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**Report of the Bills Committee on
Adoption (Amendment) Bill 2003**

Purpose

This paper reports on the deliberations of the Bills Committee on Adoption (Amendment) Bill 2003.

The Bill

2. The Bill proposes changes and improvements to existing arrangements on local adoption. The proposed changes include -

- (a) prohibiting privately arranged adoption except under certain conditions;
- (b) prohibiting the removal of a child out of Hong Kong for the purpose of adoption by an unrelated person without a court order;
- (c) requiring an applicant for an adoption order to authorise the Commissioner of Police (CP) to inform the Director of Social Welfare (DSW) whether the applicant has previous convictions and, if so, the particulars;
- (d) enabling a step parent to apply as the sole applicant for an adoption order if his spouse is the birth parent of the child born within wedlock;
- (e) providing for appeals against certain decisions of DSW to be made to the Administrative Appeal Board; and
- (f) updating the fines of certain existing offences.

3. The Bill also adds provisions for intercountry adoption for the purpose of giving effect to the Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (the Hague Convention) in the Hong Kong Special Administrative Region (HKSAR).

The Bills Committee

4. At the House Committee meeting on 20 June 2003, Members formed a Bills Committee to study the Bill. The Bills Committee was activated on 19 December 2003. The membership list of the Bills Committee is in **Appendix**.

5. Under the chairmanship of Hon Margaret NG, the Bills Committee has held 14 meetings with the Administration. The Bill Committee has received written submissions from the Law Society of Hong Kong, the Hong Kong Family Law Association, Mother's Choice, the International Social Service (Hong Kong Branch), Caritas (Hong Kong), and Ms Amelia ROBERTS, a member of the public.

Deliberations of the Bills Committee

Arrangements for intercountry adoptions

Administration's proposals

6. The Hague Convention provides for the requirements for intercountry adoptions, designation of central authorities and accredited bodies, procedural requirements in intercountry adoption, and mutual recognition of adoptions made in Contracting States. The Bill proposes, inter alia, that -

- (a) the Articles of the Hague Convention set out in the proposed Schedule 3 shall have the force of law in Hong Kong;
- (b) DSW be designated as the Central Authority for Hong Kong; and
- (c) the High Court be empowered to hear adoption applications and to grant adoption orders under the Convention.

Guiding principles for not including provisions in the Hague Convention in the Bill

7. Members have asked why not all the Articles in the Hague Convention are included in the proposed Schedule 3 of the Adoption Ordinance (Cap. 290) (AO). The Administration has explained that 5 Articles have been reflected in the main body of the legislation and 27 Articles have been included in Schedule 3. The remaining 16 Articles have not been included for the following reasons -

- (a) they contain no obligatory requirements;
- (b) they purely operate on the international plane and are to be carried out by the Central People's Government (CPG);
- (c) they can be implemented administratively; or
- (d) they are not applicable to the circumstances in Hong Kong.

Impact on current arrangements

8. Members have queried the Government's policy in intercountry adoptions. Members have also asked about the roles of the Social Welfare Department (SWD) and non-governmental organisations (NGOs) in intercountry adoptions, and the mechanism for Convention adoptions, i.e. intercountry adoptions made between Hong Kong and the Contracting States pursuant to the Hague Convention, and non-Convention adoptions.

9. The Administration has explained that the aim of adoption service is to find a suitable and permanent home for the children whose parents are unable or unwilling to take care of them. In arranging an adoption, the best interests of the child will be the guiding principle. Priority will be given to placing children to local families of the same ethnic or cultural background. Arrangements for intercountry adoption will be made only when the possibility of matching a local adoptive home for the child has been exhausted. The Hong Kong children involved are usually those who have special needs, such as those with disabilities, health problems or hard family background. However, under the parallel matching mechanism, i.e. matching with local and overseas adoptive homes, should a local adoptive home become available before a formal matching proposal is made to overseas adopters, the case will be retrieved for such local placement.

