



SCOTTISH LAW COMMISSION
(Scot Law Com No 102)

Child Abduction

Report on a reference under section 3(1)(e) of the Law
Commissions Act 1965

Presented to Parliament by the Secretary of State for
Scotland

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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Scottish Law Commission

Child Abduction

*To: The Right Honourable Malcolm Rifkind, QC, MP,
Her Majesty's Secretary of State for Scotland*

We have the honour to submit our Report on Child Abduction.

(Signed) PETER MAXWELL, *Chairman*
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R EADIE, *Secretary*
23 December 1986

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Part I Introduction

The reference and its background

1.1 On 27 July 1984 we received a reference from the Secretary of State for Scotland under section 3(1)(e) of the Law Commissions Act 1965 in the following terms:

“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 background to this reference was that in a report presented in 1980 the criminal law of England and Wales regarding, *inter alia*, child abduction was reviewed by the Criminal Law Revision Committee.¹ This provided the impetus for the introduction of a Bill into Parliament by a Private Member² which received Government support and became the Child Abduction Act 1984.³ The need for such a Bill, including the number of cases each year where it was thought that a child had been wrongfully removed from a court’s jurisdiction and the impact which this had upon those involved, was fully set out in the course of the Bill’s passage through its Parliamentary stages.⁴ The original intention was that the Bill would apply to England and Wales only. However, the terms of the Bill went further than the Committee’s review and created not only an offence of taking or detaining a child so as to remove him from the lawful control of any person having lawful control of the child, but also an offence of taking or sending a child abroad without the appropriate consent.

1.3 It became apparent that the provisions relating to the removal of a child abroad would be ineffective if a parent was able simply to take a child to Scotland, where the Bill did not apply, and thereafter travel abroad. A new clause was therefore added, making it an offence in Scotland for someone connected with the child to take or send him abroad in certain circumstances. These provisions were introduced at a late stage in the Parliamentary progress of the Bill and without prior consultation, the law in Scotland never having been subject to a review. It was therefore announced that the Scottish Law Commission would be invited to consider the matter further. As can be seen, however, the reference is in fact expressed in wider terms, asking the Commission to consider reform of the law on this subject in general and not simply to review the 1984 Act. In this Report, therefore, we firstly consider the law relating to the taking and detaining of children in general and thereafter go on to consider the law in relation to taking or sending children abroad.

Consultation

1.4 In August 1985 we published a consultative memorandum on the topic of child abduction.⁵ This analysed the nature and categories of child abduction,⁶ reviewed the

1. In its Fourteenth Report on *Offences against the Person*, Cmnd 7844.

2. Timothy Wood MP.

3. Referred to in the Report as the ‘1984 Act’. See Appendix B.

4. See also per the Lord Advocate, Lord Cameron of Lochbroon, in the passage of the Child Abduction and Custody Act 1985: ‘The best estimate at present is that somewhere in the order of 100 cases a year arise of the abduction of children from the United Kingdom.’ 460 Official Report (5th series), col 1260.

5. Consultative Memorandum No 67, *Child Abduction*, referred to in the Report as the ‘Memorandum’.

6. See Part V of the Memorandum.

present law, considered the laws of other countries,¹ and set out options for reform. Along with the Memorandum, we published a short pamphlet which explained the issues as simply as possible and which contained a short questionnaire. The pamphlet was distributed to members of the public by making it available in public libraries and citizens' advice bureaux as well as by sending it direct to interested groups and enquirers. We are grateful to all those who have assisted our consideration of this subject by submitting their comments.²

International co-operation

1.5 A further measure, the Child Abduction and Custody Act 1985,³ came into force on 1 August 1986, giving the Hague⁴ and Strasbourg⁵ Conventions of 1980 the force of law in the United Kingdom. Whereas the 1984 Act is concerned with criminal sanctions, the aim of the 1985 Act is to provide a remedy under the civil law. The 1985 Act seeks to secure the return of children who have been abducted to a foreign country. It will therefore be of assistance in the situation where a child has already been taken abroad. By contrast, in this Report we will be examining whether anything can be done before the child is taken abroad, and whether this activity should be subject to a criminal sanction, with the effect of enabling the authorities to intervene and prevent the child from being removed abroad in the first place.

1. See Part IV of the Memorandum.

2. A list of those submitting comments on the Memorandum and pamphlet is contained in Appendix D.

3. Referred to in the Report as the '1985 Act'.

4. The Convention on the Civil Aspects of International Child Abduction signed at The Hague on 25 October 1980.

5. The European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children signed at Luxembourg on 20 May 1980.

Part II Abduction

Present law

2.1 It is a crime to carry off or confine any person forcibly against his will without lawful authority.¹ According to Gordon,² “abduction for any purpose is criminal, whether or not it is accompanied by behaviour which can be categorised as assault or fraud”.

Criticisms of the present law

2.2 One difficulty regarding the crime of abduction is that there has been some doubt as to whether the crime can be committed only against an adult and not against a child, since the taking of a child is dealt with by the common law crime of *plagium*.³ Hume, for instance, refers to the victim of the crime of abduction as “a person of grown years and mature discretion”.⁴ In at least one reported case the relevancy of a charge of abduction in respect of a pupil child has been doubted.⁵ By contrast, in one recent case there appears to have been no challenge to an indictment in which an accused was charged with the abduction of a girl aged six.⁶

2.3 A second problem with the crime of abduction is that there appears to have been some uncertainty as to whether the crime is limited to those cases where the abduction is for sexual or marital purposes. In his book on criminal law, Alison 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.”⁷

By contrast, Macdonald 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”.⁸ The crime has been libelled in cases where the abduction has been for sexual purposes⁹ as well as in cases where the abduction was for some other purpose.¹⁰

2.4 While doubts have been raised by these older authorities, we are disposed to think that a court would be unlikely in present times to restrict the crime of abduction by reference to the age of the victim or the purpose for which the abduction took place. However, a third and more serious drawback of the crime of abduction is that it is an essential feature of the crime that the will of the victim is overcome. While this rarely gives rise to difficulties where the alleged victim is an adult, it can present a major problem if the person abducted is a child, where it is alleged by the accused that the child consented and went willingly. It is all too easy to imagine the situation

1. *HMA v Mclean* (May 1980, unreported) Glasgow High Court.

2. *Criminal Law*, Second Edn, para 29–52.

3. See Part III below.

4. *Commentaries on the Law of Scotland respecting Crimes*, I, 83.

5. *Mary Miller or Oates* (1861) 4 Irv 74.

6. *HMA v Mclean* above.

7. *Principles of the Criminal Law of Scotland*, I, 227. See also Burnett, *Criminal Law of Scotland*, 109.

8. *The Criminal Law of Scotland* (Fifth Edn), 124.

9. Eg *HMA v Mclean* above, *Barbour v HMA* 1982 SCCR 195.

10. Eg abduction in relation to carrying off and confining witnesses and to those about to vote in an election: *Anstruther*, 1720, and *Lindsay*, 1791, referred to in Burnett above, pp 109, 110; abduction following upon a robbery where various people were forced at gunpoint to drive the accused away in a motor-car: *HMA v Morrison and Another* (January 1978, unreported) Edinburgh High Court.

where a child in a school playground, having been offered a bar of chocolate by a stranger, thereafter went off with him. In that event, can the child be said to have been taken forcibly against his will? There have been judicial attempts to circumvent this problem by indicating that, in the case of a child, evidence of leading or inducing the child away would in itself be sufficient to establish that the child was taken away against his will.¹ However, it may be doubted whether this would indeed be sufficient, since such evidence might equally be consistent with voluntary compliance on the part of the child.

Options for reform

2.5 In the Memorandum we considered the possibility of meeting the difficulties which have been encountered with the common law crime of abduction by means of statutory intervention.² For each of the problems, a provision could be enacted clarifying the position or making appropriate amendments. Thus, in order to meet the uncertainty as to whether the common law crime of abduction could be committed against children, it could be expressly provided that the crime could be committed against a person of any age. In order to remove any lingering doubt as to whether the crime was restricted in its application to cases of abduction for sexual purposes or for the purpose of marriage, there could be express provision that the crime of abduction would not be restricted by reference to the purpose intended. Finally, in the Memorandum we considered various ways of dealing with the requirement that the will of the victim must be overcome. These included:

- (a) declaring that the overcoming of the will of the victim would not be a necessary ingredient of the crime where a child was concerned,
- (b) providing for a conclusive presumption that a child had not consented to his abduction,
- (c) making the crime apply where there was no consent on the part of a parent or other custodian,
- (d) providing that consent on the part of the child should not be a defence, or
- (e) approaching the problem of consent more generally by providing that there would be no abduction if the court was satisfied that the child had reached an age and degree of maturity at which it was appropriate to take account of his views, and that on that basis the child could be taken to have consented to what had occurred.³

In the end, it was felt that none of these alternatives was entirely satisfactory, and in the Memorandum we expressed considerable unease about amending the common law in this way.⁴ Most of those commenting on the Memorandum were similarly reluctant to see statutory modification of the common law crime of abduction.

2.6 We went on in the Memorandum to consider the possibility of creating new statutory offences.⁵ The three options for reform suggested in this regard were:

- (a) abduction so as to cause harm or danger to the child,
- (b) interference with the lawful custody or control of a child, and
- (c) removal of a child by violence.

Abduction so as to cause harm or danger to the child

2.7 The first of these suggested offences was designed to deal with the case where a child was taken with the intention of harming him or of exposing him to danger.⁶ It was envisaged that the offence would also include the taking of a child with an intention to cause him distress, since a person might take a child simply to frighten

1. Cf *HMA v Mclean*, above, and see further *R v D* [1984] 3 WLR 1986 at p 197.

2. Para 6.8 *et seq.*

3. Para 6.9 of the Memorandum.

4. Para 6.11.

5. Para 6.12 *et seq.*

6. Para 6.15 *et seq* of the Memorandum.

him. Furthermore, the offence might include those circumstances where there was an intention to place the child in a position where he was likely to be caused harm or distress, such as where a child was placed in a situation where someone else might harm him. Finally, in order to avoid the possibility that a person with a legitimate right to take the child, such as police officers or social workers, might be prosecuted, those with an 'appropriate entitlement' to take the child would be excluded from the offence.

Interference with the lawful custody or control of a child

2.8 The second offence which we contemplated in the Memorandum was one involving interference with, or deprivation of, the lawful custody or control of a child.¹ Unlike the first offence, such an offence would not necessarily have involved any use of force or any risk or likelihood of harm being caused to the child. The essence of this offence would have been 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. In considering the scope of such an offence, and in particular whether parents should be included, our tentative view was that the offence should be confined to those who were strangers to the child.² In order to protect those who might have cause to take a child in an official capacity³ or for good reason, the taking would only be an offence if done 'without lawful authority' or 'without reasonable excuse'.

