Scottish Law Commission

CONSULTATIVE MEMORANDUM NO. 67

Child Abduction

AUGUST, 1985

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The Commission would be grateful if comments on this Consultative Memorandum were submitted by 31st January 1986. All correspondence should be addressed to -

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Note In writing its Report with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Consultative Memorandum. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected but if no request for confidentiality is made, the Commission will assume that comments on the Consultative Memorandum can be used in this way.

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SCOTTISH LAW COMMISSION

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CHILD ABDUCTION

PART I - INTRODUCTION

1.1 On 12 July 1984 the Child Abduction Act 1984[1] received the Royal Assent, and shortly thereafter this Commission received an invitation on behalf of the Secretary of State for Scotland, under section 3(1)(e) of the Law Commissions Act 1965:

> "to consider the law of Scotland relating to the abduction, unlawful or unauthorised removal and stealing of children (including children in care or under supervision under the Social Work (Scotland) Act 1968 or other legislation), whether by their parents or otherwise; and, having regard to the laws applicable in England and Wales and Northern Ireland in relation to cases with cross-border implications, to recommend such changes in the law of Scotland as appear to the Commission to be necessary or desirable."

1.2 The Child Abduction Bill was introduced into Parliament as a Private Member's Bill. It received Government support, and was originally intended as a measure for England and Wales only. When passed, the Act created two offences. Although both are, rather misleadingly, side-noted as being offences of "abduction", they are in fact quite distinct. The first (section 1) makes it an offence for certain "connected" persons (mostly parents) to take or send a child out of the United Kingdom without the appropriate consent. The second

[1] Reproduced as an Appendix to this Memorandum.

(section 2) applies to persons not covered by the first offence, and makes it an offence for them to take or detain a child so as to remove him from the lawful control of any person having lawful control of the child or so as to keep him out of the lawful control of any person entitled to such control. For the purposes of both offences a child is a person under the age of 16.

1.3 So far as can be determined from the debates on the Bill, the justifications for the new measures appear to have been that -

(a) they replaced for England and Wales a body of largely unsatisfactory old statute and common law;

(b) they set out criminal offences which would justify intervention by the police in a way not possible under, for example, civil orders for custody; and

(c) by having a clear statutory statement of serious criminal offences, it should be easier to instigate extradition proceedings where a child is unlawfully taken out of the United Kingdom: this would in certain instances be preferable to relying on international conventions such as the Hague Convention or the Strasbourg Convention.[1]

1.4 Although, as noted above, the Child Abduction Bill was introduced as a measure for England and Wales only, it was feared that the provisions relating to the

[1] For the current position regarding these Conventions see para.4.12 below.

removal of a child from the United Kingdom would be ineffective if, for example, a parent were able to take a child abroad from a Scottish port or airport since in that event no offence under section 1 would have been committed in England or Wales.[1] Accordingly, a new clause (now section 6) was added to the Bill making it an offence in Scotland for a parent or other "connected" person to take or send a child out of the United Kingdom where there is an order of a United Kingdom court prohibiting such removal, or to take or send a child out of the United Kingdom without the appropriate consent where a United Kingdom court has made a custody order in respect of the child or where a court in England, Wales or Northern Ireland has made the child a ward of court.

1.5 These provisions were introduced into the Bill at a rather late stage and without prior consultation. It was accordingly announced at the time that the Scottish Law Commission would be invited to consider the matter thereafter.

1.6 The purpose of this Memorandum is to examine the existing Scots law relating to the abduction of children and to consider whether it may be defective in certain respects; to attempt to analyse the problems which our terms of reference invite us to address; to examine the ways in which these problems have been dealt with in some other jurisdictions; to examine in detail the provisions of the Child Abduction Act 1984; and to set out options for reform on which consultees are invited to comment.

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[1] But see discussion of problem of extraterritoriality in para.3.19 et seq below.

PART II - EXISTING SCOTS LAW

2.1 The law of Scotland relating to the abduction of children is mainly to be found in three places - the law of plagium, the law of abduction, and now section 6 of the Child Abduction Act 1984. There are additionally some special statutory provisions which either require, or depending on the facts of a particular case may involve, some form of abduction. Examples are section 12 of the Children and Young Persons (Scotland) Act 1937 (neglect of and cruelty to children), section 8 of the Sexual Offences (Scotland) Act 1976 (taking an unmarried girl under the age of 18 out of the possession of a parent or any other person having the lawful charge of her with intent that she should have unlawful sexual intercourse with men), and section 17(8) of the Social Work (Scotland) Act 1968 (taking away etc. a child in the care of a local authority). Some of these special provisions will be examined later, and section 6 of the Child Abduction Act 1984 will be examined in Part III of this Memorandum where we analyse and comment on the whole of the 1984 Act. In this Part of the Memorandum we confine ourselves to the Scottish common law crimes of plagium and abduction.

Plagium

2.2 Plagium is the common law crime of child stealing committed in respect of children who are below the age of puberty. Below that age children are regarded as being the property of their parents for the purposes of theft, and so can be stolen. Consequently plagium is not a separate offence in its own right but only an

aggravated form of theft.[1] Moreover, since a child below the age of puberty may be stolen, a person who detains or conceals him thereafter may be guilty of reset.[2]

2.3 There has only been one reported prosecution for plagium in recent times.[3] That was a case where a father was charged with stealing his own illegitimate daughter. It was argued on the father's behalf that he could not be guilty of stealing his own child, but that argument was rejected by the sheriff on the ground that, in the absence of a custody decree in his favour, the father of an illegitimate child has no rights in the child, and so can steal it from the person who does have such rights. The father appealed to the High Court but, at the hearing of his appeal, it was conceded that it could not succeed, and the appeal was dismissed of consent.

2.4 That case did not pose, and therefore left unanswered, the interesting question whether the parent of a legitimate child can be guilty of the theft of that child. It is probably not very fruitful, however, to speculate on how that question might be answered, should it ever arise, since the underlying concept of possession or ownership, which is inherent in the crime of plagium, is, we think, unlikely to find much support in an age where statutory provisions regularly enjoin courts to place the welfare of a child above any possessory or custodial claims that may be put forward by a parent.

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[1] Hume, Commentaries on the Law of Scotland respecting Crimes, i.84; Gordon, Criminal Law (2nd ed.) 14-43.

[2] H.M.A. v. Cairney or Cook (1897) 2 Adam 471.

[3] Downie v. H.M.A. 1984 S.C.C.R. 365.

As Dr Clive has put it:

> "The growth of the concept of the welfare of the child and the increasing recognition of its importance both at common law and by statute have made the whole idea of property in a child outmoded."[1]

2.5 Quite apart from these considerations the crime of plagium is of only limited utility as a means of protecting children since it applies only in relation to children under the age of puberty. Under Scots law girls are deemed to reach puberty at the age of 12, and boys at the age of 14. In a more general review of the whole law of children which is presently being undertaken by this Commission we shall be endeavouring to find ways of modernising many of the other rules of Scots law which draw apparently artificial and illogical distinctions between children below and above the age of puberty, and as a consequence between boys and girls. We are disposed to think that the law of plagium is another candidate for reform.[2]

Abduction

2.6 According to Gordon[3] "abduction for any purpose is criminal, whether or not it is accompanied by behaviour which can be categorised as assault or fraud". While that statement may be true today, the general application of the crime of abduction may not always have been accepted in the past. For one thing there seems to

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[1] "Refusing to Return Children to Dangerous Homes", 1976 S.L.T. 265, at 266.

[2] See further, para.6.4 below.

[3] 29-52.

have been doubt about whether or not the crime of abduction can be committed against a child, or at least a child under the age of puberty.

2.7 Having described the crime of plagium, Hume goes on to say:[1]

> "Rightly considered, to carry off and vend or send into captivity a person of grown years and mature discretion, is a quite different sort of crime from theft or robbery; and in no wise a patrimonial, but a proper personal injury, and one of the highest sort. It cannot fall under the notion of theft, for this reason, if there were no other, that the fact is accompanied with circumstances of force and invasion of the person."

Although in the foregoing passage Hume was not expressly directing his attention to the age at which a person might be the victim of the crime of abduction, his reference to "a person of grown years and mature discretion" suggests that he may have seen the crime as inappropriate in the case of children; or perhaps, altering the emphasis somewhat, that the crime of plagium was not appropriate to adults. In at least one reported case[2] the relevancy of a charge of abduction in respect of a pupil child was doubted since it did not appear to raise anything not covered by the charge of plagium. By contrast, in the recent case of H.M.A. v. McLean[3] there appears to have been no challenge to an indictment in which an accused was charged with the abduction of a girl of 6.

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[1] i.83.

[2] Mary Millar or Oates (1861) 4 Irv. 74.

[3] Glasgow High Court, May 1980, unreported.

2.8 There also appears to have been some uncertainty about whether the crime of abduction is appropriate where any abduction is for other than sexual purposes. Alison[1] states:

> "The offence of abduction, if committed without any intention of marriage or rape, belongs to another class of crimes, and will be considered under the head of plagium and theft."

Somewhat more obscurely Burnett[2] states:

> "When the abduction is neither with a view to marriage, nor rape, it is punishable tanquam crimen in suo genere, as an unjust oppression, and restraint."

By contrast Macdonald[3] appears to regard abduction as a crime of universal application and states that it is abduction "even to carry off and detain, from motives of spite, any person whatever". Some early cases[4] charged abduction in relation to carrying off and confining witnesses to prevent them appearing in court, and to carrying off a person to prevent him voting in an election.[5] In more recent times the charge of abduction has been used where, following on a robbery, various people were forced at gunpoint to drive the accused away in a motor car.[6] Equally the crime of abduction has been

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[1] Principles of the Criminal Law of Scotland, i.227.

[2] Criminal Law of Scotland, 109.

[3] The Criminal Law of Scotland (5th ed.), 124.

[4] E.g. Anstruther, 1720, and Lindsay, 1791, both referred to in Burnett, pp.109, 110.

[5] Now dealt with by the Representation of the People Act 1983, s.115.

[6] H.M.A. v. Morrison and Another, Edinburgh High Court, January 1978, unreported.

used in recent times where the abduction has been for sexual purposes.[1] Despite the doubts which appear to be raised by some of the older authorities that have been referred to, we are disposed to think that at the present day a court would be slow to hold that the crime of abduction should be restricted in any way by the nature of the purpose for which the abduction took place or by the age of the victim. There is, however, another aspect of the crime of abduction which can give rise to real difficulties where a child is the victim.

2.9 The overcoming of the will of a victim is an essential feature of the crime of abduction, and this can cause problems where the victim is a child. The alleged consent of the child in question was one of the issues which led the court in Mary Millar or Oates[2] to doubt the relevancy of the charge of abduction. By contrast, in H.M.A. v. McLean,[3] Lord Kincraig sought to avoid that problem by directing the jury that:

> "it is a crime to carry off or confine any person forcibly against their will without lawful authority. In the case of a child of 6 'forcibly' is not a necessary element in the proof. It would be sufficient to constitute the crime of abducting a child if there was evidence of her being led away by the accused or inducing her to follow. That would be sufficient to establish proof that she was taken away against her will. So far as any proper authority is concerned, a stranger has no proper authority to lead away a child."

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[1] E.g. H.M.A. v. McLean, supra; Barbour v. H.M.A. 1982 S.C.C.R. 195.

[2] supra.

[3] supra.

While one may sympathise with Lord Kincraig's attempt to get round a difficulty, it may be doubted whether it is really very satisfactory to say that evidence that a child is led away or induced to follow is sufficient to establish that she was taken away against her will. Such evidence might be equally consistent with voluntary compliance on the part of the child.[1]

2.10 All of this suggests that, by requiring, as it does, that a victim's will should be overcome, the crime of abduction may not be well adapted to cases of child victims, particularly if no force is used. This leads us to the provisional conclusion that, particularly if the crime of plagium were to be abolished, there might be advantage in seeking to reform the crime of abduction in so far as it relates to children. Possible options for reform are considered in Part VI of this Memorandum.

[1] The way in which Lord Brandon of Oakbrook dealt with this matter in R. v. D. [1984] 3 W.L.R. 186, at 197, is, with respect, scarcely more satisfying.

PART III - THE APPROACH OF THE CHILD ABDUCTION ACT 1984

The general approach of the legislation

3.1 Apart from a number of ancillary matters, with which we need not concern ourselves for the present, the 1984 Act contains three main provisions, namely sections 1 and 2, which apply to England and Wales only, and section 6, which applies to Scotland. Sections 1 and 6 roughly parallel each other, though there are a number of striking and important differences between them. Section 2, on the other hand, contains no parallel in the Scottish part of the Act.

3.2 Some of the differences between section 1 and section 6 no doubt arise because of the admittedly limited purpose for which section 6 was added at a late stage during the progress of the Bill through Parliament.[1] However, that may not be so in all cases. For example, under section 6(1)(b) it is an offence under the law of Scotland for a connected person to take or send a child out of the United Kingdom if there is in respect of the child an order of a court in the United Kingdom prohibiting the removal of the child from the United Kingdom or any part of it; but there is no comparable offence under section 1 of the Act. The result is that, if there is such a court order in existence but the order does not also award custody of the child to anyone, it will be an offence under the law of Scotland to take that child out of the United Kingdom, but it will not be an offence under the law of England. And, if the tentative

[1] See para.1.4 above.

views on extraterritoriality expressed later in this Memorandum[1] are correct, it will be an offence only if the taking or sending occurs in Scotland.

3.3 It is, of course, the case that under certain statutes and rules[2] a court order in England and Wales for custody or care and control will normally also contain a prohibition against removal of the child from England and Wales, so that in such cases the differences between the two sections will be of approach rather than of substance. But it would be possible, as we understand it, for a prohibition to be made in an injunction granted by an English court without any accompanying custody order, and it would certainly be possible for such a prohibition to be made in a Scottish interdict without there being any accompanying custody order. In that event the consequence will, we think, be as we have described it in the previous paragraph.

Section 1 of the Act

3.4 Section 1 of the Act is based on the related concepts of a "connected" person and the "appropriate consent". A person is connected with a child for the purposes of the section if (a) he is a parent or guardian of the child, or (b) there is in force an order of a court in England or Wales awarding custody of the child to him, whether solely or jointly with any other person, or (c) in

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[1] Para.3.19 et seq.

[2] Matrimonial Causes Rules 1977, r.94(2); Domestic Proceedings and Magistrates' Courts Act 1978, s.34; Guardianship of Minors Act 1971, s.13A; Children Act 1975, s.43A.

the case of an illegitimate child, there are reasonable grounds for believing that he is the father of the child.[1] A person so connected with a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom without the appropriate consent.[2] "Appropriate consent" in this context means (a) the consent of each person (i) who is a parent or guardian of the child, or (ii) to whom custody of the child has been awarded (whether solely or jointly with any other person) by an order of a court in England or Wales, or (b) if the child is the subject of such a custody order, the leave of the court which made the order, or (c) the leave of the court granted on an application for a direction under section 7 of the Guardianship of Minors Act 1971 or section 1(3) of the Guardianship Act 1973.[3]

3.5 Subsection (5) provides certain defences relative to charges brought under section 1(1). These are in some respects similar to the defences provided for Scotland by section 6(4), but there are some marked differences. Under section 1(5)(c) it is to be a defence if the person whose consent is required has unreasonably refused to give it, but no comparable defence is provided for Scotland. Furthermore, section 1(6) provides that, where there is sufficient evidence to raise an issue as to the application of section 1(5), it is for the prosecution to prove that a ground of defence does not apply, whereas section 6 contains no comparable provision in relation to the Scottish offence.

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[1] s.1(2).
[2] s.1(1).
[3] s.1(3).