10. The Administration has further explained that at present, the adoption of DSW wards by overseas adopters is arranged by SWD with the assistance of two NGOs, namely the International Social Service (Hong Kong Branch) and Mother's Choice. A DSW ward refers to a child or juvenile to whom DSW has been appointed his legal guardian under section 34(1)(a) of the Protection of Children and Juveniles Ordinance (Cap. 213). Home assessment on an overseas prospective adopter is conducted by the overseas adoption agency, while SWD assesses the adoptability of the local child. If an overseas prospective adoptive parent is matched with a DSW ward, an application will be made to the High Court to make the child a ward of the Court under section 26 of the High Court Ordinance (Cap. 4), seeking leave to send the child out of Hong Kong for adoption overseas. NGOs facilitate the procedural arrangements in support of SWD's work in the adoption process, including the preparation of child study reports, screening home assessment reports on the overseas prospective adoptive parent prepared by the overseas adoption agencies, arranging placement of the child with the approved

overseas adoptive parent when required, and monitoring the situation during the adoption placement until an adoption order has been granted in the receiving jurisdiction.

11. For Convention adoptions, an accreditation system will be put in place to allow NGOs duly accredited by DSW, which is the Central Authority for Hong Kong, to perform duties delegated by it. Under the system, DSW will remain responsible for, among others, making decision as to the suitability of an applicant to adopt a child, the decision to match the child with overseas prospective adoptive parent where Hong Kong acts as the State of origin, and the decision as to whether an adoption placement should proceed. In discharging such duties, DSW may authorise an accredited body to take up any particular case and entrusted with the procedural tasks referred in paragraph 10 above. Where Hong Kong acts as the State of origin, DSW will make decisions on matching and placement, and make application to the court for an order for the child to be taken out of Hong Kong for adoption. Where Hong Kong acts as the receiving State, DSW will liaise with the Police on criminal record check on the prospective adopter, and the Immigration Department to confirm the permission for the child to enter and stay in Hong Kong for the purpose of adoption.

12. Regarding non-Convention adoptions, the arrangement will be similar to the existing arrangements for overseas adoption. The roles of DSW will largely remain unchanged. One major difference is that the applications made by DSW to the court for an order to enable the child to be taken out of the HKSAR for the purpose of adoption by unrelated person(s) residing outside the HKSAR will in future be made under the Adoption Ordinance (as amended) rather than the High Court Ordinance. Accredited bodies may be allowed to handle non-Convention adoptions and to perform duties similar to those for Convention adoptions. In handling non-Convention adoption cases, accredited bodies should apply the same service standard as for Convention adoptions.

Escort arrangements

13. Regarding the escorting arrangements for intercountry adoptions, members have expressed concern whether there is sufficient care for the children to be adopted. They have asked whether a prospective adoptive parent is required to come to Hong Kong to escort the child back to his homeland.

14. The Administration has explained that although there is no such a requirement, SWD encourages prospective adoptive parents to do so as far as possible. In fact, most of them do come to Hong Kong to escort their child back to their homeland. Escort services are provided by the two NGOs in Hong Kong which are involved in the adoption arrangement or others, such as social workers of the overseas agencies and non-social workers of the Hong Kong agencies, if the prospective adoptive parent cannot come to Hong Kong.

15. The Administration has also informed members that Australia, Canada, Singapore, New Zealand and the United Kingdom (UK) do not impose a requirement that an overseas prospective adoptive parent has to go to the country to visit or meet the child, before the child is taken overseas for pre-adoption placement. There is also no such a requirement in the Hague Convention.

Non-recognition of intercountry adoptions

16. Article 23 of the Hague Convention provides that an adoption certified by the competent authorities of the State of the adoption as having been made in accordance with the Hague Convention shall be recognised by operation of law in the other Contracting State. Article 25 of the Hague Convention provides that any Contracting State may declare that it will not be bound under this Convention to recognise adoptions made in accordance with an agreement concluded by application of Article 39(2) of the Hague Convention, i.e. an agreement which derogates from certain procedural requirements of the Hague Convention.

17. According to the Administration, Article 25 of the Hague Convention has not been included in the proposed Schedule 3 because it operates on international plane. The Administration envisages that under the circumstance where CPG makes a declaration under Article 25 of the Hague Convention and if it is intended that the declaration would be applicable to Hong Kong, CPG would, in accordance with Article 153 of the Basic Law, consult the HKSAR Government before making such a declaration.

