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Scottish Law Commission



Child Abduction

What changes, if any,
should be made to the
criminal law relating to
the abduction of children?

An invitation to comment on

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The Scottish Law Commission was set up by Act of Parliament to promote reform of the law. This pamphlet invites members of the public to comment on some possible changes to the criminal law relating to child abduction. There is a questionnaire at the end of the pamphlet which can be cut out and used for this purpose, but separate comments will also be welcome.

The Commission would be grateful if completed questionnaires, and any comments, could be sent, by 31st January 1986, to:—

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This pamphlet does not contain final views or recommendations. It is published only to obtain comments on possible reforms. Once comments have been received and considered, the Commission will publish a report. This will contain recommendations for reform of the law (if any reform is thought appropriate) and will be submitted to the Government.

Further copies of this pamphlet can be obtained, free of charge, from the above address.

Introduction

OCT 28 1985

1. In Scotland it is a crime to abduct a child or to steal a child. A child may be abducted when he is taken away, possibly by the use of force, to be abused sexually, to be held to ransom, or for a variety of other comparable purposes. This is part of a wide crime of abduction which applies to victims of all ages. The difficulty about this crime, in so far as it relates to children, is that before abduction can be proved it has to be shown that any taking away occurred against the will of the victim. This makes sense when an adult is the alleged victim. But the situation is quite different if the victim is a child. If a young child is enticed into a stranger's car by the offer of sweets or ice-cream he, in a sense, goes quite willingly, and yet most people would probably say that he was being abducted, at least if the other person's purpose was to ill-treat him in some way. The idea of overcoming a victim's will is therefore not really appropriate where the victim is a child, and particularly so when the child in question is very young.

2. Child stealing (called plagium in Scots law) is based on the idea that a child is the property of his parents and can be stolen in the same way as any other piece of property. The crime is seldom used by prosecutors nowadays, and the reason may be that most people today would find it distasteful to think of a child simply as a piece of property. The crime of plagium also has another disadvantage. It only applies

where the child is under the age of 12 in the case of girls and 14 in the case of boys. This means not only that the crime is ineffective in relation to children above these ages, but also that a rather artificial distinction is made between boys and girls.

3. The difficulties associated with the crime of abduction in relation to children, and the inappropriate nature of the crime of plagium in modern times, would of themselves have been good reason to contemplate some reform of this branch of our law. However, in 1984 a new law dealing with a particular aspect of child abduction was introduced by Parliament, and this led to the Secretary of State for Scotland asking the Scottish Law Commission to examine all aspects of the law of child abduction in Scotland.

The new law of 1984

4. For years many people have been understandably concerned about cases, often arising after parents have separated or have been divorced, where children are taken abroad by one of the parties involved. Newspapers sometimes refer to these as "tug-of-love" cases. In such cases the parent left in this country may face a virtually impossible task of trying to trace the child in a foreign country, and of trying to persuade the courts of that country to order the return of the child. This, of course, is not just a problem in this country, and there has been a good deal of international co-operation in recent years to find ways of ensuring that children who are taken abroad in such circumstances can be returned home speedily and with a minimum of bother. At

the moment Parliament is considering new laws which would make this country a party to such international arrangements. But these arrangements, useful as they are, don't really help to stop such incidents occurring in the first place.

5. It was in the hope of doing something about this that Parliament passed the Child Abduction Act 1984. Originally it was intended that this Act would apply only in England and Wales but, shortly before it became law, it was decided to extend part of it to Scotland as well. This was meant, however, just to be a temporary measure until the Scottish Law Commission had examined the whole subject of child abduction.

6. The Scottish part of the 1984 Act makes it an offence for certain persons to take a child out of the United Kingdom in certain circumstances. The persons who can commit the offence are parents or guardians of the child, and any person who has been awarded custody of the child by a court in the United Kingdom. Any such person commits the offence if a United Kingdom court has prohibited the removal of the child from the United Kingdom. He also commits the offence if there is a custody order in force, and he does not have what is called "the appropriate consent", by which is meant the consent of each person who is a parent or guardian of the child, or to whom custody of the child has been awarded, or the permission of the court which made the custody order. No offence is committed if the person concerned had no reason to believe that there was a prohibition order or a custody order in existence, or if he believed

that the appropriate consent had, or would have, been given.

