

STATES OF JERSEY



DRAFT CRIMINAL LAW (CHILD ABDUCTION) (JERSEY) LAW 200

Lodged au Greffe on 7th June 2005
by the Legislation Committee

STATES GREFFE



Jersey

DRAFT CRIMINAL LAW (CHILD ABDUCTION) (JERSEY) LAW 200

European Convention on Human Rights

The President of the Legislation Committee has made the following statement –

In the view of the Legislation Committee the provisions of the Draft Criminal Law (Child Abduction) (Jersey) Law 200- are compatible with the Convention Rights.

(Signed) **Connétable D.F. Gray of St. Clement**

REPORT

It is probable, but not necessarily certain, that at Jersey customary law a parent can be guilty of kidnapping his own child and of unlawfully imprisoning his child.¹ The position at English common law is clearly established.² Kidnapping involves –

- (a) the taking or carrying away of one person by another;
- (b) by force or by fraud;
- (c) without the consent of the person so taken or carried away; and
- (d) without lawful excuse.

If indeed the offence of kidnapping exists at Jersey customary law, it is likely that it involves these four elements.

The purpose of this draft Law is to create two offences: abduction of a child under 16 by a parent, guardian or person having custodial rights; and abduction of such a child by a stranger. The draft Law is part of the apparatus intended to combat cross boundary abduction of children and can be read in conjunction with the draft Child Abduction and Custody (Jersey) Law 200- (“CACL”) which has simultaneously been lodged au Greffe. CACL enables the Island to sign up to the Hague Convention of 1980 on the Civil Aspects of International Child Abduction, and the European Convention, also of 1980, on the Recognition and Enforcement of Decisions concerning Custody of Children and on the Restoration of Custody of Children. Under the former, countries must co-operate to secure the swift return of abducted children; under the latter, they must recognise and enforce court orders of other contracting States relating to the custody of children. Thus, CACL deals with cross boundary civil proceedings whilst this draft Law deals with criminal sanctions within the Island.

Once a child is removed from the jurisdiction, it becomes much more difficult both to find and recover the child. Hence it is vital to prevent removal in the first place. The States have already passed an amendment to the Powers of Arrest (Injunctions) (Jersey) Law 1998. That Law provided the Viscount and Police Officers with powers of arrest upon reasonable cause to suspect that a person had acted, was acting or was about to act in breach of a non-molestation injunction or an injunction excluding that person from a specified location. The amendment extended this power of arrest to cases involving breach (actual or potential) of an injunction restraining a person from removing a minor from the Island. This provides a significant weapon to combat the abduction of children from the Island. The harbours and airport authorities can be alerted to any risk of breach of a court injunction and can call upon the police to arrest the person concerned and thereby thwart an attempt at abduction. However, the power under the 1998 Law (as amended) can only be invoked where there is a court order. The offences created by this draft Law will bring into play the ordinary powers of arrest of police officers when they have reasonable cause to suspect the commission or pending commission of an offence. The power of arrest will not be dependant upon a court having granted an injunction. However, although a court order will not be a pre-requisite to police action, it may still be advantageous (as has been found in the United Kingdom) to obtain one since, amongst other things –

- (i) it establishes the applicant’s bona fides which may help to convince the police of the need for action;
- (ii) it enables the applicant to be assisted by the authorities in tracing the child;
- (iii) it enables the Royal Court to order the surrender of a passport; and
- (iv) the Royal Court can order publicity to trace the child.

Furthermore, an order of the Court will be required if resort is to be had to CACL with a view to invoking the European Convention on International Child Abduction.

Detailed comment on each of the Articles of the draft Law may be found in the Explanatory Note incorporated in this projet and it is unnecessary to duplicate that commentary in this Report.

The creation of a statutory offence of abduction of children is a key reform in an important area of law. Removal of a child from one country to another has always been a serious problem in the light of conflict of jurisdictions between the courts of different countries. Once a child is taken out of the jurisdiction, it is much harder both to find and recover the child. Thus, it is vital to prevent removal in the first place. The absence of a clearly defined

statutory offence of abduction of young children amounts to a serious deficiency in the weaponry of any modern jurisdiction with which to combat cross-border child abduction. That deficiency was addressed in the United Kingdom by the Child Abduction Act 1984 upon which this draft Law is largely modelled.