18. To cater for implementation of any declaration to be made by CPG under Article 25 of the Hague Convention, the Administration will introduce Committee Stage amendments (CSAs) to enable the Secretary for Health, Welfare and Food (SHWF) to make an order published in the gazette, when CPG makes such a declaration, for possible non-recognition of adoption arrangements made in accordance with the agreement concluded by application of Article 39(2) of the Hague Convention. The Administration has informed members that once such an order has been made, the adoptions made under Article 39(2) of the Hague Convention may still be recognised if they meet the requirements in section 17 of AO which provides for recognition of non-Convention adoptions.

Prohibition of privately arranged adoption by unrelated persons

The Administration's proposals

19. At present, private arrangements for adoption by unrelated persons is not prohibited in Hong Kong. The Administration proposes to amend AO to prohibit a person, other than DSW or any person authorised by DSW, to make arrangements for the adoption of a child or place a child for adoption, unless the prospective adoptive parent is his birth parent or relative, or save in pursuance of an order of the court. Any

person who takes part in the management or control of a body of persons involved in the making of prohibited arrangements or any person who makes prohibited adoption arrangements or receives an infant under such prohibited adoptions arrangements, shall be guilty of an offence and liable to a fine at level 6 (currently at \$100,000) and to imprisonment for six months. These are provided in the proposed section 23A of AO. The provisions apply to local and intercountry adoptions.

Rationale for the proposed prohibition

20. Members have expressed concern about the need for the proposed prohibition of privately arranged adoption by unrelated persons. Members have queried whether there have been serious shortcomings in the existing private arrangements for adoption by unrelated persons, and the rationale for the proposal.

21. The Administration has explained that there were only three to seven cases of private local adoptions by unrelated person each year in the past five years. While in many cases the adoptions are smooth, there have also been problematic cases. Since SWD may not be involved in making the adoption arrangements, such arrangements may give rise to various problems, such as the lack of proper counselling and assessment, inability to verify consent given by birth parents, manipulation of adoption for pecuniary gain or the birth parents being compelled to make decisions on the basis of limited or incorrect information. Accordingly, there is a risk that a child will not be placed with the suitable prospective adopter nor in the best available adoptive home. Although all local adoptions are subject to the final approval of the court, the Administration considers that safeguards should be in place much earlier in the process. A professional assessment of the suitability of a proposed adoption has to be done before the first critical step of adoption placement. As adoption is a long-term decision on the part of birth parents and adoptive parents, adoption placement has to be handled by qualified and experienced professional.

22. The Administration has further explained that if an arrangement is made privately, SWD will normally have no knowledge of the placement until the Notice of Intention to Apply for an Adoption Order is submitted by the applicant, by which time the child may have already been in the care and control of the applicant for a period of time. Following home study and investigation, even if SWD may have considerable reservations or even oppose an order during the court hearing, with the close bonding already developed, the court may be presented with a *fait accompli*. Under the circumstance, the court may have no alternative but to grant the adoption order. To ensure that the vital placement decisions are handled by qualified and experienced people who are not acting for personal profit, it is necessary to prohibit arrangements or placement made by unauthorised individuals for adoption by unrelated persons. The Administration has also informed members that private arrangement for adoption by unrelated persons is prohibited in many jurisdictions of developed countries, including Australia, England, Scotland, New Zealand and generally in other Commonwealth countries.

Sanctions for making private arrangements for adoption by unrelated persons

23. Members have expressed concern about the proposal to impose criminal sanction on any unauthorised person for making private arrangements or placement for adoption by unrelated persons. Given the wide meaning of "making arrangement", for instance one who facilitates an adoption will be covered, and the severity of the penalty, members are particularly concerned that innocent people acting in good faith, out of goodwill, or without ill intention, but becoming involved inadvertently may be caught. Members have queried the need for and the level of penalty.

24. The Administration has responded that in making adoption arrangements, the best interests of the child should be the guiding principle. Individuals or non-accredited bodies (as amended by the CSAs referred to in paragraph 30 below) may not have the expertise and professional training to conduct assessment and make arrangements or placements. The proposal to outlaw private arrangements for adoption by unrelated persons received general support during the consultation exercise. The Administration considers that individuals or non-accredited bodies should not be allowed to make arrangements or placement for adoption by unrelated persons. Effective sanction should be imposed to deter adoption arrangements made by those other than SWD and accredited bodies.

