



母親的抉擇
Mother's Choice

Changing Life Stories: Understanding the Legal Aspects of Working with Children and Families

2nd Edition (May 2021)



An Introductory Manual for Child Welfare Professionals

About the Authors



母親的抉擇
Mother's Choice

Mother's Choice is a charity serving the many children without families and pregnant teenagers in Hong Kong. We join hands with our community to give hope, and change the life stories of vulnerable girls and babies. We are a champion for children and a voice for every child to be in a safe, loving and permanent family.

www.motherschoice.org

Acknowledgement

Thank you to the Centre for Comparative and Public Law at The University of Hong Kong, Herbert Smith Freehills, Mayer Brown and many other individuals who were involved in Version 1 and Version 2 of this Manual for your unfailing commitment and support to the ongoing work of Mother's Choice in protecting vulnerable children in Hong Kong. With special thanks to Mayer Brown for their additional assistance in the design and production of Version 2 this Manual.



Contents

2nd Edition (May 2021)

Chapter One

Introduction to Child Rights and the Best Interests of the Child..... 1

Chapter Two

Child Maltreatment.....19

Chapter Three

Sexual Offences41

Chapter Four

Pregnancy Rights..... 55

Chapter Five

Birth Registration and Immigration..... 71

Chapter Six

Children in Alternative Care..... 83

Chapter Seven

Adoption: Law and Practice..... 105

Chapter Eight

Introduction to Data Privacy.....125

Chapter Nine

Appendices 140

Disclaimer

This Manual contains brief information on the law relevant to the subject, which is provided by the authors and contributors to this Manual. The legal position and relevant laws on the subject may change from time to time. While the information is derived from sources believed to be reliable and accurate, the authors and contributors of the publication do not make any representation or warranty as to the accuracy of the information. Mother's Choice and its representatives also do not accept any responsibility for errors or omissions in the information provided. The information provided is not and should not be treated as legal advice, and professional legal advice should be sought before any course of action is pursued. While effort has been made to ensure that the information contained in this Manual is correct, the authors, contributors, editorial team, and Mother's Choice disclaim all liability and responsibility for any error or omission in this publication, and in respect of anything, or the consequences of anything, done or omitted to be done by any person in reliance, whether wholly or partially, upon the whole or any part of the contents of this publication.

CHAPTER 1

Introduction to Child Rights and the Best Interests of the Child





Introduction

We All Have a Role to Play

The government has a legal responsibility to protect and promote the rights and welfare of all children within Hong Kong.¹ This duty extends to all courts, administrative bodies, and other government agencies.² Protecting children is not only the responsibility of the government, but of society as a whole. Everyone can help play a role in protecting the rights of children.

It is important that every individual working with children and families is aware of the role they play in protecting children, as well as that of other professionals and caregivers. At different stages of case handling, personnel involved should collaborate with each other and share the responsibility for protection of the child and provision of assistance to the family.³

This Manual aims to help social workers and other professionals better understand some of the core legal requirements when advising and working with children and families and what role they and others can play in promoting the safety and welfare of children. References to “clients” in this Manual mean direct service recipients who receive individual, group services or program activities provided by social workers.

There are basic principles that are at the core of achieving best practices in working with children and families:

- Children should be at the center of all systems and decisions. The needs and best interests of the child should always be the paramount consideration.
- Children should have a voice. Their wishes should be listened to when making decisions about his or her life.⁴
- To ensure proper care and protection, the input of everyone who works with children — including teachers, doctors, nurses, youth workers, police, social workers, NGO workers, and others is required and significant.
- If necessary, the prescribed consent should be obtained as early as possible for personal information to be provided to relevant personnel for discussion on case handling, with a view to ensuring effective protection of children’s safety.⁵
- Professionals should regularly review the actions and processes they are using to protect and promote children’s welfare, making sure they continue to be of the highest quality and responsive to the changing needs of the children they are working with.⁶