3.6 Our principal observation on section 1 of the Act is that, even if a provision along these lines is required at all,[1] this one goes much too far in some respects, but arguably not far enough in another. Although in some instances the provision may operate in a reasonable way, it will also mean, for example, that a mother who wishes to take her child abroad on holiday must, in order to avoid committing a crime, obtain the consent of the child's father even if that father deserted her on the day of the child's birth and has never since taken any interest in the child; she must also obtain consent even if the father had been deprived of parental rights; she would even have to seek the father's consent under the Act if the father had raped her, and the child had been born as a result of that rape. By the same token a foreign national visiting the United Kingdom on holiday with his child would no doubt be surprised to discover that he was committing an offence when he sought to return home unless he had, or believed that he had, the consent of the other parent to his doing so.

3.7 It may be suggested that these are fanciful examples which, although they could arise in theory, would never in practice be prosecuted since, under section 4(2) of the Act, the consent of the Director of Public Prosecutions is required to any prosecution under section 1; and he would be unlikely to consent in such cases. That may well be so, but it may equally be thought that it is a less than satisfactory solution to the problems of child abduction which puts a parent to the choice either of seeking the consent of someone with whom

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[1] About which we entertain considerable doubts: see para.6.69 et seq. below.

she may have severed all contact many years before, or of breaking the law and hoping that the Director of Public Prosecutions will decide to withhold his consent to prosecution.

3.8 In fact, what we suspect will probably happen in the sorts of cases suggested above is that the parents concerned will simply take their children abroad without even applying their minds to the provisions of section 1, and in a great many cases without even being aware of its existence. Unless every person taking a child abroad were in future to be stopped and questioned by the police, which is unlikely, such incidents will pass unnoticed and no prosecutions will result. While that may be a perfectly satisfactory consequence in most cases, it must raise a question as to the wisdom of a criminal law which depends for its sensible operation on large numbers of people being permitted to break it with impunity. That said, we recognise only too well that, in a matter of this sort, it is exceptionally difficult to frame a crime which will effectively strike at all the right targets while not at the same time striking many others who ought not to come within its range. This is a difficulty which we face when we come to consider possible options for reform in Part VI of this Memorandum.

3.9 Thus far we have been considering possible offences under section 1 where the person concerned is connected solely by virtue of subsection (2)(a). The position is in our view scarcely less unsatisfactory where the connection arises under subsection (2)(b). The effect of this provision is that where a person, particularly a parent, has been awarded custody of a child

by a court in England or Wales (possibly in circumstances where the court has expressed the view that the other parent should have nothing whatever to do with the upbringing of the child) that person must nonetheless obtain the consent of the other parent before he takes the child out of the United Kingdom, even for a holiday. This seems to us to be an unacceptable intrusion into personal liberty, and cannot be justified by reference to the welfare of the child concerned. The parent wishing to take the child abroad does, of course, have the alternative of seeking the leave of the court which made the order,[1] but that may be an unattractive alternative. For one thing it will certainly involve the parent in question in a certain amount of trouble and expense. For another thing the parent may even be reluctant to make such an application to the court lest, through vindictiveness or for some other reason, the other parent might seek to use the opportunity to re-open old arguments about custody. Equally, of course, as was suggested in paragraph 3.8 above, it will no doubt be the case that many parents will take children abroad in complete ignorance of the fact that they are breaking the law.

3.10 If, as we have been endeavouring to show, section 1 of the 1984 Act goes too far in some respects, it also, as we suggested earlier, does not go far enough in another. As already noted, an offence under section 1 can only be committed by a "connected" person: it cannot therefore be committed by an "unconnected" person. This means, to take one possible example, that the father of a child who was the subject of a custody order would commit

[1] s.1(3)(b).

an offence if he took the child out of the United Kingdom without the appropriate consents, but no offence would be committed if the taking was done by the child's uncle. The uncle might, of course, be guilty of aiding and abetting an offence by the father if the taking took place at the father's instigation,[1] but there would be no offence if he acted solely on his own initiative. Assuming that there is any acceptable basis of principle for having the kind of offence provided by section 1, we have difficulty in seeing why the offence should be restricted in this way.

Section 2 of the Act

3.11 Section 2 of the Act applies to persons who are not connected within the meaning of section 1(2)(a) or (b). Such persons commit an offence if, without lawful authority or reasonable excuse, they take or detain a child under the age of 16 (a) so as to remove him from the lawful control of any person having lawful control of him, or (b) so as to keep him out of the lawful control of any person entitled to lawful control of him. The phrases "without lawful authority" and "lawful control" are not defined.

3.12 Apart from certain reservations about the scope of this provision, to which we return in the following paragraphs, the first point that strikes us about section 2(1) is one of construction. The offence is committed where a child is taken or detained "so as to remove him" or "so as to keep him", but it is not clear to us whether these words are used in the sense of a

[1] This could, we think, be a possible consequence of the extended definitions of "taking" etc in s.3 of the Act.

purpose or result. In other words is it an offence to take a child if that in fact has the effect of removing him or keeping him from a person's lawful control, or is it an offence only if that is the purpose of the taking? While in some cases this might be no more than a distinction without a difference, that would not always necessarily be so. We revert to this point later[1] when considering possible options for the reform of Scots law.

3.13 Turning now to the scope of this provision, we have two comments. The first concerns the fact that the father of an illegitimate child is not one of the persons automatically excluded from the ambit of section 2(1) (although he is a connected person for the purposes of section 1). He is, however, excluded in a sense by the defence provided for in section 2(2)(b). It is not clear to us why this approach should have been taken; nor is it clear to us why a different form of words should be used to describe such a father in the two sections of the Act. Section 1(2)(c) describes the person as "in the case of an illegitimate child, there are reasonable grounds for believing that he is the father of the child", whereas section 2(2)(b) uses the words "in the case of an illegitimate child, he had reasonable grounds for believing himself to be the child's father". There may be a good reason for this, but it is not immediately apparent to us. Indeed the wisdom of singling out fathers of illegitimate children for special treatment in these sections of the Act seems to us to be very questionable since their legal position does not differ in any real sense from that of fathers of legitimate children who have been deprived of parental rights.

[1] Para.6.35.

3.14 Our second general comment regarding the scope of section 2 concerns the fact that an offence under that section cannot be committed by someone who is a connected person within the meaning of section 1(2)(a) or (b). The connected person concept does not however distinguish, in the case of parents, between those who have, and those who have been deprived of, parental rights. Although we are inclined to agree that the criminal law should not be readily invoked in relation to disputes between parents, both of whom have full parental rights, we tend to think that there may be a case for giving the protection of the criminal law to a parent with parental rights against the removal of a child by one who has been deprived of such rights. Section 2 of the Act does not make any such distinction, and the policy appears to be that parents, whether with or without parental rights, should not commit an offence if they take or detain a child unless that taking or detention amounts to kidnapping.[1]

Section 6 of the Act

3.15 This section which, as mentioned above, was intended to plug certain gaps that would otherwise have existed in relation to section 1 of the Act, provides that a person connected with a child under the age of 16 commits an offence if he takes or sends the child out of the United Kingdom in certain circumstances. If there is an order of a court in the United Kingdom prohibiting the removal of the child from the United Kingdom or any part of it, an offence is committed if the child is taken or sent out of the United Kingdom; and in that case the

[1] This seems to be implicit in s.2 when read along with s.5.

only remedy for a person wishing to do what is otherwise prohibited appears to be to apply to the court which made the order for a variation of that order. If there is (a) an order of a court in the United Kingdom awarding custody of the child to any person, or (b) an order of a court in England, Wales or Northern Ireland making the child a ward of court, an offence is committed if the child is taken or sent out of the United Kingdom without the appropriate consent. The "appropriate consent" in relation to (a) means the consent of each person who is a parent or guardian of the child or to whom custody of the child has been awarded by an order of a court in the United Kingdom, or the leave of that court, and in relation to (b) means the leave of the court which made the child a ward of court.

3.16 For the purposes of the foregoing provisions a person is "connected" with a child if (a) he is a parent or guardian of the child, or (b) there is in force an order of a court in the United Kingdom awarding custody of the child to him (whether solely or jointly with any other person), or (c) in the case of an illegitimate child, there are reasonable grounds for believing that he is the father of the child. In addition to all of the foregoing, provision is made for defences in certain circumstances including where the person concerned believed that persons whose consent was required had consented or would consent if aware of all the relevant circumstances.

3.17 The provisions of section 6 can be criticised on a number of grounds, though in fairness it has to be conceded that some of these flow from the admittedly

limited purpose for which section 6 was originally enacted.[1] Some of the criticisms are the same as those which we have already directed to section 1 of the Act. In particular section 6, like section 1, has the effect of requiring a parent in all circumstances where there is a custody order to obtain the consent of the other parent (or of the court) before taking a child abroad, even for a holiday. This, in our view, goes much too far.[2] Equally, section 6, like section 1, arguably does not go far enough since the offence created by the section can be committed only by connected persons and not by those who are unconnected.[3]

3.18 There are additionally a number of criticisms which can be directed specifically against section 6 of the Act. These may be stated as follows:

(a) It may be thought undesirable as a matter of principle to make actings criminal which would in any event be punishable as a contempt of court. This would be so where there was a court order prohibiting the removal of a child from the United Kingdom, and might be so where there was a custody order in favour of another person.

(b) Section 6(4) of the Act provides certain defences based on the belief of the person taking a child out of the United Kingdom, or on his inability to communicate with the persons

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[1] See paras.1.4 and 1.5 above.

[2] For discussion of this in relation to s.1, see para.3.9 above.

[3] For discussion of this in relation to s.1, see para.3.10 above.

whose consent is required. This may be seen as objectionable on the general ground that it is undesirable to provide for crimes which depend on the existence of fairly complex defences to make them work in a sensible and reasonable way, though we recognise that the provision of suitable defences may be one way of trying to solve the problem, to which we referred earlier,[1] of framing a crime which will be neither too wide nor too narrow.

(c) A more specific objection to the defence provided for in section 6(4)(a) is that it does not qualify the word "belief" by a word such as "reasonable". This suggests that the test of whether the defence has been established or not must be a subjective one. This is consistent with the approach generally favoured in English criminal legislation but in Scotland an objective approach is generally preferred.

(d) A further criticism of section 6 arises from the inter-relationship of section 6(1)(b) and section 6(2). The offence created by section 6(1)(b) is an absolute offence in the sense that it is committed whenever there is a court order prohibiting the removal of the child from the United Kingdom or any part of it: to avoid committing an offence under that section the only remedy appears to be to go to the court which made the order to have it varied or recalled. The offence under section 6(1)(b) can be committed only by a

[1] See para.3.8 above.

person who is connected with the child under section 6(2), but under head (a) of that sub-section, a person is connected if he is a parent of the child. The effect of these provisions is that if, say, a mother has an interdict in her favour prohibiting the father from taking a child out of the United Kingdom, the mother will have to seek a recall or variation of that interdict before she herself can take the child abroad on holiday, and that notwithstanding that the interdict was originally granted for her protection and not the father's. This, in our view, is patently absurd. Having said that, it should be added that, at least in a Scottish context where an interdict will prohibit the removal of a child from the United Kingdom by a named person or persons, it may be that in such a case only the person or persons named in the interdict will be at risk of prosecution under section 6(1)(b). We doubt whether this is what was intended when the legislation was enacted, and such a narrow construction would be in conflict with the opening words of section 6(1) which suggest that the offence can be committed by any connected person. At the least, however, there is a considerable lack of clarity here. We return to this point later.[1]

Extraterritorial effect of sections 1 and 6

3.19 There is one further comment which is common to both sections 1 and 6. Section 1 makes it an offence

[1] See para.6.77 below.

according to the law of England and Wales to do certain acts anywhere in the United Kingdom, and section 6 makes it an offence according to the law of Scotland to do certain acts anywhere in the United Kingdom. In at least one respect the prohibited acts are the same under both sections, but in other respects they are different. Thus under section 1 a parent commits an offence under English law if, where there is no custody order, he takes or sends a child out of the United Kingdom without the appropriate consent; but section 6 creates no comparable offence under Scots law. Suppose that in such a case, and without the appropriate consent, a parent takes a child abroad from Edinburgh Airport. He will be committing no offence under Scots law, but would the English courts be entitled to claim jurisdiction to try that person for an offence under English law as set out in section 1? Would the Scottish police be entitled (or bound) to intervene at Edinburgh Airport to stop that offence being committed? And would it make any difference if the "offender" (or the child) was domiciled in England, or in Scotland, or, say, in France?

3.20 Conversely, under section 6 a person connected with a child commits an offence under Scots law if he takes or sends a child out of the United Kingdom when there is an order of a United Kingdom court prohibiting the removal of the child from the United Kingdom or any part of it. No similar offence is created by section 1. Because English custody orders normally contain a prohibition against removing a child out of England or Wales, effectively the same offence would often arise under section 1, but that would not necessarily be the case, and in any event section 1 only refers to custody

orders made by a court in England or Wales, and not to an order made by a court in Scotland. If, for example, a parent were to take a child abroad from Heathrow in defiance of an order made by a court in Scotland, comparable questions would arise in relation to the jurisdiction of the Scottish courts.

3.21 In general, as we understand it, the criminal jurisdiction of the courts in Scotland and in England and Wales is dependent on the occurrence of a criminal act in, respectively, Scotland or England and Wales.[1] Extraterritorial jurisdiction arises only where that is expressly provided for by statute,[2] and in that event there is clear authority that the words used must be "so clear and specific as to be incapable of any other meaning".[3] The question is whether the words used in sections 1 and 6 meet that demanding test.

3.22 In our view the most that can be said is that the words in question are ambiguous. If it had been Parliament's intention, when framing the 1984 Act, to create offences which could be committed anywhere in the United Kingdom, that could have been achieved by the well-tried means of creating United Kingdom offences (although, as will have been gathered, we would not wish what is contained in section 1 to be an offence applicable to

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[1] Renton & Brown, Criminal Procedure in Scotland (5th ed.) 1-07; Cox v. Army Council (1962) 46 Cr. App. R. 258, per Viscount Simonds at 262.

[2] For example, Criminal Procedure (Scotland) Act 1975, s.6(1); Offences Against the Person Act 1861, s.9.

[3] Air India v. Wiggins (1980) 71 Cr. App. R. 213, per Lord Diplock at 217.

Scotland). The fact that such a course has not been followed, and the absence of clear words expanding the jurisdiction of the Scottish and English courts respectively, lead us to conclude that, as a matter of construction, sections 1 and 6 should not be taken as having extraterritorial effect; but the position is not, we concede, entirely clear.

Conclusion

3.23 In this Part of this Memorandum we have directed a number of criticisms both at the general approach and at the detail of the main provisions in the 1984 Act. We have done so for the following reasons. As will be seen from Parts V and VI of this Memorandum, we recognise that the creation of an appropriate and sensible law relating to child abduction is very difficult and complex: we are, however, clearly of the view that the approach taken in many of the provisions of the 1984 Act is fundamentally misconceived, and we are not disposed to suggest, even tentatively, that these provisions should become, or remain, part of the law of Scotland. It has accordingly been necessary to draw attention in some detai to what we regard as the undesirable features of these provisions so that consultees may have the opportunity of agreeing, or disagreeing, with the views which we have formed.

3.24 This point goes rather further. There may be some who would argue that it would be advantageous to have a uniform law of child abduction applicable throughout the United Kingdom. We would not necessarily disagree with such an argument; and, of course, such an approach

would avoid many, if not all, of the problems of extra-territoriality which have just been identified. We do not consider, however, that sections 1 and 2 of the 1984 Act would provide an appropriate model for any such uniform law.

3.25 The views of consultees are sought on the questions: Do you agree with our comments on, and criticisms of, the Child Abduction Act 1984? If not, on what points do you differ from us?