25. Regarding the concern that the construction of the provision would be so wide as to cover innocent individuals, the Administration has explained that it is a fundamental principle in 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 knows or has reason to suspect that the person making the arrangement or placement is neither DSW or accredited bodies, nor acting in pursuance of a court order. Nevertheless, in response to members' suggestion of adopting a minimalist approach, the Administration has agreed to introduce CSAs to narrow down the scope of making arrangements.

Participation of non-governmental organisations in local adoptions by unrelated persons

26. At present, SWD makes arrangements for local adoptions of DSW wards. NGOs do not participate in local adoption of DSW wards by unrelated persons. Adoption of non-DSW wards by unrelated persons may be handled by private arrangements or referred to SWD for assistance. NGOs do not participate in such adoption arrangements, even though there is no prohibition against it. The proposed prohibition against privately arranged adoption by unrelated persons, if implemented, would have the effect of channelling all birth parents, prospective adoptive parents and adoptive children to SWD for adoption arrangements.

27. Members note that under the Adoption Act 1976 of UK, adoption agencies can make arrangements for the adoption of a child by unrelated persons. Members have

asked the Administration to consider allowing NGOs to make such local adoption arrangements so as to give more choices to birth parents and prospective adoptive parents.

28. Having considered members' views, the Administration has put forward three possible arrangements to provide more choices to birth and prospective adoptive parents. One of the arrangements is that SWD and NGOs can jointly establish two common lists of children and prospective adoptive parents, both SWD and NGOs will contribute to the matching process. This arrangement would give the widest agency choice to the birth and prospective adoptive parents as they can approach either SWD or NGOs, and the widest prospective adoptive parents choice for the children. Duly authorised NGOs will be able to participate in local adoption arrangements by unrelated persons, if they wish to do so, on a self financing basis.

29. After obtaining the Bills Committee's support in principle for the proposed arrangements, the Administration has developed the proposed framework. Since the Administration has already formulated a framework on the accreditation system to allow NGOs to provide intercountry adoption services as accredited bodies, and there are synergies between local and intercountry adoptions, the Administration proposes to extend the criteria and procedures entailed in the accreditation system to cover local adoption. The Administration has consulted five NGOs, namely, the Mother's Choice, International Social Service (Hong Kong Branch), Caritas (Hong Kong), Hong Kong Family Welfare Society and Po Leung Kuk, which have indicated support to the proposal.

30. To put in place the proposed arrangements in relation to local unrelated adoption by accredited bodies, the Administration will introduce CSAs to the Bill. Under the proposed CSAs, the main principles of accreditation for accredited bodies for the Hague Convention will be suitably adapted for applying to local adoption. DSW will be empowered to accredit, or renew the accreditation of a body of persons as an accredited body in relation to local adoption according to the principles set out in the schedule. DSW may also impose conditions on an accredited body, amend or revoke such conditions, or impose new conditions. The validity period of the accreditation will be four years or lesser period as DSW may determine when he grants or renew the accreditation. DSW will be required to keep a register of accredited bodies which will contain their names, addresses and other particulars as DSW thinks fit. The register will be available for public inspection at such reasonable time and place as DSW may determine. An accredited body or prospective accredited body may appeal to the Administrative Appeals Board against the decisions of DSW to approve a new or renewal application for accreditation, and to suspend or revoke an accreditation.

31. In addition to applying to DSW, a prospective adopter may apply to an accredited body for an assessment of his suitability to be an adoptive parent. The accredited body would decide whether or not the applicant is suitable. If at any time after an accredited body has placed a child with a prospective adopter for local adoption, the accredited

body considers that to continue the placement would not be in the child's best interests, the accredited body may terminate the placement. Similarly, DSW may terminate the placement for local adoption cases handled by SWD or direct the accredited body to terminate the placement for intercountry adoption cases. An applicant who is aggrieved by an accredited body's decision on assessment of the suitability of the applicant as prospective adoptive parent, and termination of a placement may appeal to DSW.

