

For discussion
on 13 May 2004

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

**Sanctions for Making Private Arrangements
for Adoption by Unrelated Persons**

Purpose

This paper addresses certain points raised by Members on the new section 23A under clause 29 of the Adoption (Amendment) Bill 2003 (the Amendment Bill) regarding making arrangements or placement for adoption of a child by an unrelated person.

Background

2. New section 23A(1) provides that a person, other than the Director of Social Welfare (DSW) or any person authorized by DSW, shall not make arrangements for the adoption of an infant, or place an infant for adoption, unless either of the prospective adopters is a parent or relative of the infant or the person is acting in pursuance of a court order (hereinafter called “prohibited adoption arrangements”)¹. This applies to both local and intercountry (Convention and non-Convention) adoptions.

3. New section 23A(2) further provides that any person who takes part in the management or control of a body of persons (corporate or unincorporate) involved in the making of adoption arrangements, or any person who makes adoption arrangements or receives an infant under such prohibited adoption arrangements, shall be guilty of an offence and liable to a

¹ Clause 29 (section 23A(1)) of the Amendment Bill provides that :

“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.”

fine at level 6 (currently at \$100,000) and to imprisonment for 6 months².

4. New section 23A(4) lists the acts which are regarded as “making adoption arrangements”³. They include entering into any agreement for adoption arrangement, making any arrangement for adoption or facilitating such an adoption, initiating or taking part in any negotiations for the purpose of making adoption arrangement, or causing another person to do these acts.

Members’ Concerns

5. Members have expressed concerns over the proposals, in particular –

- (a) the need for the provision;
- (b) the persons caught by the provision;
- (c) the acts caught by the provision; and
- (d) the severity of the penalties.

Areas for Consideration

(a) The need for the provision

6. The rationale for our proposal and the need for the provision were explained in the paper “Changes arising from the Adoption (Amendment) Bill 2003 – Impact on the Current Arrangements on Local Adoptions” (Ref : CB(2)1566/03-04(02)) and at previous Bills Committee meetings.

² Clause 29 (section 23A(2)) of the Amendment Bill provides that :

“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.”

³ Clause 29 (section 23A(4)) of the Amendment Bill provides that :

“For the purposes of this section, a person shall be deemed to make arrangements for the adoption of an infant if –

(a) he enters into any agreement or makes any arrangement for, or for facilitating, the adoption of the infant by any other person, whether the adoption is effected, or is intended to be effected, in Hong Kong or elsewhere;

(b) he initiates or takes part in any negotiations of which the purpose or effect is the conclusion of any agreement, or the making of any arrangement, as referred to in paragraph (a); or

(c) he causes another person to do an act specified in paragraph (a) or (b).”

7. In making adoption arrangements, the best interest of the child should be the guiding principle. Individuals / non-accredited bodies may not have the expertise and professional training to conduct assessment and make arrangements or placement. The need for professional inputs during the adoption process has been generally accepted. During previous consultation exercises, the proposal to outlaw private arrangements for adoption by unrelated persons received general support. Therefore, we consider that individuals / non-accredited bodies should not be allowed to make arrangements or placement for adoption by unrelated persons.

8. Although all local adoptions are subject to the final approval of the Court, it is desirable to build in safeguards early in the process so that the Court would not be presented with a *fait accompli*, i.e. a close bonding already developed between prospective adoptive parents (regardless of whether they are the best choice) and the child, and the Court has no alternative but to grant the adoption order.

9. We therefore consider that effective sanctions should be imposed to deter adoption arrangements made by those other than SWD and Accredited Bodies acting under and in accordance with its accreditation (hereinafter called ABs).

(b) The persons caught by the provision

10. Adoption by related persons will not be caught by section 23A. In response to Members' concern, we have also considered the scenario of adoption by step parent as a sole applicant (note: a step parent who applies jointly with the birth parent of the infant is currently **not** caught by section 23A by virtue of section 23A(1)(a)⁴). We agree that for the purpose of section 23A, for adoption by step parent who applies as a sole applicant to be treated in the same manner as adoption by related persons, so that such a step parent would be in the same position as a step parent who applies jointly with the birth parent of the infant.

11. Also, in response to Members' concern, we would propose Committee Stage Amendments to stipulate that Non-Governmental Organizations (NGOs) duly accredited under and in accordance with its

⁴ Section 23A(1)(a) provides that if the prospective adopter or (where 2 spouses are the prospective adopters) either of the prospective adopters is a parent or relative of the infant, this will not be caught under section 23A.

accreditation may participate in local adoption⁵, apart from intercountry adoption. Hence, ABs would not be caught by section 23A.

12. With these amendments, only arrangements or placement for adoption by unrelated persons not made by SWD or ABs, nor pursuant to a court order (in respect of local or intercountry adoption) will be caught by section 23A.

13. Members have expressed concerns over whether the present construction of section 23A would be too wide to cover individuals acting in good faith, out of goodwill, without mischief or ill intention, but becoming involved inadvertently or out of ignorance of the statutory prohibitions. It is a fundamental principle of the criminal law that the prosecutor has to prove that the defendant has committed a guilty act with the requisite guilty mind. For that matter, the defendant will not be found guilty, unless it is proven that he/she knows or has reason to suspect that the person making the arrangement or placement is neither DSW/ABs, nor acting in pursuance of a court order.

