

For discussion
on 12 February 2001

Legislative Council Panel on Welfare Services

Review of the Adoption Ordinance – The Way Forward

PURPOSE

This paper reports on the outcome of the public consultation exercise on the Review of the Adoption Ordinance and the views expressed in the revamped Working Group set up to examine the proposals. Members' views on the proposed legislative amendments are now sought prior to drafting of an Amendment Bill.

BACKGROUND

2. In November 1998, the Administration published the Report of the Working Group on the Adoption Ordinance for public consultation.
3. The consultation exercise was conducted between December 1998 and March 1999. Over 60 submissions from Government bureaux/departments, NGOs, legal professionals, political parties, academics, and adoptive and birth parents were received.
4. Having examined the views received, the Working Group was revamped to include non-officials from adoption-related organizations and support groups. The new Working Group was formed in April

1999 and has met on 6 occasions to discuss key issues raised during the consultation exercise. Membership of the Working Group is at Annex A.

5. As a point of reference, the number of adoption applications processed by SWD has steadily fallen over the past 7 years - from 399 in 1993/4 to 233 in 1999/2000. As at the end of December 2000, the number of DSW wards available for adoption was 7 (local), 118 (overseas).

RECOMMENDATIONS OF THE NEW WORKING GROUP

6. Based on the feedback obtained from the public and the advice from Members of the Working Group, we now propose to introduce amendments to the Adoption Ordinance, with a view to updating and improving current adoption arrangements. The major legislative proposals are set out below –

- (a) to explicitly set out the principle that the best interests of the child should be the paramount consideration during the entire adoption process;
- (b) to provide that persons applying for an adoption order should be subject to criminal record checks;
- (c) to remove existing provisions which allow birth parents to impose a condition about the religious faith in which the child

should be brought up;

- (d) to allow the birth mother of a child to give consent for the child to be placed for adoption when the child is four weeks old, in place of the current requirement of six weeks;
- (e) to insert new provisions making it unlawful for a person, or an organization other than the SWD (or an adoption agency authorized by SWD) to make arrangements for the adoption of a child by unrelated persons;
- (f) to insert new provisions to stipulate the procedures for overseas adoption;
- (g) to remove the list of overseas countries, where adoption orders made in those countries have the effect of fulfilling one of the three conditions for recognition of an overseas adoption order as an adoption order validly made in Hong Kong. Instead, to insert appropriate references to the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (if the latter is to apply to the HKSAR);
- (h) to use more positive and appropriate terms in the Ordinance and to remove a sex discriminatory provision;
- (i) to improve the present arrangements for step-parent adoption, so as to avoid a birth parent who remarries, from having to adopt

his/her children from a previous marriage when his/her spouse wishes to adopt such children;

- (j) to provide a “root-tracing” mechanism to enable an adopted person to have access to his/her birth records (except the addresses of the birth parents if they have exercised a veto against such disclosure), and to set up a contact register in SWD to facilitate contact between adopted children and their birth parents;
- (k) to provide for an appeal mechanism to allow applicants in unsuccessful adoption applications to lodge an appeal against DSW's decision;
- (l) to require applicants for an adoption order to serve notice to DSW at the earliest opportunity if persons other than DSW are to be appointed as the guardian ad litem; and
- (m) to update the penalty provisions to more accurately reflect the appropriate level of penalty for certain offences.

BASIS FOR THE RECOMMENDATIONS

(a) Best interests of the child

7. The original proposal in the Report was that the best interests of the child should be “the first and paramount consideration”. During the

consultation exercise, most respondents supported the principle, but cautioned that “the first” seemed to imply that there were other important considerations. Therefore, we propose to set out “the best interests of the child shall be the paramount consideration” as the overriding principle in the legislation.

(b) Criminal record check

8. During the consultation exercise, this proposal was supported by most respondents, although some argued that only serious or relevant offences (e.g. child abuse) should become grounds for disqualifying an applicant. Others argued that there should not be any bar to those who could benefit from the Rehabilitation of Offenders Ordinance.

9. At present, applicants who have criminal records are not automatically rejected, but will still be assessed on their overall suitability. Their applications are considered with regard to the nature and severity of the offences, together with other areas of assessment. Whether their applications are successful depends on the merits of their individual cases and the claims of other competing adoptive parents. This will remain the same in future.

10. We propose that SWD and the Police should check for criminal convictions for the purpose of assessing the suitability of the applicants.

