

THE LAW COMMISSION

**SIMPLIFICATION OF CRIMINAL LAW:
KIDNAPPING AND RELATED OFFENCES**

EXECUTIVE SUMMARY – CHILD ABDUCTION

PART 1

INTRODUCTION

- 1.1 This is one of two summaries of our report on kidnapping and related offences (the report).¹ This introduction gives an overview of the full report and the recommendations we make in it. Thereafter, this summary deals exclusively with those aspects of the report relating to reform of child abduction offences. We have published another summary dealing exclusively with those aspects of the report relating to kidnapping and false imprisonment. These summaries are for people with no specialist legal knowledge.

BACKGROUND

- 1.2 In our Tenth Programme the Law Commission embarked on a programme of simplification of the criminal law. Simplification involves:
- (1) giving the law a clearer structure;
 - (2) using more modern terminology;
 - (3) making the law in a given area more consistent with other closely allied areas of law;
 - (4) making the law readily comprehensible to ordinary people by ensuring that it embodies sound and sensible concepts of fairness.
- 1.3 The simplification project has now developed into a rolling scheme reviewing several areas of the criminal law over successive Law Commission programmes. In addition to this report on kidnapping, we have ongoing projects relating to public nuisance and outraging public decency, and misconduct in public office.
- 1.4 On 27 September 2011 we published a consultation paper² (“the CP”), which proposed three alternative models for reform of the law on kidnapping and false imprisonment.

CLARIFICATION OF KIDNAPPING AND FALSE IMPRISONMENT

- 1.5 Kidnapping and false imprisonment are both common law offences. They are defined in case law, and not in legislation.
- 1.6 The elements of the current offence of kidnapping are complex and overlapping; the boundaries of the offence are uncertain. We recommend that common law kidnapping should be replaced with a narrower and more certain statutory offence based on a defendant’s (D) intentional use of force in order to compel the victim (V) to accompany D.

¹ Find the full report at: <http://lawcommission.justice.gov.uk/areas/kidnapping.htm>.

² Simplification of Criminal Law: Kidnapping, Consultation Paper No 200.

- 1.7 We recommend that common law false imprisonment should be replaced with a statutory offence of unlawful detention, with the same core elements as the existing offence. These require that D, without lawful authority or reasonable excuse, intentionally or recklessly restricts V's freedom of movement.
- 1.8 The reforms we recommend will help clarify the relationship between these two closely related, but distinct, offences. Certain conduct which might be kidnapping under current law, such as moving a person by deception, would not be classified as kidnapping under a new statutory offence. Such conduct should, however, remain criminal as unlawful detention. Conduct that is currently caught by this pair of offences - kidnapping and false imprisonment – will still be caught by the pair of new offences – kidnapping and unlawful detention.

CHILD ABDUCTION

- 1.9 In the case of *R (Nicolaou) v Redbridge Magistrates' Court*³ it was held that the offence under section 1 of the Child Abduction Act 1984 (the abduction of a child by his or her parent or guardian) does not extend to a case where the child was lawfully removed from the United Kingdom but retained for longer than the permitted period in a foreign country. This appears to be a gap in the law, and in July 2013 the terms of reference of the kidnapping project were extended to include this problem. We recommend the offence of child abduction be amended so as to criminalise wrongful retention in addition to the initial act of abduction.
- 1.10 Further, in the case of *R v Kayani*⁴ Lord Judge CJ (as he then was) stated that the sentencing options in relation to child abduction are inadequate. We recommend that these sentences are increased to meet this concern.

THE LACK OF CAPACITY CASE

- 1.11 One particular problem with the current law of kidnapping, identified in the CP, was “the lack of capacity case” which could arise if a child or other person lacking capacity was abducted through exploitation of their lack of capacity, without need for recourse to force or fraud. Although in the CP we considered possible ways of dealing with this issue, we have decided that in a project which proposes reform to the general offences of kidnapping and false imprisonment is not the best place to resolve it.
- 1.12 Cases involving children will be adequately protected by the Child Abduction Act offences. We consider that any recommendation for reform in relation to adults should follow a targeted consultation which addresses directly the concerns of interested stakeholders and allows a proper assessment of the scope of the problem in practice.

³ [2012] EWHC 1647 (Admin), [2012] 2 Cr App R 23, discussed below at para 3.40 and following.

⁴ [2011] EWCA Crim 2871, [2012] 1 WLR 1927 at [16].

- 1.13 As part of the Law Commission's 12th programme of law reform, beginning this year, we will be undertaking a project on the deprivation of liberty of those lacking capacity (and the protections under the Mental Capacity Act 2005). While the precise remit has yet to be determined, the role of criminal law may form part of this review. This project will provide a more appropriate context for proper consideration of this difficult issue.