Removal of a child by violence

2.9 The third offence considered in the Memorandum was the removal of a child from another person's lawful control by the use of violence or by the threat of violence.⁴ In some ways, this would have been an aggravated version of the previous offence. In the first instance, this offence was aimed at those excluded from the second offence. The exact range of that exclusion would have depended upon the view ultimately taken in relation to that second offence, but it was envisaged that this might be parents and others with custody, and possibly also other relatives. Although a person had been excluded from the second offence, if that person took a child by the use of violence it was thought that such actions should be made criminal. However, since the removal of a child by violence would be generally deplored, there would be no reason for limiting the offence only to those persons excluded from the second offence. It followed that any person should be capable of committing this offence. While it could be argued that such actions would amount to the common law crimes of assault or breach of the peace anyway, it was hoped that the creation of such an offence would have a useful deterrent effect. Again, the person taking the child with lawful authority or reasonable excuse would have been excluded.

Comments on consultation

2.10 Of those who commented on the Memorandum, most were in favour of some measure of reform of the criminal law relating to the abduction of children. A small number felt that no change was required and that a matter such as child abduction should be left to the civil law. As regards the common law crime of child abduction insofar as it relates to children, most consultees were against the modification of the crime by statute. Several commentators advocated leaving the common law crime of abduction alone and adding one or more statutory offences. Others went further and favoured abolishing altogether the common law crime of abduction insofar as it relates to children and having a new code dealing with child abduction. As for the specific proposed offences outlined earlier, there was a considerable division of opinion as to the desirability of their implementation, with some in favour but a number expressing doubts, particularly in relation to the terminology used to express these offences. In the main, we believe that it would be fair to say that there was in general a desire for reform, but that certain problems were envisaged as to particular aspects of our proposals. For example, with the first proposed offence, problems were anticipated as regards the concepts of 'harm' and 'appropriate entitlement'; with the

1. Para 6.33 *et seq* of the Memorandum.

2. Para 6.49 of the Memorandum.

3. Eg police officers, social workers or officers of the court.

4. Para 6.62 *et seq* of the Memorandum.

second offence, as regards those to be excluded from the offence; and with the third offence, as to whether the common law crimes of assault and breach of the peace would not sufficiently cover the situation. We have therefore attempted to take these points into account in forming our recommendations.

Recommendation

2.11 As indicated in the Memorandum, we are not in favour of the abolition of the common law crime of abduction insofar as it relates to children and its replacement by a statutory code.¹ Our initial view has been reinforced by the comments which we have received on consultation. Its abolition would in any event have presented difficulties as it is not a self-contained crime, but rather a manifestation of the general crime of abduction. Moreover, the common law system has the advantage of flexibility and a common law charge may on occasions be used in circumstances where a statutory offence would not apply. The retention of the common law crime would allow the prosecutor, if he felt that a common law charge could adequately deal with the situation, to continue to use such a charge. Nor would we favour any proposal to remove possible doubts and anomalies by amending by statute the common law crime of abduction. We therefore believe that the crime of abduction in relation to children should be retained and should not be amended.

2.12 However, given that there are a number of criticisms which may be made of the present law and that doubts remain as to whether a charge of abduction might be brought in certain circumstances, we believe that the creation of a statutory offence is merited. It is to be hoped that the creation of a statutory offence might have the advantage of bringing some clarification to this branch of the law. Faced with a person suspected of abducting a child, the police could then rely upon the statutory provisions in apprehending that person. They would not have to concern themselves with whether or not the common law of abduction applied, but could simply look to the terms of the new offence. Similarly, prosecutors could charge the statutory offence in preference to the common law crime of abduction where it was anticipated that there might be doubts as to the applicability of that crime. We set out our proposals for this new statutory offence in Part IV below.

2.13 We therefore recommend in relation to abduction:

- (1) **The common law crime of abduction should not be abolished or modified by statute in relation to the abduction of children.**

(Paragraphs 2.1–2.12)

1. Para 6.31.

Part III Plagium

Present law

3.1 *Plagium* is the common law crime of child stealing which may be committed against children below the age of puberty.¹ Whereas the crime of abduction is treated as one of assault on or injury to the person abducted, the carrying off of a pupil child has been treated as falling within the ambit of theft. This is because a child under the age of puberty has been regarded as the property of his parents for the purposes of theft and therefore as something which can be stolen. Consequently, *plagium* is not a separate offence in its own right but is merely an aggravated form of theft.² Moreover, since a child below the age of puberty may be stolen, it follows that a person who detains or conceals the child thereafter may be guilty of reset.³

Criticisms of the present law

3.2 The primary criticism which may be made of the crime of *plagium*, leading many to express dissatisfaction with it, concerns its historical basis. Springing from the general concept that a pupil was held in law to have no *persona*,⁴ for the purposes of theft the child was treated as the property of his parents. Such a notion is totally at odds with contemporary thinking, which seeks to place the child first and to make the concept of the welfare of the child paramount.

3.3 The crime's historical basis gives rise to further criticisms. It was only pupils (who did not have any *persona*) who could be stolen, not minors. Pupillarity under Scots law extends to the age of fourteen for males and twelve for females. (Minority or puberty extended until the age of twenty-one for both males and females until 1 January 1970,⁵ after which date majority was attained at the age of eighteen.⁶) It therefore made sense historically for the crime of *plagium* to be committable only against pupil children. However, the notion of treating a child differently according to whether he is over or under the age of pupillarity does not accord with current thinking. Pupillarity raises two main anomalies. The first is that different ages apply as between boys and girls, and the second is that in recent times a person has been regarded as still being a child for legal purposes up to the age of sixteen, not twelve or fourteen. In order to remove these anomalies, therefore, the crime of *plagium* would have to be made to apply to the taking of anyone below the age of sixteen.

3.4 Finally, the question has arisen, again as a result of the concept of ownership or possession of the child by the parent, as to whether the crime of *plagium* can be committed by a parent. The parent might argue that if the child is regarded as his property then he cannot be charged with stealing something that he already owns. Such an argument was put forward in a recent case in which a father was charged with stealing his illegitimate daughter.⁷ The argument was rejected by the court on the ground that, in the absence of a custody decree in his favour, the father of an illegitimate child had no rights in his child. However, it must be said that such an

1. For a recent case involving *plagium* see *Downie v HMA* 1984 SCCR 365.

2. Hume I, 84; cf Gordon above, para 14–43.

3. *HMA v Cairney or Cook* (1897) 2 Adam 471.

4. Cf Fraser, *Parent and Child*, Third Edn, p 204.

5. Cf Fraser, p 199.

6. S1 Age of Majority (Scotland) Act 1969.

7. *Downie v HMA* above.

approach was still based on the question of whether the parent had any rights in the child rather than on the interests of the child.

3.5 While these criticisms may be made of *plagium*, we recognise that it is conceivable that the courts would be prepared to develop the common law crime, presenting a different rationale for it, extending the age of the child to sixteen irrespective of sex, and including the parent as a potential offender. According to at least one author, however, *plagium* is unlikely to be extended by the courts, being “an archaic and somewhat anomalous crime”.¹

Recommendation

3.6 In the Memorandum we invited views on the proposal that the crime of *plagium* should be abolished. Of those submitting comments, the majority were in favour of its abolition. We have examined in this Part of the Report the criticisms which may be made of the crime of *plagium*: the earlier and now outmoded thinking behind the crime, the discrepancy in age between boys and girls, the applicable age being lower than sixteen, and the possible exclusion of the parents of the child from the crime. It is true that some of these criticisms could be met by statutory modification of the crime, but we do not believe that such a course would satisfactorily tackle the problem. Although some would take the view that the courts will extend, develop and rationalise the crime, others would take the opposite view. Even if the former view is correct, the courts are hampered by having to wait for appropriate cases coming before them, which may take some time. Our view is that the crime of *plagium* is unacceptable in its present form. Unlike the common law crime of child abduction, *plagium* is a self-contained crime and could thus be abolished and replaced more readily by a statutory offence. We would therefore recommend that the crime of *plagium* should be abolished and that a new statutory offence should take its place. We set out our proposals for this new offence in Part IV below.

3.7 We therefore recommend that:

(2) The common law crime of *plagium* should be abolished.

(Paragraphs 3.1–3.6; clause 1—proposed section 6(4))

1. Gordon above, para 14–44n.

Part IV Proposed offence of taking or detaining a child

Introduction

4.1 From our examination of the crimes of abduction and *plagium* in the preceding parts of this Report, it will have become apparent that there are numerous reasons why some statutory provision is called for in relation to the taking and detaining of children. The main arguments in favour of a statutory provision may be summarised as follows:

- (a) A statutory provision would enable a charge to be brought in those circumstances where a common law charge of abduction might otherwise be brought but there was reluctance to proceed because of doubts as to whether
 - (i) the crime of abduction would apply to the taking of a child (since the taking of a child is dealt with by the crime of *plagium*),
 - (ii) the abduction had to be for certain specific purposes (since there may be some uncertainty as to whether the crime of abduction is limited to those cases where the abduction is for sexual or marital purposes), or
 - (iii) the will of the victim could be said to be overcome where the person abducted was a child.¹
- (b) Some new statutory provision will be required to take the place of the crime of *plagium* once it has been abolished.
- (c) A statutory provision would have the advantage of making clear in what precise circumstances the taking or detention of a child would be regarded as criminal. The present uncertain state of the law must place in a very difficult position any police officer asked to arrest someone such as a parent for taking or detaining a child and it is likely that the officer would be reluctant to become involved. A statutory offence would therefore be of assistance to the police by making the law clearer and more certain, and in some instances swift action on their part may prevent a person from thereafter taking the child abroad. Prevention is especially important in that case, since once abroad it may be very difficult either to prosecute the taker successfully or to recover the child.²

We are therefore of the opinion that the need for a statutory provision has been sufficiently established. Once *plagium* is abolished, there will be an obvious need for some statutory offence to replace it. Some statutory provision would, however, still be called for even if the crime of *plagium* were retained. Thus, in cases where the crime of *plagium* would have been committed but for the fact that the child was a boy aged fourteen or fifteen or a girl aged twelve to fifteen, there is a need for a new statutory offence. Similarly, where it was unclear whether a charge of *plagium* could be brought successfully because of the relationship of the offender to the child, as where the offender was a parent of the child, again there is, in our view, a need for a statutory offence which could be used in these circumstances. In short, the need for some statutory provision is greater if the crime of *plagium* is to be abolished, but the need remains even if *plagium* is to be retained.

4.2 In the Memorandum we considered three statutory offences which might be introduced to deal with the unlawful taking of a child³ and we have outlined these

1. See paras 2.2-2.4 above.

2. See generally Parts V and VI below.

3. Some further possibilities were also considered, such as the situation where a person taking a child was reckless as to whether the child would be likely to be caused harm or distress.

in Part II above. However, after consultation and upon further reflection, we now believe that the problem of child abduction can best be dealt with by the creation of a single statutory offence.¹ We believe that, especially where a criminal sanction is involved, there is merit in making the law as simple as possible.

