

For information  
on 18 March 2004

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

### **Response to the Submission from Ms Amelia Roberts**

#### **Purpose**

This paper sets out our response to the submission from Ms Amelia Roberts to the Bills Committee on 11 February 2004.

#### **Background**

2. We note that Ms Roberts has proposed that the Adoption (Amendment) Bill 2003 (the Amendment Bill) be amended to make the requests of the birth parents to maintain ongoing contacts with the adoptee after an adoption order has been granted a legally binding and enforceable agreement. Her submission is at the Annex.

3. In her letter of 11 February 2004, Ms Roberts proposed that “prior to the granting of the Adoption Order, if an agreement concerning ongoing contact between birth parents and the adopted child has been made between birth parents and adopters, the agreement shall retain validity after the Adoption Order has been granted, provided that the welfare of the child is not compromised.”

4. To put the matter in perspective, the “agreement” in question is a voluntary non-binding arrangement made between the birth parents and the adopters. The concern seems to be that the adopters may change their minds subsequently and no longer agree to allow contacts between the birth parents and the adoptee.

#### **Current Position**

5. Section 13(1) of the Adoption Ordinance provides that the effect of an adoption order is the complete severance of legal ties with the birth family

and creation of new legal ties with the adopter's family<sup>1</sup>. An adoption order is permanent; affects legal status; and severs the legal family ties with the birth parents. Adopters do not merely have care of the child but become the child's parents. That is why it is important that before an adoption is made, a child has been freed for adoption or consent of birth parents has been secured. Adoption is therefore different from other forms of providing long-term substitute care for children, e.g. foster care.

6. While there is no specific provision in the Adoption Ordinance providing for access or plans of contacts between the birth parents and the adoptee after the adoption, section 8(2) of the Ordinance provides that in making an adoption order, the court may impose such terms and conditions as it thinks fit<sup>2</sup>. So far, the Social Welfare Department (SWD) has not come across any special request from a birth parent to impose post-adoptoin contact as a condition in the adoption order. Should there be such a scenario, the birth parent may register his/her request to the Court by written submission. The Court will take into account all factors relevant to the proposed adoption, including the views of the adopters and the child (according to his/her age and understanding) and make a decision in the best interests of the child. It should, however, be noted that conditions are rarely imposed without the consent of the propsective adopters. The approach of the Court is that the adoption order shall as near as possible put the child in the position of a lawful child of the adopters. It would rarely be appropriate to impose a condition which derogates from this. As such, the Court will not, except in the most exceptional cases, impose terms or conditions as to access to the birth parents, if the adopters object.

7. The above notwithstanding, the Court would consider each case on its own particular facts and may approve post-adoption contacts between the birth parents and the adopee if it is in the best interests of the child to do so. For example, while a complete break is often not a problem in cases of adoption of small babies who may have little knowledge or recollection of their birth parents, adoption of older children who may remember their birth parents before the adoption may be different. In the latter cases, the Court

---

<sup>1</sup> Upon the making of an adoption order, all rights, duties, obligations and liabilities of the parents or guardian of the child in relation to future custody, maintenance and education, including all rights to appoint a guardian and to consent to marriage shall be extinguished; and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of such matters, the child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock.

<sup>2</sup> Section 8(2) of the Adoption Ordinance provides that 'the Court in an adoption order may impose such terms and conditions as the Court may think fit, and in particular may require the adopter by bond or otherwise to make for the infant such provision (if any) as in the opinion of the Court is just and expedient.'

may need to exercise discretion and allow some ongoing post-adoption contact of the adoptee with the birth parents or other close contacts established before the adoption, if such contacts do not threaten the new adoptive family to find its own feet<sup>3</sup>.

## **Response to the Proposal**

8. In short, under the existing legislative framework, the Court has jurisdiction to attach a condition relating to access to the adoption order, though such a condition is rarely imposed in the absence of agreement between the parties. In any case, if a condition is imposed by the Court and incorporated into the adoption order, it is legally enforceable after certain steps<sup>4</sup>. For adoption cases handled by SWD, where a request is made, SWD will assist the prospective adopters and birth parents to get in touch with each other during the placement period to explore the feasibility/acceptability of the contact arrangements preferably on a voluntary basis. Naturally, weight would be given to the views of the prospective adopters. However, we understand that Ms Roberts has not approached the Court to seek such a condition in the adoption order of her own birth child.

9. In the public consultation exercise in 1998-99 and subsequent consultation with the Legislative Council Panel on Welfare and SWAC, Ms Roberts' proposal had not been raised, nor had such a matter ever been drawn the public's attention. To obtain a balanced view of the issue, apart from the views of the birth parents, there is a need to hear from adopters / prospective adopters, adopted children and child experts. It is a sensitive subject,

---

<sup>3</sup> In *Re C (a minor) (adoption order : conditions)* [1989] AC 1, C, the proposed adoptee, aged 13, spent the larger part of her childhood with her older brother (M) in different children's homes. C was very much attached to M. If an adoption order was made, M would technically not be C's brother but that could not alter their affectionate relationship. It was held by the House of Lords that it was in C's best interests to make an adoption order which provided her with the security of a family. Given that the adoptive parents were supportive of access between M and C, the adoption order was made with the condition that there be access between M and C.