PART 2

CHILD ABDUCTION

- 2.1 In addition to kidnapping and false imprisonment, the law provides protection in this area with statutory offences of child abduction. In July 2013 the terms of reference of the kidnapping project were extended to include aspects of child abduction.
- 2.2 There are two child abduction offences under the Child Abduction Act 1984.
- (1) The first, under section 1, covers the case where a parent or person with similar responsibility takes a child out of the UK without the consent of the other persons with responsibility for the child or of the court.
 - (2) The second, under section 2, is generally applicable where a person other than a parent takes or keeps a child out of the control of its parents, whether or not the child is taken out of the UK.
- 2.3 The offences of child abduction are different in principle from kidnapping. Kidnapping is committed if a child does not consent to being taken, whether or not the parent consents (except where the taking falls within the scope of reasonable parental discipline and there is a defence of lawful authority). Conversely, child abduction is committed when a child is taken without the consent of a parent or other responsible person, whether or not the child consents. There are, however, cases where the same act constitutes both kidnapping and child abduction and the prosecution must decide which offence to charge. This would occur, for instance, if a parent forcibly snatched his or her child, without the child's consent, and also without the consent of the other parent.
- 2.4 In general terms, consent to a child being taken can be given either by the relevant parents or guardians or by the court. Consent is not required when the removal is for less than one month and there is a child arrangements order in favour of the person taking the child abroad, which provides that the child should reside with them.⁵
- 2.5 It should be noted that the maximum sentence for child abduction is seven years, compared to a maximum of life imprisonment for kidnapping. Unlike kidnapping and false imprisonment, child abduction is triable either in the magistrates' court or the Crown Court.⁶
- 2.6 When one parent takes a child away from the other without taking the child abroad, the abducting parent cannot be charged with any child abduction offence. However, provided that the remaining conditions for the offence are met, he or she can be charged with the more serious offence of kidnapping.

⁵ Child Abduction Act 1984, s 1(4). These provisions reflect s 13 of the Children Act 1989.

⁶ Child Abduction Act 1984, s 4(1).

The problem in *Kayani*

- 2.7 The then Lord Chief Justice's judgment in *Kayani*⁷ expresses concern about the possibility that, in cases where a charge of kidnapping is legally available against a parent, prosecutors may be reluctant to bring such a charge. This may have been conditioned by two factors:
- (1) there is a requirement for the Director of Public Prosecutions (DPP) to consent to prosecutions in cases involving parents;⁸
 - (2) the view was expressed by the court in a previous case called *C*⁹ (but contradicted in *Kayani*) that kidnapping should not be charged in cases of abduction by a parent.
- 2.8 The general policy of the law is that parental disputes about the care of children should be pursued in civil rather than criminal proceedings.¹⁰ The civil court has power to make orders regarding arrangements for a child's care under the Children Act 1989.¹¹ Where a child is taken away in breach of such an order, the normal sanction will be proceedings for contempt of court.¹² It is for this reason that the consent of the Director of Public Prosecutions is required in order to prosecute a parent or other connected person for abducting a child.¹³ This is true whether the offence charged is child abduction¹⁴ or kidnapping.¹⁵
- 2.9 On the other hand, offences of parental child abduction can be very serious, involving very high levels of harm to the child and the left-behind parent and broader family, and the higher sentencing levels currently available in kidnapping would seem desirable for some serious cases of child abduction.
- 2.10 The existing prosecutors' guidance does not specifically mention the question of how to choose between charges of kidnapping and child abduction. However, by emphasising that kidnapping should be charged whenever its conditions are fulfilled, despite the availability of other offences, the most recent guidance appears to follow the approach in *Kayani*.

⁷ [2011] EWCA Crim 2871, [2012] 1 WLR 1927.

⁸ Child Abduction Act 1984, ss 4(2) (child abduction) and 5 (kidnapping).

⁹ [1991] 2 FLR 252, [1991] Fam Law 522.

¹⁰ CS [2012] EWCA Crim 389, 2012 1 WLR 3081.

¹¹ Children Act 1989 s 8; *Cretney* para 18-015.

¹² *M v M (contempt: committal)* [1992] 1 FCR 317, [1992] Fam Law 14.

¹³ In practice this consent is given on behalf of the DPP by a senior Crown prosecutor.

¹⁴ Child Abduction Act 1984, s 4(2).

¹⁵ Child Abduction Act 1984, s 5.