7. While this new law will no doubt be helpful and effective in many cases, we are concerned that in some respects it goes too far, while in others it does not go far enough. We think that it goes too far by requiring consent in all cases where there is a custody order. A mother who has a custody order in her favour, and who has been deserted by the child's father many years before, should be able to take her child abroad on holiday without fear of committing a criminal offence. She should not have to try to get the consent of the child's father, or go to the trouble and expense of applying to the court for permission. We think that the new law does not go far enough because it does not make it an offence for a child to be taken abroad by a stranger. We do not really understand why this offence is confined to parents or guardians and persons who have been awarded custody of the child.

8. The comparable English part of the 1984 Act goes even further than the Scottish part. It makes it an offence, for example, for a mother to take a child abroad without the consent of the father even when a court has never been involved in settling who should have custody of the child. This means, to take an extreme example, that a mother whose child had been born as the result of rape would have to get the rapist father's consent before she could safely take the child abroad. It also means, to take another example, that a French father visiting England with his son, could commit the offence when he

tried to take his son back to France unless he had, or believed he had, his wife's consent to him doing so.

9. We are inclined to think that improvements could be made to the 1984 Act. We also think that the opportunity should be taken to reform the crimes of abduction and plagium which we mentioned in paragraphs 1 and 2 of this pamphlet. Later we shall be giving some details of a scheme of reform which we are provisionally proposing at this stage, and on which we would very much welcome the views of readers. First, however, it may be helpful to draw attention to a number of problems and difficulties which we think should be borne in mind.

The nature of the problem

10. Many cases which involve the taking of a child by one person from another can give rise to a very strong emotional response not only on the part of those directly involved but also on the part of the public at large if, as sometimes happens, the case attracts publicity in the newspapers and on television. This is perfectly natural and understandable. But it has to be kept in mind that a child can be "taken" in a wide variety of circumstances and for a wide variety of purposes.

11. At one extreme a child may be taken from a parent by force to be abused sexually, or to be held to ransom. At the other extreme an estranged father, who is genuinely concerned for the health and welfare of his child, may take the child away from its mother because he has reason to believe that she is neglecting and ill-treating him. In some cases a child may actually ask a parent to take

him away from the care of the other parent with whom he is living. If it were to be a crime simply to take a child away from someone else's control, both of these examples would then be criminal. No doubt most people would agree that the first example should be criminal, but we suspect that many people would not want to see the father in the second example being taken to court and facing a risk of imprisonment for what he had done.

12. Another point which we think is probably worth keeping in mind is that, if certain kinds of behaviour by, for example, parents are made criminal, these crimes may have to be proved in court. That means that the children concerned may have to give evidence against one of their own parents. If it was thought to be necessary to have such crimes at all, then that is something that would just have to be tolerated. However, we think that it should be avoided if possible. It is difficult to see how it could ever be in the best interests of a child to have to give evidence in court against, say, his own father, or possibly any other member of his own family. It is equally difficult to see how in general it would be in a child's best interests to have one of his parents fined, or possibly even sent to prison.

13. Considerations like these have led us to the conclusion that we should try to recommend reforms in the criminal law which can distinguish between cases where it is really necessary or desirable to make certain activities criminal, and cases where that is not so. And of course the fact that something is not made a crime does not necessarily mean that the courts cannot be involved in some other way. Under our civil law (as

opposed to our criminal law) our courts can make decisions about who should have the custody of a child, about who should be allowed access to a child, and so on. In many cases we think that these existing civil law powers will be perfectly adequate to control some of the situations that are likely to arise.