4.3 In considering how such a provision should be formulated, we have borne in mind the comments which were submitted to us, such as the reservations which were expressed in relation to the proposed offence based on the taking of a child with the intention of causing him harm or distress. We propose that the new statutory offence should be similar to that contained in section 2 of the 1984 Act (which applies in England and Wales). Our proposed offence would, however, differ in two important respects from that contained in section 2. First, we believe that the offence should have a general application, and should not exclude ‘connected persons’ as in section 2. Accordingly, in appropriate cases, the offence which we propose could be applied to the removal of a child by, for instance, a parent. Second, the offence should clearly be based upon the result of the taker’s actions and not upon his intentions, thus avoiding the ambiguity of the phrase ‘so as to’ which is used in section 2.

Scope of the offence

The conduct required

4.4 The conduct which the new offence would be aimed at would be the taking or detention of a child with the result that the child is removed or kept from the control of a person who had lawful control of that child. This, then, would be similar to the conduct required for the commission of an offence under section 2 of the 1984 Act.

4.5 There would therefore be two elements in the offence: ‘taking or detaining’ the child, and doing so ‘from the control of a person who had lawful control of the child’. Looking at the first of these, it is intended that something active would be required on the part of the offender who would actually have to ‘take’ or ‘detain’ the child. So, if a child simply went to another person or refused to leave a person then that person could not be said thereby to have committed the offence; but the offence would be committed if the person went on deliberately to detain the child.²

4.6 We propose that the terms ‘taking’ and ‘detaining’ should be defined in approximately the same way as in the English provisions. Section 3 of the 1984 Act provides that

- “(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.”

We regard these English provisions as satisfactory, but believe that it would be useful to add to the interpretation of ‘taking’ the situation where a person induces a child to *join* him. We do recognise, however, that the constructions given to the terms are not intended to be exhaustive.

4.7 We now turn to the second element in the offence—the removal of the child from the control of someone having lawful control of that child. We prefer to refer to removal of the child from the ‘control’ rather than from the ‘lawful control’ (as in section 2 of the 1984 Act) of any person having lawful control of the child. We believe that to use the word ‘lawful’ twice in the same phrase is unnecessary and potentially misleading. As in the English provisions, we believe that a term such as ‘lawful control’ would be preferable to a narrower term such as ‘custody’. We believe that it should not be necessary to define ‘lawful control’. Whoever had lawful control of the child on a permanent basis would be determined by the general law. In the

1. But see also the offence of taking a child abroad in Part VI below.

2. This point is expanded in paras 4.20–4.22 below.

normal case, this would be the parents of the child,¹ but the position may have been altered, such as by a court order awarding sole custody to one parent or entrusting the child to the care of the local authority. In addition, lawful control may occur on a temporary basis. In submitting its proposals for changes in the English law, the Criminal Law Revision Committee intended that those who had lawful control of the child for the time being, such as schoolteachers, baby-minders and other persons entrusted with the control of the child, should be included.² The person with lawful control of the child on a permanent basis will, of necessity, have to entrust the control of the child at certain times to others, and at such times those others will also have lawful control of the child. Thus, for example, the offence will cover the case where a child is taken from a school. It will be a question of fact as to whether a person has been entrusted with the lawful control of the child for the time being.

4.8 A further class of persons who will have lawful control of a child on a temporary basis will be those who have been granted a right of access to the child. During the permitted period of access, such persons will have lawful control of the child, and (subject to the qualifications noted below) the offence will be committed if the child is removed from that control.

Persons who may be guilty of the offence

4.9 In many instances the question of who should be guilty of the new offence which we are considering presents no problems. Bearing in mind that the offence is intended as an alternative to the common law crime of abduction and as a replacement for the crime of *plagium*, it plainly must extend to all those who are strangers to the child and who take the child, for example, for purposes of sexual molestation. But, should it also extend to parents of the child, or to other relatives, or to friends or neighbours? The English offence, in section 2 of the 1984 Act, on which we propose to model our new offence, cannot be committed by 'connected' persons, a term which includes parents and guardians of the child.

4.10 In the Memorandum we considered the position of parents and other relatives of the child in relation to the offences which were then proposed.³ We suggested various formulae, some of which would render parents and other relatives liable to prosecution, and some of which would not. Essentially the problem, particularly as between parents, is that the civil law already plays a central role in regulating disputes as to custody. That being so, it can be questioned whether the criminal law should also intervene in such matters.

4.11 On consultation there was considerable support for the view that there are some circumstances in which the criminal law *should* intervene in inter-parental disputes. In particular it was put to us that it should be an offence for a parent who has been deprived of custody rights to 'snatch' his child from the parent with custody. We can see great force in this, and therefore conclude that the new offence should be capable of being committed by parents in certain circumstances.

4.12 There are, however, other circumstances in which, in our view, it would be wrong for the criminal law to punish a parent. One such circumstance is the common one where the parent in question has a right of custody of the child. Such a right will normally exist simply by virtue of being a parent of the child, or it may have been expressly conferred by a court, for example, on the father of a child born out of wedlock, or it may have been confirmed by a court in proceedings in which the other parent has been deprived of his right of custody. Thus, we consider that it should not be an offence, where custody of the child has never been regulated by court order, and even where the parents are separated, for one parent to remove the child from the control of the other. In such a case the answer is to seek a solution to the dispute in the civil courts. So too, if one parent has been awarded custody by court order, and the other has been deprived of custody by court order, it should not be an offence

1. Except in the case of the father of a child born out of wedlock.

2. See the Report of the Criminal Law Revision Committee above, para 241. The Committee envisaged making specific provision for the person having lawful control of the child for the time being, but the draftsman has simply referred to 'any person having lawful control of the child' in s2 of the 1984 Act.

3. See for example para 6.37 *et seq* of the Memorandum.

for the parent with the custody order in his favour to remove the child from the other parent. In such a case the answer may be to seek a variation of the court order.

4.13 Another circumstance in which in general it would be wrong for the criminal law to punish a parent is where that parent has been granted access to the child by court order. So long as that parent is acting within the terms of the access order it should not, in our view, be an offence for him to take or detain the child, even from the other parent. However, access is by its nature a limited right, and we can see no reason why a parent with an access order in his favour should not commit an offence if he takes or detains the child at a time or in circumstances which are not permitted by the order.

4.14 Thus far we have been considering the matter of custody and access rights solely within the context of parents. However, while they will most commonly be the holders of such rights, it is not uncommon for custody or access rights to be granted to persons other than parents. In our view the same principles should apply to anyone with custody or access rights. We accordingly conclude that the offence which we are proposing should not be capable of being committed by any person who has a right of custody of the child, or who has a right of access to the child, but in the latter case only while the person is acting within the scope of that right.

4.15 Apart from those with custody or access rights there will also be others who should not be liable to prosecution for the offence that we are considering. These are persons such as police officers or social workers who on occasions will be legally entitled to take or detain a child. The exclusion of such persons from the scope of the offence is uncontroversial and attracted no adverse comment on consultation.

4.16 Other than the categories of persons considered in the preceding paragraphs, we do not consider that there should be any further restriction on the persons who are to be capable of committing the new offence.

4.17 Having identified those who ought to be excluded from the offence, we can go on to consider the best manner of expressing this. One possibility considered in the Memorandum¹ was to exclude those with 'appropriate entitlement'. This expression attracted a certain amount of criticism on consultation as being too vague and imprecise. On further reflection we agree with that criticism. It seems to us, however, that the various categories of persons whom we now propose should be excluded from the offence all have one feature in common. That is that each could be said to be acting at the relevant time with some form of proper or lawful authority. We note that section 2 of the 1984 Act has the effect of excluding those acting with 'lawful authority'. The phrase 'lawful authority' is reasonably familiar in a statutory context and would, we believe, be appropriate for all of the categories of persons who should, in our opinion, be excluded from the scope of the offence.

4.18 While we believe that the term 'lawful authority' would be an appropriate one to use, we are also of the view that it may not be sufficiently clear in the absence of any definition. Certainly, in the 1984 Act there is no definition of 'lawful authority', but under section 2 of the 1984 Act parents are specifically excluded from the offence. This is not the case with the offence which we propose, where the term will be used to distinguish between those parents and others to whom the offence will apply and those to whom it will not. We believe that some clarification of how the offence will apply to parents is called for.

4.19 We therefore propose that any statutory provision should clarify that a person who has a right of custody of the child—such as a parent with custody rights in the child—and a person who has a right of access to the child will have lawful authority to take or detain that child. In the case of a person with a right of access, however, that person should have lawful authority only during the period of access and while he complied with any conditions attached to that right of access by the court. While

1. In relation to the suggested offence of taking a child to cause him harm: see para 6.23 of the Memorandum.

it may be argued that it is unnecessary to define 'lawful authority' in this way, we believe that it is preferable that the position should be made clear. We would, however, limit any clarification to these two cases and not go on to list all those who may be said to have lawful authority. We believe that it should be sufficiently clear without any express provision that, for example, a person removing a child in some official capacity such as a police officer or social worker could not be said to be doing so without lawful authority.

Reasonable excuse 4.20 Even where a person has no lawful authority to take or detain a child, there will be instances where the child is taken or kept by someone for good or, at least, acceptable reasons. In these circumstances it would be wrong to say that an offence had been committed.

4.21 An example of a child being taken for good reason would be where a neighbour, having observed that a young child had been left unattended in an unlocked house while his parents had gone out for the evening, took the child into his own house. Another example would be where one parent, having had the care of a child during an access period, decided on reasonable grounds that the child was too ill to be returned to the other parent.

4.22 In considering how best to express any such exclusion we note that section 2 of the 1984 Act also excludes those acting with 'reasonable excuse'. We consider that such a term would adequately cover the situations described above. Thus, where a parent detained a child for a short time after an access period with valid reason, then he would be acting with reasonable excuse. On the other hand, should the parent with access rights (or even the neighbour) keep the child for a lengthy period without valid reason, then he would not have any reasonable excuse and so would commit the offence. We do not propose that 'reasonable excuse' should be defined, as this would be counter-productive in view of the innumerable unforeseen circumstances which might arise, but would leave it to the prosecuting authorities and, ultimately, the courts to decide whether there was reasonable excuse in any particular case.

Age of the child 4.23 As well as defining the circumstances of the 'abduction' in a new offence of child abduction, it is also necessary to define what is meant by 'child'. We note that the age limit in relation to children in the 1984 Act was set at sixteen. It would be sensible for the age limit for the analogous offence in Scotland to be the same. Moreover, this is the age limit which marks the end of childhood in many modern statutes.¹ We would therefore propose that, for the purposes of this offence, a child should be defined as any person below the age of sixteen years.

Defence 4.24 The Criminal Law Revision Committee put forward no less than five defences to their proposed offence of child abduction:

- (a) that the defendant was the mother or father of the child;
- (b) that the defendant had a right, or believed he had a right, to the control of the child;
- (c) that the person taking the child believed that the person having lawful control of the child had or would have consented;
- (d) that the defendant believed the child to be aged fourteen or over; or
- (e) that the defendant believed the child not to be in the lawful control of any person.

