

For information
on 18 March 2004

**Bills Committee on
Adoption (Amendment) Bill 2003**

**Response to the Submission from
the Hong Kong Family Law Association**

Purpose

This paper sets out our response to the submission from the Hong Kong Family Law Association (HKFLA) to the Bills Committee on 17 February 2004.

Background

2. We note that the HKFLA strongly supports the proposals in the Bill (their submission at Annex A), and has rendered comments on two specific issues -

- (a) HKFLA supports that penalties should be increased to take into account current values, but they consider that the penalty levels seem to be rather low at their maximum and custodial sentences should be imposed, especially in relation to unauthorized privately arranged adoptions; and
- (b) under the proposed root-tracing system, an adopted person can request the Social Welfare Department (SWD) to disclose his/her birth and adoption records, provided that, among others, the birth parents have not exercised a power of veto on the release of the identifying information¹. The veto shall apply until such time as the birth parent(s) either withdraw(s) the veto or pass(es) away. The HKFLA disagrees with the application of the veto power until the withdrawal or death of birth parent(s) because the birth parent(s)'

¹ Identifying information refers to the full name(s), identity card number(s), contact address(es) and telephone number(s) of the birth parent(s).

rights of privacy should not override the adopted person's rights to ascertain information concerning his/her birth parent(s), and background.

3. The HKFLA sent another submission dated 10 March 2004 to the Bills Committee. The Bills Committee has asked the Administration to consider responding to this second submission together with their first submission. However, as the HKFLA has raised in their second submission issues relating to privately arranged adoptions by unrelated persons, we intend to respond to these issues in a separate consolidated paper on the Administration's overall position of privately arranged adoptions by unrelated persons in Hong Kong.

Penalty Levels

Existing Offences

4. The existing penalty levels in the Adoption Ordinance (Cap.290), made over 40 years ago, are outdated and long overdue for revision. Our proposals are -

| Existing section in the Adoption Ordinance | Amended by clause in the Amendment Bill | Provision | Existing Penalty Levels | Updated Penalty Levels |
|---|--|---|--------------------------------|-------------------------------|
| 21(3) ² | 26 ³ | refuses to allow DSW to visit and examine the child during the placement period | a fine of \$2,000 | a fine at Level 6 (\$100,000) |

² Section 21(3) of the Adoption Ordinance provides that "Any person who refuses to allow the Director or officer authorized by him to make a visit, examination, entry or inspection in accordance with subsection (1) shall be guilty of an offence and shall be liable to a fine of \$2000."

³ Clause 26 of the Amendment Bill provides that "Section 21(3) is amended by repealing "of \$2,000" and substituting "at Level 6"."

| Existing section in the Adoption Ordinance | Amended by clause in the Amendment Bill | Provision | Existing Penalty Levels | Updated Penalty Levels |
|---|--|--|---|---|
| 22 ⁴ | 27 ⁵ | gives or receives payments (except for professional services of lawyers ⁶ or with the sanction of the Court) in connection with adoptions | a fine of \$2,000 and imprisonment for 6 months | a fine at Level 6 (\$100,000) and imprisonment for 6 months (i.e. the custodial sentence provision remains unchanged) |
| 23 ⁷ | 28 ⁸ | Publishes adoption-related advertisements (except with the written consent of DSW) as specified in the subsections | a fine of \$1,000 | a fine at Level 5 (\$50,000) |

⁴ Section 22 of the Adoption Ordinance provides that :

- (1) Save with the sanction of the Court, no person shall make or give or agree to make or give, or receive or agree to receive, or attempt to obtain, any payment, remuneration or reward whatsoever in connection, directly or indirectly, with the adoption or proposed adoption of an infant, except in consideration of the professional services of a qualified barrister or solicitor within the meaning of the Legal Practitioners Ordinance (Cap 159).
- (2) Any person who contravenes the provisions of this section shall be guilty of an offence and shall be liable to a fine of \$2000 and to imprisonment for 6 months.
- (3) The provisions of this section shall not apply to the payment to the Director of any fee prescribed by rules made in accordance with the provisions of section 12.