The problem in *Nicolaou*

- 2.11 A difference between the two offences in the 1984 Act was highlighted in the case of *R (Nicolaou) v Redbridge Magistrates' Court*.¹⁶ The section 1 offence can only be committed by “taking or sending” a child out of the UK, not by retaining the child abroad. By contrast, the section 2 offence, which applies to persons other than parents (or other connected persons), encompasses “detaining” the child. Whilst sections 1 and 2 are targeted at different problems¹⁷ it can be seen that the language of “detaining” gets rather closer to the case of keeping a child away from a parent, or failing to bring them back as agreed. By contrast, section 1 contains no language which could capture such a case.
- 2.12 It is not entirely clear from studying the debates in Parliament why this difference was thought necessary; it seems it may have been simply a problem deferred for another time, rather than a positive choice.¹⁸ However, the court deciding *Nicolaou* confirmed that “take” and “send” do not include “retain”. The law therefore does not cover the case where one parent takes a child abroad on a holiday that is permitted by the other parent, or by the court, but then does not return that child.
- 2.13 We agree with the court’s judgment in *Nicolaou* that this is the natural interpretation of the offence under section 1 of the 1984 Act. This creates a potential gap in the law.
- 2.14 There is no need, and indeed it would be inappropriate for English and Welsh law to address the position of children who were never in the UK and have no links with it. But when a child is once subject to the jurisdiction of the courts, there is a policy interest in ensuring that the child is not removed from that jurisdiction. For exactly the same reason, there is a policy interest in ensuring that a child should be returned to the jurisdiction when required. This interest is still stronger if there is already a court order and the temporary removal was by permission of the court.
- 2.15 This is recognised by the Hague Convention on Civil Aspects of International Child Abduction¹⁹ which addresses wrongful retention as well as wrongful abduction.
- 2.16 In conclusion we consider that there is a deficiency in the section 1 offence that ought to be addressed.

¹⁶ [2012] EWHC 1647 (Admin), [2012] 2 Cr App R 23.

¹⁷ Section 1 is restricted to cases of parental abduction abroad, whilst section 2 applies to abductions by anyone else within the UK.

¹⁸ See the discussion in the main report, page 47.. Another possibility is that the government of the day were concerned with issues of territoriality, on which see the discussion in the main report at page 108-112.

¹⁹ A civil treaty seeking to ensure the return of abducted children between signatory states.

REFORMING THE CHILD ABDUCTION OFFENCES

Solving the problem in *Kayani*

- 2.17 We have explained above that the new statutory kidnapping offence will apply in all cases of forcible taking. It follows that the cases to which the Lord Chief Justice's observations apply would continue to be excluded from kidnapping under our kidnapping reforms.
- 2.18 This is not to say that such cases are not serious. However, just as some such cases are presently excluded under the current law because they do not involve force or fraud against the child, or a loss of liberty on the child's part, so they would be excluded from the proposed statutory offence as they would not involve a forcible taking.
- 2.19 Accordingly, an increase in the maximum sentence for child abduction should not be regarded as merely a stop-gap solution pending the implementation of our new statutory offence of kidnapping. Increasing the maximum sentence is a distinct reform and should be pursued whether or not our new statutory offence of kidnapping is implemented.
- 2.20 At present the maximum sentence for child abduction is seven years, while the maximum sentence for kidnapping is life imprisonment. As pointed out by the Lord Chief Justice, "this wide discrepancy seems illogical". An intermediate figure such as 14 years would seem appropriate.²⁰
- 2.21 For these reasons, we recommend that the maximum sentence for the offences under sections 1 and 2 of the Child Abduction Act 1984 should be increased to 14 years' imprisonment.

Solving the problem in *Nicolaou*

- 2.22 Our final recommendation is to fill the gap in the law identified in *Nicolaou*, namely the fact that no offence (except, sometimes, contempt of court) is committed when a parent lawfully takes a child out of the UK but unlawfully retains the child away from the UK.
- 2.23 The first question to consider is a matter of policy: is it desirable to have an additional or extended offence?

²⁰ 14 years' imprisonment is used as a maximum for a number of serious offences in the criminal law, for example: trafficking people for sexual exploitation; domestic burglary and various serious driving offence such as causing death by careless driving under the influence and causing death by dangerous driving.