The first defence, excluding the parents of the child, was incorporated into section 2 of the 1984 Act by limiting the offence to those who were not 'connected' with the child as defined in section 1(2)(a) or (b). However, as indicated above, we are not of the view that parents should in all circumstances be excluded from the crime. The second, third and fifth defences would be covered by an exclusion of those acting with lawful authority or reasonable excuse (which, indeed, was the course adopted

1. See for example s18(1) Family Law Act 1986, in relation to custody proceedings.

by the English draftsman). Accordingly, they would not require to be expressed as special defences.

4.25 The remaining defence, the fourth, was enacted in section 2(2)(a) of the 1984 Act.¹ There is a second defence contained in section 2, namely where a person can show that at the time of the offence

“in the case of an illegitimate child, he had reasonable grounds for believing himself to be the child’s father”.

However, this defence would not be applicable to our proposed offence since fathers are not specifically excluded from it. It too may therefore be omitted. Thus, only one special defence remains, namely that the accused believed the child to have attained sixteen years of age. We believe that there is merit in incorporating a defence of this nature. We would not propose adding any further defences.

4.26 As regards this defence, the Criminal Law Revision Committee was of the view that it should be framed in terms of honest belief as opposed to belief on reasonable grounds.² The Committee does not give reasons for this, but says that it reached this decision in the light of comments received.³ In line with this recommendation, the 1984 Act merely requires the defendant to show a belief that the child was aged sixteen or over. In the Memorandum, we stated our view that the defence should be available only where the person can show that he believed on reasonable grounds that the child had attained the age of sixteen.⁴ While some commentators felt it unnecessary to provide for any express defence whatsoever, those who thought a special defence was desirable favoured a formulation on the basis of reasonable grounds.

4.27 Before leaving this subject, we would refer to the similar defence—also based on belief on reasonable grounds that the person had attained the age of sixteen—contained in the Sexual Offences (Scotland) Act 1976, section 4 (intercourse with a girl aged between thirteen and sixteen). In that instance we note that two limitations are attached to the defence—that the offender is under the age of twenty-four and that he had not previously been charged with a like offence. We do not believe that the first limitation, based on age, would be appropriate for the present offence. The second limitation is open to criticism in that it is unclear as to what is meant by ‘charged’. If thought useful, this could be overcome by excluding those who had been ‘convicted’ of a previous like offence. While such a possibility is worthy of consideration, we ourselves would be against any qualification being made to the special defence. Our reasons for this are twofold. First, the special defence would then be consistent on this point with the defence applicable in England and Wales contained in Part I of the 1984 Act. Second, we consider that it is less clear in the case of the taking or detention of a child why the defence should be denied solely on the basis of a previous conviction. The offence of taking or detaining a child is quite different from that of having sexual intercourse with a girl under the age of sixteen in that it is not as easily defined since it can include the much vaguer notion of inducing the child to accompany, join or remain with the accused person. We believe that the limitation of the defence to those believing on reasonable grounds that the child had attained the age of sixteen should be sufficient.

Jurisdiction

4.28 One consequence of having differing offences of child abduction in Scotland and in England and Wales could be that anomalies might arise regarding jurisdiction. An example of this would be where a parent, say a mother, who had been awarded sole custody of her child, lived in Scotland, and the father (deprived of custody) lived in England. If the father came to Scotland and took the child, then he would be guilty of the proposed offence. On the other hand, if the child ran away to the father in

1. The age of fourteen being altered to sixteen.

2. Report of the Criminal Law Revision Committee above, para 245.

3. *Ibid*, para 233.

4. Para 6.58, in relation to the suggested offence of interference with custody.

England and the father detained him there, then the father would not be committing a statutory offence. The father would not be committing an offence under the English provision,¹ since he is excluded from it, nor under the proposed Scottish provision, since his actions would all have taken place outwith the Scottish jurisdiction. Had he detained the child in Scotland, of course, he would have committed the proposed offence.

4.29 A possibility such as that just described is plainly undesirable and one possible solution would be to find some link justifying an extension of the Scottish courts' jurisdiction to enable them to deal with such cases. We do not believe, however, that this option would be acceptable since it would involve an extension of the jurisdiction of the Scottish courts beyond that which generally applies in the criminal law. The problem is moreover limited to those cases where a person connected² with the child (principally a parent) takes or detains the child, since in all other cases section 2 of the 1984 Act would apply. It is not for us to make recommendations as regards the law of England and Wales. As we are not in a position to do so, we make no recommendation designed to deal with this problem. However, we should point out that the problem would be resolved if the provision for England and Wales similarly applied to any person not having lawful authority.

Recommendations

4.30 Our recommendations for the proposed offence are therefore as follows:

- (3)(a) It should be an offence for any person to take or detain a child from the control of any person having lawful control of that child.**
(Paragraphs 4.4–4.8; clause 1—proposed section 6(1))
- (b) ‘Taking’ should be deemed to include causing or inducing the child to accompany or to join the person or anyone else or causing the child to be taken, and ‘detaining’ should be deemed to include causing the child to be detained or inducing the child to stay with the person or anyone else.**
(Paragraph 4.6; clause 1—proposed section 9(a) and (c))
- (c) Excluded from this offence should be all those who are acting with lawful authority or reasonable excuse.**
(Paragraphs 4.9–4.22; clause 1—proposed section 6(1))
- (d) For these purposes, those acting with lawful authority should expressly include those with a right of custody of the child and those with a right of access to the child—but only while acting within the scope of that right of access.**
(Paragraphs 4.18–4.19; clause 1—proposed section 6(3))
- (e) A child for these purposes should be defined as someone below the age of sixteen years.**
(Paragraph 4.23; clause 1—proposed section 6(1))
- (f) It should be a defence for the accused person to show that at the time of the offence he believed, on reasonable grounds, that the child was aged sixteen or over.**
(Paragraphs 4.24–4.27; clause 1—proposed section 6(2))

1. S2 1984 Act.

2. For those ‘connected’ with a child, see s1(2) 1984 Act.

Part V The Child Abduction Act 1984, Part II

Introduction

5.1 Prior to the 1984 Act it was not a statutory offence to take or send a child out of the United Kingdom. The removal of the child abroad would only be criminal if it constituted a common law crime.¹ Part II of the 1984 Act, however, introduced such an offence into Scotland. The circumstances in which this offence may be committed in Scotland are different from those in which the analogous offence may be committed in England and Wales. This may, at least partly, be explained by the history of the Child Abduction Bill. For our part, we have had to consider whether the existing circumstances in which the statutory offence may be committed in Scotland are the most appropriate, and if not, how the offence should be remodelled. Thereafter, we have gone on to consider whether any further measures are required in order to ensure the efficient prosecution of the offence and whether the interests of the person accused of committing the offence are sufficiently safeguarded.

Present law

5.2 Before examining Part II of the 1984 Act, it is necessary to look at Part I, which applies to England and Wales. As we have seen, Part I creates two offences. The first, contained in section 1, aims at preventing someone connected with a child, principally a parent, from taking or sending a child out of the United Kingdom without the appropriate consent (generally of the other parent or of the court). A person is regarded as being 'connected' with a child if he is a parent or guardian of the child; if there is a court order awarding him custody of the child; or, in the case of an illegitimate child, if there are reasonable grounds for believing that he is the father of the child. The order referred to was previously that of a court in England and Wales, but after the coming into force of the Family Law Act 1986, this is extended to that of a court in the United Kingdom.² The 'appropriate consent' is the consent of each person who is a parent or guardian of the child or to whom custody has been awarded by a court order—again extended to a court in the United Kingdom; if the child is the subject of a custody order, the leave of the court which made the order; or the leave of the court granted under section 7 of the Guardianship of Minors Act 1971 or section 1(3) of the Guardianship Act 1973. This offence was seen by supporters of the Bill as meeting the increasing highly distressing problem of children being wrongfully taken abroad.

5.3 The second offence, contained in section 2, to which we have previously referred, aims at preventing an unconnected person from unlawfully taking or detaining a child. As we have noted, that offence gave effect to a recommendation contained in the Report of the Criminal Law Revision Committee.³

5.4 As we have mentioned,⁴ the original intention of applying the Bill only to England and Wales proved problematic. If the first offence was to be committed when the child was taken out of England and Wales, then there would be an unacceptable restriction on travel between England and Scotland. Alternatively, if committed by taking the child out of the United Kingdom, then the offence could be avoided by

1. In Scotland, abduction or *plagium*: see Parts II and III above.

2. S65 Family Law Act 1986.

3. See para 1.2 above.

4. See para 1.3 above.

a parent leaving the United Kingdom from Scotland. Since the Bill did not apply in Scotland, no offence would have been committed. Once this lacuna had been appreciated, a comparable provision was drafted for Scotland in the latter stages of the Bill's parliamentary progress and the Bill was amended in the Commons at the Report Stage on 6 April 1984. (Of course, to meet the gap, it was only necessary to have a parallel provision for the offence contained in section 1; there was no need to extend the offence in section 2 to Scotland at that stage.)

5.5 Part II of the Bill was therefore added, applying to Scotland. It creates an offence, specified in section 6, where a person connected with a child takes or sends a child out of the United Kingdom in contravention of a court order, in certain cases without the appropriate consent (generally of the parent or of the court). There the matter was left until a more thorough review could be carried out of Scots criminal law in this area.

Criticisms of the present law

5.6 A number of criticisms may be made of section 6 of the 1984 Act, and we have considered these in some detail in the Memorandum.¹ The main criticism is that it applies only to persons 'connected' with a child whereas the offence may be even more appropriate in relation to those 'unconnected' with the child. Those commenting on the Memorandum also expressed dissatisfaction with section 6, both as regards its content and its drafting. Reform is therefore clearly called for.

Options for reform

5.7 The first option for reform which may be considered is whether there should be any legislation dealing with the removal of children abroad at all. As section 6 creates such an offence, this option would entail the repeal of Part II of the 1984 Act. In the Memorandum we recognised that there is something to be said for this option.² Equally, we recognised that there is considerable public concern as to those cases where one parent has taken a child abroad in order to prevent the other parent having custody of the child. Moreover, there would be an understandable reluctance simply to repeal so recent a measure. We therefore accept that there should be some statutory provision.