⁵ Clause 27 of the Amendment Bill provides that section 22 is amended, among others, ‘in subsection (2), by repealing “of \$2,000” and substituting “at Level 6”’.

⁶ Clause 27 of the Amendment Bill provides that “except also payment to an accredited body for its costs and expenses reasonably incurred in connection with adoptions” (apart from payment for professional services of lawyers).

New Offences

5. The Amendment Bill contains proposals to -
- (a) outlaw privately arranged adoptions by unrelated persons except in pursuance of an order of the Court, with a proposed penalty level of a fine at Level 6 (\$100,000) and imprisonment for 6 months (see clause 29 (new section 23A⁹) of the Amendment Bill); and
 - (b) outlaw removal of a child to a place outside Hong Kong with a view to adoption except under the authority of an order of the Court, with a proposed penalty level of a fine at Level 6 (\$100,000) and imprisonment for 6 months (see clause 29 (new section 23C¹⁰) of the Amendment Bill).

⁷ Section 23 of the Adoption Ordinance provides that :

- (1) Except with the written consent of the Director, no advertisement shall be published indicating -
 - (a) that the parent or guardian of an infant desires to cause the infant to be adopted;
 - (b) that a person desires to adopt an infant; or
 - (c) that any person is willing to make arrangements for the adoption of an infant.
- (2) Any person who causes to be published or knowingly publishes an advertisement in contravention of the provisions of this section shall be guilty of an offence and shall be liable to a fine of \$1000.

⁸ Clause 28 of the Amendment Bill provides that Section 23 is amended, among others, ‘in subsection (2), by repealing “of \$1,000” and substituting “at Level 5”’.

⁹ Clause 29 (section 23A) of the Amendment Bill provides, among others, that :

- “(1) Other than the Director or any person authorized by the Director for the purposes of this subsection, a person shall not make arrangements for the adoption of an infant, or place an infant for adoption, unless –
- (a) the prospective adopter or (where 2 spouses are the prospective adopters) either of the prospective adopters is a parent or relative of the infant; or
 - (b) the person is acting in pursuance of an order of the Court.

(2) A person who –

- (a) takes part in the management or control of a body of persons (corporate or unincorporate) which -
 - (i) exists wholly or partly for the purpose of making arrangements for the adoption of infants; and
 - (ii) is not a person authorized by the Director for the purposes of subsection (1);
- (b) contravenes subsection (1); or
- (c) receives an infant placed with him in contravention of subsection (1), shall be guilty of an offence and shall be liable to a fine at Level 6 and to imprisonment for 6 months.”

¹⁰ Clause 29 (section 23C) of the Amendment Bill provides that :

- (1) Except under the authority of an order under section 23B, it shall not be lawful for any person to take or send an infant residing in Hong Kong to any place outside Hong Kong with a view to the adoption of the infant by any person not being a parent or relative of the infant.
- (2) Any person who takes or sends an infant out of Hong Kong to any place in contravention of subsection (1), or makes or takes part in any arrangement for placing an infant with any person for the purpose of adoption as referred to in that subsection, shall be guilty of an offence and shall be liable to a fine at Level 6 and to imprisonment for 6 months.

6. We are of the view that the proposed penalty levels are proportionate to the severity of the offences. As a matter of reference, they are also in line with the comparable sanctions in the UK Adoption Act (see Annex B). A comparison table showing the position in HK and the UK is at Annex C to facilitate Members' reference.

7. In the light of the above, we are of the view that the proposed penalty levels in the Amendment Bill are adequate.

Veto Power of Root-Tracing

8. While we share the view that the best interests of adopted children should be the paramount consideration in the adoption process, we also see the need to protect the privacy rights of the birth parent(s) as some of them may be rape/incest victims, while others may have given birth to the child due to pre-marital, extra-marital or ex-marital relationship. The veto mechanism so proposed is to balance the adopted person's right to access to birth information and the privacy rights of the birth parent(s).

9. We also wish to clarify that the scope of information covered by the veto mechanism is **limited to the identifying information** of the birth parent(s) (i.e. full name(s), identify card number(s), contact address(es) and telephone number(s)), but not the other wide range of information as described in paragraph 12 below.

