



Panel on Welfare Services

Child Protection

Introduction

The topic under discussion “Child Protection” covers a wide range of issues. The Law Society’s Family Law Committee has decided to make representations on the following issues: Care and Protection orders and Legislative reform.

1. Care and Protection Orders (“CPOs”)

The Law Society has expressed concern on the handling of CPO applications for vulnerable children who come from broken homes or have been subjected to abuse or domestic or sexual violence, for over a decade. The basis of our concern is that there are inherent flaws in the system which mitigate against any acknowledgment particularly by the courts that these are cases which require a sensitive and light-handed approach. The legislation was passed in a less enlightened era when the effect of dealing with children in a vulnerable situation alongside juvenile delinquents was often not recognised.

The fact that children subject to CPOs are dealt with in Juvenile Courts is probably historical since the procedures follow those in England & Wales where magistrates have a dual role dealing with both criminal and civil matters. In Hong Kong the magistracies have an almost exclusively criminal role and inevitably attitudes and procedures are better “geared” to handle criminal cases.

The following is a description of an advocate’s recent experience when conducting a CPO hearing in Eastern Magistracy:

- “1. The hearings were conducted in the Juvenile Court which is otherwise used as an adult court.”*

2. *The solicitor appearing was required to stand when addressing the Bench which is a reversal of the practice introduced to make the hearings more informal and representatives were permitted to remain seated in order to maintain an air of informality.*
3. *The child was required to stand. Even though this is “normal” it adds the formality and can be intimidating for the child concerned.*
4. *New instructions were also posted on the advocate's desk for legal representatives **not** to say “good morning” to the magistrate. It is noted the directive does not engender an atmosphere in which juveniles, let alone vulnerable children, should be dealt with.*

Prior to the hearing the child was kept in a witness waiting room on the same floor as the juvenile court and escorted past adult and juvenile defendants waiting to go into the court for the hearing.”

Many children the subject of CPOs require protection because of incidents of domestic violence or institutional indifference. Those dealing with them need the training, understanding and compassion which should be provided by a specialist Family Court removed from the busy and traumatic atmosphere of a magistracy. Proceedings should be conducted in a private room and not a court room, they should be as relaxed and informal as possible and those appearing should be treated with firmness but understanding that they are appearing usually because they are the victims of circumstances not of their own making. They are thus distinguishable from juvenile delinquents and that distinction must be recognised.

The Law Society submits it is no longer appropriate for such children to be dealt with in the Magistrates Court and that the Family Court should have the jurisdiction to deal with Care and Protection Orders.

The Law Reform Commission's Report: *Child Custody and Access* recommended that CPOs should be dealt with in a Family Court and this was endorsed in the Law Society's *Report on the Domestic Violence Ordinance* in December 2005.

Currently, the Law Society is not aware of any action being taken by either the Judiciary or the Secretary of Health Welfare and Food Bureau to change the situation outlined above. At the very least, measures should be put into place to ensure that all CPO hearings should take place in a dedicated room and not in court. The procedures should allow for a relaxed atmosphere with parties seated around a table and efforts should be made to ensure that the children should not be forced to wait or come unnecessarily into contact with adult and juvenile offenders in the same building.

2. Law Reform Commission's Reports ("LRC")

There have been no amendments to the major pieces of legislation dealing with children and family-related applications for more than 30 years, and this is clearly reflected by the fact that very few of the LRC's recommendations have been implemented. The lead Bureau, the Health Welfare and Food Bureau has not issued any Consultation Paper on its proposals to implement the legislative reforms. Since 1998 the LRC has published the following reports, and we highlight some of the important recommendations which merit urgent consideration:

- *Guardianship and Custody December 1998*
- *Guardianship of Children: January 2002*
- *International Parental Child Abduction: April 2002*
- *Family Dispute Resolution Process: March 2003*

"Recommendation 27

(Case management and settlement)

We recommend that:

- (a) procedures at the Family Court be streamlined and that there be continuous monitoring of the system by effective case management;
- (b) a Practice Direction governing case management in the Family Court be introduced (possibly modelled along the lines of the Construction List checklist and its associated Practice Direction);
- (c) there be a requirement that a pre-trial checklist be completed at the Summons for Directions stage of any case involving a dispute in relation to children;
- (d) time limits should be imposed for the delivery of any affidavits associated with the case in order to minimize delay;

- (e) judges should be given more control to reduce the costs and delay in the system;
- (f) failure to conduct cases economically should result in appropriate orders for costs, including wasted costs orders.

Recommendation 28

(Delay in family proceedings)

We recommend that:

- (a) to promote the best interests of the child, priority must be given to the hearing of disputes concerning children (i.e. disputes as to custody and access, child abduction, wardship and guardianship);

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Recommendation 55

We recommend the retention of the power to order care and supervision orders in guardianship disputes and any disputes concerning the best interests of a child.

