

For information  
on 25 March 2004

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

**Supplementary information on –**

- (a) Residence Requirements for Adoption;**
- (b) Adoption of Children from Places outside HK by HK residents; and**
- (c) Escort Arrangements of Other Countries**

**Purpose**

This paper provides supplementary background information on our residence requirements for adoption, adoption of children from places outside HK by HK residents, and escort arrangements of other countries.

**Background**

2. At the meetings on 26 February, 11 March and 18 March 2004, Members requested for, among others :

- (a) explanations on the need for the current residence requirement under section 5(6) of the Adoption Ordinance (Cap.290), which provides that an adoption order shall not be made unless both the applicant (prospective adopter) and the child reside in HK;
- (b) information on adoption that involves a child coming from a place outside HK, including any place in the Mainland, for adoption by local adoptive parents, and the role of the Social Welfare Department (SWD) in such adoption; and
- (c) whether there are any requirements in other jurisdictions stipulating that a prospective adopter should go there to visit/meet the child,

before the child is taken overseas for pre-adoption placement.

**(a) Residence Requirements for adoption**

3. At present, section 5(6) of the Adoption Ordinance stipulates that “an adoption order shall not be made in respect of any infant unless the applicant and the infant reside in HK”. “Residence” is not defined in statute. It is a question of fact to be determined by reference to the circumstances of the case. Each case has to be considered by the Court having regard to the facts of that individual case. According to Hansard records and as shown by decided cases, “residence” for the purposes of section 5(6) of the Adoption Ordinance requires some degree of permanence of abode, so transient visitors to HK would not satisfy this requirement. Similarly, a visitor who travelled to HK with a view to adopting a child could not be said to have satisfied the “residence” requirement.

4. In practice, SWD would liaise with the Immigration Department as necessary and consult the Department of Justice (DoJ) in case of doubt to ascertain whether the applicant and the child have fulfilled the “residence” requirement (i.e. have their settled quarters or temporary homes in HK), having regard to all the facts such as their permission to reside, the actual duration of their stay in HK for the completion of the adoption procedures (which is normally 10 to 12 months from making an adoption application to the grant of an adoption order) and the purpose of their stay. With the advice of the Immigration Department and the DoJ, where appropriate, SWD would conduct investigation into the proposed adoption and report to the Court all the information relevant to the adoption so as to safeguard the interest of the child.

5. The “residence” requirement is reasonable because it enables the critical steps involving the guardian ad litem and the Court etc. to be undertaken, e.g. assessing the suitability of the applicant, ensuring the adoptability of the child, ascertaining the consent of the birth parent(s), the actual placement of at least 6 months and home visits by SWD, completion of the legal procedures including the writing of a report by the guardian ad litem, and serving of legal documents in the adoption process. Both the applicant and the child have to be in HK for these to be properly carried out. Otherwise, the requirement, for example, in section 5(7)(a) of the Adoption Ordinance that the child has to be in continuous actual custody of the applicant for at least 6 consecutive months immediately preceding the date of the order would be meaningless. Given these considerations, a reasonable period of stay for the purpose of satisfying the “residence” requirement is appropriate.

6. At the meetings on 11 March and 18 March 2004, Members expressed concern over the residence requirement in respect of the child, where Hong Kong acts as the receiving jurisdiction.

7. In future, for Convention adoptions, clause 24 (section 20C(5)) of the Amendment Bill provides that section 5(6) shall not apply in relation to any Convention adoption order, and the Court shall not make a Convention adoption in respect of an infant unless -

- (a) (if HK acts as the receiving State), the applicant habitually resides in HK and the infant habitually resides in a Contracting State; or
- (b) (if HK acts as the State of origin), the infant habitually resides in HK and the applicant habitually resides in a Contracting State.

8. For non-Convention adoptions, without section 5(6) of the Adoption Ordinance or other safeguard measures in lieu of such a provision in statute, it would be difficult from the welfare point of views for the guardian ad litem to discharge his/her duties of investigating fully the circumstances relevant to a proposed adoption (e.g. whether consent from birth parent(s) has been properly given, whether the proposed adoption is in the best interests of the child etc.) and for the Court to make an informed decision on the proposed adoption.

9. We understand that New Zealand has experienced problems in not having such residence requirement in its legislation, and is proposing that jurisdiction be limited to cases where the child is habitually resident in New Zealand or coming to reside in New Zealand; and the applicants are New Zealand citizens or permanent residents who are resident, and have for 3 years been habitually resident, in New Zealand prior to the filing of the application to adopt. As set out in its Law Commission's Preliminary Paper 38 on "Adoption: Options for Reform"<sup>1</sup> in October 1999 and Report No. 65 on "Adoption and Its Alternatives – A Different Approach and a New

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<sup>1</sup> Section 3(1) of the Adoption Act provides that a court may make an adoption order on the application of any person, whether domiciled in New Zealand or not; in respect of any child, whether domiciled in New Zealand or not. The effect of section 3 is that the parties need neither be resident, nor intend to be resident in New Zealand, for an adoption order to be made under New Zealand legislation by a New Zealand court.

In terms of jurisdiction, section 3 would allow New Zealand to be used as a 'clearing house' for adoptions. This could be seen as undesirable: if persons are unable to adopt in their own country, should New Zealand provide an easy alternative?

Framework”<sup>2</sup> in September 2000, the main problems highlighted include :

- (a) in some cases, the lack of residence requirement allows New Zealand adoption law to be used to circumvent more restrictive adoption practices in the child’s or adoptive parents’ country of origin (i.e. as a “clearing house” for adoptions); and
- (b) where the parties are not resident in New Zealand, they cannot be assessed appropriately. Such scenarios do not allow social workers to discharge their statutory obligation to report on the advisability of the adoption generally.