1 See [Convention on the Rights of the Child, Art. 2\(1\); Art. 3\(2\)](#).

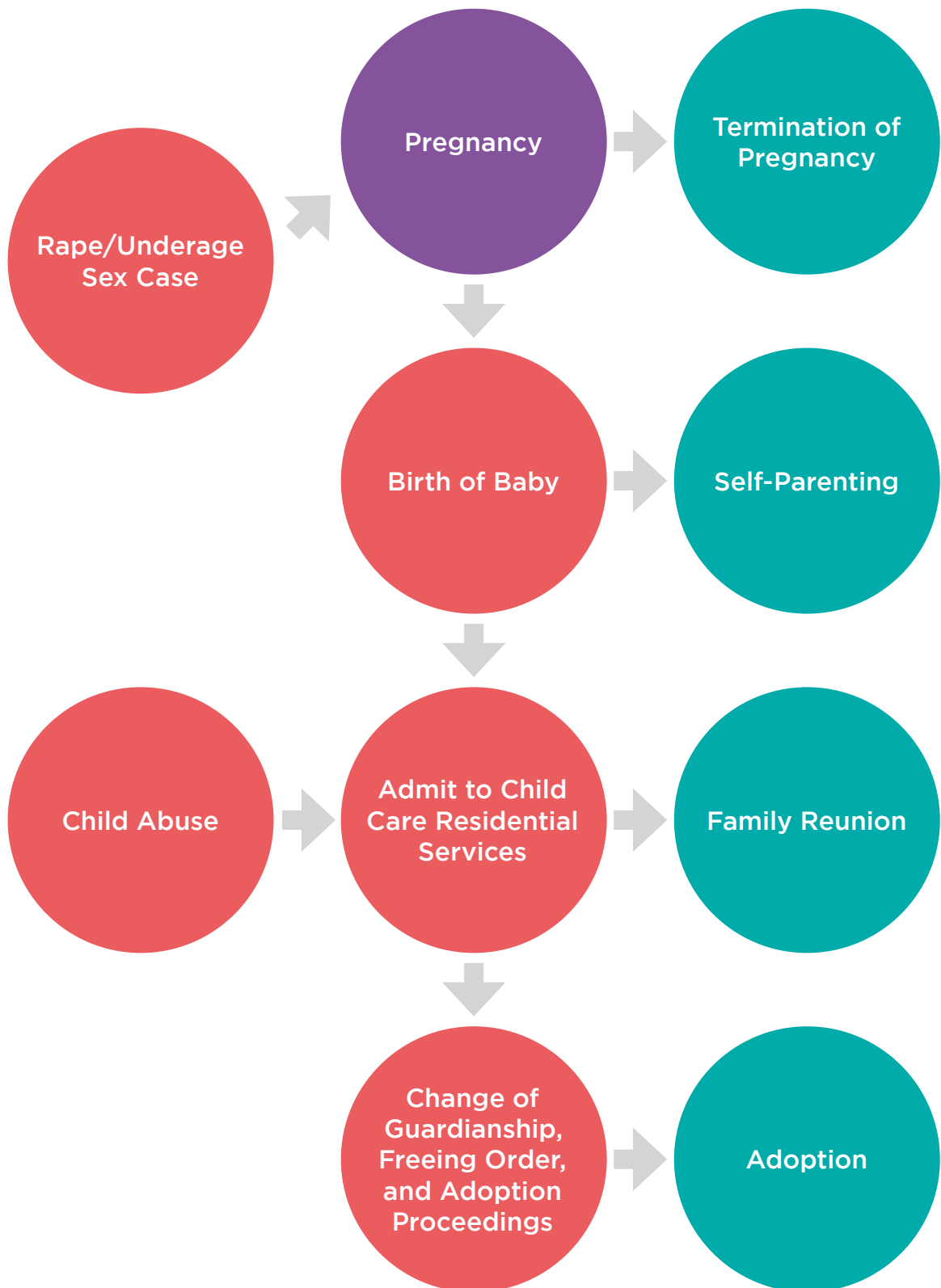
2 See [Convention on the Rights of the Child, Art. 3\(1\)](#).

3 Social Welfare Department (2020) ‘[Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation](#)’.

5 Social Welfare Department (2020) ‘[Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation](#)’.

6 Based on HM Government’s, [Working together to safeguard children: A guide to inter-agency working to safeguard and promote the welfare of children \(July 2018\)](#). These principles also echo the “Governing Principles of Child Protection”, put forward in the SWD’s, *Procedural Guide for Handling Child Abuse Cases* (2015 Version), at pages 1-2.