32. Regarding placement of children for local adoption, where specific consent for the adoption is given to a person who is assessed by DSW or an accredited body as a suitable adoptive parent, DSW or the accredited body, as the case may be, will proceed with placing the child with the person. No matching is required. Where general consent for adoption has been given, once DSW has taken a decision, having due regard to the opinion provided by the accredited bodies which have proposed any prospective adopter for a particular child and the opinion of such persons as DSW may consider appropriate, that an applicant for local adoption would be a suitable adoptive parent for the child, and the placement of the child with the applicant would be in the best interests of the child, DSW or the accredited body may proceed with the placement.

33. Members have asked about the mechanism for the matching and placement of adoptive children where general consent is given. Members have also queried why the matching decision is still vested with DSW.

34. The Administration has explained that the children available for adoption would be placed in a central pool for matching to identify the most suitable adoptive parents. There may be more than one prospective adopter, and all accredited bodies that have proposed prospective adopters for a particular child would become involved in the matching process. DSW would take a decision having due regard to the opinions provided by the accredited bodies. Where there are more than one prospective adopter, routing the matching decision through DSW would provide an additional degree of quality assurance to the process. Once a decision is taken that an applicant would be a suitable adoptive parent for a particular child, and the placement of the child with the applicant would be in the best interests of the child, DSW or the accredited body, as the case may be, may proceed with the placement.

35. Regarding the need to maintain a central pool for prospective adoptive parents, the Administration has explained that such a central list will avoid the prospective adoptive parents "shopping around" with SWD and different accredited bodies. The essence of maintaining a central pool is to match the children available for adoption to the most suitable home in the shortest time.

36. The Administration will also introduce CSAs to provide for SHWF to make regulations in relation to the procedures and the requirements in the assessment and approval of persons as suitable prospective parent and placement of infants, the exercise by accredited bodies of their functions of making or participating in arrangements for

adoption, and matter related to the grant, renewal, suspension or revocation of accreditation.

Arrangements for adoption between Hong Kong and the Mainland

37. Members have asked about the arrangements for adoption between Hong Kong and the Mainland. Members have raised concern about the possibility of a child in Hong Kong being taken by one parent without the consent of the other parent to the Mainland for adoption.

38. The Administration has advised that local legislation does not have explicit provisions for adoption arrangements between Hong Kong and the Mainland, which is intracountry adoptions. In the Mainland, adoption is governed by its Adoption Law. Generally, an adoptive child has to have registered permanent residence in the Mainland, before the relevant authorities in the Mainland will process an application for adoption. It is uncommon for Hong Kong children to be able to satisfy this requirement of registered permanent residence, save under certain circumstance. For instance, a child born in the Mainland, with one parent being a Mainlander and the other parent being a Hong Kong permanent resident, who has yet to obtain a One-way Permit to leave the Mainland for settlement in Hong Kong might still have registered permanent residence. In addition, according to the Adoption Law of the Mainland, the child's birth parents are required to make the adoption arrangement jointly for the child, unless one of the parents is untraceable, and that the adoption should be subject to other requirements stated in the Adoption Law. So far, no such adoption cases have been known to SWD.

39. In the case of an adoption in Hong Kong of a Hong Kong child by a Mainlander, the Administration has pointed out that it is uncommon for Mainland residents to be able to satisfy the residence requirement provided in section 5(6) of AO. A Mainland visitor who travels to Hong Kong intending to adopt a child could not be taken to have satisfied the residence requirement. In the unlikely event that such cases are encountered in Hong Kong, the existing arrangements for local adoptions will apply. So far, SWD has not come across such cases.

40. The Administration has also pointed out that under the Bill, an order from the court is required before a Hong Kong child can be taken outside Hong Kong for adoption by an unrelated person. A parent may apply for an injunction order to prevent the other parent from taking away the child from Hong Kong without his consent to the Mainland for adoption. However, where the child has already been taken out of Hong Kong to the Mainland, it would be very difficult for the other parent to secure his return. Under the circumstance, the Administration would seek the cooperation of the relevant Mainland authorities to help find the child and encourage the other parent to return the child to Hong Kong.