**(b) Adoption of Children from Places outside HK by HK residents**

10. The adoption of children from places outside Hong Kong by Hkong Kong residents mainly falls into the following two categories :

- (a) children from places outside Hong Kong brought into Hong Kong for adoption primarily by their step-parents or relatives which are known to SWD; and

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<sup>2</sup> Domicile or Habitual Residence

Since the publication of that Preliminary Paper, we have discovered that section 3 does create practical difficulties (with four specific examples quoted in that Report – which are not set out in details here). Some of the difficulties highlighted include -

- (a) In some cases, section 3 allows New Zealand adoption law to be used to circumvent more restrictive adoption practices in the child’s or adoptive parents’ country of origin.
- (b) It also creates practical difficulties. Where the parties are not resident in New Zealand, they cannot be assessed appropriately, and post-placement services and monitoring cannot be provided. Such scenarios do not allow social workers to discharge their statutory obligation to report on the suitability of the applicant to adopt or the advisability of the adoption generally.

Common law rules relating to adoption

Having discussed the potential for misuse of section 3, we should emphasize that adoptions so made may not be recognized overseas. The general rule expressed in *Re Valentine’s Settlement* is that recognition of an adoption made overseas will depend upon whether the adopting parents were domiciled in the country where the adoption order was made. Lord Denning MR went further and added the requirement that the child should also be resident in the country in which the adoption order is made.

This rule has implications for adoptions under section 3 made by persons habitually resident overseas to adopt a child who may or may not be resident in New Zealand. Although an order made using section 3 would be valid in New Zealand, it may not be considered valid overseas.

- (b) children from places outside Hong Kong adopted by foreigner/expatriate families in Hong Kong which are processed by a non-governmental organization (NGO).

11. The relevant statistics for the two categories of adoption in the recent three to four years are shown at Annexes A and B respectively (note: overlapping in Annexes A and B in respect of a few cases is possible). For adoptions within the first category, there were 11 cases in 2000-01, 6 cases in 2001-02 and 8 cases in 2002-03. From April to December 2003, there was only one case. The children came from a total of 13 places. For the second category, according to information provided by International Social Service – Hong Kong (ISS-HK), the NGO in Hong Kong involved in making such adoption arrangements, there were only a few such cases in recent years with 4 in 2000-01, 7 in 2001-02 and 7 for 2002-03. As regards the places of origin, they came from five places, namely, the Mainland, Brazil, India, Thailand and the Philippines.

12. At present, adoption of children under category (b) of paragraph 10 above is mainly handled by ISS-HK through a self-financing programme. In future, when the legislative amendments are in place, SWD will be the Central Authority for Convention adoptions, and will monitor the work and performance of Accredited Bodies for both Convention and non-Convention adoptions.

### **(c) Escort Arrangements in other countries**

13. The Commonwealth Legal Advisory Service has advised that they have conducted a search of the legislations of the United Kingdom, Australia, New Zealand, Canada and Singapore, and find that none of them have any legislative provisions to require an overseas prospective adopter(s) to go to those countries to visit/meet the child, before the child is taken overseas for pre-adoption placement. Nor does the Hague Convention impose such a requirement.

14. We note that many countries such as Korea adopt arrangements similar to those of Hong Kong and allow escort arrangements by persons other than overseas prospective adopters in justifiable circumstances. Such circumstances in Hong Kong would include, as explained to Members at the previous Bills Committee meetings, commitment of the prospective adopters to stay home to take care of their other children, the prospective adopters having difficulty in travelling and so on.

## **Presentation**

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

Health, Welfare and Food Bureau  
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## Annex A

### Number of cases with adoption orders granted for children from places outside Hong Kong being brought into Hong Kong for adoption (as known to the Social Welfare Department)

Country/Place	2000-01	2001-02	2002-03	2003/04 (up to December 2003)
Boliva	0	1	0	0
Canada	1	0	0	0
India	0	0	1	0
Japan	0	0	1	0
Macau	1	0	0	0
Mainland	0	0	3	0
New Zealand	0	1	0	0
Philippines	1	2	1	0
Russia	0	0	0	1
Taiwan	0	0	1	0
Thailand	1	1	0	0
UK	6	0	0	0
USA	1	1	1	0
<b>Total</b>	<b>11</b>	<b>6</b>	<b>8</b>	<b>1</b>

#### Note:

For this purpose, we have not included re-adoption cases (i.e. children already adopted in a place outside HK, and re-adopted under the HK law after coming to HK).

**Number of cases processed by ISS-HK on  
Adoption of Children from Places outside Hong Kong  
by foreign/expatriate residents in Hong Kong**

<b>Child's Place of Origin</b>	<b>Year</b>	<b>2000-2001</b>	<b>2001-2002</b>	<b>2002-2003</b>
Mainland China* (for expatriates only)		3	4	4
Brazil		0	0	1
India		0	1	1
Thailand		1	0	1
Philippines		0	2	0
<b>Total</b>		<b>4</b>	<b>7</b>	<b>7</b>

Source : ISS-HK

- \* The service is only available for foreigners/expatriates in Hong Kong. As explained in the paper on "Arrangements for adoptions between the HKSAR and the Mainland" (ref : CB(2)1661/03-04(01)), all adoption applications must be made in accordance with the requirements in the Adoption Law of the People's Republic of China and separate procedures in the Measures for Registration of Adoption of Children by Foreigners in the PRC (外國人在中華人民共和國收養登記辦法) .