This Manual Covers the Life Journey of a Child Along the Following Paths:





General Practices

Introduction to the United Nations Convention on the Rights of the Child

WHAT IS THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD?

The Convention on the Rights of the Child is an international treaty that sets out the basic rights of children under international law. Treaties are agreements between nations, in which governments agree to certain rules or standards regulating how they will behave. During the 20th century, a variety of human rights treaties were entered into between nations around the world. By doing this, the governments of those countries agreed to uphold minimum standards protecting the basic human rights of all individuals. **Human rights** are considered to be basic rights which belong to all human beings, regardless of their race, gender, nationality, religion or class.

WHAT DOES THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD DO?

The Convention on the Rights of the Child (the **Convention**) specifically sets out the rights of *children*. The Convention recognizes that children and young people play a special role in society and have particular needs and rights that must be protected. The Convention was adopted by the United Nations General Assembly on 20 November 1989.⁷ Currently 196 countries are party to the Convention, making it the most widely adopted international agreement. The Convention was extended to Hong Kong in 1994. By signing up to the Convention, governments agreed to respect the rights of children as described in that document. The widespread adoption of the Convention indicates that these rights for children are widely supported by nations around the world.

WHAT **RIGHTS** ARE PROTECTED BY THE CONVENTION?

There are more than **50** specific rights within the Convention on the Rights of the Child, incorporated within **four core principles**. These are:

- Non-discrimination
- Consideration of the best interests of the child
- Right to life, survival, and development
- Respect for the views of the child

WHAT DOES THE RIGHT TO “**NON-DISCRIMINATION**” MEAN?

The principle of **non-discrimination** (Article 2) states that the rights within the Convention apply to all children. Governments must protect the rights of all children equally, irrespective of the child’s or his or her parent’s or legal guardian’s race, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

WHAT DOES THE “**BEST INTERESTS OF THE CHILD**” MEAN?

The **best interests of the child** principle (Article 3) states that in “all actions concerning children... the best interests of the child shall be a primary consideration”. This

7 UNICEF (2016) ‘[What is the UNCRC](#)’

means that when parents, government officials, professionals, judges and other persons make decisions affecting children, the impact of that decision on the child, from a best interests perspective, must be considered as one of the most important factors.

WHAT DOES THE “**INHERENT RIGHT TO LIFE**” MEAN?

Under the Convention (Article 6), “every child has the ***inherent right to life***” and countries “shall ensure to the maximum extent possible the ***survival and development*** of the child”. This principle means that children must be given the best chance at both a healthy life as well as developing to their full potential. This principle not only encompasses the physical health of a child, but also their social development and education.

WHAT DOES “**RESPECT FOR THE VIEWS OF THE CHILD**” MEAN?

The final principle requires that there be ***respect for the views of the child*** (Article 12). This means that children have a right to have their opinions heard and respected in matters concerning them, taking into account their age and maturity. Respecting the views of a child can be seen to include two parts. First, it is important to hear and take into account the child’s views and opinions. Second, the child should be an active participant in the decision-making process of matters concerning him or her. The weight of the child’s views must be balanced with what is deemed to be in their best interests.

HOW ARE CHILDREN’S RIGHTS BALANCED AGAINST THE RIGHTS AND INTERESTS OF THE **FAMILY**?

The Convention also recognizes the vital role that the family plays in the lives of children. The Convention supports loving and harmonious environments for children to develop in and specifically requires that governments should provide support to families and allow parents to fulfil their parental duties to children. Although the Convention recognizes the rights of parents, it also addresses the responsibilities parents have to their children. It is important to recognize that parental rights are not absolute and must be balanced against a child’s rights, especially the child’s right to be heard and to have his or her “best interests” considered.

HOW ARE CHILDREN’S RIGHTS PROTECTED?

