



THE  
**LAW SOCIETY**  
OF HONG KONG  
香港律師會

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Practitioners Affairs  
**百年100<sup>th</sup>**  
誌慶 ANNIVERSARY

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8 May 2007

Miss Betty Ma  
Clerk to Panel  
Legislative Council  
Legislative Council Building  
8 Jackson Road, Central, Hong Kong

Dear Miss Ma,

**Re: Panel on Welfare Services  
Meeting on 14 May 2007**

I refer to your letter dated 25 April 2007 in connection of the Panel meeting on 14 May 2007, and the Law Society's Family Law Committee notes the Panel is seeking views on "*the child fatality review and child protection*".

### **1. Child Fatality Review**

The Family Law Committee does not have any comments.

### **2. Child Protection**

The Family Law Committee note the Report by the Legislative Council Secretariat "*Child Protection in Selected Overseas Places*" indicates Hong Kong does not have comprehensive legislation on "*guiding principles for child protection policies/measures*". In order to address this omission, the Family Law Committee re-iterates its observations that the Law Reforms recommendations in its reports on *Guardianship and Custody (December 1998)*, *Guardianship of Children (2002)*, and the *Family Dispute Resolution Process (March 2003)*, should be implemented as soon as possible. A copy of the Law Society's submissions dated 23 June 2006 is attached.

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## The Law Society of Hong Kong

The Law Society has written to the Health Welfare and Food Bureau on numerous occasions to check the status of these reports and received the following comment on 13 February 2007:-

*“As regards the Law Reform Commission Reports on guardianship and custody, we are examining the various recommendations in the reports on guardianship of children, international parental child abduction and custody and access carefully and will adopt a holistic approach in considering how to take forward the relevant recommendations. As the recommendations of the reports carry far-reaching implications to the guardianship and custody arrangements of children in Hong Kong, we need to consult the relevant bureaux/departments extensively before we are in a position to consider the way forward carefully.”*

We note the Report on *Guardianship and Custody* is now over 8 years old, and the Report on *Guardianship of Children* is 5 1/2 years old, yet there is still no indication the Administration will update Hong Kong's legislation.

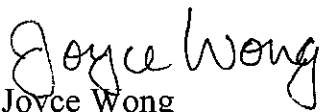
### **3. Care and Protection Orders**

The Law Society re-iterates its observations that the procedures for Care and Protection Orders are outdated and need to be reformed.

### **4. Attendance at the Panel meeting 14 May 2007**

The Law Society will not be sending any representative to attend the Panel meeting next week.

Yours sincerely,



Joyce Wong

Director of Practitioners Affairs

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Encl.



## **Panel on Welfare Services**

### **Child Protection**

#### **Introduction**

The topic under discussion “Child Protection” covers a huge 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 complaints included the fact that many Magistrates failed to adopt a different approach to these children, simply regarding all of the children appearing in the Magistrate’s Court as juvenile delinquents; failing to separate the vulnerable children from those juveniles facing criminal charges; hearing CPO applications in the court room.

It was clear that until we raised concerns under Hong Kong’s report to the United Nations in 1998 under the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment, these complaints fell on deaf ears; to put it simply there was bureaucratic indifference to their plight.

Since 2000 the situation has improved but the Administration should not adopt a complaisant attitude. It should conduct a thorough review of this issue and implement comprehensive reforms not only to the legislation but also to the court system.

The Juvenile Offenders Ordinance provides the “Juvenile Court” with the jurisdiction to handle CPOs. The thrust of the Juvenile Offenders Ordinance is clearly stated in the title “Juvenile Offenders”, young persons charged with criminal offences. The reason for assigning this work to the Magistrates Court is historical as the Magistrate’s Courts in England and Wales dealt with both criminal and civil matters. We submit however, that in Hong Kong, the primary jurisdiction of the Magistracies is “criminal” not “civil” work and the reality is that many Magistrates deal day in and day solely with criminal cases. Some, but not all, lack the empathy to deal with the vulnerable children who are the subject of CPO applications. Some Magistracies lack suitable facilities to handle these cases; the newer court buildings are obviously better and have more purpose built areas.

The Law Society submits it is inappropriate in this day and age for such children to be dealt with in the Magistrates Court and that the Family Court should have the jurisdiction to deal with such applications. The Juvenile Offenders Ordinance was enacted in 1933 and the Protection of Children and Juveniles Ordinance was enacted in 1951. The policies underpinning these pieces of legislation belong to a world which our great-grandparents and grand-parents were familiar but are so outdated and in need of reform. The legislation does not provide the policies to help our children and at the very least should be overhauled.

The following passage on CPOs was published in the *Law Society’s Report on the Domestic Violence Ordinance* (December 2005) advocating the need to establish a true Family Court and highlighting reasons to transfer CPOs from the Magistracies:

“The Law Society endorses the recommendations on CPOs made in the Law Reform Commission’s Report: *Child Custody and Access*. The recommendation to transfer the Juvenile Court to a Family Court has merit as the physical environment for these hearings should be considered. The Magistracy is not an appropriate place to deal with children in the 21<sup>st</sup> Century. The administration of Care and Protection Orders is a hangover from colonial times and changes could and should be introduced as soon as possible. Despite past complaints, there is evidence of a lack of empathy for the trauma these children are enduring and there is considerable room for improvement.

There is evidence of an inconsistent approach by the different Magistracies when dealing with CPOs. On the whole, the Fanling and Kowloon Magistracies have improved their procedures. The children have been separated from the juvenile delinquents and adults facing criminal charges, and hearings are conducted in a room other than the courtroom. However, some of these children can still wait up to 2 hours before a Magistrate hears the application.

It is clear that some Magistrates lack awareness and the ability to distinguish the different needs of children involved in CPO applications with those required for juvenile offenders. 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.*
- 5. 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.”*

It should be recognised that many of these children require protection *because* of incidents of domestic violence and have suffered unnecessary anxiety as a result of institutional indifference. CPO cases should be dealt with by the Family Court and the Administration should take urgent steps to remedy this unsatisfactory situation.”

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 improve the situation outlined above. At the very least, measures should be put into place to ensure that all Magistrates hearing CPO cases appreciate the fact that these children have not done anything wrong and they should not be treated as if they were to blame for the predicament in which they find themselves. We have conducted a brief survey of members who have appeared before Magistrates in CPO applications and regret to report the attitude of some Magistrates remains unacceptable. If Magistrates are to continue to hear CPO applications for the foreseeable future we urge that care be taken in selecting suitable candidates to handle these cases.

## **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);

***Child Custody and Access: March 2005***

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, and only lawyers with this special training should handle these 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 our children.**

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

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