

For information
on 18 March 2004

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

**Adoption of a female child by a sole male applicant
only as an exceptional measure justified by special circumstances
(section 5(3) of the Adoption Ordinance)**

Purpose

This paper provides background information on section 5(3) of the Adoption Ordinance.

Background

2. At the meeting on 19 January 2004, Members requested for information on, among others -

- (a) the legislative intent of section 5(3) of the Adoption Ordinance;
- (b) the reasons for proposing the change;
- (c) the effect of the proposed deletion on the matters to be considered by the Court when considering whether to make an adoption order; and
- (d) whether similar legislative provisions as the existing section 5(3) were found in other jurisdictions.

Historical Development

3. Section 5(3) of the Adoption Ordinance provides that “an adoption order shall not be made in respect of **an infant who is a female in favour of a sole applicant who is a male**, unless the Court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order”.

4. The legislative intent of this provision, which was introduced in 1956 based on the provisions of the English Adoption Act 1950, is to guard against a potential risk and aims at protecting a young female adoptee from possible sexual abuse by a sole male applicant. This provision helps to draw the attention of those involved in the legal proceedings to the special circumstances of the adoption application under process, with a view to strengthening the protection to the adoptees.

5. In the 1990s, there was discussion that this provision might contravene Article 1(2) of the Hong Kong Bill of Rights Ordinance, which provides that “men and women shall have an equal right to the enjoyment of all civil and political rights set forth in this Bill of Rights”. On the face of it, section 5(3) might appear to discriminate against men since no such provision applies to women who wish to adopt boys. However, legal advice was that the existing provision was probably justifiable for the purpose of protecting female infants.

6. To address the community concern that the provision might be seen to be discriminatory, various options were then explored. Common to the various options was the tenet that the importance of protecting children in the adoption process should be highlighted. The element of protection should be included together with the principle of the best interests of the child as a paramount consideration in the Adoption Ordinance. Inevitably, this would be an important consideration for the Court to take into account before deciding whether to grant an adoption order. The options explored are set out below -

- (a) In 1992, it was proposed that section 5(3) be retained but all references to gender should be removed, i.e. amended to read as “an adoption order shall not be made **in respect of an infant in favour of a sole applicant**, unless the Court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order”.
- (b) In 1998, the Working Group on Review of the Adoption Ordinance recommended in its consultation document that “a new part be added to section 5(3) to **ensure parity of treatment of both genders** and that the element of protection should be included together with the principle of the best interests of the child as the first and paramount consideration in the Adoption Ordinance”. Feedback received during the consultation exercise was generally in support of the Working Group’s proposal.

- (c) When the details were further developed between 1999 and 2001, it was proposed that the provision be amended to read as “an adoption order shall not be made **in respect of an infant in favour of a sole applicant of the opposite gender**, unless the Court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order”.
- (d) When this was discussed at the Revamped Working Group in 2003, some NGO members still perceived that the revision appeared discriminatory against sole applicants vis-à-vis joint applicants. Hence, the Administration proposed in the Adoption (Amendment) Bill 2003 (the Amendment Bill) that **section 5(3) be repealed**, and the Court would consider whether an adoption order should be granted having regard to the best interests of the child.

Overseas and Mainland Experience

7. The Commonwealth Legal Advisory Service has examined the adoption laws in Australia, Canada, India, New Zealand, Singapore and the UK. Only two countries (New Zealand and Singapore) have such a provision which is almost the same as our section 5(3). Others (the UK, Australia, Canada and India) do not have such a provision. Separately, Article 9 of the Adoption Law of the People’s Republic of China provides that “where a male person without spouse adopts a female child, the age difference between the adopter and the adoptee shall be no less than 40 years”.

8. The following development is also relevant -

- (a) It is stated in Bromley Family Law 5th Edition 1976 that one of the reasons for this provision in the English Adoption Act 1950 was presumably to prevent possible sexual corruption of the child and that the prohibition on a man solely adopting a girl was abolished by the Children Act 1975 which provided the overriding principle in section 3, namely “in reaching any decision relating to the adoption of a child, a Court or adoption agency shall have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood; and shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding”.

- (b) We understand that New Zealand is proposing that its legislative provision which is similar to our section 5(3), i.e. the prohibition against a single male adopting a female child, be removed. The rationale is set out in its Law Commission’s Preliminary Paper 38 on “Adoption: Options for Reform”¹ in October 1999 and Report 65 on “Adoption and Its Alternatives – A Different Approach and a New Framework”² in September 2000.

Conclusion

9. To sum up, the Revamped Working Group has supported the proposal to repeal section 5(3). We also note that no submissions to the Bills Committee have raised any objection to this proposal. We are therefore inclined to adhere to the original proposal, though we keep an open mind on this and are prepared to consider the Bills Committee’s views on the subject.

¹ A male may not adopt a female child unless he is the father of the child or there are special circumstances justifying the proposed adoption. This provision was undoubtedly enacted in an attempt to protect female children from sexual abuse. It constitutes a statutory presumption that it is inappropriate for single men to parent a female child. The Houghton Report commenting on this provision in the previous UK adoption legislation, observed that “a distinction should be drawn between the legal criteria of eligibility and professional assessment of suitability”. A general prohibition against certain classes of persons adopting a child may not be the best approach.

Social Welfare (Authority) screens most applicants for suitability to adopt, and is appropriately placed to make an assessment on an individual basis. While it is the welfare of the child that should predominate, this general prohibition may be viewed as a form of gender discrimination against the male adopter (and perhaps the female adoptee (c.f. section 21(1)(a) of the Human Rights Act 1993)). Consideration is warranted as to whether a general prohibition against adoption of female children by males is necessary where both the Court and Social Welfare (Authority) specifically approve the adoption.

² Section 4(2) of the Adoption Act provides that a single man may not adopt a female child, unless he is the father of the child or there are special circumstances justifying the proposed adoption. This constitutes a statutory presumption that it is inappropriate for single men to parent a female child. The discussion paper (i.e. footnote 1 above) argued that rather than approach the issue as a question of of general “eligibility”, an individual professional assessment should be made of “suitability”.

There is no such restriction in either the Guardianship Act or the Children, Young Persons, and Their Families Act 1989. The majority of submitters who commented on this point argued that section 4(2) was no longer necessary or appropriate. As we observed in the preface to this report, modern society recognizes the legitimacy of many forms of parenting that depart from the traditional paradigms.

The policy of protecting a female child is no less important now than in 1955. But if her adoption by a single man is in her interests, there should be no legal impediment to that course. We recommend removing the statutory bar, while emphasizing the added responsibility that this imposes upon those charged with protecting her interests in the adoption process.

We recommend that the prohibition against a single male adopting a female child be removed.

Presentation

10. Members may wish to note the above background information for reference.

Health, Welfare and Food Bureau
March 2004