PART IV - OTHER JURISDICTIONS, AND MOVES TOWARDS INTERNATIONAL CO-OPERATION

England and Wales

4.1 Until the passing of the Child Abduction Act 1984 the relevant English law, apart from special provisions such as section 20 of the Sexual Offences Act 1956, was to be found in the offence of false imprisonment, the offence of kidnapping, and the offence of child stealing provided for in section 56 of the Offences Against the Person Act 1861. Section 56 of the 1861 Act was repealed by the 1984 Act.[1]

(a) False imprisonment

This is a common law offence involving a trespass against the person punishable with a maximum of life imprisonment. It involves the detention of a person without his consent or any other justification.[2] It has recently been made clear that this offence can in certain circumstances be committed by a parent against his own child. This can occur where there has been an unreasonable exercise of parental rights.

(b) Kidnapping

Kidnapping is an attack on, and infringement of, the personal liberty of an individual. The offence has four ingredients, namely (1) the taking or

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[1] s.11(5)(a).

[2] Glanville Williams, Textbook of Criminal Law, 2nd ed. 217 Smith and Hogan, Criminal Law, 5th ed. 382.

[3] R. v. Rahman, The Times, 5 June 1985. See also R. v. D. [1984] 3 W.L.R. 186; Glanville Williams, "The Kidnapping of Children" (1984) 134 N.L.J., 277.

carrying away of one person by another; (2) by force or by fraud; (3) without the consent of the person so taken or carried away; and (4) without lawful excuse.[1] Since the decision in R. v. D., the crime does not depend on the age of the victim and can be committed by a parent against his own child.[2]

Canada

4.2 In 1982 the Canadian Criminal Code was amended in relation to the abduction of children. Prior to that time the Code contained an offence similar to, and presumably derived from, section 56 of the English Offences Against the Person Act. The new provisions are as follows:

> "249. (1) Every one who, without lawful authority, takes or causes to be taken an unmarried person under the age of sixteen years out of the possession of and against the will of the parent or guardian of that person or of any other person who has the lawful care or charge of that person is guilty of an indictable offence and is liable to imprisonment for five years.
>
> (2) In this section and sections 250 to 250.2, 'guardian' includes any person who has in law or in fact the custody or control of another person.
>
> 250. Every one who, not being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, unlawfully takes, entices away, conceals, detains,

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[1] Per Lord Brandon in R. v. D. [1984] 3 W.L.R. 186 at p.192.

[2] It seems that English law also recognises a separate crime of abduction though this may have been more relevant in earlier days when distinctions were made between "removals" out of or within the kingdom. Charges of abduction are apparently little used today, and some writers appear to treat the words "abduction" and "kidnapping" as synonymous.

receives or harbours that person with intent to deprive a parent or guardian or any other person who has the lawful care or charge of that person of the possession of that person is guilty of an indictable offence and is liable to imprisonment for ten years.

250.1 Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person in contravention of the custody provisions of a custody order in relation to that person made by a court anywhere in Canada with intent to deprive a parent or guardian or any other person who has the lawful care or charge of that person of the possession of that person is guilty of

(a) an indictable offence and is liable to imprisonment for ten years; or

(b) an offence punishable on summary conviction.

250.2 (1) Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in relation to whom no custody order has been made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person, is guilty of

(a) an indictable offence and is liable to imprisonment for ten years; or

(b) an offence punishable on summary conviction.

(2) No proceedings may be commenced under subsection (1) without the consent of the Attorney General or counsel instructed by him for that purpose."

4.3 In relation to sections 250 to 250.2 consent to the abduction by the parent, guardian or person having lawful possession, care or charge of the child is a

defence, but in relation to sections 249 to 250.2 consent of the child himself is not. It is also a defence in relation to sections 249 to 250.2 that the abduction was necessary to protect the child from danger of imminent harm.[1]

United States of America

4.4 The Model Penal Code of the American Law Institute[2] provides for four main offences relating to abduction. These are:

(a) kidnapping;

(b) felonious restraint;

(c) false imprisonment; and

(d) interference with custody.

4.5 Kidnapping is defined in Article 212.1 of the Code as follows:

> "A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:
>
> (a) to hold for ransom or reward, or as a shield or hostage; or
>
> (b) to facilitate commission of any felony or flight thereafter; or
>
> (c) to inflict bodily injury on or to terrorise the victim or another; or
>
> (d) to interfere with the performance of any governmental or political function.

[1] A wider defence was originally proposed, namely that the abduction was essential for the welfare of the child.

[2] Published with revised commentaries in 1980.

> Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a felony of the second degree. A removal or confinement is unlawful within the meaning of this section if it is accomplished by force, threat or deception, or, in the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare."

4.6 It is to be noted that the main part of the foregoing definition avoids some of the problems inherent in the use of phrases like "without consent" or "against the will" by using the word "unlawfully". In relation to children under the age of 14 that word is then defined by reference to a lack of consent on the part of a parent, guardian or other person responsible for general supervision of his welfare. In this regard the commentary notes:

> "This formulation not only covers conduct of the sort often designated as "enticing" or "inveigling", but also reaches cases where the defendant removes a child or incompetent person at his own request. Of course, liability for such conduct is limited to instances where the actor has one of the stated nefarious purposes. Most prior legislation had similar coverage, but the critical age below which the child could not consent to asportation by another varied from 10 to 18 years. Certainly the latter figure is too high, for the age should be low enough so that the actor's actual conduct evidences some wrongdoing on his part. Giving transportation to a willing 17 year old scarcely meets that test. On this analysis, the lines should be drawn just below the point in adolescence when youngsters commonly begin to exercise independent judgment as to choice of companions and freedom of movement. The Model Code uses 14 as the best approximation of that rationale."

4.7 Felonious restraint is defined in Article 212.2 of the Code as follows:

> "A person commits a felony of the third degree if he knowingly:
>
> (a) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or
>
> (b) holds another in a condition of involuntary servitude."

4.8 False imprisonment is defined in Article 212.3 of the Code as follows:

> "A person commits a misdemeanour if he knowingly restrains another unlawfully so as to interfere substantially with his liberty."

4.9 Interference with custody is defined in Article 212.4 as follows:

> "(1) Custody of children. A person commits an offence if he knowingly or recklessly takes or entices any child under the age of 18 from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so. It is an affirmative defence that:
>
> (a) the actor believed that his action was necessary to preserve the child from danger to its welfare; or
>
> (b) the child, being at the time not less than 14 years old, was taken away at its own instigation without enticement and without purpose to commit a criminal offence with or against the child.
>
> Proof that the child was below the critical age gives rise to a presumption that the actor knew the child's age or acted in reckless disregard thereof. The offence is a

misdemeanour unless the actor, not being a parent or person in equivalent relation to the child, acted with knowledge that his conduct would cause serious alarm for the child's safety, or in reckless disregard of a likelihood of causing such alarm, in which case the offence is a felony of the third degree.

'(2)[1] Custody of committed persons. A person is guilty of a misdemeanour if he knowingly or recklessly takes or entices any committed person away from lawful custody when he is not privileged to do so. "Committed person" means, in addition to anyone committed under judicial warrant, any orphan, neglected or delinquent child, mentally defective or insane person, or other dependent or incompetent person entrusted to another's custody by or through a recognised social agency or otherwise by authority of law.'"

4.10 Statutes, to a greater or lesser extent reflecting the provisions of the Model Penal Code, have been enacted in many of the States in the USA. Additionally, because of the problems which can arise when a child is abducted by a parent from one State to another, recent federal legislation[2] has been directed to providing uniform grounds of jurisdiction in child custody cases and to establishing machinery to ensure that abductors cannot circumvent these laws. This is comparable to the recent proposals by the English and Scottish Law Commissions

[1] This part of Article 212.4 is quoted since it would appear to deal, inter alia, with the American equivalent of children in care.

[2] Uniform Child Custody Jurisdiction Act 1973; Parental Kidnapping Prevention Act 1980.

for a uniform system within the United Kingdom for jurisdiction in, and enforcement of, custody orders.[1]

Moves towards international co-operation

4.11 Whatever systems of national law may be devised for dealing with cases of child abduction (however that may be defined) there will still be cases where children are removed from one country to another, whether against the wishes of a parent or in contravention of some kind of court order. In recognition of this it was claimed, when the Child Abduction Bill was being discussed in Parliament, that one of its advantages was that it would facilitate extradition proceedings but, of course, such proceedings, even if successful,[2] will only secure the return to the United Kingdom of the person who took the child abroad: they will do nothing to secure the return of the child.

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[1] Custody of Children - Jurisdiction and Enforcement within the United Kingdom (1985, Law Com. No.138; Scot. Law Com. No.91).

[2] This reference to extradition proceedings may serve to explain the rather puzzling sidenote to s.1 of the 1984 Act. That describes the crime provided for in the section as "abduction" although it is difficult to see how taking a child abroad without the appropriate consent (though possibly with the full consent and co-operation of the child in question) could ever be so described. However, each of the extradition treaties which the United Kingdom has with foreign and commonwealth countries contains a list of crimes for which extradition will be competent, and almost all of those lists contain the word "abduction". It may be that it is hoped that this will persuade other countries to treat an offence under s.1 as one which is extraditable. Whether this hope will be realised remains to be seen. One would have imagined that, in extradition proceedings, the courts in most countries would look at the subtance of an offence rather than just its label.

4.12 That problem has been addressed in recent years by two international conventions, namely those of The Hague and Strasbourg, each of which was drawn up in 1980. They seek to provide, under the civil law, a means of securing the return of a child who has been abducted to a foreign country. The Hague Convention is potentially world-wide in its application whereas the Strasbourg Convention applies only between Member States of the Council of Europe. Apart from these differences there are also differences of substance between the two conventions. Probably the most important, stated generally, is that the Strasbourg Convention is primarily concerned with the recognition and enforcement of custody orders, so that any order for the return of a child would be dependent on the existence of a custody order in the State from which the child had been abducted. The Hague Convention, on the other hand, is concerned with custody rights rather than with custody decisions. A Bill to give these Conventions the force of law in the United Kingdom is presently before Parliament.[1]

[1] Child Custody and Abduction Bill, 1985.

PART V - THE NATURE OF THE PROBLEM

5.1 There are, we think, at least three underlying difficulties which suggest that any approach to the problem of child abduction must be a cautious one. First, cases where children are "taken" (to use what is intended for the present to be a neutral word) will often give rise to fierce emotions, particularly where parents are involved. Second, children can be taken in a multitude of different circumstances and for a multitude of different purposes. Some of these circumstances and purposes may be of so objectionable a kind that there would no doubt be ready agreement that the behaviour in question should be a crime; but the same view might well not be taken where the circumstances or the purposes are of a different kind. Third, while it may appear reasonably easy to determine what should, or should not, amount to abduction in the case of a baby, it may not be so easy to do so where the child is, say, 15 and able, and possibly anxious, to exercise a will of his own.

5.2 With these difficulties in mind (along with others touched on earlier in this Memorandum), we have endeavoured to analyse the nature of child abduction and to categorise it in ways which will, we hope, assist consideration of our provisional proposals for law reform. There are, we think, four main categories.

Taking away so as to cause child harm or distress

5.3 In this first category we would place any sort of behaviour which is likely, or is intended, to lead to the child being harmed or caused distress. An example

of this kind of case would be one where a child is taken away in order that he may be subjected to sexual abuse. Another example is where a child is taken away to be held captive while an attempt is made to extort a ransom from his parents or family. In these sorts of examples the child may be taken by force, but that would not necessarily be the case: he, or she, may simply be enticed or inviegled away. What is, in our view, common to all kinds of behaviour falling within this category is that it can properly be regarded as behaviour directed against the welfare of the child: it will, in other words, be a crime against the person of the child himself rather than a crime directed against his parents or other persons having his lawful care and control.

Taking from lawful control of a parent or other person with lawful control

5.4 In this category we would group those cases where a person, not having lawful authority to do so, removes or keeps a child from the lawful control of a parent, or any other person having lawful control of him. This would be done, not in order to harm the child, but simply because the remover wishes to have the child. This is the kind of case colloquially known as "baby-snatching".

Taking away by one parent from another

5.5 In this category we would group all of those cases where a child is taken by one parent from another in the course of, or as a result of, an inter-parental dispute as to who should have the care and control of the child. In many respects this is the most difficult category of all and, as will be seen in the next Part of this

Memorandum, it is the one which has caused us the greatest anxiety. The taking of a child by one parent from another can occur in a great variety of circumstances, and may on occasions be accomplished by the use of considerable force[1] or in circumstances causing the other parent considerable alarm for the child's safety.

Taking out of the United Kingdom

5.6 This category is essentially that covered by sections 1 and 6 of the Child Abduction Act 1984. Cases may include those where a child is taken out of the country without the consent of all persons having the right to determine the child's place of residence or, more narrowly, may include those where there is a court order relating to the custody of the child or, possibly, expressly prohibiting the removal of the child out of the country. An important feature of such cases, in our view, is that in many instances the person taking the child out of the country will, at least in part, be motivated by a desire to prevent some other person from having the child's custody determined and controlled by the courts of this country.

5.7 In the preceding paragraphs we have done no more than sketch in the bare outlines of our suggested categories. Within each of them many sub-divisions are possible. Moreover, the description of the sort of

[1] An example of the sort of behaviour we have in mind is to be found in the English case of R. v. D., although in that case the father had lost his parental rights, the child having been made a ward of court. The facts of that case are fully set out in the judgment of Watkins L.J. in [1984] 1 All E.R. 574, at 575 to 577.

activities which might fall into each of the categories leaves many questions unanswered, not least whether, and if so in what circumstances, these activities should be subject to the criminal law. In the next Part of this Memorandum we shall attempt to address these questions and to suggest possible ways in which they might be answered.

PART VI - OPTIONS FOR REFORM

Introduction

6.1 In this Part of the Memorandum we consider possible options for the general reform of the law relating to the abduction of children. In Part VII we shall consider problems relating to children in care, and in Part VIII we shall consider a number of other subsidiary matters.

6.2 Apart perhaps from the special problems where children are taken abroad (dealt with by sections 1 and 6 of the 1984 Act), it is no doubt arguable that the criminal law should not be extended at all in this area and that the existing crimes of plagium and abduction should simply be retained (possibly with some modifications) for those cases where the criminal law has hitherto been thought to be appropriate. This sort of argument proceeds on the basis that the civil law is already well developed to deal with what are essentially custody disputes (by means of custody orders, interdicts, contempt of court proceedings, etc.), and that the criminal law should not intervene in such cases unless what occurs can, in a sense, be regarded as some kind of offence against the person of the child, or constitutes some other offence known to our criminal law. While we invite views on this sort of approach, our fairly firm conclusion is that more ought to be done. First, we are clearly of the view that the common law crime of plagium is both objectionable in concept and of limited utility in practice. Second, we consider that the common law crime of abduction, in so far as it relates to children, is uncertain and may be defective at least in so far as it involves an overcoming of the will of the victim. And

third, we are inclined to think that there may be a place for a crime (of lesser gravity than abduction, or whatever may replace it) to penalise the taking or removal of children in certain circumstances, not all of which would necessarily be covered by the present law. In what follows, we elaborate on all of these.

6.3 In the meantime we invite consultees to express their views on the preliminary question:

> Apart from dealing with any special problems arising under section 6 of the Child Abduction Act 1984, should the criminal law relating to the abduction of children be left as it is?

Abolition of plagium

6.4 In paragraphs 2.2 to 2.5 above, we drew attention to the fact that plagium is based on a concept of property by a parent in his own child, and is thus at odds with contemporary thinking on children generally, and on their welfare in particular. We also drew attention to the limited utility of the crime, since it only applies to children below the age of puberty, and to the sexual distinction which results from this particular age limit. These factors have persuaded us that the crime of plagium is a relic of the past which should have no place in our law today, and we accordingly propose that it should be abolished.

6.5 As was observed earlier in this Memorandum,[1] the crime of plagium seems to be little used in modern times.

[1] Para. 2.3.