41. The Administration has proposed to introduce CSAs to the effect that if an arrangement leads to the placement of a child from a place outside Hong Kong but

within the People's Republic of China (PRC) with a person resident in Hong Kong, then the provision in the proposed section 23A(1) would not apply to the arrangement nor the placement, and any agreement for adoption where the adoption is effected or is intended to be effected in a place outside Hong Kong but within PRC would not be covered. The proposed section 23A(1) (as amended by the CSAs referred to in paragraph 30 above) will prohibit any person other than DSW, an accredited body or a person acting in pursuance of an order of the court to make arrangements of the adoption of a child by unrelated person. Members have queried the need for such provisions.

42. The Administration has explained that intracountry adoption is outside the ambit of the Bill, and there is no accreditation system for intracountry adoption. Most of the intracountry adoptions would take place or be effected outside Hong Kong but within PRC. However, on rare occasions, certain intracountry adoption activities may take place in Hong Kong and the provisions are needed to avoid catching such activities. For example, in the adoption of a Macao child by a Hong Kong resident, the relevant Macao authorities may appoint an agency in Hong Kong to conduct home assessment report on the prospector adopter. However, as the agency may not be an accredited body under the Bill, the preparatory work done by the agency, such as the home assessment report on the Hong Kong resident, may be caught by the provisions in the proposed section 23A. It is therefore necessary to exempt such preparatory work done in Hong Kong in relation to an adoption from the proposed section 23A.

43. Although the Administration has advised that adoption orders issued by the relevant Mainland authorities are recognised in Hong Kong, members have expressed concern that the proposed CSAs, if adopted, would pose an impression that the adoption arrangements between Hong Kong and the Mainland are given special treatment and not being regulated. Members have pointed out that one of the reasons given by the Administration on its proposal to prohibit privately arranged adoption by unrelated persons is because of the lack of professional assessment of the suitability of adoption placement, and thus there is a risk that a child will not be placed with the most suitable prospective adopter. However, with the proposed CSAs, any arrangements, such as assessment of the suitability of a prospective adopter in Hong Kong, carried out by an agency which is not an accredited body would be exempted from the prohibition provisions. Members consider that formal arrangements on adoption between Hong Kong and the Mainland should be put in place.

44. The Administration has explained that the purpose of the Bill is to improve the local adoption arrangements and to cater for intercountry adoptions. Intracountry adoption is outside the ambit of the Bill. Nonetheless, in the longer run, the possibility of establishing formal arrangements in respect of intracountry adoption should be explored. At the request of members, the Administration has undertaken to state in the speech to be made by SHWF during the resumption of the Second Reading debate on the Bill that the Administration will study the need for establishing formal arrangements on adoption with the Mainland and consult the relevant Panel in due course. Members have suggested that the matter be referred to the Panel on Welfare Services for follow-up.

Residence requirement for adoption

45. Section 5(6) of AO provides that an adoption order shall not be made in respect of any infant unless the applicant, i.e. prospective adoptive parent, and the infant reside in Hong Kong. Members have queried the need for the residence requirement.

46. The Administration has explained that the term "residence" is not defined in statute. It is a question of fact to be determined by reference to the circumstances of the case. According to records of decided cases, "residence" for the purpose of the section requires some degree of permanence of abode, therefore, transient visitors to Hong Kong would not satisfy this requirement. Similarly, a visitor who travels to Hong Kong with a view to adopting a child could not have satisfied the residence requirement. The residence requirement is reasonable as 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 six 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 Hong Kong for these to be properly carried out. Otherwise, the requirement, for instance, in section 5(7) of AO that the child has to be in continuous actual custody of the applicant for at least six consecutive months immediately preceding the date of the adoption order would be meaningless.

Adoption of a female child by a sole male applicant

47. Section 5(3) of AO 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. The Administration proposes to repeal the provision.

48. Members have expressed concern about the proposed repeal of the provision. Members are concerned that as a result, the protection to female children may be compromised. Members have questioned the reasons for proposing the change, the effect of the proposed repeal, and the matters to be considered by the court when deciding whether to make an adoption order. Members have also asked whether similar legislative provisions are found in other jurisdictions.

49. The Administration has explained that introduced in 1956 on the basis of the provisions of the English Adoption Act 1950, the provision is to protect young female adoptive children from potential risk of sexual abuse by sole male applicants. The 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 female adoptive children. In 1990s, there were discussions that this provision might contravene Article 1(2) of the Hong Kong Bill of

Rights, 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". However, legal advice obtained was that the existing provision was probably justifiable for the purpose of protecting female children.