(c) Religious Upbringing

11. During the consultation exercise, most respondents were of the view that while birth parents should be given an opportunity to state their choice for the religious upbringing of their children, their views should not be legally binding. This is in line with Article 14 of the United Nations Convention on the Rights of the Child, which states that States Parties shall respect -

- (a) the right of the child to freedom of thought, conscience and religion; and
- (b) the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his/her right in a manner consistent with the evolving capacities of the child.

Under the circumstances, it is the adoptive parents who should provide such direction. We therefore propose to remove the current provision for birth parents to impose a condition with respect to the religious upbringing of the child.

(d) Minimum period of consent to place a child for adoption

12. During the consultation exercise, this proposal was generally supported. This measure will facilitate the early placement of a child for adoption, which will be in his/her best interests. Early completion

of the procedures can reduce the emotional stress on birth mothers who are rape/incest victims. The proposed change will not exert pressure on the birth mother to make a quicker decision, as she can always take longer than the proposed statutory minimum of four weeks to decide. In this connection, SWD has strengthened its work on pre-natal counselling for unmarried mothers. We therefore propose to adopt a statutory minimum of four weeks after birth, after which time a birth mother can give consent for her child to be placed for adoption.

(e) Arrangements for the adoption of a child by unrelated persons

13. Most submissions received supported the proposal. Private arrangements for the adoption of a child by unrelated persons cannot ensure that the child is placed in the best available adoptive home. It can lead to numerous problems, such as lack of proper counselling and assessment and inability to verify consent given by birth parents. In addition, manipulation of adoption for monetary gain or the birth parents being compelled to make decisions on the basis of limited/incorrect information or persuasion from people not professionally competent to advise, remain distinct possibilities.

14. However, a minority of Members of the Working Group held different views and cautioned that the existing legislative requirements could be easily circumvented through long-term childminding, making it difficult for the Court not to grant an adoption order in the final analysis, having regard to the best interests of the child.

15. Most members of the Working Group did not agree and argued that the possible circumvention through childminding should not be an excuse because –

- (a) the arguments in support of the proposal (in paragraph 13) remain valid;
- (b) private adoption by unrelated persons is not legally desirable;
- (c) only adopters which have little chance of success would use such a loophole. It was all the more important, therefore, to make clear in the Ordinance, as a matter of principle, society's disapproval of private adoption by unrelated persons;
- (d) whether the Court would make an adoption order in favour of a childminder circumventing the law in this way was for the Court to decide. The Court would likely take into account the best interests of the child, the circumstances and the severity of the breach etc. It did not follow that the Court would automatically approve each and every case. There were precedents in the UK of the Court refusing to make such an adoption order in these circumstances; and
- (e) circumvention of the law was not likely to be prevalent. Further consideration could be given to tackling this, if a problem arose in the light of actual experience.

16. To clarify the position and to protect the best interests of the child, we propose to make it unlawful for any person, other than SWD or an adoption agency so authorized by SWD, to make arrangements for the adoption of a child, or placement of a child for adoption, with the exception of that by a parent or his/her spouse, or a relative of the child, or those acting in pursuance of an order of the Court.

(f) Procedures for overseas adoption

17. There has been some criticism of the inadequate protection afforded to children sent out of Hong Kong under the Guardianship of Minors Ordinance for the purposes of adoption, since it leaves uncertain whether the requirements of the Adoption Ordinance (e.g. supervision of the child's well-being after departure from Hong Kong) have been met. During the public consultation phase, most submissions agreed that clear and proper procedures on overseas adoption should be established.

18. We propose that new provisions should be introduced to make it unlawful for an unrelated person to remove a child out of Hong Kong for the purpose of adoption without an order given by the Court under the Adoption Ordinance. In addition, the legal steps necessary to undertake overseas adoption should be stipulated in the Ordinance. The Court has to satisfy itself that certain conditions (e.g. consent from birth parents and suitability assessment of the prospective adopters) have been fulfilled before granting an order authorizing departure of the child for overseas adoption. The order would confer parental rights and duties for the child on the adoption agency in the overseas country, before an

adoption order is made in that country.

(g) The effect of adoptions made in Commonwealth countries and the USA

19. During the course of the Working Group's deliberations, it was agreed that section 17(2)(c)(i) of the Ordinance, which provides that Hong Kong automatically recognizes adoption orders made in Commonwealth countries and the USA, thereby fulfilling one of the three conditions for recognition of an overseas adoption order as an adoption order validly made in Hong Kong, to be outdated following the return of sovereignty to China. It should therefore be repealed.

20. On 30 November 2000, China signed the Hague Convention on the Protection of Children and Cooperation in respect of Intercountry Adoption. We are considering whether to apply the Convention to Hong Kong. The question of recognizing adoption orders made in overseas countries will be addressed in that context.