Nonetheless, if it were to be abolished, there would then be a gap in our law which would have to be filled. It would, we think, be seen as objectionable if the criminal law were to regard the wrongful taking away of a person's child as less serious than the stealing of his property. We are disposed to think that such a gap should be filled by a reformed crime of abduction relating to children, and by a new lesser crime, all of which we suggest below.[1]

6.6 Views are accordingly invited on the proposal that the crime of plagium should be abolished.

Abduction

6.7 In paragraphs 2.6 to 2.9 above we drew attention to the difficulties and uncertainties to which the common law crime of abduction can give rise where children are the victims. In particular we pointed out the problems associated with the issue of overcoming the will of a victim. If the crime of plagium were to be abolished (but even if it were not) it seems to us that these difficulties and uncertainties would point to a need for some sort of reform, or at least clarification. While some modification of the existing crime of abduction in so far as it relates to children would be possible, it would, we think, be unsatisfactory and potentially confusing to have a common law crime which had been altered by statute in relation to one class of victims but which remained unaltered in relation to another. We set out for consideration in the following paragraphs a possible scheme of reform involving some modification of the present crime of abduction. Our preference, however,

[1] Paras.6.15 et seq and 6.33 et seq.

would be to create new statutory crimes relating solely to the abduction of children.

Modification of the common law crime of abduction

6.8 Although new statutory crimes in relation to children are our preferred option, it would be possible to make statutory modifications to the common law crime in an attempt to meet the deficiencies and uncertainties which have been identified. To avoid any remaining uncertainty about whether or not common law abduction can be committed against children, it could be expressly provided that it can be committed against a person of any age. Further to clarify the position it could be expressly provided, at least in relation to children, that the abduction need not be for sexual purposes or for the purpose of marriage.

6.9 There remains, however, the problem related to overcoming the will of the victim. Clearly a way would have to be found of avoiding the problems to which this has given rise in the past. One way would simply be to declare that the overcoming of the will of the victim would not be a necessary ingredient of the crime where a child was concerned. Such a provision might, however, leave a rather uncertain content in the crime since the overcoming of a person's will is otherwise such an essential feature of it. Moreover, this approach would not provide a ready answer in a case where an accused person asserted, by way of defence, that the child had consented to his removal. One could provide for a conclusive presumption that a child had not consented to his abduction, but that approach would be open to some

of the objections already stated, and would appear a little odd if the alleged victim was, say, just under the age of 16 and there was clear evidence that he had in fact given a rational and considered consent.

6.10 Two other possibilities are suggested by the provisions of other jurisdictions which were examined in Part IV of this Memorandum. On the analogy of the American Model Penal Code[1] one could seek to side-step the problem of consent on the part of the child by making the crime apply where there was no consent on the part of a parent or other custodian. That, however, may be thought to confuse a crime against the child with a crime against the parent or custodian. Alternatively, on the analogy of the Canadian Criminal Code[2] one could provide that consent on the part of a child should not be a defence. The first difficulty about this approach is that under the existing law of abduction in Scotland consent is not strictly a defence: rather it is the case that the overcoming of a person's will is an element of the crime itself which has to be established by the prosecution. Accordingly, such a provision would sit rather uneasily with the existing common law. A second difficulty, which also arises under some of the other possibilities presently being considered, is that, while an absolute provision relative to consent may be appropriate and sensible in cases involving young children, it may not appear to be so in cases involving children very close to the age of 16. In other words, if consent on the part of the "victim" will defeat a charge of abduction where that person is aged 16 years

[1] Paras.4.5 and 4.6.

[2] Para.4.3.

and one month, why should it not do so where he is 15 years and 11 months? One could, no doubt, seek to recognise the capacity of older children to give what might be regarded as a valid consent by prescribing a lower age limit than 16 in relation to that issue, but such a course would in our view serve only to complicate the law still further. Another possibility, on the analogy of Article 13 of the Hague Convention, would be to approach the problem of consent more generally by providing that there would be no abduction if the court (or jury) were satisfied that the child had reached an age and degree of maturity at which it was appropriate to take account of its views, and that on that basis the child could be taken to have consented to what had occurred.[1] While this approach would admit of more flexibility, it would not remove the consent problem altogether, and it would be a very vague formula for use in the criminal law.

6.11 We ourselves entertain very considerable doubts about the options outlined in the last three paragraphs. However, the views of consultees are invited on the questions:

(1) Do you consider that the common law crime of abduction can be suitably modified for cases involving the abduction of children?

(2) If so, how do you think that this can be done?

[1] This formula is used in the Hague Convention in the context of determining whether or not to order the return of a child from one State to another.

New statutory crimes

6.12 The "taking" of children (to use what is intended to be a neutral word) can occur in an infinite variety of circumstances, and for an infinite variety of purposes. At one extreme a child may be taken away, possibly by the use of force, to be abused sexually. At the other extreme a caring parent may take him from the control of the other parent, believing that this is in the child's own best interests. In some cases a child may be taken with the intention that he should be caused some sort of harm, while in other cases he may be taken with no intention of causing him harm but with every intention of keeping him from the person who has lawful care and control of him. This great variety of circumstances and purposes gives rise to two major problems when formulating any new crimes: how to describe sufficiently comprehensively the kinds of activity that should be criminal; and how to ensure that any new crimes do not strike at undeserving targets. This latter problem is, of course, a particularly anxious one where parents and other relatives of the child are concerned.

6.13 It seems to us that the best way of approaching these problems is by considering first what kinds of activity should in certain circumstances be criminal, and second by considering in each of these cases what range of people should potentially be at risk of prosecution for having committed the crime in question. Although the new crimes which we propose hereafter in this Part of the Memorandum may in some instances be seen as reflecting different levels of gravity, our intention is that they should form a composite response to the need to replace the common law crime of plagium, and to replace,

or possibly amplify, the common law crime of abduction in relation to children. Moreover since, as will be seen, we suggest a number of options to deal with the problem of who should be potential offenders under our proposed crimes, it follows that the exact relationship of each crime to the others cannot be determined until the views of consultees on these options are known. In other words, if the view were to be taken that, for example, a parent should be excluded from the ambit of one of our crimes but included within the ambit of another, then the character of these crimes would be affected accordingly.

6.14 In relation to the kinds of activity which should be declared to be criminal, we have come to the provisional conclusion that these fall into two broad categories (leaving aside for the moment the special case where children are removed from the country). These are (a) where a child is taken so as to cause him harm or danger, (an offence primarily against the child) and (b) where a child is removed or kept from a person's lawful control (an offence primarily against the person having lawful control). The second category may be further sub-divided depending on whether the removal or detention is by a stranger, or by a parent or other relative. These categories each flow from the types of situations and circumstances which we described briefly in Part V of this Memorandum. Each has its own problems both in relation to the range of potential offenders and also in other respects as well. In what follows we examine each of the categories and their problems in detail.

Abduction so as to cause child harm or danger

6.15 The first of our proposed crimes is designed for the case where the taking is intended to lead to the child being harmed or exposed to danger. One example which we have given of this is where a child is taken away in order that he might be subjected to sexual abuse. No doubt there would be general agreement that this sort of behaviour should be a crime; but the formulation of any such crime is not without difficulty.

6.16 The main difficulty is one to which we have referred several times in this Memorandum, namely that of defining the prescribed behaviour in a way which will include as potential offenders those who ought to be included while not at the same time striking at undeserving or unintended targets. In the present context one would plainly wish to include the person who took a child and exposed him to harm in the form of sexual abuse, but one would not wish to include, for example, a parent who, perhaps foolishly, took a child climbing and exposed him to harm on a dangerous rock face.[1]

6.17 One could define this crime in terms of taking a child in a manner, or in circumstances, likely to cause him harm or danger, but such an approach would not, we think, convey with sufficient clarity the sort of behaviour that the crime was actually meant to strike at. In particular, by focussing on the likely result of any taking, the crime might expose to a risk of prosecution persons, such as the rock-climbing parent

[1] Depending on the circumstances the latter kind of case might in any event constitute an offence under s.12 of the Children and Young Person's (Scotland) Act 1937.

mentioned above, who were perfectly entitled to take the child, and who never intended to cause him any harm.

6.18 An alternative approach would be to seek to exclude persons such as the rock-climbing parent by making clear that the crime could only be committed by those who had no lawful authority to take the child in the first place, and then going on to describe the crime in terms such as "thereby rendering the child liable to harm". While this approach has certain attractions, it would mean that a person could be guilty of the crime even if any harm caused to the child was, in a sense, quite accidental. Any formulation of the crime which is expressed by reference to the result of the taking, as distinct from the purpose with which the taking was effected, is in our view likely to be unsatisfactory. Our preference, accordingly, is to express the crime primarily in terms of an intention to cause the child harm. This, we think, will properly reflect the character of the crime, which we see essentially as a crime against the child himself, and will provide a mens rea comparable to that required for the common law crime of abduction. With this general approach in mind we turn now to consider in more detail the constituent elements of the proposed new crime.

6.19 As already mentioned we think that an essential feature of this crime should be an intention to cause harm to the child. To this we would also add an intention to cause distress since it is conceivable that a person might take a child simply in order to frighten him in some way. By "harm" we would mean to include any physical or mental injury, sexual abuse or exploitation, and any

other form of exploitation which is detrimental to the welfare of the child. This last example of harm would be intended to cover, for example, a case where a child was taken with the intention that he should be exposed for adoption in a foreign country.

6.20 So far as the intention itself is concerned we consider that this should not merely be an intention to cause harm or distress but should also be an intention to place the child in a position where he is likely to be caused harm or distress. It would be undesirable that a person who took a child without any appropriate entitlement to do so, and with the intention that the child should be put in, say, a brothel, should avoid conviction on the basis that he did not intend himself to cause the child any harm. It is also, we think, for consideration whether it should be a crime where the person who takes a child is reckless as to whether or not the taking will cause the child harm or distress or will place him in a position where he is likely to be caused harm or distress. We do not propose that there should be a crime based on recklessness alone, but such a mens rea may, in certain circumstances, be a useful alternative to a requirement of intention. We invite views on this.

6.21 We have also considered whether this crime should expressly refer to an intention to hold a child to ransom, but have concluded that it should not. Such an intention does not necessarily involve an intention to cause the child harm or distress, but, if it did, the fairly wide expression both of intention and of harm which we have already suggested would cover such a case. Moreover, any ransom demands made subsequent to any such taking

would themselves probably constitute the crime of extortion, while the actual taking of the child might amount to the second crime which we propose in this Memorandum.[1]

6.22 The actual taking of a child can occur in many different ways. It may involve the use of considerable force, or it may involve no more force than is required to lift a young baby out of a pram. In some cases it may involve no force at all as, for example, where a young child is enticed or induced to go away with someone. Again, there may be no taking in the strict sense at all if, for example, a child is merely detained in a place where he already is. We consider that a new crime should adequately cover all of these possibilities by using words like "to take, remove, entice or detain".

6.23 Even if a new crime were to be described in the manner which we have so far explained, there would, we think, still be a risk that in certain circumstances some persons could find themselves liable to prosecution when that was not our intention. This risk might rarely arise where it was proved that there was an intention to harm the child since in such a case it would presumably be beyond question that the person concerned should be guilty of this crime. But the risk of an unintended liability to prosecution could arise in a case where the proved intention was to place the child in a position where he was likely to be caused harm or distress. While an intention expressed in that way is necessary for the reasons given in paragraph 6.20 above, it would also be applicable in,

[1] See para.6.33 et seq.

for example, the case we have previously mentioned of a father who exposed his child to harm on a dangerous rock face: but that is not the kind of behaviour that we have in mind in formulating a new crime of child abduction. To avoid the risk of such a person being prosecuted (and also others such as, for example, doctors, police officers or social workers) we think that this crime should be committed only by those who do not have what we would call an "appropriate entitlement" to take the child in the first place. What would amount to an appropriate entitlement would depend on the circumstances of a given case, but it could include persons such as those we have just mentioned. It could also include a person who took a child with the consent of his parent or guardian though in that event it might be necessary to consider whether any consent was express or only implied. In our view a degree of flexibility is necessary in determining what will or will not amount to "appropriate entitlement" in a particular case. While express consent to the taking would normally, we expect, be seen as amounting to such entitlement, we would not wish to exclude the possibility that implied consent might also, in appropriate cases, be seen as having the same effect. We accordingly do not propose a restricted definition of the words "appropriate entitlement".

6.24 In our view a statutory crime expressed in the terms which have been discussed in the preceding paragraphs will have certain advantages. It will strike at the grave kind of conduct towards children which ought properly to be the concern of the criminal law, while not exposing to a risk of prosecution those who are not, as a matter of common sense, abducting the child because

they have an appropriate entitlement to take him in the first place. Most importantly, in our opinion, the crime which we are proposing avoids the major difficulty of the common law crime of abduction, namely the need to prove an overcoming of the will of the victim.

6.25 We accordingly invite the views of consultees on the following proposals and questions:

(1) It should be a crime for a person to take, remove, entice or detain a child under the age of 16 -

(a) if he has no appropriate entitlement to do so, and

(b) if he intends to cause the child, or to place the child in a position where he is likely to be caused, harm or distress.

(2) Should it also be a crime for a person to take, remove, entice or detain a child under the age of 16 -

(a) if he has no appropriate entitlement to do so, and

(b) he is reckless as to whether or not his actions will cause the child, or place the child in a position where he is likely to be caused, harm or distress?

(3) For the purposes of the above a person may have appropriate entitlement by virtue of parental rights, the consent of any person having parental rights in respect of the child, any enactment, an order pronounced by a court, or otherwise.

(4) For the purposes of the above "harm" includes physical or mental injury, sexual abuse or exploitation, and any other form of exploitation which is detrimental to the welfare of the child.

(5) In the light of the discussion in the preceding paragraphs, is there any other formulation of this crime which is preferred?

(6) Do you agree with the definition of "appropriate entitlement" proposed in (2) above, or would you prefer a definition which allowed no flexibility to the court? If so, what should that definition be?

A possible defence[1]

6.26 A further matter which we have considered is whether this proposed new crime should be qualified by any sort of special exception or defence. This consideration has in part been prompted by the fact that section 2(1) of the Child Abduction Act 1984 is qualified by the words "without ... reasonable excuse".

6.27 The offence created by section 2 of the 1984 Act is, however, quite different from the crime which we are now considering since it involves a deprivation of lawful control whereas the proposed crime of abduction presently being considered is essentially a crime against the child himself. Whether a qualification or defence of the kind mentioned may be needed in respect of an offence like

[1] Scots law may recognise a general defence of necessity. If so, this could be available in relation to the crime presently being proposed (but see "The Excuse of Necessity in Scots Law", (1985) 30 J.L.S.S. 151).

that created by section 2 is something that we consider later in this Memorandum.[1] So far as the present crime is concerned, we doubt whether it is either necessary or desirable. The proposed crime will not merely involve an abduction, but will involve an abduction which is intended to cause the child certain forms of harm or injury. We have difficulty in seeing how there could ever be a reasonable excuse for that. Accordingly, we do not suggest that the crime should be qualified by words like "without reasonable excuse". There may, however, be a case for saying that it should be a defence to this crime if the person charged reasonably believed that he had appropriate entitlement to take the child in the first place. We have no firm views on this but would welcome comments.

6.28 We accordingly invite the views of consultees on the questions:

(1) Should the words of the crime presently being proposed be qualified by words such as "without reasonable excuse"?

(2) Should a defence be provided where the person charged reasonably believed that he had appropriate entitlement to take the child in the first place?

Penalty

6.29 The crime of abduction which we have just proposed would be intended, so far as children are concerned, to replace, or at least supplement the common

[1] Para.6.35.

law crime of abduction. It might also in some instances replace the crime of plagium. Since both abduction and plagium are liable to a maximum penalty of life imprisonment, we consider that the new crime should be subject to the same maximum. We think, however, that, as with the existing crimes, the new crime should be triable either on indictment or summarily. In the latter case we propose that the maximum penalty should be imprisonment for six months, or a fine of the statutory maximum,[1] or both.

