

**Submissions on Guardianship of Minors (Amendment) Bill 2011**

**I. Introduction**

We gratefully adopt the introduction and concur with the concerns put forward by the Law Society of Hong Kong with regard to the almost decade-long period it has taken to reform the law in accordance with the 2002 Guardianship of Children Report ("2002 Report") by the Law Reform Commission ("LRC"). It is urged that the recommendations set out in the 2005 Child Custody and Access Report ("2005 Report") by the LRC could be adopted sooner, so as to bring the law in line with current societal needs and values.

**II. Comments on the Guardianship of Minors (Amendment) Bill 2011**

The proposal to incorporate the nine recommendations of the 2002 Report into the Guardianship of Minors Ordinance (Cap 13) ("GMO") is welcomed. Whilst the reform of the GMO is now being considered, it would also be a valuable opportunity to achieve a more thorough reform in the law by further incorporating recommendations in the 2005 Report that are useful and does not involve huge changes that may require more public deliberation on.

Two recommendations in the 2005 Report suitable for incorporation at this stage are: (i) to replace the term "welfare" with "best interests" in section 3(1)(a)(i) of the GMO, which is not only more appropriate for the prevailing family situations in Hong Kong but it also serves to comply with our international obligations under the United Nations Convention of the Rights of the Child; and (ii) introducing a statutory checklist of factors to assist the judge in exercising his discretion in determining custody or guardianship proceedings.

**(i) Replacing the term "welfare" with "best interests" in s. 3(1)(a)(i) of the GMO**

The welfare principle is found in section 3(1)(a)(i) of the GMO, which provides that the court "shall have regard to the welfare of the minor as the first and paramount consideration and in having such regard and due consideration to" the factors listed in relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property.

The welfare principle is also applied in other matrimonial legislations, including section 48C of the Matrimonial Causes Ordinance (Cap 179), section 18(6) of the Matrimonial Proceedings and Property Ordinance (Cap 192), and section 5 of the Separation and Maintenance Orders Ordinance (Cap 16) (it is termed as 'best interests of the child' in this provision).

The reasons for preferring the term "best interests" to welfare was expounded in paragraph 9.19 of the 2005 Report:

"The concept of *"welfare"* is retained in the Children Act 1989 and the Children (Scotland) Act 1995. However, the Australian Family Law Council considered that using the term *"best interests"* to describe the principle was more in conformity with the language of the United Nations Convention on the Rights of the Child. The Council recommended that:

*"the adoption of wording of international conventions, to which Australia is a signatory, should as far as possible, apply in relation to wording in all cases where an international convention of relevance applies." "*

The Australian Family Law Council has adopted the wording of "best interests" and it would be desirable for Hong Kong to follow this approach fully in compliance with the United Nations Convention on the Rights of the Child. In fact, the term "best interests" has already been used in section 5 of the Separation and Maintenance Orders Ordinance (Cap 16), and it would be preferable also to use it in the other matrimonial legislations, with the additional reason of conformity and avoiding confusion.

#### **(ii) Statutory checklist of factors to assist the judge in exercising his discretion**

The aforementioned welfare or best interest principle does not contain a detailed checklist as to how the judge considers and applies this principle. Arguments in favour of a checklist include greater consistency, clarity and understanding of the basis of the judge's decision for parents and children. On the other hand, arguments against include the lengthening of proceedings, mechanical approaches to judges' decision-making, relevant professionals

already using their own checklist and the all-encompassing nature of the best interests principle.

Nevertheless, the LRC recommended the use of a checklist for the reasons stated in paragraph 9.26 of the 2005 Report:

"On balance, we consider that a statutory checklist of factors would be a useful mechanism to assist the court in making its determination in any particular case. It would also assist social welfare officers in preparing their reports for the court, as they could use the list to ensure that all aspects of the best interests of the child were covered. In cases where it arose, judges would be able to identify more clearly their reasons for departing from the recommendations in a social welfare officer's report. There would also be less concern about judges applying their own subjective judgement or cultural values."

Therefore, the introduction of such a checklist is desirable. The checklist proposed in the 2005 Report, and outlined by Her Honour Judge Chu in *PFH v CMS FCMC 9655/2005*; *FCMC 9655A/2005*; [2007] *HKCU 2034* is as follows:

*"(a) the ascertainable wishes and feelings of the child concerned considered in the light of his age and understanding);*

*(b) the child's physical, emotional and educational needs;*

*(c) the nature of the relationship of the child with each of the child's parents and with other persons;*

*(d) The likely effect on the child of any change in the child's circumstances;*

*(e) The child's age, maturity sex, social and cultural background and any other characteristics which the court considers relevant;*

*(f) The attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents*

*(g) Any harm which the child has suffered or is at risk of suffering;*

*(h) Any family violence involving the child or a member of the child's family;*

*(i) How capable each of the child's parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;*

*(j) (a broader formulation along the lines of) the practical difficulty and expense of a child having contact with a parent and whether that difficulty or expense will*



*substantially affect the child's right to maintain personal relations and direct contact with both parents on a regular basis;*

*(k) The range of powers available to the court under this Ordinance in the proceedings in question.*

*(l) Any other fact or circumstance that the court thinks is relevant".*

HHJ Chu considered the checklist helpful in considering the welfare and best interest of the child and used the checklist in her consideration in the case of *PFH v CMS*. The same goes for *Bruno Chan J in LHM v HYF FCMP 10/2010; [2011] HKCU 1323*. In *TRR v RAR FCMC 8382/2008; [2010] HKCU 1143*, Her Honour Judge Melloy found the checklist to be useful to many judges, including herself. Since the checklist have been found to be useful in practice, it would be highly desirable to incorporate it into the law.

### **III. Further Reforms**

There is great need for a more in-depth reform of the law relating to child custody and access, especially in moving away from notions of parental rights to an emphasis on the parental responsibility of both parents for the child which continues after separation and divorce. This is one of the main themes in the 2005 Report.

The courts have acknowledged such needs in the Court of Appeal cases of *PD v KWW CACV 188/2009; [2010] 5 HKC 543* and *SMM v TWM 209/2009; [2010] HKCU 1263*, which have already been drawn to the attention of the Administration by the Law Society. Calls for reform also come from judges in the Family Court in (i) *CTT & ANOR v SLWE & ORS FCMP 228/2009; [2010] HKCU 2031*, (ii) *TRR v RAR FCMC 8382/2008; [2010] HKCU 1143*, and (iii) *SEB v ZX FCMC ; [2007] HKFLR 165*. In all these cases, the judges described it "unfortunate" that legislative changes have not yet been brought about on the 2005 Report recommendations.

Therefore, it is respectfully urged that the Administration take steps to proceed with implementing the recommendations in the 2005 Report as soon as practicable.

**The Family Law Association  
20 July 2011**