(h) Use of more appropriate terms. Removal of a sex discriminatory provision

21. Many submissions received during the consultation exercise suggested that the language and terms used in the Ordinance should be made more positive. We agree and propose that “surrender her child” and “surrender the infant” in Form 4 and Form 4A respectively should be replaced by “agree to the placement of the child for adoption”. Also, to follow up on the advice in the Law Reform Commission Subcommittee’s Consultation Paper on Guardianship and Custody, we

propose that the “wishes of the infant” should be replaced by “views of the infant” in the Ordinance.

22. Section 5(3) of the Ordinance currently provides that “an adoption order shall not be made in respect of an infant who is a female in favour of a sole applicant who is a male, unless the Court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order”. To avoid overt discrimination against men and bearing in mind the best interests of the child, we propose to amend the clause to read “an adoption order shall not be made in respect of an infant in favour of a sole applicant, unless the Court is satisfied that there are special circumstances which justify the making of an order”. Whilst this proposal may appear discriminatory on the grounds of marital status, Section 56C of the Sex Discrimination Ordinance has already provided a general exception in relation to discrimination between persons of different marital status arising from the provision of adoption services.

(i) Step-parent adoption

23. During the consultation phase, many submissions agreed that the present arrangement of requiring a birth parent to adopt his/her child from a previous marriage when he/she remarries (since the granting of parental status to his/her new spouse requires a joint application to be made by both) was not reasonable. They agreed that the law should be amended to avoid “downgrading” the parental status of birth parents to adoptive parents.

24. Since there are good reasons for a step-parent to adopt the child(ren) of his/her spouse from a previous marriage, e.g. to establish a clear legal status between the child and the step-parent, the practice of step-parent adoption should continue.

25. The Working Group noted that the Adoption (Scotland) Act 1978, as amended by the Children (Scotland) Act 1995, enables a step parent to apply to adopt a child as a sole applicant if his/her spouse was the natural parent of the child and the child was born within marriage. This also confirms that the birth parent who is married to the step parent retains all of his/her original rights over the child after the step parent has adopted the child. The non-custodial parent's consent to the adoption is also required. As for children born out of wedlock, the couple (birth parent and step parent) should still make a joint application to adopt the child in order to protect the interests of the child under certain circumstances.

(j) Root-tracing

26. During the consultation exercise, views were divided as to whether information about the birth parents should be disclosed to the adopted child.

27. The absence of a statutory right for an adopted person to be informed of the identity of his birth parents may constitute a breach of Article 17 of the International Covenant on Civil and Political Rights and Article 14 of the Hong Kong Bill of Rights Ordinance (which gives

effect to the former in Hong Kong). However, on the other hand, consideration should also be given to protecting the rights of birth parents (e.g. who might have been a rape/incest victim). Experience in overseas countries also varies, with some allowing full disclosure whilst others do so subject to their being no veto by the birth parents.

28. The Working Group agreed that a middle course of action should be pursued. We propose that upon request from an adopted person, the Administration should disclose the birth and adoptive records, except for the addresses of the birth parents if the birth parents have exercised their right of veto on disclosure.

29. The information currently provided by SWD to adoptive parents upon the granting of adoption orders is set out in Annex B. It includes information on the birth history of the child, information on the birth parents (except identifying information), the circumstances leading to the adoption, and the adoption process. A copy of this information will be given to the adopted person if he/she approaches SWD for his birth information in future.

30. Section 22(1) and (2) of the Births and Deaths Registration Ordinance currently provide that any person is entitled to cause a search for and obtain a copy of, an entry in the register. As a result, once the adopted person knows his/her birth name and his/her birth mother's name, he/she can perform a record search and obtain a certified true copy of his birth certificate. In this way, the addresses of the birth parents may become known as one column in the register form of birth refers to "signature, description and residence of informant", although in most

cases, this will refer to information 20 years ago.

31. Therefore, when a birth parent is consulted on whether to impose a veto, he/she will be advised clearly of this possibility, namely that a veto will not necessarily guarantee that his/her address can be withheld from the birth child.

32. SWD will also set up a contact register to facilitate contact between adopted children and their birth parents, and provide the necessary counselling before they decide whether to meet each other.

(k) Appeal mechanism

33. Feedback received during the consultation exercise strongly supports the establishment of an appeal mechanism. We therefore propose to provide for this in the Ordinance.

34. As such, we intend to set up an Adoption Review Board which would be chaired by a Deputy Secretary for Health and Welfare and consist of not less than two non-official members appointed by the Secretary for Health and Welfare. The decision of the Board would be final. We expect the number of appeal cases to be very small, based on past experience.