We also recommend that the anomalies between the Director of Social Welfare's powers in relation to care and supervision orders under the Guardianship of Minors Ordinance (Cap 13) and the Matrimonial Causes Ordinance (Cap 179), and his powers under the Protection of Children and Juveniles Ordinance (Cap 213), should be resolved.

Recommendation 56

We recommend that there should be a definition of a care order and a supervision order in each of the matrimonial Ordinances.

Recommendation 57

We recommend that the Director of Social Welfare should only be entitled to apply for a care order or supervision order in private law proceedings on the same grounds as those in section 34(2) of the Protection of Children and Juveniles Ordinance (Cap 213).

Recommendation 58

We recommend that the welfare or best interests principle should guide all proceedings under the Protection of Children and Juveniles Ordinance (Cap 213).

Recommendation 59

We recommend that rule 93 of the Matrimonial Causes Rules (Cap 179) and order 90, rule 4 of the Rules of the District Court (Cap 336) should be amended to allow for an *ex parte* application in case of emergency, but that an *inter partes* hearing should proceed if the Director's application was opposed.

Recommendation 60

We recommend that section 34 of the Protection of Children and Juveniles Ordinance (Cap 213) should be amended to allow an application for a care order or supervision order to be made by third parties.

We also recommend that the same criteria for applications by third parties, already adopted for private law proceedings, should be adopted for such public law proceedings.

Recommendation 61

We recommend that research should be conducted into how the court environment could be improved for children appearing in care and protection proceedings.

Recommendation 62

We recommend that separate representation by the Official Solicitor should be available for children as of right in care or supervision proceedings, whether brought under Protection of Children and Juveniles Ordinance (Cap 213) or the matrimonial Ordinances.

Recommendation 63

We recommend that, where care or supervision orders are applied for, whether under the matrimonial Ordinances or the Protection of Children and Juveniles Ordinance (Cap 213), parents should be granted legal representation (by The Duty Lawyer Service if in the juvenile court, or by the Legal Aid Department if in the Family Court or the Court of First Instance) if they fulfil the eligibility requirements.

We also recommend that there should be legal representation provided by the Legal Aid Department for children and parents in wardship proceedings where the applicant is the Director of Social Welfare or other public agency, as the effect of the order is to take away the responsibility of the parents.

Recommendation 64

We recommend the adoption of the Australian guidelines for setting out the duties of lawyers representing children and parents in the juvenile court for care and protection and supervision orders.

We also recommend that special training on how to interview and represent children and parents should be provided to lawyers for these sensitive and complex cases.

We further recommend that these arrangements should apply to cases involving care and supervision orders being made under the matrimonial Ordinances in the Family Court.

Recommendation 65

We recommend that, before making a care order, a District Judge should have the power under the matrimonial Ordinances to order that a child be assessed by a medical practitioner, clinical psychologist or an approved social worker, as is provided in section 45A of the Protection of Children and Juveniles Ordinance (Cap 213).

We also recommend that the Director of Social Welfare should have the power to order assessment in these proceedings in line with section 45A.

Recommendation 66

We recommend that the views of a child should be taken into account in proceedings under the Protection of Children and Juveniles Ordinance (Cap 213).

Recommendation 67

We recommend that parents whose children are made the subject of care orders under the matrimonial Ordinances should be entitled to apply to have orders made to secure regular contact between them and their children.

We also recommend that section 34C (6) of the Protection of Children and Juveniles Ordinance (Cap 213) should be amended to allow the court to make an order for contact when a care order is being made.”

We submit that co-ordinated action should be taken by the relevant Bureaux and the Judiciary to address the unsatisfactory system still in place in relation to CPO hearings for vulnerable children.

3. Legislative Reform

Legislation covering “children” is scattered in the following legislation:

- Guardianship of Minors Ordinance (Cap 13)
- Matrimonial Proceedings and Property Ordinance (Cap 192)
- Wardship of Children High Court Ordinance (Cap 4)
- Matrimonial Causes Ordinance and Rules (Cap 179)
- Separation and Maintenance Ordinance (Cap 16)
- Domestic Violence Ordinance

- Protection of Children and Juvenile’s Ordinance (Cap 213)
- Juvenile Offenders Ordinance
- Adoption Ordinance (Cap 290)
- Parent and Child Ordinance (Cap 429)
- Legitimacy Ordinance (Cap 184)
- Affiliation Proceedings (Cap 183)
- International Child Abduction (Cap 512)
- High Court Ordinance (Cap 4)
- District Court Ordinance (Cap 336)

We submit that resources be allocated to updating and consolidating the legislation, and for a new “*Children’s Ordinance*” to be enacted to provide modern legislation to protect children in Hong Kong.

**The Law Society of Hong Kong
The Family Law Committee
28 June 2006**
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