Our approach to reform

14. We have come to the provisional conclusion that the most satisfactory way of dealing with the reform of the law relating to child abduction will be by abolishing the crime of plagium which, as we pointed out in paragraph 2, is limited in its usefulness, and is probably out of touch with the way that most people regard children today, and by creating new crimes to deal with different circumstances in which a child may be abducted. We would leave the existing crime of abduction in existence since, after all, it is necessary in cases where adults are the victims. But we would expect most, if not all, cases of child abduction to be dealt with in future under the new crimes which we are proposing. Our provisional view is that there are four broad categories of child abduction which should be criminal.

Taking a child to cause him harm

15. The first category is where the person taking the child intends to cause him harm or distress, or to place him in a position where he is likely to be caused harm or distress. An obvious example of this, which we have previously mentioned, is where a child is taken away to be sexually molested or abused. We see this category as involving what is first and foremost a crime against the

child himself, and we would imagine that everyone would agree that this sort of conduct should be a crime.

16. Setting out this crime as suggested in the preceding paragraph will avoid the problem of the existing law, which we mentioned in paragraph 1, namely that of proving that any taking away occurred against the will of the child. Accordingly this crime will be committed even if a child is simply enticed to go away with someone if that person's intention is to cause the child harm or distress, or to place him in a position where he is likely to be caused harm or distress.

17. As well as those cases in which there is a clear intention to cause danger to the child as already described, there may be other cases in which the person taking the child acts with criminal recklessness towards him. In other words, he is totally indifferent to the likelihood of harm or danger being caused to the child. We would welcome views on whether this crime, against the child, should be capable of being committed by recklessness as well as intentionally.

18. There are, of course, cases where a person will be perfectly entitled to take a child away in the first place, and we would not want such a person to be at risk of being prosecuted for this crime. For example, a father who was keen on mountaineering might take his son climbing in severe conditions and thereby place him in a position where he was likely to be caused harm or distress. This is not the kind of conduct that is aimed at by a crime of child abduction.

19. To meet difficulties of this kind we suggest that the crime which we are proposing should be committed only where the person taking the child did not have what we propose to call "appropriate entitlement" to do so. A person might have "appropriate entitlement" to take the child if, for example, he had parental rights in respect of the child, if he had the consent of a person with parental rights, or if he was by law entitled to take the child. This last category would include, for example, a policeman who had power to arrest the child.

20. We propose therefore that it should be a crime for a person to take, remove, entice or detain a child under the age of 16 -

- (a) if he has no appropriate entitlement to do so, and
- (b) if he intends to cause the child, or to place the child in a position where he is likely to be caused, harm or distress.

We suggest that "harm" should be defined as including physical or mental injury, sexual abuse or exploitation, and any other form of exploitation which is detrimental to the welfare of the child.

Taking a child from someone else's control

21. The second category of child abduction which we think should be made a crime is where the taking of the child is not intended to harm the child or to place him in a position where he is likely to be harmed but is intended to keep him from somebody else's, possibly a parent's, lawful control. This would not be so much a

crime against the child himself but rather a crime against the parent, or whoever had lawful control of the child at the time.

22. A crime of this sort would, we think, be desirable for the kind of case where, say, a complete stranger snatches a baby out of a pram to take it home and look after as if it was his or her own child. It may be questionable, however, whether this crime should be extended to parents, guardians and close relatives of the child. We have already mentioned the kind of case (which is by no means uncommon) where parents have separated, and one of them thereafter removes the child from the other in the belief that that is in the best interests of the child concerned. Should such a parent be guilty of the crime which we are now proposing?

23. We are inclined to think not. The parent from whom the child has been taken, in the example we have given, can still go to the civil court and ask for a custody order as a means of getting the child back. That court will then consider what is in the best interests of the child, and will grant or refuse a custody order on that basis. Our provisional view is that it is better for disputes of this kind to be settled in that way rather than saying that one of the parents is a criminal.