Existing Root Tracing Arrangements

10. Under SWD's existing administrative arrangements, birth information about an adopted person, except identifying data of his/her birth parent(s), is provided to the adoptive parent(s) after an adoption order has been granted. The information includes the biological and medical history of the adopted person and the birth parent(s), the reasons for relinquishment for adoption and so on. Adoptive parent(s) is/are encouraged to share the information with the adopted person. A copy of the information will also be given to the adopted person on request after he/she has reached 18 or if he/she has obtained the consent of the adoptive parent(s) before he/she has reached 18.

11. Moreover, under the Adoption Ordinance, the adopted person may

also apply to the Court under section 18(4)¹¹ for an Order for the Registrar (which is defined as the Registrar of Births and Deaths in section 2 of the Ordinance and is currently the Director of Immigration) to disclose tracing information between the register of births and the Adopted Children Register. Hence, the door to tracing is not necessarily closed even if, say, the birth parent(s) withhold(s) consent for disclosure of his/her identity.

Proposed Root Tracing Arrangements

12. The proposed root tracing system will also be introduced administratively. Under this system, an adopted person reaching the age of 18 can approach SWD/Accredited Bodies for root tracing. Those under 18 who fails to obtain the consent of the adoptive parents may also make such a request which will be considered on a case-by-case basis. Like the existing practice, the adopted person will be given as much birth information as possible, except for identifying information of the birth parent(s), if the veto is still in place. The information to be released, if available, includes :

- (a) ***information of the adopted person*** – original name, length of pregnancy, date of birth, time of birth, place of birth, weight at birth, type of delivery, complications at birth, health conditions since birth and place of residence since birth;
- (b) ***non-identifying information of the birth parent(s)*** – surname(s), age, height, weight, colour of eyes and hair, race, marital status, relationship of birth parents, family composition, education, employment, personality and characteristics, interests and hobbies, health conditions, family history of serious/heredity illness and disability, addiction to drug or alcohol and other children of birth parent(s); and
- (c) ***Others*** : course of acquaintance of the birth parents leading to the birth of the child, reasons for relinquishment for adoption, significant events during the adoption process, as well as gifts/souvenirs from birth parent(s).

¹¹ Section 18(4) of the Adoption Ordinance provides that “the Registrar shall, in addition to the Adopted Children Register and the index thereof, keep such other registers and books, and make such entries therein, as may be necessary to record and make traceable the connection between any entry in the registers of births which has been marked "Adopted" or "受領養" pursuant to section 19 and any corresponding entry in the Adopted Children Register; but the registers and books kept under this subsection shall not be, nor shall any index thereof be, open to public inspection or search, nor, except under an order of the Court, shall the Registrar furnish any person with any information contained in or with any copy or extract from any such registers or books.”

13. Even if a veto is in place, all the above information will be released and only the identifying information of the birth parent(s) will be withheld. The wide range of information provided to the adopted person, even without the identifying information of the birth parent(s), should be generally sufficient for the adopted person to know about his/her origin and background. Moreover, in case the adopted person would like to request for establishing contact/meeting with the birth parent(s), no matter whether a veto has been imposed or not, SWD will discreetly trace the birth parent(s) and seek their consent for contact as appropriate.

14. In addition, to enable the adopted person to resolve his/her possible emotional problems arising from root tracing issues, counselling will also be offered to the adopted person who seeks access to his/her birth records or contact with his/her birth parent(s).

15. Moreover, upon being requested by the adopted person, SWD will discreetly trace the birth parent to check if he/she is agreeable to withdraw a veto given previously, say at the time of birth. The veto will cease if the birth parent(s) withdraw(s) it or pass(es) away.

16. Moreover, the legislative channel available for the adopted person to seek an Order from the Court for disclosure of the tracing information under section 18(4) of the Adoption Ordinance as explained in paragraph 11 above would continue to apply.

17. In the light of the above, we consider it reasonable to restrict administrative root tracing to non-contentious cases, or to disclose information not constituting personal data where the parent(s) refuse(s) to disclose his/her/their identifying information. The veto on the release of identifying information of the birth parent(s) should therefore remain valid until such time as the birth parent(s) has(ve) either withdrawn the veto or passed away.