14. Overseas experience in the UK, Queensland of Australia and New Zealand has shown that their equivalent provisions of section 23A have rarely been invoked, which may reflect, to a certain degree, the strength of their deterrent effect or the difficulty of charging persons under such provisions. However, the existence of such provisions does at least serve the purpose of stating firmly the society's disapproval of any improper handling of adoption arrangements for children.

(c) **The acts caught by the provision**

15. In response to Members' suggestion of adopting a minimalistic approach, we have reviewed the provision and suggest removing the proposed offence in the original section 23A(2)(a) which seeks to outlaw the taking part in the management or control of any body of persons (or body of persons other than ABs) which exists for making adoption arrangements. We can still rely on the remaining section 23A(2)(b) and (c) to catch those who have contravened the provision in section 23A(1) on prohibiting the making of arrangements and placement. Section 23A(3), which is related to evidence that is to be admissible for proving an offence under section 23A(2)(a) will become unnecessary and can be deleted.

⁵ This will be the subject of a separate paper for the meeting on 13 May 2004.

(d) **The severity of the penalties**

16. Members have two specific concerns over the need for and the level of penalty :

- (a) whether it is possible to accord a lower level of penalty for those who have made private arrangement or placement for adoption by unrelated persons in good faith, out of goodwill, without mischief or ill intention, and/or out of ignorance of the statutory prohibitions; and
- (b) whether by virtue of the Court refusing to grant an adoption order to those applicants breaching section 23A, this would have provided sufficient deterrent to prohibited adoption arrangements, in lieu of criminal sanctions.

17. On paragraph 16(a), according to legal advice, sentencing is a matter of discretion for the Court. In sentencing, the Court will take into account all the circumstances of the case, the background of the offender and all mitigating factors⁶, if applicable, before deciding the appropriate sentence. It is not appropriate for us to pinpoint any particular factor in the legislation to dictate how the Court should determine sentence. However, it would be possible for persons who have made prohibited adoption arrangements out of goodwill, in good faith, without mischief or ill intention, or out of ignorance of statutory prohibitions to rely on these as mitigating factors to seek mercy from the Court during sentencing. Therefore, introducing a penalty system for offenders with different intent in the legislation would not be desirable.

18. On paragraph 16(b), we have taken into account the relevant overseas experience in the process. In the UK and Australia, the Court is not barred from making adoption orders to those breaching the equivalent provision of section 23A, as it is a balancing exercise of the Court having regard to the public policy considerations and the best interests of the child. We do not support the proposal of denying the Court the jurisdiction to grant adoption orders to those applicants breaching section 23A (in lieu of criminal sanctions), as the hands of the Court would then be tied in making its judgment on the merits of individual cases, and this might not be in the best interests of the child. Harm could be caused to the child concerned in certain cases, say if bonding has already been developed and the adoptive parent is suitable on all fronts save for a breach of section 23A.

⁶ Mitigating factors include offender's ignorance of the law, motive, character of the offender, remorse shown by the offender, how the offender behaves after the offence, offender acting on erroneous legal advice, mental condition of the offender, etc.

Proposed Committee Stage Amendments

19. On the the basis of the above, we consider that criminal sanctions for section 23A should be retained. But, we suggest moving Committee Stage Amendments (CSAs) to -

- (a) make it clear that the “person authorized by the Director” refers to ABs acting under and in accordance with its accreditation;
- (b) exclude from the scope of prohibition adoption in which the prospective adopter is a person who is married to a birth parent of the infant; and
- (c) remove section 23A(2)(a) and section 23A(3).

The proposed CSAs are at the Annex.

Conclusion

20. Members’ views on the approach and the proposed CSAs are welcome.

Health, Welfare and Food Bureau
May 2004

**Proposed Revision of clause 29 (new section 23A)
of the Adoption (Amendment) Bill 2003**

**23A. Restriction on arranging adoption and
placing of infant for adoption**

(1) Subject to subsection (1A), no person ~~Other~~ than –

(a) the Director; ~~or~~

(b) an accredited body acting under and in accordance with its accreditation; or

(c) a person acting in pursuance of an order of the Court,

~~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.

(1A) Subsection (1) shall not apply if ~~unless~~ the prospective adopter, or (where ~~2 spouses are~~ the prospective adopters ~~are a married couple~~) either of the prospective adopters, is –

(a) a parent or relative of the infant; or

(b) a person who is married to a birth parent of the infant.~~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 an accredited body a person authorized by
the Director for the purposes of subsection (1)];~~

~~(a)~~ contravenes subsection (1); or

~~(b)~~ 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.

~~[(3) In any proceedings for an offence under subsection (2)(a), proof of
things done or of words written, spoken or published (whether or not in the
presence of any party to the proceedings) by any person taking part in —~~

~~(a) — the management or control of a body of persons (corporate or
unincorporate); or~~

~~(b) — making arrangements for the adoption of infants on behalf of
the body;~~

~~shall be admissible as evidence of the purpose for which that body exists.]~~

(34) For the purposes of this section, a person shall be deemed to make
arrangements for the adoption of an infant if —

(a) he enters into any agreement or makes any arrangement for,

or for facilitating, the adoption of the infant by any other person, whether the adoption is effected, or is intended to be effected, in Hong Kong or elsewhere;

- (b) he initiates or takes part in any negotiations of which the purpose or effect is the conclusion of any agreement, or the making of any arrangement, as referred to in paragraph (a); or
- (c) he causes another person to do an act specified in paragraph (a) or (b).