6.30 The views of consultees are invited on the following proposals:

(1) The new crime of abduction should be triable either on indictment or summarily.

(2) In the former case the maximum penalty should be life imprisonment.

(3) In the latter case the maximum penalty should be imprisonment for six months, or a fine of the statutory maximum, or both.

Should the new crime replace or supplement the common law crime of abduction?

6.31 If effect were to be given to our proposal to create a new statutory crime of child abduction, there would then be a question as to whether or not that crime should wholly replace the common law crime of abduction in so far as it relates to children. While we anticipate that our new crime would normally be used in preference to the common law, we think that it might create

[1] This is at present £2000 (Criminal Procedure (Scotland) Act 1975, s.289B(6), as applied by Criminal Justice Act 1982, s.74(2).

difficulties if an attempt were made to abolish only that part of the common law crime of abduction which relates to children. It would have been different had the crime of child abduction been a self-contained crime at common law, but instead it is merely one manifestation of a crime of much wider application. In these circumstances we have concluded that the common law should be left unaltered, much as occurred when the common law crime of rape was supplemented by a statutory crime in the case of intercourse with young girls.[1]

6.32 The views of consultees are accordingly sought on the proposal:

> Our new crime should be in supplement of, and not in replacement for, the common law crime of abduction in so far as it relates to children.

A possible crime involving interference with lawful custody or control

6.33 What we have considered thus far is the possible introduction of a new crime of child abduction where the abduction is with the intention of causing the child harm. As we have suggested, that is essentially a serious crime against the person of the child concerned. We think, however, that there should also be a place in Scots law for a crime involving interference with, or deprivation of, lawful custody or control of a child. Such a crime would not necessarily involve any use of force or any risk or likelihood of harm or danger being caused to the child, and indeed might be appropriate in some cases where no harm or danger was to be anticipated at all. This

[1] Criminal Law Amendment Act 1885, now Sexual Offences (Scotland) Act 1976.

is the sort of behaviour described in the second category which we postulated in paragraph 5.4 above and, very broadly, is the sort of crime that is created by section 2 of the 1984 Act.

6.34 The utility of having such a crime is, we think, readily apparent in cases of a kind which might at present fall to be dealt with under the law of plagium, but which would not fall under the proposed crime of child abduction which we have described in the preceding paragraphs of this Part of the Memorandum; for example, the case of a woman, who is a complete stranger, who takes a baby from a pram in order to take it home with her and to look after it as if it were her own child.

6.35 To deal with such cases one could, we think, enact something on the lines of section 2 of the 1984 Act. Bearing in mind our earlier comments on the ambiguity of the words "so as to"[1] which appear in that section, we would suggest that the essence of any new crime should be the taking or detention of a child for the purpose of, or with the intention of, removing or keeping him from the lawful control of any person having such lawful control of the child. Having said that, however, there remain what we regard as major and difficult problems relating to the scope of any such crime.

6.36 The first question is: Are there any persons, or classes of person, whom it would not be appropriate to treat as potential offenders against this crime? A second, and related, question is: If there are such

[1] See para.3.12 above.

persons, or classes of person, how can the crime be expressed in order that it will apply only to those who ought properly to fall within its scope?

The scope of any new crime

6.37 The major issue here concerns the position of parents. Suppose, for example, that the parents of a child have separated. The child remains in the care and control of one of the parents, but the custody of the child has not been regulated by any court order. Should it, in these circumstances, be a crime for the parent who does not have care and control to remove the child from the parent who does? Even if there has been a court order regulating custody, similar problems will arise. Suppose that a mother has been awarded custody, should it be a crime for the father to take the child from the mother's care and control? Or suppose that the father has been given a limited right, such as a right of access, should it be a crime for him to take the child at a time or in a manner inconsistent with his limited right; or, for example, to refuse to return the child at the expiry of a period of access? In the latter examples it should perhaps be borne in mind that, although deprived of a right of custody, the father will not have been deprived of all his parental rights in respect of the child.

6.38 The foregoing problems may also, we think, be exacerbated by the attitude and actings of the child himself. Suppose that, in any of the examples suggested in the previous paragraph, the child has himself gone to the father, or asked to be taken away from the mother, or refused to go back to the mother after a period of

access, should that make any difference and, if so, should that be dependent on the age of the child? In other words, should it, for example, be a crime for a father to refuse to return his 5 year old child even when that child has expressed a desire to remain with him, but not be a crime where the child is 15½?

6.39 Before even attempting to answer these questions, it is as well to point out that the problems which they illustrate are not necessarily confined to cases of conflicts between parents. The person at risk of committing a crime, particularly in cases of retaining a child in compliance with his wishes but against the wishes of, say, a parent, could equally well be a grandparent, or an uncle or aunt, or a friend, or a neighbour. Here again the possibilities are many and varied. A child might, for example, spend a holiday with a grandparent. The grandparent, at the child's request, might decide to keep him for a few extra days. If that were not with the consent of the child's parents, ought that keeping to be a crime? Or again, a neighbour might observe that a young child's parents had gone out drinking leaving the house unlocked, and the child unattended. If, rather than calling the police or the social services, that neighbour took the child into his own home, he would, in a sense, have taken the child with the intention of removing him from the lawful control of his parents, but presumably it would not be thought that such actings should be criminal provided, of course, that it was the intention of the neighbour to return the child to its parents when they had returned home and were in a fit state to look after it.

6.40 All of the foregoing questions and examples (and one could figure many more) indicate to us that this is a very difficult and complex matter which ought to be approached with great caution. While on the one hand it is probably desirable to have a crime which will strike at the kind of activity and kind of person mentioned in paragraph 6.34 above, it is on the other hand clear that any such crime should so far as possible not strike at plainly undeserving targets. What is or is not an undeserving target must, however, be a matter of opinion.

6.41 In the case of purely inter-parental disputes, it is, we think, plainly arguable that the criminal law should not intervene at all, except possibly where a parent has been deprived of all parental rights, where, as in the case of the father of an illegitimate child, he has never had such rights, or possibly where, having been allowed limited rights under a court order, he has acted outwith these rights. Such exceptions apart, there is a strong case for saying that any disputes about the custody or place of residence of a child should be determined only in the civil courts, and all the more so if, as in some of the examples given, these courts have already been involved in the dispute. Moreover, it must be borne in mind that any crime may have to be proved in court and, if the crime presently under consideration were to be extended to parents or other relatives of the child, this could involve children having to give evidence against one or other of their own parents or against another member of their family in circumstances where the child's own loyalties might be very seriously divided. This can scarcely be in the best interests of the children concerned and, while it might have to be tolerated if such

a crime were otherwise thought to be essential, it is a factor which ought not, we think, to be overlooked. We ourselves tend as a matter of principle to the view that parents and relatives should in general be excluded from the ambit of this crime.[1]

6.42 There is in fact at present one way in which, so far as we can see, a parent could be guilty of an offence if he removed a child from the care and control of another parent. This could arise under section 51 of the Children Act 1975. Under that section it is an offence, except in certain limited circumstances, to remove a child from the care and possession of a person who has applied for custody of the child if the child has been in the care and possession of that person for a period or periods before the making of the application amounting to at least three years, and the application is pending in any court.

6.43 Section 51 of the 1975 Act appears in a Part of that Act which is primarily designed to prescribe certain procedures and safeguards which are to apply where application is made for custody of a child by a person who is not that child's parent or guardian. In the relevant sections applying to England and Wales (sections 33 to 46) such custody is described by the special name of "custodianship", and the section which is the equivalent of section 51 (section 41) is

[1] It has, however, recently been held in England that a father with parental rights may commit the offence of false imprisonment in respect of his own child where his actings involve an unreasonable exercise of these parental rights (R. v. Rahman, The Times, 5 June 1985).

accordingly restricted to cases where an application has been made for a custodianship order. The comparable Scottish sections, however, do not use the term "custodianship" and simply refer to "custody" without any apparent limitation. The consequence is that section 51 appears to have the rather wider effect which we have indicated in the previous paragraph. That provision accordingly represents a statutory exception to what, as we have indicated, is our preferred policy in relation to removals of a child by a parent. Since it is possible that section 51 may not have been enacted for more than the rather limited purpose to which express effect is given by the equivalent English provision, we do not regard it as an obstacle to the wider application of our preferred policy.

6.44 So far as non-parents are concerned, the problem is in some respects different, but not necessarily any easier. One of the difficulties here is that what ought, or ought not, to amount to a crime may be a matter of degree. It might be thought, for example, that, in the cases of the grandparent and the neighbour suggested in paragraph 6.39 above, there should be no risk of prosecution for what they had done. But suppose that the grandparent had decided to keep the child for a month, or for six months, or permanently; or that the neighbour had decided to keep the child for a week, or a month. Is there not perhaps a case for saying that activity of that kind ought to be criminal?

6.45 As can be seen the whole matter of the scope of this proposed crime is something to which there are no easy answers. To provide a basis for consideration by

consultees we think that it might be helpful to set out the range of persons who might be included as potential offenders against this crime.

6.46 At its narrowest this crime could be confined only to those who are complete strangers to the child. As a matter of technique this could be achieved by prescribing a list of those who could not commit the crime. Such a list could include all or some of those related to the child by blood or by affinity. The result would be that this crime could be committed only by one who was, in effect, a stranger to the child.

6.47 If that approach were thought to be too narrow it would be possible to exclude from the crime parents (including for this purpose the father of an illegitimate child) and any person who had a lawful right in respect of the custody or care of the child.

6.48 Yet another possibility would be to exclude from the crime only parents of the child. This approach would not, however, draw any distinction between parents with, and parents without, parental rights in respect of the child. If such a distinction was thought to be desirable, it could be achieved by providing that the crime could not be committed by a parent acting within his parental rights. This would mean that the crime could be committed by a parent who had been deprived of his parental rights, or by one, such as the father of an illegitimate child, who had never had such rights. There would then remain the case of the parent who had been deprived of some, but not all, of his parental rights, for example a father who had been denied custody of his child but who had been

allowed a right of access. In the case of such a father it would be possible to take two courses. One would be simply to class him as a parent having parental rights, with the result that he could not commit the crime in any circumstances. The other course would be to provide that he could not commit the crime if any taking or detention of the child by him was consistent with his limited rights. In other words he would commit the crime if he took the child from its mother at a time when he was not permitted to exercise access.

6.49 Clearly there are arguments for and against all of the foregoing options. We for our part have come to the conclusion that the criminal law should be involved in matters of this sort only where that is absolutely necessary. Consequently our own tentative preference would be to confine this crime as a general rule to those who are strangers to the child. This could be achieved by excluding from the scope of the crime relatives (including parents) of the child, and any other person having lawful rights in respect of the custody of the child, but in the latter case only so far as, at the material time, such person was exercising and acting within the scope of such rights. The word "relatives" would require to be defined, and we offer a possible definition in paragraph 6.59 below.

6.50 While the foregoing represents our general approach to the main options for determining the broad categories of persons who should, or should not, be included as potential offenders against the crime presently under consideration, there are a number of other persons, and a number of other factors, which also have

to be considered. For a start there are persons acting in some kind of official capacity such as police officers, social workers and officers of court. They might have to take a child from a person's care and control by virtue of, respectively, a power of arrest, a supervision order made by a children's hearing placing a child with foster parents or in a List D school, or a delivery order pronounced by a court.

6.51 So far as such persons are concerned we think that they would be adequately protected if the crime were qualified, as in section 2 of the Child Abduction Act 1984, by the words "without lawful authority".

6.52 The next factor which we think might usefully be incorporated in the description of the crime is an absence of consent on the part of the person having lawful control of the child. While on one view such a provision might be thought to be unnecessary, it may, we think, be helpful to guard against the risk that, for example, a school teacher who took a child to a summer camp might technically be committing a crime since such a person might not be held to have lawful authority to take the child away. If our suggestion were adopted, he would not, however, commit a crime if the taking occurred with the consent of the parent or other person having lawful control of the child. We have, of course, criticised the concept of consent as it is used in section 1 of the Child Abduction Act 1984, but we do not think that it is likely to give rise to problems in the present context.

6.53 If the suggestion which we have just made were to be adopted, it would then be for consideration whether

any consent that was required to avoid a course of actings being criminal should be express and explicit, or whether it would be enough that the person concerned believed, or had reasonable cause to believe, that such consent had been, or would have been, given. A provision to this effect, albeit in a different context, is to be found in sections 1(5)(a) and 6(4)(a) of the Child Abduction Act 1984. We are not very attracted by a provision which would enable a person to escape criminal liability by establishing that he believed that the relevant consent would have been given. On the other hand, where certain actings become criminal only if done without consent, then a belief that such consent has in fact been given arguably removes an important element of the mens rea necessary for the commission of the crime. This suggests that a defence based on a reasonable belief that the relevant consent had been given ought to be provided for.

6.54 To sum up thus far, what we have in mind is a statutory provision which would make it a crime for any person, other than a person expressly excluded from the scope of the crime, to take, remove or detain a child, without lawful authority, and without the consent of the person having lawful control of the child, with the intention of removing or keeping the child from the lawful control of that person. For the reasons already given we think that a crime expressed in this way would be capable of dealing with cases of child snatching which ought to be the concern of the criminal law while leaving out of the criminal law cases which arguably ought not to be so regarded. Some further problems, however, remain for consideration.

6.55 One is the matter of reasonable excuse. This is a factor which appears in section 2 of the 1984 Act. We rejected the possibility of such a provision in relation to our proposed statutory crime of child abduction,[1] but different considerations may, we think, apply in the context of the crime now under consideration.

6.56 Certainly, what is inherent in the words "without reasonable excuse" would in our view be desirable in order to protect, for example, the actings of the neighbours who took in the child who had been deserted by his parents when they went out drinking.[2] It would also be desirable, to give another example, in order to protect someone who was unable to return a child home because roads were blocked by snow, though no doubt in such a case the person having lawful control of the child would readily consent to what was happening. In our view the qualification provided by the words "without reasonable excuse" will provide a useful safeguard against the possibility of a person becoming liable to prosecution in circumstances where this would be quite unreasonable.

6.57 Two further matters remain for consideration in relation to this proposed crime. The first is this. We have drawn attention throughout this Memorandum to the fact that in many instances the removal or retention of a child may occur at that child's own instigation. The question therefore is whether that should ever amount to an excuse for, or defence to, what would otherwise be a crime. Our provisional view on this is that, had we

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[1] See para.6.27 above.

[2] See para.6.39 above.

been disposed to suggest that this crime should extend to cases arising from inter-parental disputes, it might have been necessary to consider making the child's own actings an excuse or defence in certain circumstances. We have, however, taken the view that, although there is certainly room for debate as to how wide the scope of this crime should be, it should not extend to parents and possibly not to other relatives of the child. On that approach we are disposed to think that a child's own actings should not be a relevant factor, or at least should not be expressed as such. In the possibly rare cases where a child's own actings will be relevant, we would anticipate that they might be taken note of by the "without reasonable excuse" provision which we have already proposed.

6.58 The second matter is the possibility of providing, as is done in section 2 of the 1984 Act, a defence where the person accused of the crime believed that the child had attained the age of 16. We think that provision should be made for such a defence, but we differ from the 1984 Act in that, in our view, the defence should arise only where the person can show that he believed on reasonable grounds that the child had attained the age of 16.

6.59 We accordingly invite the views of consultees on the following questions and proposals:

(1) It should be a crime for any person, other than a person expressly excluded from the scope of the crime, to take, remove or detain a child without lawful authority or reasonable

excuse, and without the consent of the person having lawful control of the child with the intention of removing or keeping the child from the lawful control of that person.

(2) The persons to be expressly excluded from the scope of the above crime should be -

(First option)

(a) any person having lawful rights in respect of the custody of the child, but only so far as, at the material time, such person was exercising, and acting within the scope of, such rights; and

(b) parents of the child.