Presentation

18. Members may wish to take note of the information above to facilitate consideration of the Adoption (Amendment) Bill 2003.

Health, Welfare and Food Bureau
March 2004



中華人民共和國香港特別行政區
Hong Kong Special Administrative Region of the People's Republic of China



立法會
LEGISLATIVE COUNCIL

By Fax : 2524 7635

來函編號 : YOUR REF :
本函編號 : DEPT : CB2/BC/12/02
電話 : TELEPHONE : 2869 9594
傳文傳真 : FAX/MSF : 2509 0775

17 February 2004

Secretary for Health, Welfare and Food Bureau
(Attn : Miss Diane WONG)
8th floor, West Wing
Central Government Offices
11 Ice House Street
Hong Kong

Dear Miss WONG,

**Bills Committee on
Adoption (Amendment) Bill 2003**

I attach a submission from the Hong Kong Family Law Association for your reference. I should be grateful if you would provide the Administration's response to the issues raised therein.

With best regards,

Yours sincerely,

(Raymond LAM)
for Clerk to Bills Committee

Encl.

TO 25247635
Vice-chairman
Miss Sharon Ser
Hon. Treasurer
Mr. Jonathan Mok
Hon. Secretary
Miss Wendy Lam

President
Miss Elsie Leung
Vice President
Miss Jacqueline Leung, QC. SC

2847 2470
2843 2244
2533 2529

17 February 2004

& BY POST

Mrs. Sharon Tong
Clerk to Bills Committee
Legislative Council Building
Jackson Road
Central, Hong Kong

Dear Mrs. Tong,

Re: Bills Committee on Adoption (Amendment) Bill 2003

Mr. Barnes, the Chairman of the Hong Kong Family Law Association has passed to me your letter of the 21st January 2004 addressed to him, and following deliberations by the Executive Committee of the Hong Kong Family Law Association, he has asked me to write to you in response to your letter of the 21st January 2004.

May I first of all say that the Hong Kong Family Law Association was delighted to be invited to convey their views to the Bills Committee, and we are indebted to you for being given the opportunity to do so.

The Family Law Association was essentially in favour of the proposed amendments to the Adoption (Amendment) Bill 2003.

We completely agreed with paragraph 10 of the Legislative Council Brief, which proposes to amend the Adoption Ordinance to prohibit a person or an organisation other than SWD or adoption agencies authorised by SWD to make arrangements for

Mrs. Sharon Tong
17 February 2004

the adoption of a child, with the exception of adoption of a child by his/her birth parent or relative, or save pursuant to an Order of the Court.

We further agreed with the proposal set out in paragraph 14 of the Legislative Council Brief insofar as proposed overseas adoptions were concerned.

Similarly, we had no objections to the proposed changes as set out in paragraphs 15, 17 and 19 of the Brief.

As far as paragraph 20 of the Brief was concerned, which set out details of the proposed penalty for breach of the ordinance, we accept that the penalties do have to be increased in order to take into account current values, but since these are matters that concern the welfare of a child, the financial penalty levels still seem to be rather low at their maximum, and we were surprised that no custodial sentences have been considered for any proposed breach, especially, say, in relation to the unauthorised private adoptions.

The Family Law Association agreed to the proposed amendments as are set out in paragraphs 24, 26, 27, 28, 30 and 32 of the Brief.

We did have concerns about the Root-tracing System as set out in paragraphs 33 to 35. In our view, the rights of the adopted child have to be of paramount interest. It is the adopted child who has to deal with identity issues once that child has learned that he or she is adopted. Given that the adopted child will actually be an adult at 18 when the mechanism will start to work for Root-tracing, we did not agree that a power of veto that might be exercised by a birth parent should apply until such time as the birth parent had either withdrawn the veto or had passed away. We did not accept that the birth parents' right of privacy overrode the right of the adopted person to ascertain information concerning his/her birth parents, and background.

The Family Law Association had no concerns insofar as the Textual and Formatting changes were concerned, and we accept and endorse the proposals concerning Inter country adoption and we were delighted that Hong Kong was fully embracing the provisions of the Hague Convention in this regard.