However, in *Re T (adoption : contact)* [1995] 2 FLR 251, the adopted child was ten years old and she had been with the adopters for 2.5 years. The adoptive mother consented to the child seeing the natural mother once a year. However, the natural mother wished to see the child two or three times a year. The judge ordered that there should be contact not less than once a year. The Court of Appeal held that although the adopters were prepared to continue contact with the natural mother, finality of adoption and the importance of letting the new family find its own feet ought not be threatened by an order.

<sup>4</sup> Technically, when a condition as to access is attached to the adoption order, according to decided cases, there are two methods of enforcing the condition. One method is to get from the adopter(s) an undertaking to comply with the conditions imposed on the making of the adoption order. The undertaking might then be enforced by committal proceedings. Another method is to make the child a ward of court and to seek directions from the court as to compliance with the conditions of the adoption order or the undertaking given by the adopter(s).

particularly as the interests of the birth parents may not be consistent with the best interests of the adoptees. Adopters may also consider the actions of the birth parents intrusive. The situation may also be complicated by the emotions that may evolve among the adoptee, the adopters and the birth parents concerned.

10. The requests for post-adoption contact arrangements were very rare in Hong Kong in the past. Ms Roberts' case has been the only case come across by SWD since 1997.

11. Given that this subject had not been discussed in public before and that there had not been any indication of a pressing need for such a provision, we do not see the justifications for incorporating such a provision in the Amendment Bill. Nonetheless, we would keep in view local development and review the need for making appropriate legislative provisions in Hong Kong. The public would be consulted before any changes are made.

### **Presentation**

12. Members may wish to take note of the contents of this information note.

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

AS/W3

立法會  
LEGISLATIVE COUNCIL

**By Fax : 2524 7635**

英語傳真 FAX ENGLISH :  
英語傳真 FAX ENGLISH : CB2/BC/12/02  
電話 TELEPHONE : 2869 9594  
國文傳真 FAX CHINESE : 2509 9055

24 February 2004

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

Dear Miss WONG,

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

I attach the submission from Ms Amelia ROBERTS and 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.

LC Paper No. CB(2)1474/03-04(03)

The Hon Ms. Margaret Ng,  
Member of the Legislative Council,  
Hong Kong Special Administrative Region,  
Room 116, 11<sup>th</sup> Floor,  
New Henry House,  
10 Ice House Street,  
Central,  
Hong Kong

[REDACTED]

11 February 2004

Dear Ms. Ng,

I have read the Legal Service Division Report on Adoption (Amendment) Bill 2003 (LS135/02-03) and would like to propose an additional amendment. This amendment would make the Adoption Ordinance (Cap 290) ("the Ordinance") more flexible to the needs of an open adoption arrangement. Under the existing provisions of the Ordinance, Birth Parents who sign an agreement with the Adoptive Parents concerning ongoing contact with the adopted child have no protection if the agreement is then reneged upon.

I am a birth mother whose child was placed for adoption in Hong Kong in 1997 under an 'open' arrangement, assisted by the Social Welfare Department. When the agreement was not acted out, there was no protection for me under the Ordinance. Legal protection was possible, however, in Wardship proceedings and under the Guardianship of Minors Ordinance (Wardship) (Cap. 13) ("GMO"). This route is more obscure which considerably prolonged my route to eventual restitution.

The inadequacy of the Ordinance in recognizing the rights of birth parents in open adoptions caused almost five years of loss of contact between myself and the adoptive family, and led to an initial refusal of Legal Aid, which was later overturned on Appeal. With more adequate legal protection, this lengthy period of distress could have been avoided. Contact has now been resumed, as a direct result of the legal protection offered to me as a result of the Wardship proceedings.

In order to avoid similar difficulties for others in the future, I would like to propose an addition to the Ordinance, to the effect of:

*"Prior to the granting of the Adoption Order, if an agreement concerning ongoing contact between birth parents and the adopted child has been made between birth parents and adoptive parents, the agreement shall retain validity after the Adoption Order has been granted, provided that the welfare of the child is not compromised."*

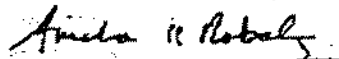
This increases the flexibility of the Ordinance and increases the protection offered to birth-parents, without impinging on the protection offered to the adopted child and his adoptive parents. It also removes an inconsistency between the remedies available in Wardship, and the Ordinance.

There is an increase in support for Open Adoptions internationally. Research shows that much of the problems associated with closed adoptions are avoided. Open adoptions may be more complex initially, but appear to provide a better foundation for many adopted children in the longer term. Speaking personally, openness allows birth-parents to experience some joy within the adoption process. Clearly structured and mutually agreed outlines for ongoing contact protect all members of the adoptive triangle.

~~I believe that the Social Welfare Department's Adoption Unit needs to be more flexible to cater for different types of adoptions. If the proposed amendment for prohibiting private adoptions is passed, such flexibility is even more essential, as all adoptions will then pass through the Adoption Unit. It is likely that Hong Kong will follow the international trend of Open Adoptions becoming more common. The Ordinance needs to provide for flexibility in adoption, in anticipation of the demands that are likely to be placed on the Adoption Unit.~~

I would be grateful if you could examine this issue and propose the necessary amendments to improve further the legal status of open adoptions. I would be happy to discuss this matter further with you, should this be of assistance. I can be contacted on . Thank you for your help in this matter.

Yours sincerely,



Amelia Roberts

Cc Sharon Ser (Hampton, Winter and Glyn)  
Bari Rwezaura (Department of Law, HKU)  
Wendy Cheung (Health, Welfare and Food Bureau)  
Joyce Wong (Law Society, HK)