This reform in Jersey is long overdue and will provide a safeguard that in many other countries has long been taken for granted.

Financial/manpower implications

There are no additional financial or manpower implications for the States arising from this draft Law.

European Convention on Human Rights

Article 16 of the Human Rights (Jersey) Law 2000 will, when brought into force by Act of the States, require the Committee in charge of a *Projet de Loi* to make a statement about the compatibility of the provisions of the *Projet* with the Convention rights (as defined by Article 1 of the Law). Although the Human Rights (Jersey) Law 2000 is not yet in force, on 3rd June 2005 the Legislation Committee made the following statement before Second Reading of this *projet* in the States Assembly –

In the view of the Legislation Committee the provisions of the Draft Criminal Law (Child Abduction) (Jersey) Law 200- are compatible with the Convention Rights.

Notes

¹ There appears to be no case in which such an offence has been charged. The Report of the Commissioners on the Criminal Law (1847) does not refer to any such offence. However, *Le Geyt's* manuscripts on the Constitution Laws & Usages of Jersey, Tome III, page 411, contain, so far as relevant, the following passage (in translation) under the heading “*Du Plagiaire*” –

“It is yet another form of larceny, when one detains under one’s roof, a daughter [or] a son . . . against the wish of the father . . . This offence strictly relates only to the human person . . . The abduction of a child causes pain and grief . . .

Whilst *Le Geyt*, writing in the late 17th Century, contemplated an offence restricted to the abduction of a child from its father, it is submitted that it would be open to the Royal Court to hold that the offence now extended to the abduction of a child in breach of custodial rights of the mother.

² *R v D* [1984] AC 778 [1984] 2 All ER 449, in which the House of Lords held that a parent can be guilty of kidnapping his own child.

R v Rahman [1985] 81 Cr App Rep 349: *held* that a parent can be guilty of unlawfully imprisoning his child.

Explanatory Note

This draft Law is, as its long title indicates, a Law to amend the criminal law relating to the abduction of children. It creates 2 statutory offences of abduction of a child under the age of 16.

The offence under *Article 2* is committed by a parent of the child or by other persons who might loosely be described as in loco parentis and involves taking or sending the child out of Jersey.

The offence under *Article 3* is committed by any other person who takes or detains a child under 16 so as to remove the child from the person having lawful control of the child or so as to keep the child out of the lawful control of that person.

Article 1 of the draft Law is the interpretation provision and imports a number of definitions from the Children (Jersey) Law 2002. It also defines the old concept of custody for the purposes of this Law and what is meant by taking a child, sending a child or detaining a child.

Article 2 of the draft Law creates the offence of abduction of a child under 16 by a parent, guardian, etc without the appropriate consent, that is to say, the consent of the mother, father, guardian or any person in whose favour a residence order is in force with respect to the child, or the leave of the court. The offence is not committed by taking or sending a child out of Jersey without the appropriate consent if the child lives or is to live with the relevant adult in accordance with a residence order or if the child is taken or sent for a period of less than one month provided in either case that there is no breach of an order under Part 2 of the Children (Jersey) Law 2002. Orders under Part 2 consist of –

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| (a) | contact orders | (requiring the person with whom a child lives to allow the child to visit, stay and have contact with a named person); |
| (b) | prohibited steps orders | (preventing a person from taking a step which could have been taken by a parent in meeting parental responsibility without the consent of the Court); |
| (c) | residence orders | (settling the arrangements to be made as to with whom the child is to live); |
| (d) | specific issue orders | (giving directions to determine a specific question in connection with any aspect of parental responsibility). |

There is also a defence if the accused believed that the appropriate person had consented or would consent, or despite taking reasonable steps the accused had been unable to communicate with the appropriate person, or if that person had unreasonably refused to consent. This defence does not apply if the person who refused consent had a residence order in respect of the child or custody of the child, or if the person taking or sending the child out of Jersey would be in breach of a court order.

Special provision is made in *Article 2(8)* and the *Schedule* in respect of –

- (i) a child in the care of Minister for Health and Social Services, in respect of whom the consent of the Minister is required;
- (ii) a child who is subject to various types of place of safety orders under legislation repealed but preserved by the Children (Jersey) Law 2002;
- (iii) a child who is remanded to a remand centre, in respect of whom the leave of the court so remanding the child is required;
- (iv) a child who is the subject of a an order freeing the child for adoption, or a pending application for such an order, or a pending application for an adoption order, in respect of whom the leave of the Royal Court is required;

The States are empowered by Regulations to amend the *Schedule*.

