause 6 to provide that it has the meaning in Article 5(a) and may arise under the conditions specified in Article 3.

### **4 PART III – APPLICATIONS TO COURT**

#### **4.1 Clause 11**

Clause 11 of the draft Bill provides that the Court may, at any time before an application under section 8 or 9 is determined, “give such interim directions as it thinks fit for the purpose of securing the welfare of the child concerned or of preventing changes in the circumstances relevant to the determination of the application”.

The Committee would be grateful for a clarification on whether the interim directions under Clause 11 may be given by the Court on an ex-parte application.

#### **4.2 Clause 12**

- (a) Clause 12(1)(a) of the draft Bill provides the Court may, where any application under section 8 for the return of a child is pending or has been determined by the Court, “issue an injunction restraining any person from taking the child out of Singapore”.

The Committee would be grateful for a clarification on whether Clause 12 applies where the child is in transit in Singapore.

- (b) Clause 12(1)(b) of the draft Bill allows any person, with the Court's leave, to take the child out of Singapore either unconditionally or conditionally, where the application for the return of a child is pending.

The Committee notes that Clause 12(1)(b) is adapted from section 131(1) of the Women's Charter, which is in the context of, amongst others, pending matrimonial proceedings. However, the objective of the Hague Convention, as stated in its preamble, is "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure *their prompt return to the State of their habitual residence*, as well as to secure protection for rights of access". [emphasis added]

Giving the Court the discretion to grant leave to any person to take the child out of Singapore when an application under the Hague Convention is pending would compromise the objective of the Hague Convention for the prompt return of the child to the country of the child's habitual residence. The Committee is therefore of the view that Clause 12(1)(b) should be deleted.

#### **4.3 Clause 13**

Clause 13 provides that the Court "may receive advice from any person, whether or not a public officer, who is trained or experienced in matters relevant to the court's determination of an application under section 8 or 9, but shall not be bound to follow any such advice".

The Committee is of the view that Clause 13 may not be necessary given that Rule 41 of the Women's Charter (Matrimonial Proceedings) Rules ("Rules") already allows, upon application to the Court, a child to be examined or assessed by a psychologist, counsellor or other social work professional or mental health professional for the purpose of the preparation of expert evidence for use in the proceedings for ancillary relief involving the custody and welfare of the child. In this regard, the Committee would also be grateful for a clarification on the applicability of the Rules in the context of the International Child Abduction Act.

If however Clause 13 is retained, the Committee is of the view that the scope of persons that the Court may receive advice from should include lawyers. In addition, any advice received by the Court from a third party should be disclosed to the parties and their solicitors, so that they have the opportunity to challenge such advice in Court.

#### **4.4 Clause 14(3)**

Clause 14(1) provides that when an application is filed for the return of a child, the Court shall not make any decision on the merits of rights of custody in respect of the child in any proceedings until it is decided that the child is not to be returned. Clause 14(3) goes on to define the phrase "merits of rights of custody in respect of a child" as "making, varying, revoking or enforcing a custody order in respect of the child *but shall not include any interim order providing for care and control of the child*". [emphasis added]

The Committee is of the view that defining the phrase "merits of rights of custody" to exclude any interim order providing for care and control is likely to be confusing and introduces unnecessary additional terms given that:

- (i) The Court already has the power under Clause 11 to give interim directions for the purpose of securing the welfare of the child

concerned or of preventing changes in the circumstances relevant to the determination of the application; and

- (ii) The term “rights of custody” is defined to include rights relating to the care of the person of the child in Article 5(a) of the Hague Convention, which is part of the Schedule to the draft Bill. A decision on the merits of rights of custody under Clause 14(a) would therefore naturally include a decision on the merits of rights relating to the care of the child.

To avoid confusion, the Committee therefore recommends that the phrase “but shall not include any interim order providing for care and control of the child” be deleted from Clause 14(3). For greater clarity, Clause 14(3) could provide that the Court’s decision on the merits of rights of custody is without prejudice to the Court’s discretion to give interim directions under Clause 11.

## **5 OTHER FEEDBACK**

### **5.1 Preamble and other Articles in the Hague Convention**

The Committee notes that the preamble and certain Articles in the Hague Convention have not been incorporated in the Schedule to the draft Bill. While the Committee understands that the MCYS may have policy reasons in deciding not to incorporate certain Articles in the Schedule, there is no reason not to include the preamble which sets out the objective and intent of the Hague Convention and which will provide a useful aid to the Singapore courts interpreting the Hague Convention.

### **5.2 Making parental abduction a criminal offence**

The Committee notes that certain countries that are signatories to the Hague Convention made parental abduction a criminal offence. For example, the United States, the United Kingdom, Canada, Australia and Finland have made parental abduction a criminal offence.

Fundamentally, the Hague Convention addresses the welfare and return of the child, while criminal prosecution addresses the status of the offender. The Hague Convention is therefore not an alternative solution to criminalizing parental child abduction. As noted in the US *International Parental Kidnapping Crime Act (IPKCA) of 1993*, House Report No. 103-390, November 20, 1993, the creation of penal sanctions separate from the Hague Convention has both an overlapping and independent basis:

- “(1) by making this action a federal offense the United States Government has a direct basis for requesting extradition with those countries with which we have treaties;
- (2) the threat of federal criminal sanctions will deter at least some potential offenders;
- (3) this new crime allows the issuance of federal warrants that will assist United States diplomatic negotiations with foreign governments for the return of kidnapped children; and

(4) enactment of such stern measures will clarify to other countries the seriousness with which the United States regards these cases.”  
([http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm01957.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01957.htm))

The Committee is of the view that the rationales for criminalizing parental abduction set out in the US House Report would also be largely relevant in Singapore’s context. Currently, the offence of parental abduction is only expressly addressed under section 126(3) to (5) of the Women’s Charter, which is limited as it requires an order for the custody of the child to be in force. The Committee therefore urges the MCYS to seriously consider criminalizing parental abduction in the Penal Code or other appropriate penal legislation to supplement the implementation of the Hague Convention in Singapore.

2 July 2010