The *rights of children* described in the Convention are considered to be absolute. By agreeing to be bound by the Convention, countries agree that they should take concrete steps to respect and protect the rights described in it. However, the Convention only lays down the general standards: it is understood that each country must find its own way of implementing these standards. One way that countries do this is to incorporate the rights or certain principles described in the Convention into their own domestic laws. This could then facilitate the enforcement of laws that protect children’s rights locally and perhaps most importantly, promote changes in the attitudes and behavior of society to best protect these rights. In Hong Kong, some of the Convention’s principles have been adopted in the Hong Kong Bill of Rights (Cap. 383) and the Guardianship of Minors’ Ordinance (Cap. 13), and Hong Kong court decisions supporting the Convention’s standards and principles form part of Hong Kong common law. Further, English court decisions confirming the Convention’s principles are either binding on Hong Kong courts or have persuasive effect.

Introduction to the “Best Interests of the Child” Standard

ARTICLE 3(1)

United Nations Convention on the Rights of the Child

*“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a **primary consideration**.”*

WHAT DOES THE “BEST INTERESTS OF THE CHILD” STANDARD MEAN?

While the “best interest of the child” standard is required by the Convention to be ‘a’ primary consideration, in most countries it is now a legal requirement to consider what is best for the child as ‘the’ paramount consideration in decisions affecting their care or wellbeing.⁸ For example, in cases of child abuse, the child’s rights and interests must be considered above other factors, including what is best for the parents, family, or others involved with the case.⁹

In Hong Kong, the best interest standard is legally required by both international law obligations,¹⁰ and Hong Kong’s domestic law.¹¹ The standard in Hong Kong is that the best interests of the child must be the “paramount consideration.”¹²

8 See Guardianship of Minors Ordinance (Cap 13), s. 3(1); H v N [2012] 5 HKLRD 498; J v C 113 Sol Jo 164, [1969] 1 All ER 788, [1969] 2 WLR 540, [1970] AC 668, 710H, “Welfare of the infant” should be regarded as “the first and paramount consideration” in custody matters as opposed to only being “a primary consideration” as envisaged by the Convention.

9 See PD v KWW [2010] 4 HKLRD 191; H v N [2012] 5 HKLRD 498; JD v East Berkshire Community Health NHS Trust [2005] UKHL 23. Convention on the Rights of the Child, Art. 3(1); International Covenant on Civil and Political Rights, Art. 24 (the Best Interests Standard is an implied obligation under article 24 of the ICCPR); Guardianship of Minors Ordinance (Cap 13), s. 3(1) (HK); Children Act 1989 (UK), s. 1(1); Adoption and Children Act 2002 (UK), s. 1(2); Family Law Act 1975 (Australia), s. 60CA; and Determining the Best Interests of the Child, Child Welfare Information Gateway (Nov. 2012), Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau

10 See Convention on the Rights of the Child, Art. 3(1); International Covenant on Civil and Political Rights, Art. 24 (the Best Interests Standard is an implied obligation under article 24 of the ICCPR). See Office of the High Commissioner for Human Rights, General Comment No. 17: Rights of the Child, (Art 24) (HRI/GEN/1/Rev 1) at para 6.

11 See Hong Kong Bill of Rights, Art. 20; Guardianship of Minors Ordinance (Cap 13), s.3(1)(a); K v W (Children – Removal from Jurisdiction) [2006] 2 HKFLR 292; PD v KWW [2010] 4 HKLRD 191

12 See K v W (Children – Removal from Jurisdiction) [2006] 2 HKFLR 292, para 23 states that “[T]he welfare of the child is always paramount”, citing Dame Butler-Sloss in Payne v Payne [2001] 1 FLR 1052; Guardianship of Minors Ordinance (Cap. 13) s. 3(1)(a), which states that “[I]n relation to the custody or upbringing of a minor ... in any proceedings before any court ... the court shall regard the best interests of the minor as the first and paramount consideration...” as opposed to only being “a primary consideration” as envisaged by the Convention on the Rights of the Child.

WHAT ROLE CAN A SOCIAL WORKER PLAY?

