



**Submissions on Guardianship of Minors (Amendment) Bill 2011
The Law Society of Hong Kong**

Introduction

1. In April 1995, the then Attorney General and the Chief Justice referred to the Law Reform Commission (“LRC”),

“to consider the law relating to guardianship and custody of children, and to recommend such changes as may be thought appropriate.”
2. In May 1996, the LRC appointed a sub-committee to make proposals for reform. The sub-committee published an extensive Consultation Paper on *Guardianship and Custody* in December 1998 addressing the approach of the law and the courts to custody and access arrangements for children, the use of dispute resolution procedures in family cases, parental child abduction and guardianship of children on the death of a parent and setting out a wide range of proposals for reform.
3. Subsequently, there is a series of four reports from their study: -
 - (1) Guardianship of Children – January 2002;
 - (2) International Parental Child Abduction – April 2002;
 - (3) The Family Dispute Resolution Process – March 2003; and
 - (4) Child Custody and Access – March 2005
4. It can be seen in the Legislative Council Brief on Guardianship of Minors (Amendment) Bill 2011 (“the Bill”) (Ref.: LWB CR 1/4841/02) that the Bill seeks to implement the recommendations of the Report on Guardianship of Children published by the LRC in 2002 (“2002 Report”). The Bill has adopted all recommendations made in the aforesaid report.
5. The Law Society welcomes the proposed amendments of the Bill which gives effect to the recommendations of the 2002 Report, but notes with concern that it has taken nearly a decade after its publication to bring about the reform.

Comments

6. Despite the fact that all nine recommendations in the 2002 Report have been adopted, the Bill fails to respond to the problems identified with subsequent recommendations made by LRC in the Report on Child Custody and Access published in 2005 (“2005

Report”). There are two issues addressed in the 2005 Report which the Bill fails to deal with: (i) removal of the limitation in section 10 of the Guardianship of Minors Ordinance (Cap 13) (“GMO”) on the right of third party to apply to the court for orders of custody or access (i.e. Recommendation 28 of the 2005 Report); and (ii) replacing the term “wishes” with “views” in section 3 of the GMO (i.e. Recommendation 42 of the 2005 Report).

Limitation in section 10 of the GMO

7. In the first instance, section 10 of the GMO states to the effect that only (i) either of the parents of a minor or (ii) the Director of Social Welfare has the right to apply for orders concerning minors. Under the current provision, a third party, e.g. a grandparent or any relative of the minor who is the actual carer of the minor, and/or have been taking care of the minor since both parents’ whereabouts is unknown, or are unable to care for the children, cannot apply for orders. In paragraph 10.37 of the Report, it explains the situation in the following,

“It has been noted in Chapter 3 that section 10 of the Guardianship of Minors Ordinance (Cap 13) causes problems for third parties such as grandparents or other carers in applying to the court for orders of custody or access. Such orders may be necessary to protect the child's best interests; for example, where a single parent leaves his child to be brought up by the grandparents and subsequently demands the child back. It may be also in the child's best interests to maintain contact with both sets of grandparents, particularly in Hong Kong where the extended family is particularly important.”

8. As the LRC correctly pointed out, this provision is unable to keep pace with the current social phenomena in Hong Kong – most minors live with or have contact with extended families. For a child who is brought up by his/her grandparents or other relatives, it may be in the best interests of the child to live under the guardianship of his/her grandparents or other relatives.
9. In this regard, the 2005 Report proposes to remove the aforesaid limitation in section 10 and replace it by enacting a provision on the lines of section 10 of the English Children Act 1989 to provide that anyone may apply to the court or that a restricted group of persons who fulfill certain criteria may apply. The 2005 Report further suggested amendments to subsections (5)(b) and (10) of the English Children Act 1989 to provide that no leave would be required if the child had lived with the applicant for a total of one year out of the previous three and that one year period need not necessarily be a continuous period.¹ But this one year must not have ended more than three months before the application.²

Replacing the term “wishes” with “views” in section 3 of the GMO

10. Section 4 of the Bill proposes to repeal the current sections 5 to 8 and introduces the new sections 5 to 8H. In the new section 6(5) it adopts the term “*views* of the minor”³.

¹ The Report on Child Custody and Access 2005, at para. 10.37-10.43.

² The Report on Child Custody and Access 2005, recommendation 28.

³ Section 6 (5) of the Bill provides, “In appointing a guardian of a minor, a parent or guardian

However, no proposal in the Bill to amend the existing section 3 of the GMO in which the term “*wishes of the minor*” is used under subsection (1)(a)(i)(A).⁴ The current section 3 of the GMO is the general principle that applies to any proceedings before any court “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”⁵.

Section 48C of the Matrimonial Causes Ordinance (Cap 179) states:

“For the avoidance of doubt, section 3 of the Guardianship of Minors Ordinance (Cap 13) (which provides that the welfare of the minor shall be the first and paramount consideration) shall apply in relation to any order for the custody care or supervision of a child which may be made under this Ordinance or the Matrimonial Proceedings and Property Ordinance (Cap 192).”