- 2.24 That decision should be made in the knowledge that, as a result of arrangements between the UK and several other countries, adequate powers for the recovery of the child already exist in some cases in civil law. The numerous treaties are complex, but in summary, provided that the child has been taken to a country which is a signatory to the Hague Convention then there is an existing process by which the child's recovery can be sought. In practice the legal decision to return the child, made by the court in the country where the child has been taken or retained, is a matter for the court dealing with the Hague Proceedings. In some cases attempts can be made to recover the child through diplomatic channels.²¹
- 2.25 It is generally considered that disputes between parents about where a child should live are better resolved through the civil rather than the criminal law. Any criminal offence should be confined to actions which frustrate the civil court's process. The justification for the offence under section 1 of the Child Abduction Act 1984 is that the child is outside the jurisdiction of the civil court, making it harder for that court to make and enforce its decision about where the child should live.²²
- 2.26 For this reason, the criminal proceedings are not concerned with the substantive question of where the child should eventually live, and the civil and criminal processes operate quite independently of each other. Where a person takes a child abroad, proceedings under the Hague Convention may recover the child but are not designed to recover the abductor. Conversely criminal proceedings may recover the abductor but are not designed to recover the child.²³
- 2.27 Following these principles, there is no objection to extending the offence under the 1984 Act to include the wrongful retention of a child. Wrongful retention, just as much as wrongful abduction, frustrates the process of the civil court by keeping the child out of its jurisdiction. Nor will proceedings for contempt of court always be an adequate remedy.²⁴ The situation can arise equally when the child is taken abroad with the consent of one parent and no court order exists.

²¹ In addition, stakeholders have reported further uncertainty in practice arising from differing levels of ability or willingness of certain foreign state agencies to enforce court orders for a child's return.

²² Hence the fact that the section 1 offence does not include the abduction of a child by a parent to a place within the UK.

²³ Although in each case they may have this indirect effect in practice.

²⁴ See *Re: K (a child) (removal from jurisdiction: committal for failing to secure child's return)* [2014] EWCA Civ 905.

- 2.28 The proposed reform of the 1984 Act would be designed not to impact on the existing civil procedures. If the retention of the child is made an offence, civil procedures for the recovery of the child and criminal procedures for the arrest and punishment of the abductor could take place independently of each other just as they do now in the case of an unlawful abduction. Nor would such reform impact on the existing mechanism for dealing with threatened abduction by arresting the would-be abductor for attempted child abduction,²⁵ or by issuing a port alert,²⁶ without the need for civil proceedings.²⁷
- 2.29 In conclusion, we recommend expanding the scope of section 1 of the 1984 Act to cover retention and see no technical difficulty in doing so.

Details of the new or extended offence

- 2.30 The amendments themselves may well be relatively straightforward. First of all, the problem only affects parental abduction, since section 2 of the 1984 Act, which addresses abduction by other persons, already reads “takes or detains”. It would only be necessary to amend section 1 to include similar wording. For example the section could provide that the offence is committed when D:

- (1) takes or sends the child out of the UK without the appropriate consent, or
- (2) having taken or sent the child out of the UK with the appropriate consent, keeps or retains that child outside the UK without the appropriate consent or in breach of the conditions of the consent given.²⁸

Paragraph (1) states the existing offence. Paragraph (2) can be regarded either as an extension of that offence or as a new offence.

- 2.31 As in existing law, consent could be granted either by the other parent or by the court: the offence would only be committed if neither consents.²⁹ Some practical and drafting issues may arise.

²⁵ Home Office Circular No 75/1984 (Child Abduction Act 1984), cited in N Lowe, M Everall and M Nicholls, *International Movement of Children* (2004), paras 9.1 and 9.2.

²⁶ *Registrar’s Direction (Children: Removal from Jurisdiction)* [1986] 1 WLR 475, [1986] 2 FLR 89 and Home Office Circular 21/1986, both cited in Lowe et al (above) para 9.55 and *Clarke, Hall and Morrison on Children Division 2* para [12] (revised to October 2012).

²⁷ Lowe et al (above) para 9.56. The last observation represents the law in England and Wales; in Scotland a court order is needed before a port alert can be issued.

²⁸ This is a description of a general idea rather than a drafting proposal. The international treaties mentioned above contain definitions of wrongful retention which could be used or adapted at the drafting stage.

²⁹ At the point when either initial or further consent is required.

- 2.32 There is a potential issue of jurisdiction, which is considered in more detail in the main report.³⁰ In the absence of special reasons, it is generally considered undesirable to create offences triable by the courts of England and Wales which occur abroad. The act of “retaining” (or failing to return) a child is arguably one performed in the country to which the child has been taken. Criminalising such an act potentially infringes the principle of territoriality, and there may in certain circumstances be difficulties in securing the return of those accused of the new offence from abroad.
- 2.33 However, the general rule against extraterritoriality is not without exceptions, and we believe that criminalising such conduct remains desirable, will have an important declaratory effect, and will improve the position of children and left-behind parents who are the victims of wrongful retention abroad.
- 2.34 We recommend that the offence under section 1 of the Child Abduction Act 1984 should be amended to include the case where the connected person, having taken or sent the child out of the UK with the appropriate consent, keeps or retains that child outside the UK without the appropriate consent or in breach of the conditions of the consent given.

³⁰ See para 5.33 of the report.