24. If our provisional view is acceptable so far as parents are concerned, we think that probably the same rule should apply in the case of anyone else who has lawful rights in respect of the custody of the child, at least in so far as what they do is consistent with the rights that they have. It sometimes happens that someone

who is not a parent may be given certain rights in relation to a child by a court. A grandparent, for example, may be allowed custody of a child from time to time, and we do not think that such a person should be guilty of a crime if he takes the child away from, say, a parent at a time when he is lawfully entitled to the child's custody.

25. There may, in fact, be a case for saying that this crime should not extend to any close relatives of the child - such as grandparents, brothers and sisters, aunts and uncles, as well as parents. It is not difficult to imagine cases where a relative, though not necessarily a parent, might take a child away from someone else's care and control with the best of motives. Should that sort of person be liable to prosecution for this crime? We would welcome views on the whole question of how far this crime should extend.

26. Quite apart from the kinds of people we have so far been considering, there are others who, we think, would have to be protected from any risk of prosecution. For example, if a children's panel decided that a child was at risk at home and should be removed to a place of safety, it would be necessary to ensure that the social worker who took the child away would not run any risk of prosecution for simply carrying out his duty. The same considerations apply in relation to a policeman who had a warrant to arrest the child, or an officer of the court giving effect to a court order for delivery of the child. We think that such persons can be satisfactorily protected if the crime is worded in such a way that it

can only be committed by a person who is acting "without lawful authority" at the time.

27. There are two other protections which we think should be built into this crime so as to avoid any risk of undeserved prosecutions. One is that there will be no crime if the taking away occurred with the consent of the person who had lawful control of the child. This is possibly just stating the obvious, but we think that it is better to avoid any risk of prosecution in such a case. The other is that there will be no crime if there was a "reasonable excuse" for the taking away. We are concerned that there may be cases where a person feels that he has to remove a child from, say, a parent's control, and we think that if his explanation is reasonable in the circumstances he should not be guilty of any crime. As an example of the sort of thing we have in mind, suppose that a neighbour becomes aware that a young child is in the house next door with his parents who are both very drunk and threatening violence to the child. If, in these circumstances, the neighbour took the child away from its parents, at least until they had sobered up, we think that he would have a reasonable excuse for doing so, and we think that the existence of that reasonable excuse should protect him from any risk of prosecution and conviction.

28. Accordingly, in this second category of child abduction what we are proposing is that it should be a crime for any person, other than a person who may be expressly excluded from the scope of the crime (such as a parent), to take, remove or detain a child without lawful authority or reasonable excuse, and without the consent

of the person having lawful control of the child, with the intention of removing or keeping the child from the lawful control of that person.

29. There are two other circumstances which, although they may only arise occasionally, should be catered for. One is where the person taking a child away did not in fact have the consent of the person with lawful control of the child, but had reasonable grounds for believing that he did. This might, for example, happen if, say, a person was in the habit of taking a neighbour's child to watch a football match every Saturday, and mistakenly but reasonably believed that he had the parent's consent on a particular Saturday when in fact he did not. The other circumstance which we think should be catered for is where a person taking a child away had reasonable grounds for believing that the child had attained the age of 16 (that is to say, was no longer a child).

Taking a child from someone else's control
by the use of violence

30. The third category of child abduction is in some respects similar to the second one which we have just been discussing, but the desirability of having a separate crime to deal with it arises in this way. If parents, and possibly others, are going to be excluded from the second crime which we are proposing, it may be thought that there should be a separate crime to deal with cases where they not only take a child from someone else's control but do so by the use of violence or in circumstances likely to give rise to serious alarm for the child's safety. In other words a father, for example, would not be guilty of our second proposed crime

if he took his child away from its mother, provided that was all he did, but he would be guilty of a crime if he took the child by the use of violence or in circumstances likely to give rise to serious alarm for the child's safety.

31. "Circumstances likely to give rise to serious alarm for the child's safety" would arise in the sort of case where, say, a baby is snatched from its pram in the street while the mother is inside a nearby shop. On coming out of the shop the mother will have no means of knowing what has happened to her baby, and will be understandably alarmed and concerned for its safety.