Article 3 creates the offence of abduction by other persons by removing a child from or keeping the child out of the lawful control of the person entitled to such control. In the case of a child whose parents were not married to each other at the time of his or her birth, it is a defence that the accused is the child's father or that at the time of the alleged offence he reasonably believed that he was the child's father. In all other cases, it is a defence for the accused to prove that, at the time of the alleged offence, he or she believed the child was 16 or over.

Article 4 provides that a person guilty of an offence under the Law shall be liable to 7 years imprisonment or an unlimited fine or both. A prosecution for an offence under *Article 2* can only be instituted with the consent of the Attorney General.

Article 5 is a consequential amendment to the Children (Jersey) Law 2002 that disapplies *Article 3* of this Law in certain circumstances where a refuge is provided for children at risk.

Article 6 is the usual Article of citation and commencement.



Jersey

DRAFT CRIMINAL LAW (CHILD ABDUCTION) (JERSEY) LAW 200

Arrangement

Article

- 1 Interpretation
- 2 Abduction of child by parent etc.
- 3 Abduction of child by other persons
- 4 Penalties and prosecutions
- 5 Amendment of Children Law
- 6 Citation and commencement

SCHEDULE

MODIFICATIONS OF “APPROPRIATE CONSENT” FOR THE PURPOSES OF ARTICLE 2



Jersey

DRAFT CRIMINAL LAW (CHILD ABDUCTION) (JERSEY) LAW 200

A LAW to amend the criminal law relating to the abduction of children.

Adopted by the States [date to be inserted]

Sanctioned by Order of Her Majesty in Council [date to be inserted]

Registered by the Royal Court [date to be inserted]

THE STATES, subject to the sanction of Her Most Excellent Majesty in Council, have adopted the following Law –

1 Interpretation

(1) In this Law –

“care order”, “guardian”, “parental responsibility” and “residence order” have the same meanings as in Article 1(1) of the Children Law;^[1]

“Children Law” means the Children (Jersey) Law 2002.^[2]

(2) A person shall be treated under this Law as having custody of a child if there is in force an order of a Jersey court awarding the person (whether solely or jointly with another person) custody, legal custody or care and control of the child.

(3) For the purposes of this Law a person shall be regarded as –

(a) taking a child, if the person causes or induces the child to accompany him or her or any other person or causes the child to be taken;

(b) sending a child, if the person causes the child to be sent;

(c) detaining a child, if the person causes the child to be detained or induces the child to remain with him or her or any other person.

(4) References in this Law to a child’s parents and to a child whose parents were (or were not) married to each other at the time of the child’s birth shall be construed in accordance with Article 1 of the Children Law (which extends their meaning).

2 Abduction of child by parent etc.

(1) Subject to paragraphs (4), (5) and (8), a person connected with a child under the age of 16 year commits an offence if the person takes or sends the child out of Jersey without the appropriate consent.