50. To address the community concern that the provision might be seen to be discriminatory, the Administration had then explored various options. The various options considered had stressed the importance of protecting children in the adoption process. The element of protection and the principle of the best interests of the child should be paramount considerations. 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". However, when discussed by the Revamped Working Group in 2003, some NGO members considered that the proposal was still discriminatory against sole applicants vis-à-vis joint applicants. The Administration therefore proposes that section 5(3) be repealed.

51. The Administration is of the view that the provision, if repealed, would not compromise the need to protect the interests of the child as the court still needs to be satisfied before granting the adoption order that the adoption will be in the best interests of the child. The court may, if appropriate, consider the eligibility of applicants having regard to their gender and sole or joint applicant's status before making its decision.

52. According to the information provided by the Administration, New Zealand and Singapore also have similar legislative provision as section 5(3). New Zealand is considering that its legislative provision be removed. Australia, Canada, India and the United Kingdom do not have such a provision.

53. Members are of the view that since there has not been any complaint received against the provision, to guard against potential risk of young female children from sexual abuse by sole male applicants, section 5(3) should be retained. The Administration has pointed out that retaining the section will constitute a statutory presumption that in adoption, the starting point is in general, it is inappropriate for single men to parent a female child, and convey such a message to members of the public. Single father raising young daughters on their own may take exception to such a view. Nevertheless, at the request of members, the Administration has agreed to introduce a CSA to retain section 5(3).

Adoption by step-parents

54. The proposed new section 5(1)(c) provides that the court shall not make an adoption order unless the applicant is married to a person who is a birth parent of the infant, and to whom the infant was born in lawful wedlock. Members have queried the

policy intent for the proposed provision and the need for imposing the lawful wedlock requirement.

55. The Administration has explained that at present, section 5 of AO has the effect that a birth parent who re-marries has to apply to adopt his own child from a former marriage if his new spouse wishes to adopt the child. Such arrangement has been criticised as downgrading the status of a birth parent to that of an adoptive parent. To preserve the status of the birth parent who re-marries, a provision should be made to enable a step-parent to apply as a sole applicant if his spouse is the birth parent of the child. The status of the child (legitimate or illegitimate) would be changed after the adoption process, and stand to the birth parent and the adopter (the step-parent) as their child born in the wedlock. The lawful wedlock requirement would require a parent of a child born outside wedlock to apply as a joint applicant with the step-parent. Such a parent would include an illegitimate father without any parental rights.

56. In response to members' concern, the Administration has proposed moving a CSA to remove the lawful wedlock requirement and replace "birth parent" with "parent". Given the definition of "parent" in AO, the proposed change would have the effect of allowing legitimate and illegitimate fathers and mothers intending to adopt their birth children to apply as a sole applicant, except that an illegitimate father without any parental rights would still have to apply as a joint applicant with the step-mother married to him.

Mandatory criminal record checks

57. At present, applicants for adoptions are invited to declare whether they have any past convictions. In the absence of legislative framework, criminal record checks to verify the authenticity of these declarations cannot be undertaken without the consent of the applicants. To help ensure the safe custody of children to be adopted, the Administration considers that a statutory requirement on criminal record checks on the applicants should be in place. Under the proposed sections 27A and 28 of AO, an applicant is required to submit an authorisation to CP authorising CP to inform DSW whether or not the applicant has been convicted of any offence in Hong Kong or elsewhere and, if so, release to DSW the particulars of the conviction. On receiving the authorisation, DSW will make enquires with CP to ascertain whether or not the applicant has any previous convictions. DSW may release to such person as he considers appropriate any information on the applicant that DSW has obtained from CP. A written authorisation from the applicant in respect of the criminal record check is required.

58. As an application for adoption may be made with an accredited body, at the suggestion of members, the Administration has agreed to move CSAs to the effect that when so authorised by the applicant, CP may inform the accredited body, instead of DSW, whether the applicant has previous convictions and, if so, the particulars. The Administration will also introduce CSAs to specify the parties to which DSW or the

accredited body, as the case may be, may release any information in relation to criminal records on the applicant that DSW or the accredited body has obtained from the CP.