Essentially the Family Law Association thought the proposed amendments were progressive and helpful and, with respect, we thought the rationale behind the changes, and indeed as expressed in the Legislative Council Brief, were well thought out and well drafted.

The Family Law Association welcomes and supports the idea of "open adoption", in order to facilitate that any perceived stigma or embarrassment associated with adoption is eradicated at an early stage by children and adoptive parents speaking openly about the adoption process, and even in some circumstances having limited contact with the birth parents. Such a concept has been fully embraced in the U.K. and we believe that such a concept has scope here in Hong Kong also. We believe that the very progressive approach adopted by the Bills Committee on the Adoption (Amendment) Bills of 2003 is an important step in the direction of greater transparency in matters concerning adoption, and that we would fully endorse.

Mrs. Sharon Tong
17 February 2004

If we can be of any further assistance to you then do please contact us at the Hong Kong Family Law Association.

Yours sincerely,



Sharon A. Ser
Executive member of
The Hong Kong Family Law Association

SAS/381694/es

**The Maximum Penalty Levels for Similar Offences
in the UK Adoption Act**

- (a) Section 36 of the UK Adoption Act on the offence of obstructing home visit to prospective adopted children (i.e. similar to our offence in section 21 of the Adoption Ordinance), the penalty is imprisonment not exceeding 3 months and/or a fine not exceeding Level 5 on the standard scale¹²;
- (b) Section 57 of the UK Adoption Act on the offence of payment (i.e. similar to our offence in section 22 of the Adoption Ordinance), the penalty is imprisonment for a term not exceeding three months and/or a fine not exceeding Level 5;
- (c) Section 58 of the UK Adoption Act on the offence of advertisement (i.e. similar to our offence in section 23 of the Adoption Ordinance), the penalty level is a fine not exceeding Level 5;
- (d) Section 11 of the UK Adoption Act on private arrangements for adoption by unrelated persons (i.e. similar to our new offence in clause 29 (section 23A) of the Amendment Bill), the penalty is imprisonment for a term not exceeding three months and/or a fine not exceeding Level 5 (to be updated to imprisonment for a term not exceeding six months and/or a fine of £ 10,000 in future); and
- (e) section 56 of the UK Adoption Act on removal of children to places outside Great Britain for adoption (i.e. similar to our offence in clause 29 (new section 23C) of the Amendment Bill), the penalty is imprisonment for a term not exceeding three months and/or a fine not exceeding Level 5 (to be updated to: on summary conviction, to imprisonment for a term not exceeding six months and/or a fine of statutory maximum; in the

¹² According to section 37(2) of the UK Criminal Justice Act 1982, Level 5 (i.e.£ 5,000) is the highest level in the UK.

event of being referred to the Crown Court, to imprisonment for a term not exceeding twelve months and/or an unlimited fine, in future).

Annex C

**Comparison of the Maximum Penalty Levels for Similar Offences under
the Adoption Ordinance in HK and the Adoption Act in UK**

| | HK Adoption Ordinance (after legislative amendments) | UK Adoption Act |
|---|---|--|
| Obstructing visit to prospective adopted person | Fine at Level 6 | Imprisonment for not exceeding 3 months and/or fine not exceeding Level 5 |
| Non-authorized payment | Fine at Level 6 and/or imprisonment of 6 months | Imprisonment for not exceeding three months and/or a fine not exceeding Level 5 |
| Publishing of advertisement | Fine at Level 5 | A fine not exceeding Level 5 |
| Making privately arranged arrangements for adoptions by unrelated persons | Fine at Level 6 and/or imprisonment for 6 months | A fine not exceeding Level 5 and/or imprisonment for 3 months (to be updated to imprisonment for a term not exceeding 6 months and/or a fine of £ 10,000 in future) |
| Removal of children to places outside HKSAR/Great Britain for adoption | Fine at Level 6 and/or imprisonment for 6 months | A fine not exceeding Level 5 and/or imprisonment for 3 months (to be updated to: on summary conviction, to imprisonment for a term not exceeding 6 months and/or a fine not exceeding the statutory maximum (currently at £ 5,000); in the event of being referred to the Crown Court, to imprisonment for a term not exceeding 12 months and/or an unlimited fine, in future) |