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

- (a) the person is a parent of the child;
 - (b) in the case of a child whose parents were not married to each other at the time of the child's birth, there are reasonable grounds for believing that he is the father of the child;
 - (c) the person is a guardian of the child;
 - (d) the person is a person in whose favour a residence order is in force with respect to the child; or
 - (e) the person has custody of the child.
- (3) In this Article "appropriate consent", in relation to a child, means –
- (a) the consent of each of the following –
 - (i) the child's mother,
 - (ii) the child's father, if he has parental responsibility for the child,
 - (iii) any guardian of the child,
 - (iv) any person in whose favour a residence order is in force with respect to the child;
 - (b) the leave of the court granted under any provision of Part 2 of the Children Law; or
 - (c) if any person has custody of the child, the leave of the court that awarded custody to the person.
- (4) A person does not commit an offence under this Article by taking or sending a child out of Jersey without obtaining the appropriate consent if –
- (a) the person is a person in whose favour there is a residence order in force with respect to the child; and
 - (b) the person takes or sends the child out of Jersey for a period of less than one month, unless by so doing the person is in breach of an order under Part 2 of the Children Law.
- (5) A person does not commit an offence under this Article by doing anything without the consent of another person whose consent is required under the foregoing provisions of this Article if –
- (a) the person does it in the belief that the other person –
 - (i) has consented, or
 - (ii) would consent if the person were aware of all the relevant circumstances;
 - (b) the person has taken all reasonable steps to communicate with the other person but has been unable to communicate with that other person; or
 - (c) the other person has unreasonably refused to consent.
- (6) Paragraph (5)(c) does not apply if –
- (a) the person who refused to consent is a person –
 - (i) in whose favour there is a residence order in force with respect to the child, or
 - (ii) who has custody of the child; or
 - (b) the person taking or sending the child out of Jersey is, by so acting, in breach of an order made by a court in Jersey.
- (7) Where, in proceedings for an offence under this Article, there is sufficient evidence to raise an issue as to the application of paragraph (5), it is for the prosecution to prove that the paragraph does not apply.
- (8) In the case of a child of a description specified in column 1 of the Schedule–
- (a) the reference in paragraph (1) of this Article to the appropriate consent shall be construed as a reference to the corresponding leave or consent specified in column 2 of the Schedule; and
 - (b) paragraphs (3) to (7) do not apply.
- (9) The States may by Regulations amend the Schedule.

3 Abduction of child by other persons

- (1) Subject to the following provisions of this Article, a person commits an offence if, without lawful authority or excuse, the person takes or detains a child under the age of 16 years –
 - (a) so as to remove the child from the lawful control of any person having lawful control of the child; or
 - (b) so as to keep the child out of the lawful control of any person entitled to lawful control of the child.
- (2) The offence in paragraph (1) does not apply to –
 - (a) the child’s father and mother, where they were married to each other at the time of the child’s birth;
 - (b) the child’s mother, where she was not married to the child’s father at the time of the child’s birth;
 - (c) a guardian of the child;
 - (d) a person in whose favour a residence order is in force with respect to the child; or
 - (e) a person who has custody of the child.
- (3) A person does not commit an offence under this Article if –
 - (a) where the father and mother of the child in question were not married to each other at the time of the child’s birth –
 - (i) he is the child’s father, or
 - (ii) at the time of the alleged offence, he believed, on reasonable grounds, that he was the child’s father; or
 - (b) at the time of the alleged offence, the person believed that the child had attained the age of 16.

4 Penalties and prosecutions

- (1) A person guilty of an offence under this Law shall be liable to imprisonment for a term of 7 years and to a fine.
- (2) No prosecution for an offence under Article 2 shall be instituted except by or with the consent of the Attorney General.

5 Amendment of Children Law

In Article 46(4) of the Children Law after the words “Article 44” there shall be inserted the words “of this Law and Article 3 of the Criminal Law (Child Abduction) (Jersey) Law 200”.

6 Citation and commencement

- (1) This Law may be cited as the Criminal Law (Child Abduction) (Jersey) Law 200.
- (2) This Law shall come into force on such day as the States may by Act appoint, and different days may be appointed for different provisions of this Law.

SCHEDULE

(Article 2(8))

MODIFICATIONS OF “APPROPRIATE CONSENT” FOR THE PURPOSES OF ARTICLE 2

	<i>Description of child</i>	<i>Appropriate leave or consent</i>
1.	A child who is the subject of a care order (except a child falling within entry 5 below).	The consent of the Minister for Health and Social Services.
2.	A child who is the subject of a warrant issued under Article 10(1) of the Children (Jersey) Law 1969.	The leave of the Bailiff.
3.	A child who is the subject of an order under Article 36 of the Children (Jersey) Law 1969 or Article 37 of the Adoption (Jersey) Law 1961. ^[3]	The leave of the Bailiff or the Royal Court as the case may be.
4.	A child who is remanded to a remand centre under Article 16 of the Criminal Justice (Young Offenders) (Jersey) Law 1994. ^[4]	The leave of the court making the order.
5.	A child who is the subject of – (a) an order under Article 12 of the Adoption (Jersey) Law 1961 declaring him or her free for adoption, or a pending application for such an order; or (b) a pending application for an adoption order under Article 10 of that Law.	The leave of the Royal Court.

[1] Chapter 12.200.

[2] Volume 2002, page 1313.

[3] Chapter 12.050.

[4] Chapter 08.380.