Prohibition of certain payments in connection with adoption

59. Section 22 of AO provides for the prohibition of payment, remuneration or reward in connection with adoption, except for professional services of legal practitioners or with the sanction of the court. Any person who contravenes the provision shall be guilty of an offence and liable to a fine of \$2,000 and to imprisonment for six months. The Administration proposes to amend the section to increase the fine to level 6 (currently at \$100,000). However, the custodial sentence provision remains unchanged. Members have queried whether the imprisonment term would have sufficient deterrent effect and whether it would be proportionate to the severity to the offence.

60. The Administration has explained that the proposed increase of the fine, which was set over 40 years ago, is to reflect inflation during the past years. Since it is not introduced due to an increase in the seriousness of the offence, the imprisonment term will remain unchanged. However, the Administration would, in the light of further operational experience, review the level of penalty as necessary.

Birth parent to maintain ongoing contacts with adopted child

61. Members have discussed the suggestion to provide in the Bill that a voluntary arrangement made between a birth parent and an adoptive parent on maintaining ongoing contact with the adopted child would be legally binding and enforceable after an adoption order has been granted.

62. Members have been advised by the Administration that under the existing legislative framework, the court has jurisdiction to attach conditions relating to access to the adoption order. A birth parent may register his request to the court of imposing post-adoption contact as a condition in the adoption order. The court will not, except in the most exceptional cases, impose such terms or conditions to access to the birth parent, if the adoptive parent objects. If a condition is imposed by the court and incorporated into the adoption order, it is legally enforceable. For adoption cases handled by SWD, where a request is made, SWD will assist the prospective adoptive parent and birth parent to get in touch with each other during the placement period to explore the feasibility/acceptability of any proposed contact arrangement.

63. Members are generally of the view that providing in the Bill that a voluntary arrangement made between the birth parent and the adoptive parent is legally binding and enforceable may give rise to litigation. As such, it may not be in the best interests of the child. Moreover, the existing legislative framework allows the court to attach a condition as to access to the birth parent, though such a condition is rarely imposed in the absence of agreement between the parties.

Transitional provisions

64. An adoption normally takes about 10 months to one year to complete. To minimise the disruption to the child who may have been placed with the prospective adoptive parent, the Administration will introduce CSAs to provide for transitional arrangements to cater for adoption cases that are at different stages of the adoption process to proceed when the Bill, if enacted, comes into operation.

Committee Stage amendments

65. Apart from the CSAs mentioned in the above paragraphs, the Administration has proposed to move other amendments to the Bill, including consequential amendments to a number of other Ordinances, for the purpose of clarity and consistency.

Follow-up action by the Administration

66. The Administration has undertaken to state in the speech to be made by SHWF during the resumption of the Second Reading debate on the Bill that the Administration will study the need for establishing formal arrangements on adoption with the Mainland, and consult the relevant Panel in due course (paragraph 44 above refers).

Recommendation

67. The Bills Committee recommends that the establishment of formal adoption arrangements between Hong Kong and the Mainland be referred to the Panel on Welfare Services for follow-up (paragraph 44 above refers).

Consultation with the House Committee

68. The Bills Committee consulted the House Committee on 18 June 2004 and sought the latter's agreement that the Second Reading debate on the Bill be resumed at the Council meeting on 7 July 2004, subject to the CSAs to be moved by the Administration.

Council Business Division 2
Legislative Council Secretariat
24 June 2004

Bills Committee on Adoption (Amendment) Bill 2003

Membership list

Chairman Hon Margaret NG

Members Hon Cyd HO Sau-lan
Hon CHAN Yuen-han, JP
Hon Miriam LAU Kin-yee, JP
Hon Ambrose LAU Hon-chuen, GBS, JP
Dr Hon LAW Chi-kwong, JP
Hon LI Fung-ying, JP
Hon Michael MAK Kwok-fung
Hon Audrey EU Yuet-mee, SC, JP

Total: 9 Members

Clerk Mrs Sharon TONG LEE Yin-ping

Legal Adviser Mr LEE Yu-sung

Date **7 January 2004**