(Second option)

(a) as above; and

(b) relatives of the child.

(3)(i) For the purposes of the foregoing proposal "relative" is to mean -

(a) where the relationship is by consanguinity, a mother, father, grandmother, grandfather, great grandmother, great grandfather, sister, brother, aunt, uncle, niece, or nephew of the child;

(b) where the relationship is by affinity, the spouse of any of the relatives mentioned in (a) above.

(ii) Collateral consanguineous relationships should include relatives of the half-blood as well as full-blood.

(4) It should be a defence to the foregoing crime that the person charged -

(a) had reasonable grounds for believing that the person having lawful control of the child had consented to the taking, removal or detention;

(b) had reasonable grounds for believing that the child had attained the age of 16.

(5) Do you agree that there should be no express provision to deal with cases where any taking, removal or detention has occurred at the instigation or request of the child concerned?

Penalty

6.60 Section 4 of the 1984 Act provides that a conviction under section 2 of the Act should carry, on indictment, a maximum sentence of seven years imprisonment, and on summary conviction a maximum of six months imprisonment or a fine not exceeding the statutory maximum as defined in section 74 of the Criminal Justice Act 1982,[1] or both. The crime which we have just been proposing is similar in some respects to that under section 2 of the 1984 Act, and, although it is intended to replace the common law crime of plagium which can attract a maximum sentence of life imprisonment, we consider that this new crime should have the same maximum penalties as the section 2 crime.

6.61 We accordingly propose that the new crime which has just been considered should carry, on indictment, a maximum sentence of seven years imprisonment, and, on summary conviction, a maximum of six months imprisonment or a fine not exceeding the statutory maximum, or both.

[1] At present £2000.

A possible crime by parents and others excluded from crimes previously considered

6.62 If the suggestions made so far in this Part of the Memorandum were to be adopted, we recognise that one consequence would be that, particularly in relation to the second of our proposed new crimes, a potentially wide range of people would not be at risk of prosecution for taking a child from another person's lawful control. The exact range of that exclusion will, of course, depend on the view ultimately taken in relation to that second proposed crime. We anticipate that there will be sound reasons for excluding certain persons from the scope of that crime, but the question will remain whether there may not be circumstances in which such excluded persons should be guilty of some crime if they take a child from another person's lawful control.

6.63 Suppose, for example, that a parent, or indeed anyone who might be excluded from our second proposed crime, were to remove a child from another person's lawful control by the use of violence, or the threat of violence. May there not be a case for making such actions criminal? No doubt, of course, in such cases the actual use, or a threat, of violence might itself amount to the crime of assault; and we are aware of at least one case where such actings have been successfully prosecuted as a breach of the peace.[1] That said, however, it is at least

[1] Allan v. Jeans, Edinburgh Sheriff Court, 6 March 1985, unreported. It is also worth noting that common law crimes such as assault and breach of the peace can attract unlimited fines and imprisonment for life when prosecuted on indictment.

arguable in our view that a crime expressly directed to the taking of a child by such means could have a useful deterrent effect.

6.64 Even where no force is used, it is by no means unusual to have cases where the taking of a child occurs in circumstances that are likely to give rise to serious alarm for the child's safety. A baby may be snatched from a pram outside a shop, or a child might be taken without warning on his way to or from school. In such cases the person having lawful control of the child would be likely to be seriously alarmed for the child's safety, but of course none of the crimes which we have so far proposed would be committed if the person who took the child was someone who was excluded from our second proposed crime (and assuming that the taking was not done with the intention of causing the child harm, which would bring it within the ambit of our first proposed crime).

6.65 We think that there may be a case for having a crime which strikes at such conduct. While such a crime would be primarily intended to catch, in the prescribed circumstances, anyone who was excluded from the scope of our second proposed crime (whoever they may turn out to be), we can see no reason to limit the range of potential offenders in this case. If, for example, a total stranger were to take a child by violence, we think that he should be equally liable to prosecution either under our second proposed crime or under the crime now being considered. Indeed, since the crime now being suggested will be an aggravated version of our second proposed crime, and should therefore attract a higher

maximum penalty,[1] we would anticipate that in appropriate cases it would be charged in preference to our second proposed crime.

6.66 We recognise, however, that there may be circumstances in which a person could act perfectly properly, but might technically be at risk of committing the crime which we are now considering. A person might, for example, use force to remove a child from its mother's grasp when the mother was standing on a bridge and threatening to jump. A person, seeing a baby in a pram which was running down a hill unattended, might snatch the baby and, at least until the circumstances were explained, the baby's mother might be seriously alarmed for her child's safety on emerging from the shop and finding that baby and pram had both disappeared. We think that any risk of persons committing a crime in such circumstances, even if only in a technical sense, should be avoided. We think that this can be achieved by (a) qualifying the crime by a requirement that any taking should be with the intention of depriving a person of the lawful control of the child, and (b) qualifying the crime by the words "without reasonable excuse".

6.67 We accordingly seek views on the question: Should it be a crime for a person to take, remove or detain a child without reasonable excuse, and with the intention of depriving another person of the lawful control of the child, by the use of violence, or the threat of violence, or in a manner or in circumstances likely to give rise to serious alarm for the child's safety?

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[1] See para.6.68 below.

Penalty

6.68 As we have just observed, we regard the crime which has just been proposed as an aggravated version of the crime proposed in paragraph 6.59 above. We consider that the degree of this aggravation would be adequately recognised if the maximum sentence on indictment were to be ten rather than seven years imprisonment. We accordingly propose that this crime should carry, on indictment, a maximum sentence of ten years imprisonment, and, on summary conviction, a maximum of six months imprisonment or a fine not exceeding the statutory maximum, or both.

Removal of a child out of the country

6.69 Earlier in this Memorandum[1] we examined in detail the provisions of sections 1 and 6 of the Child Abduction Act 1984. Leaving aside for the moment what we see as the major defects in, and objections to, the detail of these sections, we are inclined to think that there is a perfectly presentable argument for not having any such provisions at all. We say this for four reasons.

6.70 First, since quite plainly the police or immigration authorities are not going to interrogate every person who seeks to leave the country with a child under the age of 16, the effectiveness of this sort of provision as a means of actually stopping the removal of children abroad will, we think, be limited to those cases where, in advance of any such removal, there are grounds on which the police and others can properly be alerted to what is likely to happen. These grounds are most likely to

[1] Part III.

be present in cases where some earlier removal of the child from the control of a parent or guardian has taken place. Very often, however, removal out of the country will occur without any prior removal from someone else's control. The person with the child at the time may simply take him abroad in order to frustrate other persons' rights. In such cases the crime provided by section 6 is likely to be of limited value.

6.71 Second, in those cases where there has been no prior abduction or removal of the child, it may be open to doubt whether there is any acceptable consideration of policy which would justify prohibiting the taking of a child out of the country. It may be thought undesirable that a parent, for example, who has committed no crime in relation to his child, and who is not acting in contravention of any court order, should be in any way restricted in his freedom to take his child abroad if he wishes to do so.

6.72 Third, we are not persuaded by the argument that the creation of a crime of this kind may make it easier to institute effective extradition proceedings. We have already questioned the intrinsic validity of this argument,[1] but, even if it were the case that extradition proceedings became more effective, they would do nothing to secure the return of the child. That is more likely to be achieved by international agreement; and the new Child Abduction and Custody Bill, based on the Hague and Strasbourg Conventions, is an important and helpful step

[1] Para.4.11.

in this direction. These Conventions do not, however, depend for their operation on the commission by anyone of a crime.

6.73 Fourth, and lastly, we entertain some doubt about whether a crime of this kind is likely to have much, if any, deterrent effect. Those with experience of matrimonial disputes are only too well aware that in a great many instances parties become highly involved emotionally to a point where even criminal sanctions are unlikely to deter them from taking certain courses of action. If a parent were really minded to take his child abroad against the wishes of the other parent, we doubt whether the mere existence of sections 1 and 6 would be likely to make him change his mind.

6.74 Accordingly, we consider that it is not unreasonable to state as an option for consideration that Scots law should not contain any crime on the lines of either section 1 or section 6 of the 1984 Act. Having said that, we recognise, however, that, standing the very recent enactment of these provisions, it is unlikely that their total removal would find favour. We also recognise that there is considerable public concern about cases where one parent has taken a child abroad in order to frustrate the other parent's claim to custody. To meet that concern a crime, even if limited in its effectiveness, may be better than no crime at all. That being so, we turn now to consider the detailed form which any crime relating to the removal of a child abroad might take.

6.75 We begin by re-iterating our earlier opinion[1] that it is not acceptable to have a provision such as appears in section 1 of the Act which, even in the absence of any court order, requires a parent to obtain certain consents before taking his child abroad. We also remain very doubtful whether it can be seen as acceptable to impose a similar restriction on a parent who has a custody order in his favour, especially if, as may be the case, the court has expressed the view that the other parent should have nothing whatever to do with the upbringing of the child. Having considered this matter as best we can, our opinion at present is that there are only two circumstances in which it would be appropriate for it to be a crime to take a child abroad. One is where such taking is in contravention of an express prohibition in a court order. This is in effect what is presently provided in section 6(1)(b) of the 1984 Act. The other is where the taking abroad occurs with the intention of preventing another person from having the custody of the child determined and controlled by a court in the United Kingdom. We now examine each of these in more detail.

Court orders

6.76 Section 6(1)(b) presently refers to "an order of a court in the United Kingdom prohibiting the removal of the child from the United Kingdom or any part of it". We can see no objection to this kind of formulation save for several problems which we think should be statutorily clarified. We have earlier drawn attention[2] to the consequence which arises from the inter-relationship of

[1] Para.3.6

[2] See para.3.18(d) above.

sections 6(1)(b) and 6(2) whereby a parent, having obtained an interdict prohibiting the other parent from removing the child from the United Kingdom, is apparently himself struck at by the terms of section 6(1)(b). We have also pointed out that, if this view is, at least in a Scottish context, incorrect, it is so only upon the basis that section 6(1)(b) is effective against a particular person or persons named in an interdict, and against no others. We think that this confusion should be cleared up.

6.77 In part this problem arises from the fact that a Scottish interdict is pronounced only against a named individual or individuals, and is effective against them only when they have notice of it whereas, as we understand it, a prohibition attached to an English custody order is effective against the world at large.[1] We think that it would be advantageous if Scottish courts were to be expressly authorised to pronounce an order prohibiting removal from the country by "any person". This would, we think, achieve what we suspect was intended by the relevant parts of section 6 of the 1984 Act. It would, however, be desirable to add two qualifications. The first is that, when pronouncing such an order against "any person", the court should also have power to exclude from the effect of that order any named person or persons. This would avoid the problem of the order being effective against the person in whose favour it was granted. The

[1] The Domestic Proceedings and Magistrates' Courts Act 1978, s.34, for example, provides that a court may direct that "no person" should take the child out of England and Wales without the leave of the court.

second is that, although pronounced against "any person", the order should be effective only against a person having knowledge of it. For the purposes of the crime which we are presently considering this is, we think, particularly important. Section 6(5) of the 1984 Act deals with this point by providing a defence based on absence of knowledge: we are inclined to think that proof of knowledge should be a necessary prerequisite for conviction. Normally such proof will be provided by facts and circumstances from which the requisite knowledge can be inferred.

6.78 A further problem which we think should be clarified is this. Normally a court order prohibiting the removal of a child from the United Kingdom or any part of it will be explicit, and will have been made with the express authority of the court concerned. Under wardship procedure in England, Wales and Northern Ireland, however, such a prohibition attaches at the moment when an application is presented to have a child made a ward of court and, as we understand it, without there having been any judicial consideration of the matter. Unless clarified, we think that this sort of situation could give rise to uncertainty. We accordingly consider that any statute should make it clear whether this "automatic" wardship prohibition is or is not to be taken as "an order of a court" prohibiting removal. In our view it should be expressly provided that it should not have such an effect.

The scope of the crime

6.79 We have some difficulty in understanding why both section 1 and section 6 should be confined to persons

who are "connected" with the child. If it is to be a crime to take a child abroad in contravention of a court order, why should that be so if the taking is done by a parent, but not if it is done by, say, an uncle? Now, of course, section 6(6) of the 1984 Act defines "taking" and "sending" in a way which may involve third parties who are not themselves connected with the child, and it is therefore possible that in some cases such a third party would be guilty of the crime art and part. But even the concept of art and part could present difficulties in this sort of case, and there may of course be cases where a person who is not connected with the child might decide to act quite independently and on his own initiative. We consider that, if it is to be a crime to take a child abroad in contravention of a court order, it should be possible for anyone with knowledge of that order to commit it.

Taking abroad to deny access to courts

6.80 There is, in our view, a case for arguing that any crime relating to taking a child abroad should be limited to the case where that is expressly prohibited by a court order. We are conscious, however, that such a limited approach may not be seen as going far enough, and may indeed be thought to be undoing some good that has been achieved by section 6 of the Act. We would, however, be most reluctant to suggest a crime which turned on a failure to obtain appropriate consents, particularly if it were to be drawn as widely as is section 1 of the Act. In Part III of this Memorandum we have offered detailed criticisms of the effect of the consent provisions in section 1, and to a lesser extent the more limited provisions in section 6.

6.81 Bearing in mind what are presumably the policy objectives of sections 1 and 6, namely to prohibit, and thereby to deter, removals which are designed either to flout the directions of a court or to deny another person recourse to the court, it seems to us that a possible approach would be to concentrate not on the obtaining, or failure to obtain, consents but rather on the purpose or intention with which a removal abroad is effected. On this approach it could be declared to be a crime for any person to take a child out of the United Kingdom where the taking was with the intention of preventing any other person from having the custody of the child determined or controlled by a court in the United Kingdom.

6.82 The sort of formulation outlined above has, in our view, three principal advantages over what is presently in sections 1 and 6 of the Act. First, it makes the crime one which can be committed by anyone, and not just by connected persons. Second, it avoids the need for any provisions based on consent. And third, by avoiding that, it also avoids the many undesirable consequences which we have identified whereby persons may be put quite needlessly, in our view, at risk of prosecution.

6.83 In considering this approach we are conscious that in some cases it may be difficult, or even impossible, to prove that any taking abroad occurred with the intention of preventing another person from having the custody of the child determined or controlled by a United Kingdom court. On the other hand, as with any other crime of intent the intention will usually have to be proved by inferences based on all the surrounding

circumstances, and we suspect that in a good many cases there will be circumstances, such as threats that a person will be prevented from obtaining custody of the child, from which the necessary intent can readily be inferred.

6.84 One further matter requires to be noted in relation to this approach. In considering the 1984 Act, and in particular section 1, we observed that the crime contains no restriction as to the nationality or residence of the child concerned: thus a Frenchman spending a holiday in England with his son will technically breach section 1 of the Act if he takes his son home to France without his wife's consent. This is not a problem in the express prohibition case, but it is, we think, a problem that should be dealt with if effect were to be given to our proposal that it should be a crime to take a child abroad with the intention of denying another person effective access to the courts. We consider that the problem could be dealt with if it were to be provided, in relation to that proposal, that a crime would be committed only where the child is habitually resident in the United Kingdom or where the child is the subject of a custody order pronounced in favour of another person by a court in the United Kingdom.

6.85 We have used the foregoing as the criterion for prosecution in line with the proposals made in our recent Report on Custody of Children - Jurisdiction and Enforcement within the United Kingdom.[1] If effect is given to that Report the habitual residence of a child will be the normal ground of jurisdiction in custody matters.

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[1] 1985, Law Com. No.138; Scot. Law Com. No.91.

The custody of a child may, however, be dealt with by a court in other circumstances, for example, in the course of divorce proceedings. If, in such a case, a custody order is made in favour of one spouse, but without the addition of a prohibition against taking the child abroad, we think that there is a case for saying that, if the other spouse takes the child abroad with the intention of preventing the future regulation of custody by that court, he should be liable to prosecution.