5.8 Despite the criticisms of section 6 of the 1984 Act, we do not believe that it would be an acceptable option simply to adopt a provision similar to section 1, since section 1 is itself open to criticism. Most notably, section 1 requires a parent to obtain certain consents before taking his child abroad, even in the absence of a court order. We believe that this could, in some cases, lead to absurd results. For example, read literally, a French parent who brought his child to Dover for the day would commit the offence on taking the child back to France unless he had first obtained the appropriate consent (which in most cases would be the consent of the other parent). There are a number of other examples which may be given of the anomalous results of section 1 which we have set out in some detail in the Memorandum.³

5.9 In the Memorandum we put forward for consideration two circumstances in which it might be appropriate to make it an offence to take or send a child abroad. The first would be where a child was taken or sent abroad in contravention of a court order. The second would be where the child was taken or sent abroad in order to prevent the custody of the child being determined by a court in the United Kingdom.⁴ Since a Scottish interdict is pronounced only against a named individual or individuals and is effective only when he or they have notice of it (unlike a prohibition attached

1. Paras 3.15–3.18.

2. Paras 6.69–6.74.

3. See paras 3.4–3.10.

4. Para 6.75.

to an English custody order which, we understand, can be effective against the world at large) we also proposed that Scottish courts should be able to pronounce an order prohibiting removal from the country by 'any person'.¹ Finally, we suggested that there is no reason why the offence should be limited only to those who were 'connected' with the child.²

5.10 Amongst those commenting on the Memorandum, the majority agreed that there should be a statutory offence involving the removal of a child abroad, with most agreeing with the offence proposed in the Memorandum. Only a small number submitting comments favoured the repeal of Part II of the 1984 Act without anything being put in its place. They would have preferred leaving the matter to the civil courts, which could deal with any contravention of their orders by way of contempt of court. Certain doubts were expressed by some commentators as to the desirability of including the second part of the proposed offence (where the child was taken abroad to prevent a court determining custody). Almost all agreed that provision should be made for a general order prohibiting the removal of the child from the United Kingdom by any person and that the offence should apply to anyone. We have attempted to take these views into account, and we set out our proposals for a revised statutory offence in Part VI below.

1. Para 6.77.
2. Para 6.79.

Part VI Proposed offence of taking or sending a child out of the United Kingdom

Scope of the offence

The conduct required

6.1 Having reached the conclusion that there should be a statutory offence of taking a child abroad, we move on to consider how such an offence should operate. After considering views expressed on consultation, we do not propose to make provision for the situation where a person takes a child abroad with the intention of preventing someone else from having the custody of the child determined by a court. There are a number of reasons for excluding this ground. In the first place, there would be difficulties in proving precisely what the intention of the accused was. Secondly, in any prosecution, the alleged offender could maintain that in taking the child abroad he was acting in the best interests of the child. If a court in another country, by awarding custody to that parent, indicated that it shared that view, it might be regarded as somewhat anomalous if the parent could still be prosecuted in Scotland. Finally, the offence would be much more uncertain if this second ground was included. For all of these reasons, we would limit the offence to the single ground of where a child is taken or sent abroad in contravention of a court order. The offence would then be a straightforward one, involving the existence of a court order and the removal of a child abroad in contravention of that order.

6.2 Like its English counterpart,¹ the offence would involve ‘taking’ or ‘sending’ a child abroad. Again—as with the first offence which we proposed in this Report²—the concepts of ‘taking’ and ‘sending’ should include causing or inducing the child to accompany or to join the offender or anyone else, or causing the child to be taken or sent. Thus, a parent could not evade the offence simply by employing someone else to take the child abroad.

6.3 In this context, by taking or sending the child ‘abroad’, we envisage the taking or sending of the child out of the United Kingdom as opposed to simply out of Scotland. This would be consistent with section 1 (applying to England and Wales) and section 6 (applying to Scotland) of the 1984 Act which made it an offence to take the child out of the United Kingdom.³ However, by enlarging in this way the territory in which the offence may be committed, certain difficulties regarding jurisdiction arise, to which we shall refer later.⁴

6.4 Although a court order may have been made prohibiting a person from removing a child abroad, there may be circumstances in which the court would consent to such removal, for instance, to enable the child to be taken on holiday. Clearly, provision would have to be made for such cases. It should therefore be open to any person prohibited from taking a child abroad to apply to the court for consent to do so. If such consent were given, then no offence would be committed by taking the child abroad. Thus, it would be an offence to take a child abroad in contravention of a court order only where the consent of that court had not first been obtained.

Persons who may be guilty of the offence

6.5 As indicated in the Memorandum,⁵ we have some difficulty in understanding why sections 1 and 6 of the 1984 Act should be confined to persons who are ‘connected’

1. S1 1984 Act.

2. See para 4.6 above.

3. See para 5.4 above.

4. See para 6.13 below.

5. Para 6.79.

with the child. We propose that in principle it should be possible for anyone to commit the offence.

Age of the child 6.6 As for the first offence which we have proposed in this Report,¹ and for the same reasons, we believe that a child should be defined as a person under the age of sixteen for the purposes of this offence. This is the same age as in the English provisions and in the current Scottish provisions.²

Types of order 6.7 As indicated above, we propose that it should be an offence in certain circumstances to take or send a child abroad in contravention of a court order. The type of order referred to in section 6(1)(b) of the 1984 Act 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'. As stated in the Memorandum,³ we are in broad agreement with a formulation of this nature, and we would propose to follow this general approach. Thus, an order of a court in England, Wales or Northern Ireland, as well as of a court in Scotland, prohibiting the removal of a child from the United Kingdom would constitute a relevant order.

6.8 In the particular case of a child who is a ward of court, as we understand the position, any important step involving the ward can only be taken with the leave of the court. Taking the child abroad would be one such step. The person removing the child abroad without the court's consent would therefore be guilty of contempt of court. However, the further question arises as to whether he should also be regarded as committing the proposed new offence if the child is taken abroad from Scotland. Where there was a court order making the child a ward of court, the new offence would be committed; any removal of the child abroad would be in contravention of that order. However, under wardship procedure, the child becomes a ward of court as soon as the application is presented, without there having been any judicial consideration of the matter. If a wardship application automatically has the effect of preventing the child from being taken abroad, it could be argued that the application may be regarded as a deemed order of a court preventing any person from taking the child abroad. If that is so, then arguably the proposed offence should also apply where there has simply been an application for wardship. In this regard, we are conscious that a distinction is drawn in section 41 of the Supreme Court Act 1981 between a child being made a ward of court—which can only be done by virtue of a High Court order—and a child becoming a ward of court on the making of a wardship application. The section is in the following terms:

“Wards of court

41.—(1) Subject to the provisions of this section, no minor shall be made a ward of court except by virtue of an order to that effect made by the High Court.

(2) Where an application is made for such an order in respect of a minor, the minor shall become a ward of court on the making of the application, but shall cease to be a ward of court at the end of such period as may be prescribed unless within that period an order has been made in accordance with the application.

(3) The High Court may, either upon an application in that behalf or without such an application, order that any minor who is for the time being a ward of court shall cease to be a ward of court.”

The conclusion which may be drawn from this distinction and from the clear terms of subsection (1) is that a mere application to the court could not be regarded as the same as an order of a court. We therefore take the view that a wardship application would not for these purposes be deemed to be a court order. Accordingly, the taking abroad of a child in respect of whom an application for wardship had been made would not in itself bring into operation the proposed offence. While we recognise that the matter is not altogether beyond doubt, we do not believe that it is necessary to make any recommendation dealing specifically with wardship applications.

1. See Part IV and in particular para 4.23 above.

2. Ss1 and 6 1984 Act respectively.

3. Para 6.76.

Interdict 6.9 The appropriate order which a Scottish court would grant in order to prevent the removal of a child from its jurisdiction would be an interdict. At present, at common law, a court in Scotland may grant an interdict against the removal of a child from its jurisdiction, which in the case of the Court of Session would be Scotland and in the case of a sheriff court would be the sheriffdom. Under section 35(3) of the Family Law Act 1986, both the Court of Session and the sheriff court may grant interdict prohibiting removal of a child from the United Kingdom or any part of it on the application of certain specified persons.¹ Application may be made by:

- (a) a party to custody proceedings or other proceedings in which an interdict can competently be granted,
- (b) the child's tutor or curator, or
- (c) any person who has or wishes to obtain the custody or care of the child.²

We see no reason to limit the class of person entitled to apply for an interdict prohibiting removal of the child from the United Kingdom, especially since a court order will form the basis for the proposed offence. We therefore recommend that any person able to show an interest should be entitled to apply. Over the years, however, numerous restrictions have been placed on the circumstances in which an interdict may be granted. Thus, an interdict may be sought only where there is a reasonable apprehension of a person or certain stated persons—the defender(s)—taking the child abroad, and the order may only be made against that person or those persons. The court could not interdict or prohibit all the world from doing something.

General order 6.10 In view of the restrictions which have been placed on the law of interdict, we put forward in the Memorandum the proposal that Scottish courts should be enabled to pronounce a more general order which would prohibit 'any person' from removing the child from the country.³ Those commenting on the Memorandum saw a real and immediate need for such an order. After much consideration, we have reached the conclusion that if the removal of a child is to be successfully prevented, the courts must have the power to make a general order prohibiting anyone from removing the child abroad. We think that the grounds of jurisdiction to make such an order should be the same as the grounds of jurisdiction to grant a custody order in respect of the child. The jurisdiction of the Scottish courts to grant custody orders is set out in Chapter III of the Family Law Act 1986. Briefly, the courts would have jurisdiction in the following circumstances:

- (a) in the course of proceedings for divorce, nullity of marriage or separation;
- (b) if there are no proceedings for divorce, nullity of marriage or separation continuing in the United Kingdom, there would be jurisdiction
 - (i) in the Court of Session or sheriff court where the child is habitually resident in Scotland or in the sheriffdom respectively; or
 - (ii) where the child is not habitually resident in the United Kingdom, but is present in Scotland, in the Court of Session, or in the sheriff court where either the pursuer or defender is habitually resident in the sheriffdom; and
- (c) an emergency jurisdiction would be conferred on the Court of Session and sheriff court if the child is present in Scotland or in the sheriffdom respectively and a custody order is considered necessary for the child's immediate protection.

We believe that an application for a general order should be capable of being made by any person able to show sufficient interest to the court. It should be competent for such an order to be made subject to exceptions, so that, for example, the applicant might be excluded from the prohibition. We envisage that the order may be varied or recalled by the court on the application of any person claiming an interest. Finally, we propose that the general order against all persons, and any variation of it, as well as any interdict against specified persons, should cease to have effect on the child attaining the age of sixteen.

1. See Appendix C.

2. S35(4) Family Law Act 1986.

3. Para 6.77.

Defence 6.11 There remains one final important matter which requires to be dealt with in relation to the proposed offence, namely whether there need be any express defence to it. Having considered whether any special defences ought to be provided, and if so what these should be, we have concluded that only one special defence is called for. The essence of this defence would be lack of knowledge of the court order prohibiting removal of the child abroad. Such knowledge could alternatively be made a constituent element of the offence. However, if that were the case, the Crown might experience overwhelming difficulty in proving what was in the mind of the accused. The matter may be satisfactorily dealt with by providing for a special defence where the accused had no knowledge of the court order prohibiting the removal of the child from the United Kingdom. The person taking a child abroad in such circumstances might be doing so quite innocently and should not be committing an offence.