(l) Guardian ad litem

35. During the consultation exercise, the Judiciary Administrator suggested introducing a new rule requiring any applicant for an adoption

order to serve notice of the application on DSW at the earliest opportunity regardless of whether the Director is to be the guardian ad litem. At present, an applicant is only required to notify the Director of the hearing of an adoption application if the Director is not the guardian ad litem. This is often 6 months after the filing of the application and only shortly before the hearing. This does not allow the Director sufficient time to look into the merits of the application or to intervene, to protect the child. The Working Group proposes to amend the Ordinance to overcome this problem.

(m) Penalties

36. The Ordinance currently provides for penalties for contravention of certain provisions, such as restrictions on adoption-related advertisements and prohibition of payments in connection with adoption. These penalties, made over 40 years ago, are outdated and long overdue for revision. We propose that these be updated to more realistic levels. In consultation with the Department of Justice, it is proposed that the original fines of “\$1,000” and “\$2,000” be replaced with fines at “Level 5” (currently \$50,000) and “Level 6” (currently \$100,000) respectively.

THE WAY FORWARD

37. We intend to consult the Social Welfare Advisory Committee on our proposals in February 2001 and introduce an amendment Bill in the second half of the 2001-02 legislative session.

ADVICE SOUGHT

38. Members are invited to comment on the legislative proposals.

Health and Welfare Bureau
February 2001

Annex A

**Membership of the Working Group
to Review the Adoption Ordinance**

Chairman:	Mr Robin Gill, JP	HWB
Members:	Mr Stephen Yau, JP	International Social Service (HK)
	Dr Joyce Chang, JP	Caritas HK
	Mr Thomas Mulvey, JP	Hong Kong Family Welfare Society
	Dr Grace Ko	Happy Parents' Association
	Ms Gretchen Ryan	Mother's Choice
	Ms Mary Ho	DoJ
	Miss Victoria Tang	HWB
	(from April 1999 to December 1999)	
	Miss Diane Wong	HWB
	(from January 2000 onwards)	
	Ms Ann Lau	SWD
	Mrs Anna Mak	SWD
	Mrs Agnes Li	SWD
	Ms Lana Mok	SWD
	(from April 1999 to January 2000)	
	Mr Y T Wong	SWD
	(from February 2000 onwards)	
Secretary:	Mr Vincent Fung	HWB
	(from April 1999 to June 2000)	
	Mr Eric Chow	HWB
	(from July 2000 onwards)	



社會福利署
Social Welfare Department

Our Ref. : SWD 121/71

Tel. No. :

Adoption Unit,
4/F., Harbour Building,
38 Pier Road, Central,
Hong Kong.

Background Information of _____
originally known as _____

I. Information of the child

1. Original name			
2. Length of pregnancy			
3. Date of birth			
4. Time of birth			
5. Place of birth			
6. Weight at birth			
7. Type of delivery			
8. Any complications at birth			
9. Health condition since birth (include record of hospitalization, if any)			
10. Place of residence since birth	Date :	From :	To :

II. Information on child's birth parents

	Birth Mother	Birth Father
1. Surname		
2. Age		
3. Place of birth		
4. Height		
5. Weight		
6. Colour of eye		
7. Colour of hair		
8. Race		
9. Marital status		
10. Relationship of birth parents		

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11. Family composition	Relationship	Sex/Age	Occupation	Relationship	Sex/Age	Occupation
12. Education						
13. Employment						
14. Personality & characteristics						
15. Interests & hobbies						
16. Health condition (including any history of serious/hereditary illness & disability that required long-term medication and treatment)						
17. Family history of serious/hereditary illness & disability						
18. Addiction to drug or alcohol						
19. Other children of birth parents (siblings or half-siblings)	Sex :	Age :	Sex :	Age :		

III. Course of acquaintance of child's birth parents (Please fill in information on when and how the child was found and other details available if the child was abandoned by unknown parents.)

IV. Reasons for relinquishment

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V. Significant events during adoption process (e.g. change of adoptive placement, trips outside of Hong Kong)

VI. Adoption procedures

1. Date of child's birth parents signed on the Statutory Declaration	Birth Mother	Birth Father
2. Date of the child became the ward of the Director of Social Welfare		
3. Date & place of matching between the child and the adoptive applicants		
4. Name of adoptive parents		
5. Date of adoption placement		
6. Date of enactment of adoption order		
7. Place of enactment of adoption order		

VII. Gifts/souvenirs from birth parents (if any)

Caseworker of Adoption Unit,
Social Welfare Department

Dated this day of