32. Although this crime would be primarily intended to catch, in these extreme cases, the types of person who would be excluded from our second crime, we can see no reason why anyone should not be capable of committing it. It would be a more serious crime than our second crime, and if, say, a complete stranger were to snatch a baby from outside a shop, we think that he should be charged with the more serious rather than the less serious crime. We think, however, that in this case also a person should not be guilty if he had a reasonable excuse for what he did. This would mean, for example, that a person who snatched a baby from a woman standing on a window-ledge, and threatening suicide, would not of course be guilty of any crime, even although he had to use some force to get hold of the child.

33. Although we think that a crime along the lines which we have just suggested would in some cases have a useful deterrent effect, it can be argued that it is not

necessary. This is because much of the behaviour which would amount to this crime is likely to be a crime anyway under our existing law. If a person used violence in order to take a child away, he would probably be guilty of an assault, and the whole incident might very likely amount to a breach of the peace. These are just two examples. We would very much welcome views on this point.

Taking a child abroad

34. The fourth, and final, category which we think has to be considered is where someone takes a child out of the country. This is the sort of conduct which gave rise to the Child Abduction Act 1984, which we mentioned earlier. As we said then, it is perfectly understandable that people should wish to do something about this, but we are not very happy about the solution reached by that Act. There is, we think, a case for saying that this sort of conduct should not be a crime at all, but we suspect that most people would like to see it made a crime in certain circumstances. What we think should be done in that event is to try to find a solution which will punish where it is appropriate to do so but which will not impose quite unreasonable restrictions on, for example, a parent's right to take his child abroad on holiday.

35. In our view there are two circumstances in which taking a child abroad should be a crime. One is where a court in the United Kingdom has expressly ordered that a child should not be taken out of the country. The other is where it can be shown that the person taking the child abroad is doing so in order to prevent someone else from

having the child's custody decided and controlled by the courts in this country. In the first of these cases there should, of course, be no crime unless it can be shown that the person concerned knew of the order's existence and effect.

36. Earlier in this pamphlet we pointed out that the Child Abduction Act 1984 could apply to the case of a foreigner who was simply visiting this country on holiday with his child. This would be less of a problem if the Act were to be reformed in the ways that we have just been suggesting, and should not in any event matter if a court in this country had actually ordered that the child should not be removed abroad. But it could be a problem if the person concerned was trying to stop somebody else from having the child's custody decided and controlled by the courts in this country. For example, a French father and a Scottish mother might have separated, and the mother might have come back to live in Scotland and be threatening to raise custody proceedings in the Scottish courts. If the couple's child was in Scotland, and the father wanted to take him back to France so that the Scottish courts could not deal with the matter, we think that in general the question whether or not that should be a crime should depend on where the child normally had its home. If the child's normal home was in Scotland, we think it should be a crime but, if the child's normal home was in France, we suggest that it should not be a crime.

Conclusion

37. To sum up, what we are provisionally proposing is that the old crime of plagium should be abolished, and

that it, and the crime of abduction in so far as it relates to children, together with the offence introduced by the Child Abduction Act 1984, should be effectively replaced by new crimes. We have tried to explain what we think these new crimes should consist of, and we have also pointed out what we see as some of the difficult problems that have to be grappled with. In due course we shall have to make firm recommendations to Government, but before we do so we are anxious to have the comments and advice of as many people as possible.

38. Some of the problems which we have described in this pamphlet are perhaps rather technical, but others depend very much on what people think about the extent to which the criminal, as opposed to the civil, law should become involved in child custody disputes. We would be very glad to know the views of anyone who reads this pamphlet, even if these views are on some, rather than all, of the provisional proposals which we have made.

39. To assist readers of the pamphlet to send us any comments they may have, there follows a questionnaire which sets out the principal questions on which we should welcome views. Comments should be sent to the person named at the beginning of this pamphlet.