6.12 A similar defence is contained in Part II of the 1984 Act.¹ That defence operates where the accused had no reason to believe that a court order was in existence. Such a formulation of the defence raises an important issue, namely whether the defence should be in terms of having 'no reason to believe' that the order was in existence or simply in terms of 'not knowing' of it. We recognise that there may be strong arguments in favour of the former type of formulation. Principally, since the test would be more objective, it would be easier for the prosecution to counter such a defence. The court would have to infer from the surrounding circumstances whether or not the accused would have had reason to believe that there was such a court order in existence. It would not simply rely upon the accused's evidence of his own state of knowledge. We acknowledge that this is a particularly important issue since, once a special defence has been raised, it is for the prosecution to exclude it beyond reasonable doubt.² Moreover, we recognise that circumstances might arise in which the accused ought, on reasonable grounds, to have known of the court order but, in fact, did not have such knowledge. An example of this would be where an accused, on being served with court papers (containing the court order), deliberately disposes of them rather than opening and reading them. However, as a matter of principle, since knowledge of the order will be the foundation of the offence, we believe that lack of it should be the basis of the defence. We therefore propose that there should be a defence and that this defence should operate where the accused 'did not know' of the existence of the court order.

Jurisdiction

6.13 In the Memorandum we drew attention to the cross-border implications arising from the difference in the way in which sections 1 and 6 of the 1984 Act are framed.³ Our terms of reference direct us specifically to consider such cases. The problem exists since section 1 makes it an offence according to the law of England and Wales to do certain things anywhere in the United Kingdom, and section 6 makes it an offence according to the law of Scotland to do certain things in the United Kingdom, but in some respects the prohibited acts are different. Thus, under section 1, a parent commits an offence under English law, in the absence of a custody order, if he takes or sends a child out of the United Kingdom without the consent of the other parent. However, section 6 creates no comparable offence under Scots law. To take an example, a parent in such a case may take a child abroad from Scotland without the consent of the other parent. That parent will not be committing an offence under Scots law. However, the question arises whether the English courts would be entitled to claim jurisdiction to try that person for an offence under English law as set out in section 1.

6.14 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 court in the United Kingdom prohibiting the removal of the child from the United Kingdom or any part of it. No similar offence is created by

1. S6(5).

2. See Renton and Brown, *Criminal Procedure in Scotland* (Fifth Edn), para 18-02.

3. See paras 3.19-3.22.

section 1. A similar question could therefore arise under the 1984 Act if a person connected with a child took or sent him abroad from England when there was a United Kingdom court order prohibiting the removal of the child from the United Kingdom. As section 1 does not make it an offence to take a child abroad in contravention of a court order, he would not be committing an offence under English law. Comparable questions would then arise in relation to the jurisdiction of the Scottish courts, namely, whether the Scottish courts would be entitled to claim jurisdiction to try that person even although all of the actings had taken place in England. These questions which arise under the 1984 Act would still remain in relation to the offence which we propose since that too would apply to actings in the whole of the United Kingdom and the actual actings would still differ substantially from those prohibited by section 1 of the 1984 Act.

6.15 In general, as we understand the position, the criminal jurisdiction of the courts in Scotland and in England and Wales is dependent upon the occurrence of a criminal act in Scotland or in England and Wales respectively. The rules of *locus delicti* would apply and the person committing the offence would be subject to the jurisdiction of the court with authority to deal with that offence in the place where the offence was committed.¹ Thus, the courts would have to look to see whether sufficient actings had taken place within their territory before they could establish jurisdiction to try the case.

6.16 Extraterritorial jurisdiction is conferred only if expressly provided for by statute.² In that event, the words used must be “so clear and specific as to be incapable of any other meaning”.³ The English authorities have recently been reviewed in the case of *Regina v. Bevan*.⁴ There, the Court of Appeal referred to the basic principle that:

“No British subject can be tried under English law for an offence committed abroad unless there is a statutory provision to the contrary.”

In the case of the 1984 Act, as stated in the Memorandum,⁵ the conclusion which we reached was that sections 1 and 6 do not contain clear words expanding the jurisdictions of the Scottish and English courts and therefore, as a matter of construction, should not be taken as having extraterritorial effect. When one looks to the history of the Child Abduction Bill, that view is reinforced. The reason for adding Part II to the Bill was that it was perceived that without it a person could avoid the offence contained in section 1 by taking the child abroad from Scotland. Had the Bill conferred extraterritorial jurisdiction on the courts of England and Wales this would not have been the case. We believe that the position will remain the same as regards the new Scottish offence which we propose since again no express extraterritorial jurisdiction will be conferred. The general rules of *locus delicti* would therefore apply.

6.17 Accordingly, there are jurisdictional problems which arise from the way in which sections 1 and 6 of the 1984 Act are framed. Even after substitution of the offence proposed in this Report for that in section 6, these problems will still remain. However, we are unable single-handedly to put forward any recommendations to deal with those cases with cross-border implications. We would regard as undesirable an express provision that an offence is committed under Scots law if the activity in question occurs in England and Wales, and vice-versa.⁶ Not only would that represent a substantial innovation in criminal law and procedure, but it would also create enormous difficulties for the police and those others involved in operating the provisions. We believe that the only real solution to the problem lies in having a single offence applicable throughout the United Kingdom. We have already made clear that we have grave reservations as to the formulation of the offence in England and Wales,⁷ and we would certainly not be disposed to support an extension of the English model

1. Cf Renton and Brown above, para 1-07; *Cox v. Army Council* (1962) 46 Cr App R 258 at 262.

2. Eg Criminal Procedure (Scotland) Act 1975 s6(1), Offences Against the Person Act 1861 s9.

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

4. The Times Law Report, 24 Oct 1986.

5. Para 3.22.

6. See also on this point paras 6.89-6.90 of the Memorandum.

7. See paras 3.4-3.10 of the Memorandum.

to Scotland. We have no jurisdiction to make proposals for reform outside Scotland, and we therefore refrain from making any recommendation on this point.

Recommendations

6.18 Our recommendations for this proposed offence are therefore as follows:

- (4)(a) It should be an offence for any person to take or send a child out of the United Kingdom in contravention of an order of a court in the United Kingdom prohibiting the removal of the child from the United Kingdom or any part of it without first obtaining the consent of that court.**
(Paragraphs 6.1–6.4; clause 1—proposed section 7(1))
- (b) ‘Taking’ should be deemed to have the same meaning as in Recommendation (3)(b) above, and ‘sending’ should be deemed to include causing the child to be sent.**
(Paragraph 6.2; clause 1—proposed section 9(a) and (b))
- (c) A child for these purposes should be defined as someone below the age of sixteen years.**
(Paragraph 6.6; clause 1—proposed section 7(1))
- (d) It should be a defence for the person removing the child from the United Kingdom to show that he did not know of the existence of the court order.**
(Paragraphs 6.11–6.12; clause 1—proposed section 7(2))
- (e) Any person claiming an interest should be entitled to apply to the Court of Session or the sheriff court for an interdict prohibiting the removal of the child from the United Kingdom or any part of it by any named person or persons.**
(Paragraphs 6.7–6.9; clause 2(a))
- (f) On the application of any person claiming an interest, in those instances where they would have power to make a custody order in relation to a child, the Court of Session and the sheriff court should be enabled to make a general order prohibiting the removal by any person of the child from the United Kingdom or any part of it.**
(Paragraph 6.10; clause 2—proposed section 35(4))
- (g) This general order should be capable of being made subject to exceptions.**
(Paragraph 6.10; clause 2—proposed section 35(4))
- (h) The general order should be subject to variation and recall by the court on the application of any person able to show an interest.**
(Paragraph 6.10; clause 2—proposed section 35(4A))
- (i) An interdict or general order prohibiting the removal of a child from the United Kingdom or any part of it, as well as any variation of a general order, should cease to have effect when the child attains the age of sixteen.**
(Paragraph 6.10; clause 2—proposed section 35(4B))

Part VII Ancillary matters

Children in care

7.1 By virtue of our terms of reference, we were required to have regard to the position of children in care or under supervision under the Social Work (Scotland) Act 1968 or other legislation.¹ Both the Social Work (Scotland) Act 1968 and the Adoption (Scotland) Act 1978 make it an offence in certain circumstances to remove children who come within the terms of these Acts. In the case of the second offence which we propose—of taking or sending a child out of the United Kingdom—we believe that no problem should arise as a result of these Acts. The reason for this is that there will not be a court order under these Acts prohibiting the removal of the child abroad.² Normally orders under these Acts will not be made by a court but by a body such as a local authority or a children's hearing. Even where the order is made by a court, such as in exercising an appellate function, it would not have the effect of prohibiting the removal of the child abroad. The provisions of these Acts and of our proposed offence are therefore quite separate in this regard.

7.2 However, in the case of the first offence which we propose in this Report—of taking or detaining a child—we recognise that there will be some overlap between this proposed offence and the offences under these Acts. Each will in some way be concerned with the taking and detaining of children.

7.3 We believe that it would be an almost impossible task to remove this overlap altogether by making clear the circumstances in which each offence would exclusively apply. Moreover, the offences in these Acts fulfil a different function from the offence which we propose. They act as a deterrent against perverting the course of justice whereas the offence which we propose will be a replacement for the common law crimes of abduction in relation to children and *plagium*. The overlap exists at present as between these common law crimes and the offences under these Acts. This does not appear to present any difficulties, perhaps because prosecutions under these Acts are not very common. Prosecutors will therefore still have to choose which charge would be more appropriate.

7.4 For these reasons, and also because we would be reluctant to encumber any enactment giving effect to our recommendations with complex provisions dealing with these Acts, we are prepared to accept that some overlap of offences will continue to exist. In any event, none of our consultees was in favour of making any special provision for children in care or under supervision.

7.5 We therefore recommend that:

- (5) **No special provision should be made for children in care or under supervision.**
(Paragraphs 7.1–7.4)

Penalties

7.6 One anomaly of the 1984 Act is that the penalty for unlawfully taking or sending a child abroad is different in Scotland from that in England and Wales. In Scotland the maximum penalty on summary conviction is three months imprisonment or

1. See para 1.1 above for the full terms of reference. See also Part VII of the Memorandum.

2. But see s50(1) Adoption (Scotland) Act 1978 dealing with taking or sending a child abroad for adoption in contravention of that subsection.

the statutory maximum fine¹ or both. On conviction on indictment it is two years imprisonment or an unlimited fine or both.² In England and Wales the maximum penalty for the similar offence (as well as for the offence of taking or detaining a child from a person with lawful control of that child) is, on summary conviction, six months imprisonment or the statutory maximum fine,³ or both. On conviction on indictment it is seven years imprisonment or an unlimited fine or both.⁴

7.7 We can see no reason why the penalty should differ north and south of the border. We are accordingly of the view that the maximum penalty for the two offences which we propose in this Report should be the same as that applicable to the analogous offences in England and Wales.

7.8 We would therefore recommend that:

- (6) The maximum penalty for both offences proposed in this Report should be, on summary conviction, six months imprisonment or the statutory maximum fine or both, and on conviction on indictment, seven years imprisonment or an unlimited fine or both.**

(Paragraphs 7.6–7.7; clause 1—proposed section 10)

Arrest

7.9 In order to avoid any doubt, we propose that there should be an express provision to the effect that a constable in Scotland would have a power of arrest without warrant. This would apply in relation to any person whom the constable reasonably suspected of attempting to commit, committing or having committed either of the proposed new Scottish offences.