11. If there is no correspondent amendment to section 3, there will be two different terms in the GMO. Such inconsistency may cause confusion on the principle to be used in dealing with matters on custody and other issues concerning children.
12. The 2005 Report deals with this matter in more details in Chapter 12. The LRC quoted the Scottish Law Commission’s comment on the term “*views*”⁶ and referred to Article 12.1 of the United Nations Convention on the Rights of the Child in which the term “*views*” is used. Further to this, the Report proposes to adopt the term “*views*” rather than “*wishes*” of the minor in all matrimonial legislations including the GMO. Although the Bill adopts the term “*views*” in relation to the appointment of a guardian, for the sake of consistency it would be better to replace the term “*wishes*” with “*views*” in the current section 3 of the GMO. Further amendment in this regard is necessary in order to avoid unnecessary confusion.

Other Reforms Recommended in the 2005 Report

13. In the 2005 Report, the LRC reviewed how the law of child custody and access operates and examined the various reforms that have taken place in various other jurisdictions in recent years. The LRC considered that there is a need to move away from notions of parental rights to an emphasis on the parental responsibility of the parents for the child which continues after separation and divorce. The 2005 Report makes a total of 72 recommendations to suggest a paradigm shift from the custody law on parental rights and authority to parental responsibility and rights of the child. It considers that the Hong Kong’s private law provisions on child custody should be modernized to handle changes in society and comply with the principles set out in the United Nations

of the minor must take into account the views of the minor as far as practicable having regard to the minor’s age and understanding.”

⁴ section 3(1)(a)(i)(A): “the wishes of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so”

⁵ Section 3(1) of the GMO.

⁶ The Report on Child Custody and Access, at para. 12.6: “...the term “views” “recognises that a young person may be ... capable of balancing his ... immediate wishes and feelings against long term considerations and the interests of others and [then] coming to a considered view as to what was the right course of action in the circumstances.”

Convention on the Rights of the Child, the Basic Law and the International Covenant on Civil and Political Rights.

14. In **Hong Kong Bill of Rights Ordinance (Cap 383), Article 19(4)** of the Hong Kong Bill of Rights acknowledges that,

“(4) Spouses shall have equal rights and responsibilities as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”

15. **United Nations Convention on the Rights of the Child 1989 Article 18(1) of the UNCRC** requires,

“States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents ... have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.”

16. The Law Society has studied the recommendations made in the 2005 Report and gave its full support to the reforms proposed in this report. It is given to understand that the Bar Association, the Hong Kong Family Law Association and the Hong Kong Committee on Children’s Rights are also in support of the reforms and urge the Administration to introduce changes to the existing law as soon as possible.

17. One year ago on the 6 July 2010, the Law Society has drawn the attention of the Administration to two judgments from the Court of Appeal which also lent its support for the changes to be brought about by the recommendations of the 2005 Report. In **PD v KWW CACV 188/2009**, Hartmann JA in this judgment explained there is a “*A shift in societal values*” and he said,

“There was a time when the parents of a child, more particularly the father, had almost absolute authority over that child. That is no longer the case. The principle that the best interests of the child – not the authority of the parents – must be the paramount consideration is today almost universally recognised.

Social imperatives change. When they are important and lasting, the common law can, and should, keep pace with that change. It is widely recognised today that the long-term best interests of a child are invariably best protected if, despite the breakdown of the marital union, both parents are able to continue to play an equal role in making the important decisions that will determine the child’s upbringing. ... In England and Wales, the Children Act 1989 has sought to emphasise the continuing parental responsibility of both parents even if an order has been made that the child will reside with only one of them.

The Hong Kong Law Reform Commission Report on Child Custody and Access of 2005 recommended changes in line with the Children Act 1989 but regrettably, to date at least, little appears to have been done to give the Commission’s recommendations legislative form.” (paras. 44 - 51)

Lam J. in the same judgment supported the changes to the law and said,

“Likewise, as observed by my Lord, the recommendations of our Law Reform

Commission in 2005 regarding Child Custody and Access have not been taken forward. Had such recommendations been implemented, the respective rights and responsibilities of the parents towards their children would be more clearly and specifically defined. Judging from the submissions advanced by the parties in this case, I cannot help from observing that with the implementation of such reforms, appeals like the present one could have been avoided.” (para.80)

18. In the other Court of Appeal judgment **SMM v TWM 209/2009**, P. Cheung JA, also supported the changes and said in a judgment delivered on 9 June 2010 that,

“It should be noted that the Hong Kong Law Reform Commission Report on Child Custody and Access (7th March 2005) has recommended changes to the GMO, by, among other things, replacing custody orders with residence and contact orders. There has been no implementation of the recommendation yet. In my view the Administration should make a serious effort in implementing the recommendations by legislation soon.” (para. 29)
19. The Law Society has been involved in and facilitated several consultation exercises conducted by the Labour and Welfare Bureau regarding the reforms since the 2005 report. 6 years later, it is most regrettable that little progress has been made to the implementation of the proposed recommendations. The Law Society was recently informed that the Labour and Welfare Bureau intends to launch yet again, another consultation in the latter part of 2011, this time with the general public, on the LRC’s proposed ‘joint parental responsibility model’ and the relevant recommendations. This timeline will inevitably delay the reform by at least another year.
20. Therefore, the Law Society takes this opportunity to urge the Administration to take steps to proceed with the implementation of the reforms as proposed by the 2005 Report without delay.

The Law Society of Hong Kong
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