QUESTIONNAIRE ON CHILD ABDUCTION

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

1. On the basis of what is said in paragraphs 1 and 2 of the pamphlet, do you agree that the existing law of child abduction in Scotland could with advantage be reformed?
2. In particular, do you think that the crime of plagium should be abolished?
3. If the law of child abduction is to be reformed, we have proposed certain new crimes. The first of these is that it should be a crime for a person to take, remove, entice or detain a child under the age of 16 -
 - (a) if he has no appropriate entitlement to do so, and
 - (b) if he intends to cause the child, or to place the child in a position where he is likely to be caused, harm or distress.

Do you agree with this suggested crime? If not, do you have any alternative suggestion to offer?

4. Should it also be a crime for a person to take, remove, entice or detain a child under the age of 16 -
- (a) if he has no appropriate entitlement to do so, and
 - (b) he is reckless as to whether or not his actions will cause the child, or place the child in a position where he is likely to be caused, harm or distress?
5. In relation to this first crime we propose that it should not be capable of being committed by people who have "appropriate entitlement" to take the child in the first place. This phrase could include persons with parental rights in respect of the child, persons acting with the consent of a person who had parental rights, and persons who were by law entitled to take the child. Do you agree with this proposal?
6. For the purposes of this crime we propose that "harm" should be defined as including physical or mental injury, sexual abuse or exploitation, and any other form of exploitation which is detrimental to the welfare of the child. Do you think that this definition is adequate and appropriate?

7. The second crime which we propose would make it a crime for any person, other than a person expressly excluded from the scope of the crime, to take, remove or detain a child without lawful authority or reasonable excuse, and without the consent of the person having lawful control of the child with the intention of removing or keeping the child from the lawful control of that person. Do you agree with this proposal? If not, have you any alternative suggestion to offer?

8. Should certain persons be excluded from a risk of being prosecuted for this crime?

9. If so, should these persons be -

- (a) parents of the child;
- (b) any person having lawful rights in respect of the custody of the child, but only so far as, at the material time, such person was exercising, and acting within the scope of, such rights;
- (c) any relative of the child;
- (d) any other person?

10. If relatives are to be excluded from this crime, it will be necessary to say who are relatives for this purpose. One possibility would be to define the word as including parents, grandparents, great grandparents, sisters, brothers, aunts, uncles, nieces and nephews, and the husband or wife of any of the foregoing. Do you think this list is too wide, or too narrow? Do you have any other suggestions for inclusion, for example, cousins?

11. It is proposed that this crime should not extend to any person acting with lawful authority or with reasonable excuse. Do you agree?

12. It is also proposed that it should be a defence to this crime that the person charged -

- (a) had reasonable grounds for believing that the person having lawful control of the child had consented to the taking, removal or detention;
- (b) had reasonable grounds for believing that the child had attained the age of 16.

Do you agree with this?

13. The third crime which we propose would make it a crime for a person to take, remove or detain a child without reasonable excuse and with the intention of depriving another person of the lawful control of the child, by the use of violence, or the threat of violence, or in a manner or in circumstances likely to give rise to serious alarm for the child's safety. Do you consider that this crime is necessary or desirable?

14. If you think that there should be this third crime, do you agree that it should not extend to any person acting with reasonable excuse?

15. The fourth crime which we propose would make it a crime for any person to take or send a child out of the United Kingdom -

- (a) knowing that there is, in respect of the child, an order of a court in the United Kingdom prohibiting the removal of the child by him from the United Kingdom or any part of it; or
- (b) with the intention of preventing any other person from having the custody of the child determined and effectively controlled by a court in the United Kingdom.

Do you think that this would be an improvement on what is presently in the Child Abduction Act 1984? Are there any other circumstances in which you think taking a child abroad should be a crime?

16. In relation to taking a child abroad so as to prevent someone else from having the child's custody determined and controlled by a United Kingdom court, do you agree that this should only be a crime where the child's normal home is in the United Kingdom?
17. Do you have any further suggestions or comments which you would like to make?