7.10 We therefore recommend that:

- (7) A constable in Scotland should have the express power to arrest without warrant anyone whom he reasonably suspects of attempting to commit, committing or having committed either of the offences proposed in this Report.**

(Paragraph 7.9; clause 1—proposed section 8)

Evidence

7.11 We have considered whether any provision need be made to facilitate the practical application of our proposals. As regards the proposed offence of taking or detaining a child, we are of the view that no special provision is called for. On the other hand, as the proposed offence of taking or sending a child out of the United Kingdom will involve doing so in contravention of a court order, we believe that provision ought to be made regarding the proof of such orders.

7.12 Where the court order is a general one,⁵ it will apply to everyone, unless expressly excluded. The accused will therefore have been precluded from removing the child abroad unless he had been expressly excluded from the scope of the order. Conversely, where the court order is of the nature of an interdict or interim interdict, the prosecutor will have to prove that the order applies to the accused person. Since this will generally be in the nature of routine evidence, we propose that where the prosecutor has to prove the application of an order to an accused person, this should be sufficiently established if the prosecutor serves on the accused a copy of a duly authenticated copy or extract of the court order at least fourteen days prior to the trial. In the event that the accused disputes that the order applies to him, there should

1. At present £2,000, in terms of the Criminal Procedure (Scotland) Act 1975 s289B(6), as applied by Criminal Justice Act 1982 s74(2), and as amended by The Increase of Criminal Penalties etc (Scotland) Order 1984 art 3.

2. S8 1984 Act.

3. As defined by s74 of the Criminal Justice Act 1982—presently £2,000.

4. S4(1) 1984 Act.

5. See para 6.10 above.

be a requirement that he serves notice on the prosecutor denying such application at least six days prior to the trial. If he does this, then the normal rules of evidence will apply.

7.13 It will also generally be a matter of routine evidence to establish that the child named in the court order is the child in relation to whose removal the criminal proceedings have been taken. We therefore consider that it should be possible to establish this in a similar manner. Accordingly, we propose that this may also be sufficiently established if the prosecutor serves on the accused a copy of a duly authenticated copy or extract of the court order at least fourteen days before the trial. Should the accused dispute that the child removed is the same child as the one named in the court order, he would have to serve notice to this effect on the prosecutor at least six days before the trial. The prosecutor would then have to prove this point according to the normal rules of evidence.

7.14 In order to prove the order of a Scottish court, it should be sufficient simply to lodge in court the original duly authenticated order or a properly certified extract of it.¹ In the case of non-Scottish court orders, the 1984 Act already makes provision for their proof in order to obviate the need for court officials to travel unnecessarily to give evidence. We propose to repeat that provision. Any such provision should equally apply to orders and documents issued by Scottish courts. A duly authenticated copy or extract of an order of a court in the United Kingdom should be deemed to be a true copy unless the contrary is shown. The copy or extract should be sufficient, but not conclusive, evidence of the terms of the order. Therefore it would still be open for either party to challenge the order. Provision should further be made that a copy or extract will be deemed to be duly authenticated if it bears to be certified by the judge or a court officer to be a true copy.

7.15 We would therefore make the following recommendations:

(8)(a) In any prosecution for taking or sending a child out of the United Kingdom in contravention of an order of a court in the United Kingdom, the application of that order to the accused should be sufficiently established where the prosecutor has served a copy of a duly authenticated copy or extract of the order on the accused at least fourteen days prior to the trial, unless the accused serves notice on the prosecutor denying such application at least six days prior to the trial.

(Paragraph 7.12; clause 1—proposed section 7(4))

(b) In any such prosecution, it should be sufficiently established that the child named in the court order is the child in relation to whose removal the criminal proceedings have been taken where the prosecutor has served a copy of a duly authenticated copy or extract of the order on the accused at least fourteen days prior to the trial, unless at least six days prior to the trial, the accused serves on the prosecutor a notice denying that fact.

(Paragraph 7.13; clause 1—proposed section 7(4))

(c) For these purposes, a duly authenticated copy or extract of an order of a court in the United Kingdom or of a document issued by that court should be deemed to be a true copy or extract unless the contrary is shown and should be sufficient evidence of the terms of that order or document.

(Paragraph 7.14; clause 1—proposed section 7(3))

(d) Such a copy or extract should be deemed to be duly authenticated if it bears to be certified by the judge or a court officer as a true copy.

(Paragraph 7.14; clause 1—proposed section 7(5))

Consequential amendments

7.16 It is recognised that certain consequential amendments will require to be made to other statutes, namely the Firearms Act 1968 and the Suppression of Terrorism Act 1978. These are noted in the draft Bill annexed to this Report.

1. Cf Walker & Walker, *The Law of Evidence in Scotland*, para 205.

Draft legislation

7.17 A draft Bill giving effect to the foregoing recommendations is annexed to this Report.¹

1. See Appendix A.

Part VIII Summary of recommendations

Abduction

- (1) The common law crime of abduction should not be abolished or modified by statute in relation to the abduction of children.
(Paragraphs 2.1–2.13)

Plagium

- (2) The common law crime of *plagium* should be abolished.
(Paragraphs 3.1–3.7; clause 1—proposed section 6(4))

Proposed offence of taking or detaining a child

- (3)(a) It should be an offence for any person to take or detain a child from the control of any person having lawful control of that child.
(Paragraphs 4.4–4.8, 4.30; clause 1—proposed section 6(1))
- (b) ‘Taking’ should be deemed to include causing or inducing the child to accompany or to join the person or anyone else or causing the child to be taken, and ‘detaining’ should be deemed to include causing the child to be detained or inducing the child to stay with the person or anyone else.
(Paragraphs 4.6, 4.30; clause 1—proposed section 9(a) and (c))
- (c) Excluded from this offence should be all those who are acting with lawful authority or reasonable excuse.
(Paragraphs 4.9–4.22, 4.30; clause 1—proposed section 6(1))
- (d) For these purposes, those acting with lawful authority should expressly include those with a right of custody of the child and those with a right of access to the child—but only while acting within the scope of that right of access.
(Paragraphs 4.18–4.19, 4.30; clause 1—proposed section 6(3))
- (e) A child for these purposes should be defined as someone below the age of sixteen years.
(Paragraphs 4.23, 4.30; clause 1—proposed section 6(1))
- (f) It should be a defence for the accused to show that at the time of the offence he believed, on reasonable grounds, that the child was aged sixteen or over.
(Paragraphs 4.24–4.27, 4.30; clause 1—proposed section 6(2))

Proposed offence of taking or sending a child out of the United Kingdom

- (4)(a) It should be an offence for any person to take or send a child out of the United Kingdom in contravention of an order of a court in the United Kingdom prohibiting the removal of the child from the United Kingdom or any part of it without first obtaining the consent of that court.
(Paragraphs 6.1–6.4, 6.18; clause 1—proposed section 7(1))

- (b) 'Taking' should be deemed to have the same meaning as in Recommendation (3)(b) above, and 'sending' should be deemed to include causing the child to be sent.
(Paragraphs 6.2, 6.18; clause 1—proposed section 9(a) and (b))
- (c) A child for these purposes should be defined as someone below the age of sixteen years.
(Paragraphs 6.6, 6.18; clause 1—proposed section 7(1))
- (d) It should be a defence for the person removing the child from the United Kingdom to show that he did not know of the existence of the court order.
(Paragraphs 6.11–6.12, 6.18; clause 1—proposed section 7(2))
- (e) Any person claiming an interest should be entitled to apply to the Court of Session or the sheriff court for an interdict prohibiting the removal of the child from the United Kingdom or any part of it by any named person or persons.
(Paragraphs 6.7–6.9, 6.18; clause 2(a))
- (f) On the application of any person claiming an interest, in those instances where they would have power to make a custody order in relation to a child, the Court of Session and the sheriff court should be enabled to make a general order prohibiting the removal by any person of the child from the United Kingdom or any part of it.
(Paragraphs 6.10, 6.18; clause 2—proposed section 35(4))
- (g) This general order should be capable of being made subject to exceptions.
(Paragraphs 6.10, 6.18; clause 2—proposed section 35(4))
- (h) The general order should be subject to variation and recall by the court on the application of any person able to show an interest.
(Paragraphs 6.10, 6.18; clause 2—proposed section 35(4A))
- (i) An interdict or general order prohibiting the removal of a child from the United Kingdom or any part of it, as well as any variation of a general order, should cease to have effect when the child attains the age of sixteen.
(Paragraphs 6.10, 6.18; clause 2—proposed section 35(4B))

Children in care

- (5) No special provision should be made for children in care or under supervision.
(Paragraphs 7.1–7.5)

Penalties

- (6) The maximum penalty for both offences proposed in this Report should be, on summary conviction, six months imprisonment or the statutory maximum fine or both, and on conviction on indictment, seven years imprisonment or an unlimited fine or both.
(Paragraphs 7.6–7.8; clause 1—proposed section 10)

Arrest

- (7) A constable in Scotland should have the express power to arrest without warrant anyone whom he reasonably suspects of attempting to commit, committing or having committed either of the offences proposed in this Report.
(Paragraphs 7.9–7.10; clause 1—proposed section 8)

Evidence

- (8)(a) In any prosecution for taking or sending a child out of the United Kingdom in contravention of an order of a court in the United Kingdom, the application of that order to the accused should be sufficiently established where the

prosecutor has served a copy of a duly authenticated copy or extract of the order on the accused at least fourteen days prior to the trial, unless the accused serves notice on the prosecutor denying such application at least six days prior to the trial.

(Paragraphs 7.12, 7.15; clause 1—proposed section 7(4))

- (b) In any such prosecution, it should be sufficiently established that the child named in the court order is the child in relation to whose removal the criminal proceedings have been taken where the prosecutor has served a copy of a duly authenticated copy or extract of the order on the accused at least fourteen days prior to the trial, unless at least six days prior to the trial, the accused serves on the prosecutor a notice denying that fact.

(Paragraphs 7.13, 7.15; clause 1—proposed section 7(4))

- (c) For these purposes, a duly authenticated copy or extract of an order of a court in the United Kingdom or of a document issued by that court should be deemed to be a true copy or extract unless the contrary is shown and should be sufficient evidence of the terms of that order or document.

(Paragraphs 7.14–7.15; clause 1—proposed section 7(3))

- (d) Such a copy or extract should be deemed to be duly authenticated if it bears to be certified by the judge or a court officer as a true copy.

(Paragraphs 7.14–7.15; clause 1—proposed section 7(5))

Appendix A

CHILD ABDUCTION (SCOTLAND) BILL

ARRANGEMENT OF CLAUSES

Clause

1. Amendments of Child Abduction Act 1984.
2. Powers to restrict removal of child from jurisdiction.
3. Other amendments.
4. Short title, commencement and extent.

DRAFT
OF A
BILL
TO

Amend, as respects Scotland, the Child Abduction Act 1984; and for connected purposes.