6.86 The views of consultees are accordingly sought on the following proposals:

(1) It should be a crime for any person to take or send a child out of the United Kingdom -

(a) knowing that there is, in respect of the child, an order of a court in the United Kingdom prohibiting the removal of the child by him from the United Kingdom or any part of it; or

(b) with the intention of preventing any other person from having the custody of the child determined and effectively controlled by a court in the United Kingdom.

(2) For the purposes of (1)(a) above a court in Scotland should have power to make an order prohibiting the removal of a child from the country by "any person", and should have power to exclude from the effect of the order any named person or persons.

(3) For the purposes of (1)(a) above a prohibition against removal out of a country which follows automatically on an application to have a child

made a ward of court in England, Wales or Northern Ireland should not of itself be "an order of a court".

(4) The proposal in (1)(b) above should apply only where the child in question is habitually resident in the United Kingdom or is the subject of a custody order pronounced in favour of another person by a court in the United Kingdom.

Penalty

6.87 Section 8 of the 1984 Act provides that, for an offence under section 6, a person should be liable on summary conviction to imprisonment for a term not exceeding three months, or to a fine not exceeding the statutory maximum as defined in section 74(2) of the Criminal Justice Act 1982,[1] or both, and on conviction on indictment to imprisonment for a term not exceeding two years, or to a fine, or both. In relation to sentence on indictment the maximum term of imprisonment provided for is significantly lower than that provided by section 4(1)(b) for an offence under section 1, but section 4(1)(b) also applies to offences under section 2. If there is to be a crime relating to the removal of a child out of the United Kingdom, we are disposed to think that the penalties provided in section 8 appropriately reflect the relative gravity of such a crime.

6.88 Do consultees agree that, for the crime presently being considered, the maximum penalty on indictment should be two years imprisonment or a fine, or both, and on

[1] Presently £2000.

summary conviction three months imprisonment or a fine not exceeding the statutory maximum, or both?

Extraterritoriality

6.89 Earlier in this Memorandum[1] we drew attention to what we see as jurisdictional problems arising from the way in which the offences in sections 1 and 6 of the 1984 Act are framed. We are expressly directed by our terms of reference to consider cases with cross-border implications, but in our view such cases cannot be effectively dealt with unless, either there is a single offence applying throughout the United Kingdom or, if there are to be separate offences applying respectively in Scotland and England and Wales, there is a clear and express provision that an offence is to be committed under Scots law if the activity in question occurs in England or Wales, and vice versa. We would regard the second of these alternatives as undesirable because not only would it represent a substantial innovation in criminal law and procedure, but also it would, we think, create enormous difficulties for the police and others who had to operate the laws in question. For example, would English police investigation and interrogation procedures have to comply with Scots law for an admission made by a suspect to be admissible in Scottish proceedings, and vice versa? This, we think, is not a practicable proposition.

6.90 The alternative of having a single offence, applicable throughout the United Kingdom, would avoid these practical problems, but in that event there would

[1] Para.3.19 et seq.

be a question as to what the offence should be. For reasons which we have given at length in this Memorandum we would not be disposed to support the introduction into Scots law of anything remotely like the offence created by section 1 of the 1984 Act, and of course section 1 does not in fact expressly make it an offence to take a child out of the United Kingdom where there is a court order prohibiting such removal. We think that there is little advantage in pursuing these thoughts further until we know the reaction of consultees to the general proposals made in this Memorandum.

6.91 Although we do not think that this problem can be resolved at this stage, it would be of considerable assistance to us if consultees were to answer the question:
Do you consider that our views on extraterritoriality are well founded?

PART VII - CHILDREN IN CARE OR UNDER SUPERVISION

Introduction

7.1 Our terms of reference require us, among other things, to have regard to the position of children in care or under supervision under the Social Work (Scotland) Act 1968 or other legislation.[1] The reason for this being within our reference is that the Child Abduction Act 1984, in so far as it relates to England and Wales, contains a number of provisions on such matters.[2]

7.2 The provisions in the 1984 Act are there for a special purpose; to identify, in the case of children in care etc., the body whose consent will be required, in place of the persons and bodies mentioned in section 1(3), before a child can be taken out of the United Kingdom without risk of prosecution under section 1(1). However, our proposals for reform of section 6 of the Act, as set out in Part VI of this Memorandum, take a different approach from that in section 1, and in particular do not involve the obtaining of any consents. Accordingly, if our proposals were to be adopted, it would not be appropriate to make any provision for Scotland identical to that made in the 1984 Act for England and Wales.

7.3 Uniformity would, nevertheless, be desirable and in the circumstances we think it right to consider all of our proposals, with reference to children in care etc., in order to see whether any modification or extension

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[1] For the full terms of our reference, see para.1.1 above.

[2] s.1(8), and Schedule.

of these proposals would be necessary in respect of them. Before doing so it may be worth noting existing statutory provisions which are relevant to such children.

Existing provisions relative to children in care etc.

7.4 Existing statute law relating to children contains a number of provisions making it an offence in certain circumstances to remove them from a person's, or a body's, care and control. The Social Work (Scotland) Act 1968 contains several such provisions. Section 17 of the Act, dealing with the care of children in respect of whom a resolution assuming parental rights is in effect, provides, by subsections (8) and (9) -

> "(8) Any person who--
>
> (a) knowingly assists or induces or persistently attempts to induce a child, in respect of whom a resolution under section 16 of this Act is in effect, to run away, or
>
> (b) without lawful authority takes away such a child, or
>
> (c) knowingly harbours or conceals such a child who has run away or who has been taken away or prevents him from returning,
>
> shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale[1] or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment.
>
> (9) Where--
>
> (a) a local authority have, in accordance with subsection (3) of this section; or

[1] Level 5 on the standard scale is presently £2000.

(b) a voluntary organisation have, in accordance with subsection (3A) of this section,

allowed any person to take over the care of a child with respect to whom a resolution under the said section 16 is in force and have by notice in writing required that person to return the child at a time specified in the notice (which, if that person has been allowed to take over the care of the child for a fixed period, shall not be earlier than the end of that period) any person who harbours or conceals the child after that time or prevents him from returning as required by the notice shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment."

7.5 Section 69 of the 1968 Act makes provision for the arrest of a child who absconds from a place of safety or from the control of a person under which he has been placed by a supervision requirement, and subsection (5)(a) of that section provides that in that section, and in section 70, any reference to a child absconding includes a reference to his being unlawfully taken away. Section 70 then makes provision for the arrest of a child who absconds from a residential establishment; and finally section 71 provides that -

"**71.** Any person who knowingly--

(a) assists or induces or persistently attempts to induce a child so to act as to be liable to be brought back in pursuance of either of the two last foregoing sections, or

(b) harbours or conceals a child so liable or prevents him from returning to a place or person mentioned in either of those sections,

shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment."

7.6 Where children are subject to custody proceedings special provision is made by section 51 of the Children Act 1975. This provision has been discussed earlier in this Memorandum.[1]

7.7 In relation to children who are subject to adoption proceedings special provision is made by the Adoption (Scotland) Act 1978. The relevant provisions of sections 27 and 28 are as follows -

"**27.**--(1) While an application for an adoption order is pending in a case where a parent or guardian of the child has agreed to the making of the adoption order (whether or not he knows the identity of the applicant), the parent or guardian is not entitled, against the will of the person with whom the child has his home, to remove the child from the care and possession of that person except with the leave of the court.

(2) While an application is pending for an order freeing a child for adoption and--

(a) the child is in the care of the adoption agency making the application, and

(b) the application was not made with the consent of each parent or guardian of the child,

no parent or guardian of the child who did not consent to the application is entitled, against the will of the person with whom the child has his home, to remove the child from the care and possession of that person except with the leave of the court.

[1] See para.6.42 et seq.

(3) Any person who contravenes subsection (1) or (2) shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale or both.

28.--(1) While an application for an adoption order in respect of a child made by the person with whom the child has had his home for the five years preceding the application is pending, no person is entitled, against the will of the applicant, to remove the child from the applicant's care and possession except with the leave of the court or under authority conferred by any enactment or on the arrest of the child.

(2) Where a person ("the prospective adopter") gives notice to the local authority within whose area he has his home that he intends to apply for an adoption order in respect of a child who for the preceding five years has had his home with the prospective adopter, no person is entitled, against the will of the prospective adopter, to remove the child from the prospective adopter's care and possession, except with the leave of the court or under authority conferred by any enactment or on the arrest of the child, before--

(a) the prospective adopter applies for the adoption order, or

(b) the period of three months from the receipt of the notice by the local authority expires,

whichever occurs first.

(7) Any person who contravenes subsection (1) or (2) shall be guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding level 5 on the standard scale or both."

7.8 As can be seen, the above provisions to a certain extent overlap with the crimes of abduction, and removal from a person's lawful control, which we have proposed

earlier in this Memorandum. We do not regard a degree of overlap as being in itself objectionable: indeed it exists at present as between the above statutory offences and the common law crimes of abduction and plagium. We do not consider that the proposed new crimes which we have just mentioned require any modification to take account of children in care or under supervision, and we suggest that the combined effect of our proposals and the existing statutory offences will give satisfactory protection to children in such cases. That, however, leaves the matter of taking children out of the country.

Taking children out of the country

7.9 Apart from exercising an appellate function, courts are not generally involved in matters such as assumptions of parental rights or the making of supervision orders; and of course the bodies which are involved in such matters are not empowered to make orders prohibiting the removal of a child out of the United Kingdom. Consequently, if section 6 of the Child Abduction Act 1984 were to be reformed in the way suggested in Part VI of this Memorandum, so that it would be an offence to take a child out of the United Kingdom inter alia where there was a court order prohibiting such removal, that provision would, of itself, not deal with the kinds of children whom we are presently considering. We do not, however, regard this as a fatal defect. In any case where it was apprehended that an attempt might be made to take, for example, a child in care abroad, application could be made to a court for an appropriate interdict or prohibition order. Even if that were not done, it is possible that taking abroad in such a case would be effected with the

intention of preventing another person from having the child's custody determined by a court. Alternatively, it is likely, in this sort of case, that there would be a contravention either of one of our other proposed new crimes or of one of the statutory offences mentioned above prior to any removal from the country taking place, and that of course would provide grounds for the apprehension of the person concerned. Furthermore, if, as we suggested in our recent Report on Custody of Children,[1] stop list procedures are extended to Scotland, the commission of one of these offences would be sufficient to activate these procedures.

7.10 Bearing in mind, as we pointed out at the beginning of this Part of the Memorandum, that the special provisions in the Schedule to the 1984 Act were necessitated only by the consent provisions in that Act (none of which we have recoemmended should be retained so far as Scotland is concerned) our provisional conclusion is that no special provision need be made for children in care or under supervision.

7.11 Consultees are accordingly invited to answer the question:
Do you agree that no special provision is necessary in relation to children in care or under supervision?

[1] 1985, Law Com. No.138; Scot. Law Com. No.91; para.6.20.

PART VIII - MINOR AND ANCILLARY MATTERS

8.1 The Child Abduction Act 1984, in addition to the major matters which we have considered at length in this Memorandum, also makes provision on a number of minor and ancillary matters. In particular, section 7 empowers a constable to arrest without warrant any person whom he reasonably suspects of committing or having committed an offence under Part II of the Act; section 9 makes provision for the proof and admissibility of certain documents; section 10 contains a provision relating to the law of evidence; and Part III of the Act makes provision on a number of supplementary matters.

8.2 We do not expect these provisions to give rise to problems and we have therefore not examined them in this Memorandum.

PART IX - SUMMARY OF PROPOSALS AND QUESTIONS ON WHICH THE VIEWS OF CONSULTEES ARE SOUGHT

A. Do you agree with our comments on, and criticisms of, the Child Abduction Act 1984? If not, on what points do you differ from us? **(Para.3.25)**

B. Apart from dealing with any special problems arising under section 6 of the Child Abduction Act 1984, should the criminal law relating to the abduction of children be left as it is? **(Para.6.3)**

C. The crime of plagium should be abolished. **(Para.6.6)**

D. (1) Do you consider that the common law crime of abduction can be suitably modified for cases involving the abduction of children?

(2) If so, how do you think that this can be done? **(Para.6.11)**

E. (1) It should be a crime for a person to take, remove, entice or detain a child under the age of 16 -

(a) if he has no appropriate entitlement to do so, and

(b) if he intends to cause the child, or to place the child in a position where he is likely to be caused, harm or distress.

(2) Should it also be a crime for a person to take, remove, entice or detain a child under the age of 16 -

(a) if he has no appropriate entitlement to do so, and

(b) he is reckless as to whether or not his actions will cause the child, or place the child in a position where he is likely to be caused, harm or distress?

(3) For the purposes of the above a person may have appropriate entitlement by virtue of parental rights, the consent of any person having parental rights in respect of the child, any enactment, an order pronounced by a court, or otherwise.

(4) For the purposes of the above "harm" includes physical or mental injury, sexual abuse or exploitation, and any other form of exploitation which is detrimental to the welfare of the child.

(5) In the light of the discussion in the preceding paragraphs, is there any other formulation of this crime which is preferred?

(6) Do you agree with the definition of "appropriate entitlement" proposed in (2) above, or would you prefer a definition which allowed no flexibility to the court? If so, what should that definition be?

(Para.6.25)

F. (1) Should the words of the crime presently being proposed be qualified by words such as "without reasonable excuse"?

(2) Should a defence be provided where the person charged reasonably believed that he had appropriate entitlement to take the child in the first place?

(para.6.28)

G. (1) The new crime of abduction should be triable either on indictment or summarily.

(2) In the former case the maximum penalty should be life imprisonment.

(3) In the latter case the maximum penalty should be imprisonment for six months, or a fine of the statutory maximum, or both.

(Para.6.30)

H. Our new crime should be in supplement of, and not in replacement for, the common law crime of abduction in so far as it relates to children. **(Para.6.32)**

I. (1) It should be a crime for any person, other than a person expressly excluded from the scope of the crime, to take, remove or detain a child without lawful authority or reasonable excuse, and without the consent of the person having lawful control of the child with the intention of removing or keeping the child from the lawful control of that person.

(2) The persons to be expressly excluded from the scope of the above crime should be -

(First option)

(a) any person having lawful rights in respect of the custody of the child, but only so far as, at the material time, such person was exercising, and acting within the scope of, such rights; and

(b) parents of the child.

(Second option)

(a) as above; and

(b) relatives of the child.

(3)(i) For the purposes of the foregoing proposal "relative" is to mean -

(a) where the relationship is by consanguinity, a mother, father, grandmother, grandfather, great grandmother, great grandfather, sister, brother, aunt, uncle, niece, or nephew of the child;

(b) where the relationship is by affinity, the spouse of any of the relatives mentioned in (a) above.

(ii) Collateral consanguineous relationships should include relatives of the half-blood as well as full-blood.

(4) It should be a defence to the foregoing crime that the person charged -

(a) had reasonable grounds for believing that the person having lawful control of the child had consented to the taking, removal or detention;

(b) had reasonable grounds for believing that the child had attained the age of 16.

(5) Do you agree that there should be no express provision to deal with cases where any taking, removal or detention has occurred at the instigation or request of the child concerned?