BEIT 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:—

1. For Part II of the Child Abduction Act 1984 there shall be substituted the following—

“PART II

OFFENCES UNDER LAW OF SCOTLAND

Offence of taking or detaining of child. 6.—(1) Subject to subsection (2) below, a person commits an offence, if, without lawful authority or reasonable excuse—

- (a) he takes a child under the age of sixteen years with the result that the child is removed from the control of any person having lawful control of the child; or
- (b) he detains such a child with the result that the child is kept out of the 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, he believed on reasonable grounds that the child had attained the age of sixteen years.

(3) For the purposes of this section, a person shall be regarded as having lawful authority—

- (a) who has a right of custody of the child; or
- (b) who has a right of access to the child, but only while acting within the scope of that right.

(4) The crime of *plagium* is hereby abolished.

Offence of taking or sending child out of United Kingdom. 7.—(1) Subject to subsection (2) below, a person commits an offence if he takes or sends a child under the age of sixteen years out of the United Kingdom where—

- (a) there is in force in respect of the child an order of a court in the United Kingdom which has the effect of prohibiting the removal of the child by that person (whether named in the order or not) from the United Kingdom or any part of it, and
- (b) the person does not first obtain the consent of that court.

(2) In any 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 did not know that the order referred to in subsection (1) above was in existence.

(3) For the purposes of this section, a duly authenticated document which purports to be a copy or an extract of an order made, or other document issued, by a court of the United Kingdom shall be deemed without further proof to be a true copy or extract unless the contrary is shown, and shall be sufficient evidence of any matter to which it relates.

(4) In any proceedings in relation to an offence under this section, a duly authenticated copy or extract of the order referred to in subsection (1) above, of which a copy has been served on the accused not less than 14 days before his trial, shall be sufficient evidence—

- (a) of the application of that prohibition to the accused, unless, not less than 6 days before his trial, he serves notice on the prosecutor that he denies such application, and
- (b) that the child named in the order of the court is the child in relation to whose removal the proceedings have been taken, unless, not less than 6 days before his trial, the accused serves notice on the prosecutor that the child so named is not the child in relation to whose removal the proceedings have been taken.

EXPLANATORY NOTES

Clause 1

This clause implements most of the Recommendations contained in the Report by substituting a new Part II of the Child Abduction Act 1984.

The *proposed section 6(1)* implements Recommendations 3(a), (c) and (e) and creates a new offence of taking or detaining a child from the control of any person having lawful control of the child. The offence is intended as a statutory alternative to the existing common law crime of abduction in relation to children and as a replacement for the crime of *plagium* (see proposed section 6(4)).

The *proposed section 6(2)* implements Recommendation 3(f).

The *proposed section 6(3)* implements Recommendation 3(d). The person most commonly having a right of custody in the child will be the parent of the child. A parent may, however, lose his right of custody, such as by a court order, and another person may be awarded this right.

The *proposed section 6(4)* implements Recommendation 2.

The *proposed section 7(1)* implements Recommendations 4(a) and (c) and makes it an offence to take or send a child under the age of sixteen out of the United Kingdom in contravention of an order of a court in the United Kingdom without first obtaining the consent of that court.

The *proposed section 7(2)* implements Recommendation 4(d) and provides a defence based on the accused's lack of knowledge of the existence of the court order.

The *proposed section 7(3)* implements Recommendation 8(c). It is similar to the existing section 9(1) of the 1984 Act except that it applies to documents issued by any court in the United Kingdom, including those in Scotland.

The *proposed section 7(4)* implements Recommendations 8(a) and (b). Where a copy of a court order has been served on the accused at least 14 days prior to the trial, that shall be sufficient evidence of the application of the prohibition to the accused and that the child named in the order is the child in relation to whose removal the proceedings have been taken, unless notice challenging this is served on the prosecutor at least 6 days prior to the trial.

Child Abduction (Scotland) Bill

(5) For the purposes of subsections (3) and (4) above, a document is duly authenticated if it purports to be certified by any person in his capacity as a judge, sheriff, magistrate or officer of that court to be a true copy.

Power of arrest. 8. A constable may arrest without warrant any person whom he reasonably suspects of attempting to commit, committing or having committed an offence under this Part of this Act.

Construction of references to taking, sending and detaining. 9. 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, or to join, 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. 10. 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, or to both such imprisonment and fine;
(b) on conviction on indictment, to imprisonment for a term not exceeding seven years.”.

2. Section 35 of the Family Law Act 1986 shall be amended as follows—

(a) in subsection (3) for the words from “an application” to “of the child” there shall be substituted the words “the application of any person claiming an interest, grant interdict or interim interdict prohibiting the removal of the child by any named person or persons”;

(b) for subsection (4) there shall be substituted the following subsections—

“(4) Where a court in Scotland would have jurisdiction to make a custody order in relation to a child, it may, on the application of any person claiming an interest, make an order prohibiting persons generally from removing the child from the United Kingdom or any part thereof; and a prohibition under this subsection may be made subject to exceptions.

(4A) A court in Scotland may, on the application of any person claiming an interest, vary or recall any order under subsection (4) above.

(4B) The following shall cease to have effect on the child concerned attaining the age of sixteen years—

(a) an interdict or interim interdict granted under subsection (3) above;

(b) an order under subsection (4) above;

(c) a variation order under subsection (4A) above.”;

(c) in subsection (5) for the words “subsection (3) above ‘the court’” there shall be substituted the words “subsections (3), (4) and (4A) above ‘court’”.

3.—(1) In the Firearms Act 1968—

(a) in section 18(3) for “18” there shall be substituted “18A”;

(b) after paragraph 18 of Schedule 2 there shall be inserted—

“18A Offences against Part II of the Child Abduction Act 1984.”.

(2) At the end of paragraph 11B of Schedule 1 to the Suppression of Terrorism Act 1978 there shall be added the words—

“or section 6 of that Act.”.

Powers to restrict removal of child from jurisdiction. 1986 c 55.

Other amendments. 1968 c 27.

1978 c 26.

EXPLANATORY NOTES

The *proposed section 7(5)* implements Recommendation 8(d).

The *proposed section 8* implements Recommendation 7 giving a police constable an express power of arrest without warrant in relation to an offence under either section 6 or section 7.

The *proposed section 9* implements Recommendations 3(b) and 4(b).

The *proposed section 10*, implementing Recommendation 6, lays down the maximum penalties for the offences contained in sections 6 and 7.

Clause 2

This clause implements Recommendations 4(e)-(i) by amending section 35 of the Family Law Act 1986.

Clause 2(a) implements Recommendation 4(e). It expands the class of person who may apply to the Court of Session or the sheriff court for an interdict prohibiting the removal of the child from the United Kingdom or any part of it. For those who may currently apply, see the existing section 35(4) of the Family Law Act 1986 set out in Appendix C.

The *proposed section 35(4)* implements Recommendations 4(f) and (g) and enables the Court of Session and sheriff court, on the application of any person claiming an interest, to make a general order prohibiting the removal of the child from the United Kingdom or any part of it by any person. Such an order may only be granted where the court would have jurisdiction to make a custody order in relation to the child (see paragraph 6.10).

The *proposed section 35(4A)* implements Recommendation 4(h).

The *proposed section 35(4B)* implements Recommendation 4(i), terminating the court orders when the child attains the age of sixteen.

Clause 3

This clause makes certain consequential amendments.

Child Abduction (Scotland) Bill

1984 c 37.

(3) In section 11(3) of the Child Abduction Act 1984 for the words “Part II” there shall be substituted the words “section 7”.

Short title
commencement
and extent.

4.—(1) This Act may be cited as the Child Abduction (Scotland) Act 1986.

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

(3) This Act extends to Scotland only.

EXPLANATORY NOTES

Appendix B

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

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 [¹a 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”, 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 [¹a court in the United Kingdom]; 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.

(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—

¹Words substituted by Family Law Act 1986 (c 55) s65.

Offence of abduction of child by parent, etc.

1971 c 3.
1973 c 29.

- (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 [¹a court in the United Kingdom] 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.

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.

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.

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;
- (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.

Offence of abduction of child by other persons.

Construction of references to taking, sending and detaining.

Penalties and prosecutions.

1982 c 48.

¹Words substituted by Family Law Act 1986 (c 55) s65.

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 subsection (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 subsection (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
 - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or both.
- 1982 c 48.
- 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.”

Child Abduction Act 1984

(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.

SCHEDULE

Section 1(8).

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—

1975 c 72.

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

(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—

1975 c 72.

(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;

(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.

(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.

1980 c 5.

Family Law Act 1986

SECTION 35

Powers to restrict removal of child from jurisdiction.

35.—(1) In each of the following enactments (which enable courts to restrict the removal of a child from England and Wales)—

- (a) section 13A(1) of the Guardianship of Minors Act 1971,
- (b) section 43A(1) of the Children Act 1975, and
- (c) section 34(1) of the Domestic Proceedings and Magistrates' Courts Act 1978,

for the words “England and Wales” there shall be substituted the words “the United Kingdom, or out of any part of the United Kingdom specified in the order,”.

(2) In Article 38(1) of the Domestic Proceedings (Northern Ireland) Order 1980 (which enables courts to restrict the removal of a child from Northern Ireland) for the words “Northern Ireland” there shall be substituted the words “the United Kingdom, or out of any part of the United Kingdom specified in the order,”.

(3) A court in Scotland—

- (a) at any time after the commencement of proceedings in connection with which the court would have jurisdiction to make a custody order, or
- (b) in any proceedings in which it would be competent for the court to grant an interdict prohibiting the removal of a child from its jurisdiction,

may, on an application by any of the persons mentioned in subsection (4) below, grant interdict or interim interdict prohibiting the removal of the child from the United Kingdom or any part of the United Kingdom, or out of the control of the person in whose custody the child is.

(4) The said persons are—

- (a) any party to the proceedings,
- (b) the tutor or curator of the child concerned, and
- (c) any other person who has or wishes to obtain the custody or care of the child.

(5) In subsection (3) above “the court” means the Court of Session or the sheriff; and for the purposes of subsection (3)(a) above, proceedings shall be held to commence—

- (a) in the Court of Session, when a summons is signeted or a petition is presented;
- (b) in the sheriff court, when the warrant of citation is signed.

Appendix D

List of those who submitted written comments on Memorandum No. 67

Aberdeen University, Faculty of Law
Association of Chief Police Officers (Scotland)
Association of Directors of Social Work
Association of Scottish Police Superintendents
Children Abroad Group
Committee of Senators of the College of Justice
Convention of Scottish Local Authorities
Crown Office
Faculty of Advocates
D Gallant, Leisure Education Association
Sheriff G H Gordon
Dr R W Grant, Aberdeen
Law Society of Scotland
I A McIntosh, Glasgow
Mothers' Union, Edinburgh and Glasgow
Royal Faculty of Procurators in Glasgow
Scottish Council for Single Parents
Scottish Law Agents Society
Scottish Legal Action Group
Scottish National Council of YMCAs
Sheriffs' Association
Society of Procurators Fiscal
Union of Catholic Mothers, Edinburgh and Glasgow
G A Watt, Edinburgh
Dr S Wolff, Edinburgh