(Para.6.59)

J. The new crime which has just been considered should carry, on indictment, a maximum sentence of seven years imprisonment, and, on summary conviction, a maximum of six months imprisonment or a fine not exceeding the statutory maximum, or both. **(Para.6.61)**

K. Should it be a crime for a person to take, remove or detain a child without reasonable excuse, and with the intention of depriving another person of the lawful control of the child, by the use of violence, or the threat of violence, or in a manner or in circumstances likely to give rise to serious alarm for the child's safety? **(Para.6.67)**

L. This crime should carry, on indictment, a maximum sentence of ten years imprisonment, and, on summary conviction, a maximum of six months imprisonment or a fine not exceeding the statutory maximum, or both. **(Para.6.68)**

M. (1) It should be a crime for any person to take or send a child out of the United Kingdom -

(a) knowing that there is, in respect of the child, an order of a court in the United Kingdom prohibiting the removal of the child by him from the United Kingdom or any part of it; or

(b) with the intention of preventing any other person from having the custody of the child determined and effectively controlled by a court in the United Kingdom.

(2) For the purposes of (1)(a) above a court in Scotland should have power to make an order

prohibiting the removal of a child from the country by "any person", and should have power to exclude from the effect of the order any named person or persons.

(3) For the purposes of (1)(a) above a prohibition against removal out of a country which follows automatically on an application to have a child made a ward of court in England, Wales or Northern Ireland should not of itself be "an order of a court".

(4) The proposal in (1)(b) above should apply only where the child in question is habitually resident in the United Kingdom or is the subject of a custody order pronounced in favour of another person by a court in the United Kingdom. **(Para.6.86)**

N. Do you agree that, for the crime presently being considered, the maximum penalty on indictment should be two years imprisonment or a fine, or both, and on summary conviction three months imprisonment or a fine not exceeding the statutory maximum, or both? **(Para.6.88)**

O. Do you consider that our views on extraterritoriality are well founded? **(Para.6.91)**

P. Do you agree that no special provision is necessary in relation to children in care or under supervision? **(Para.7.11)**

APPENDIX

CHILD ABDUCTION ACT 1984
1984 Chapter 37

An Act to amend the criminal law relating to the abduction of children [12th July 1984]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

PART I

OFFENCES UNDER LAW OF ENGLAND AND WALES

Offence of abduction of child by parent, etc.

1.—(1) Subject to subsections (5) and (8) below, a person connected with a child under the age of sixteen commits an offence if he takes or sends the child out of the United Kingdom without the appropriate consent.

(2) A person is connected with a child for the purposes of this section if--

(a) he is a parent or guardian of the child; or

(b) there is in force an order of a court in England or Wales awarding custody of the child to him, whether solely or jointly with any other person; or

(c) in the case of an illegitimate child, there are reasonable grounds for believing that he is the father of the child.

(3) In this section "the appropriate consent", in relation to a child, means--

(a) the consent of each person--

(i) who is a parent or guardian of the child; or

(ii) to whom custody of the child has been awarded (whether solely or jointly with any other person) by an order of a court in England or Wales; or

(b) if the child is the subject of such a custody order, the leave of the court which made the order; or

(c) the leave of the court granted on an application for a direction under section 7 of the Guardianship of Minors Act 1971 or section 1(3) of the Guardianship Act 1973.

1971 c.3.
1973 c.29

(4) In the case of a custody order made by a magistrates' court, subsection (3)(b) above shall be construed as if the reference to the court which made the order included a reference to any magistrates' court acting for the same petty sessions area as that court.

(5) A person does not commit an offence under this section by doing anything without the consent of another person whose consent is required under the foregoing provisions if--

(a) he does it in the belief that the other person--

(i) has consented; or

(ii) would consent if he was aware of all the relevant circumstances; or

(b) he has taken all reasonable steps to communicate with the other person but has been unable to communicate with him; or

(c) the other person has unreasonably refused to consent,

but paragraph (c) of this subsection does not apply where what is done relates to a child who is the subject of a custody order made by a court in England or Wales, or where the person who does it acts in breach of any direction under

section 7 of the Guardianship of Minors Act 1971 or section 1(3) of the Guardianship Act 1973.

(6) Where, in proceedings for an offence under this section, there is sufficient evidence to raise an issue as to the application of subsection (5) above, it shall be for the prosecution to prove that that subsection does not apply.

(7) In this section--

(a) "guardian" means a person appointed by deed or will or by order of a court of competent jurisdiction to be the guardian of a child; and

(b) a reference to a custody order or an order awarding custody includes a reference to an order awarding legal custody and a reference to an order awarding care and control.

(8) This section shall have effect subject to the provisions of the Schedule to this Act in relation to a child who is in the care of a local authority or voluntary organisation or who is committed to a place of safety or who is the subject of custodianship proceedings or proceedings or an order relating to adoption.

Offence of abduction of child by other persons.

2.—(1) Subject to subsection (2) below, a person not falling within section 1(2)(a) or (b) above commits an offence if, without lawful authority or reasonable excuse, he takes or detains a child under the age of sixteen--

(a) so as to remove him from the lawful control of any person having lawful control of the child; or

(b) so as to keep him out of the lawful control of any person entitled to lawful control of the child.

(2) In proceedings against any person for an offence under this section, it shall be a defence for that person to show that at the time of the alleged offence--

(a) he believed that the child had attained the age of sixteen; or

(b) in the case of an illegitimate child, he had reasonable grounds for believing himself to be the child's father.

Construction of references to taking, sending and detaining.

3.—For the purposes of this Part of this Act—

(a) a person shall be regarded as taking a child if he causes or induces the child to accompany him or any other person or causes the child to be taken;

(b) a person shall be regarded as sending a child if he causes the child to be sent; and

(c) a person shall be regarded as detaining a child if he causes the child to be detained or induces the child to remain with him or any other person.

Penalties and prosecutions.

4.—(1) A person guilty of an offence under this Part of this Act shall be liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, as defined in section 74 of the Criminal Justice Act 1982, or to both such imprisonment and fine;

1982 c.48.

(b) on conviction on indictment, to imprisonment for a term not exceeding seven years.

(2) No prosecution for an offence under section 1 above shall be instituted except by or with the consent of the Director of Public Prosecutions.

Restriction on prosecutions for offence of kidnapping.

5.—Except by or with the consent of the Director of Public Prosecutions no prosecution shall be instituted for an offence of kidnapping if it was committed—

(a) against a child under the age of sixteen; and

(b) by a person connected with the child, within the meaning of section 1 above.

PART II

OFFENCE UNDER LAW OF SCOTLAND

Offence in Scotland of parent, etc. taking or sending child out of United Kingdom.

6.—(1) Subject to subsections (4) and (5) below, a person connected with a child under the age of sixteen years commits an offence if he takes or sends the child out of the United Kingdom--

(a) without the appropriate consent if there is in respect of the child--

(i) an order of a court in the United Kingdom awarding custody of the child to any person; or

(ii) an order of a court in England, Wales or Northern Ireland making the child a ward of court;

(b) if there is in respect of the child an order of a court in the United Kingdom prohibiting the removal of the child from the United Kingdom or any part of it.

(2) A person is connected with a child for the purposes of this section if--

(a) he is a parent or guardian of the child; or

(b) there is in force an order of a court in the United Kingdom awarding custody of the child to him (whether solely or jointly with any other person); or

(c) in the case of an illegitimate child, there are reasonable grounds for believing that he is the father of the child.

(3) In this section, the "appropriate consent" means--

(a) in relation to a child to whom sub-section (1)(a)(i) above applies--

(i) the consent of each person

(a) who is a parent or guardian of the child; or

(b) to whom custody of the child has been awarded (whether solely or jointly with any other person) by an order of a court in the United Kingdom; or

(ii) the leave of that court;

(b) in relation to a child to whom sub-section (1)(a)(ii) above applies, the leave of the court which made the child a ward of court;

Provided that, in relation to a child to whom more than one order referred to in subsection (1)(a) above applies, the appropriate consent may be that of any court which has granted an order as referred to in the said subsection (1)(a); and where one of these orders is an order referred to in the said subsection (1)(a)(ii) no other person as referred to in paragraph (a)(i) above shall be entitled to give the appropriate consent.

(4) In relation to a child to whom subsection (1)(a)(i) above applies, a person does not commit an offence by doing anything without the appropriate consent if--

(a) he does it in the belief that each person referred to in subsection (3)(a)(i) above--

(i) has consented; or

(ii) would consent if he was aware of all the relevant circumstances; or

(b) he has taken all reasonable steps to communicate with such other person but has been unable to communicate with him.

(5) In proceedings against any person for an offence under this section it shall be a defence for that person to show that at the time of the alleged offence he had no reason to believe that there was in existence an order referred to in subsection (1) above.

(6) For the purposes of this section--

(a) a person shall be regarded as taking a child if he causes or induces the child to accompany him or any other person, or causes the child to be taken; and

(b) a person shall be regarded as sending a child if he causes the child to be sent.

(7) In this section "guardian" means a person appointed by deed or will or by order of a court of competent jurisdiction to be the guardian of the child.

Power of arrest.

7.—A constable may arrest without warrant any person whom he reasonably suspects of committing or having committed an offence under this Part of this Act.

Penalties and prosecutions.

8.—A person guilty of an offence under this Part of this Act shall be liable--

(a) on summary conviction, to imprisonment for a term not exceeding three months or to a fine not exceeding the statutory maximum as defined in section 74(2) of the Criminal Justice Act 1982, or both; or

1982 c.48.

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or both.

Proof and admissibility of certain documents.

9.—(1) For the purposes of this Part of this Act, a document duly authenticated which purports to be--

(a) an order or other document issued by a court of the United Kingdom (other than a Scottish court) shall be sufficient

evidence of any matter to which it relates;

(b) a copy of such an order or other document shall be deemed without further proof to be a true copy unless the contrary is shown, and shall be sufficient evidence of any matter to which it relates.

(2) A document is duly authenticated for the purposes of--

(a) subsection (1)(a) above if it purports to bear the seal of that court;

(b) subsection (1)(b) above if it purports to be certified by any person in his capacity as a judge, magistrate or officer of that court to be a true copy.

Evidence.

10.—In any proceedings in relation to an offence under this Part of this Act it shall be presumed, unless the contrary is shown, that the child named in the order referred to in section 6(1) above, or in any copy thereof, is the child in relation to whom the proceedings have been taken.

PART III

SUPPLEMENTARY

Consequential amendments and repeals.

1952 c.67.

11.—(1) At the end of paragraph 1(b) of the Schedule to the Visiting Forces Act 1952 (definition of "offence against the person"), there shall be inserted, appropriately numbered--

"( ) the Child Abduction Act 1984.".

1968 c.27.

(2) After paragraph 2 of Schedule 1 to the Firearms Act 1968 there shall be inserted--

"2A. Offences under Part I of the Child Abduction Act 1984 (abduction of children).".

1978 c.17.

(3) The reference to abduction in section 1(1) of the Internationally Protected Persons Act 1978 shall be construed as not including an offence under section 1 above or any corresponding provision in force in Northern Ireland or Part II of this Act.

1978 c.26.

(4) In section 4(1)(a) of the Suppression of Terrorism Act 1978, after "11,", there shall be inserted "11B,"; and in Schedule 1 to that Act, after paragraph 11A, there shall be inserted--

"11B. An offence under section 2 of the Child Abduction Act 1984 (abduction of child by person other than parent etc.) or any corresponding provision in force in Northern Ireland.".

(5) The following provisions are hereby repealed--

1861 c.100.

(a) section 56 of the Offences against the Person Act 1861;

1870 c.52.

(b) in Schedule 1 to the Extradition Act 1870, the words "Child stealing";

1968 c.27.

(c) in paragraph 2 of Schedule 1 to the Firearms Act 1968, the words "section 56 (child-stealing and abduction)".

Enactment of corresponding provision for Northern Ireland.

1974 c.28.

12.--An Order in Council under paragraph 1(1)(b) of Schedule 1 to the Northern Ireland Act 1974 (legislation for Northern Ireland in the interim period) which contains a statement that it operates only so as to make for Northern Ireland provision corresponding to part I of this Act--

(a) shall not be subject to paragraph 1(4) and (5) of that Schedule (affirmative resolution of both Houses of Parliament); but

(b) shall be subject to annulment in pursuance of a resolution of either House.

Short title, commencement and extent.

13.--(1) This Act may be cited as the Child Abduction Act 1984.

(2) This Act shall come into force at the end of the period of three months beginning with the day on which it is passed.

(3) Part I of this Act extends to England and Wales only, Part II extends to Scotland only and in Part III section 11(1) and (5)(a) and section 12 do not extend to Scotland and section 11(1), (2) and (5)(a) and (c) does not extend to Northern Ireland.

Section 1(8)

SCHEDULE

MODIFICATIONS OF SECTION 1 FOR CHILDREN IN CERTAIN CASES

Children in care of local authorities and voluntary organisations

1.—(1) This paragraph applies in the case of a child who is in the care of a local authority or voluntary organisation in England or Wales.

(2) Where this paragraph applies, section 1 of this Act shall have effect as if—

(a) the reference in subsection (1) to the appropriate consent were a reference to the consent of the local authority or voluntary organisation in whose care the child is; and

(b) subsections (3) to (6) were omitted.

Children in places of safety

2.—(1) This paragraph applies in the case of a child who is committed to a place of safety in England or Wales in pursuance of—

1933 c.12. (a) section 40 of the Children and Young Persons Act 1933; or

1958 c.5. (7&8 Eliz.2) (b) section 43 of the Adoption Act 1958; or

1969 c.54. (c) section 2(5) or (10), 16(3) or 28(1) or (4) of the Children and Young Persons Act 1969; or

1980 c.6. (d) section 12 of the Foster Children Act 1980.

(2) Where this paragraph applies, section 1 of this Act shall have effect as if—

(a) the reference in subsection (1) to the appropriate consent were a reference to the leave of any magistrates' court acting

for the area in which the place of safety is; and

(b) subsections (3) to (6) were omitted.

Adoption and custodianship

3.—(1) This paragraph applies in the case of a child--

(a) who is the subject of an order under section 14 of the Children Act 1975 freeing him for adoption; or

1975 c.72.

(b) who is the subject of a pending application for such an order; or

(c) who is the subject of a pending application for an adoption order; or

(d) who is the subject of an order under section 25 of the Children Act 1975 or section 53 of the Adoption Act 1958 relating to adoption abroad or of a pending application for such an order; or

(e) who is the subject of a pending application for a custodianship order.

(2) Where this paragraph applies, section 1 of this Act shall have effect as if--

(a) the reference in subsection (1) to the appropriate consent were a reference--

(i) in a case within sub-paragraph (1)(a) above, to the consent of the adoption agency which made the application for the order or, if the parental rights and duties in respect of the child have been transferred from that agency to another agency by an order under section 23 of the Children Act 1975, to the consent of that other agency;

1975 c.72.

(ii) in a case within sub-paragraph (1)(b), (c) or (e) above, to the leave of the

court to which the application was made; and

(iii) in a case within sub-paragraph (1)(d) above, to the leave of the court which made the order or, as the case may be, to which the application was made; and

(b) subsections (3) to (6) were omitted.

Cases within paragraphs 1 and 3

4.—In the case of a child falling within both paragraph 1 and paragraph 3 above, the provisions of paragraph 3 shall apply to the exclusion of those in paragraph 1.

Interpretation

5.—(1) In this Schedule—

(a) subject to sub-paragraph (2) below, "adoption agency" has the same meaning as in section 1 of the Children Act 1975;

(b) "adoption order" means an order under section 8(1) of that Act;

(c) "custodianship order" has the same meaning as in Part II of that Act; and

(d) "local authority" and "voluntary organisation" have the same meanings as in section 87 of the Child Care Act 1980.

1980 c.5.

(2) Until the coming into force of section 1 of the Children Act 1975, for the words "adoption agency" in this Schedule there shall be substituted "approved adoption society or local authority"; and in this Schedule "approved adoption society" means an adoption society approved under Part I of that Act.

(3) In paragraph 3(1) above references to an order or to an application for an order are references to an order made by, or to an application to, a court in England or Wales.

(4) Paragraph 3(2) above shall be construed as if the references to the court included, in any case where the court is a magistrates' court, a reference to any magistrates' court acting for the same petty sessions area as that court.