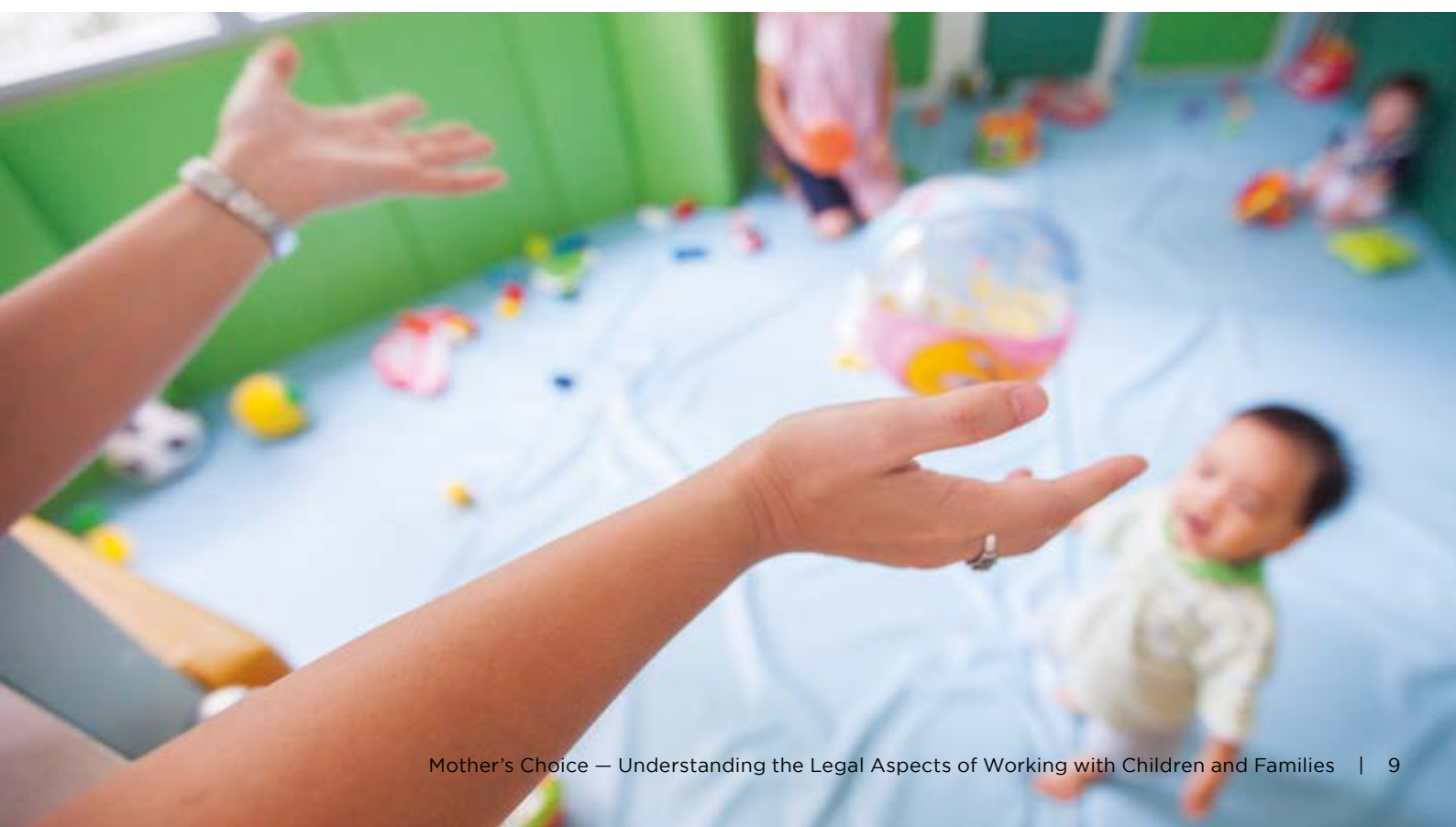
Social workers often play a key role in providing recommendations to others on what is in the *best interests of the child* and how a child's interests can be protected, in particular to lawyers, judges, and other decision makers. It is therefore critically important that social workers develop strong skills in both assessing and advocating children's best interests. Social workers can become especially skilled at understanding how to communicate with children across a range of ages and stages of development and how to work with them together with their families.

HOW DO YOU KNOW WHAT IS IN THE “BEST INTERESTS OF THE CHILD?”

Although it is clear that decision makers **must** consider the *best interests of the child*, figuring out what that means in practice can be difficult. It often requires many factors to be balanced against each other. Those factors, and the relative weight of each of them, may be different in every case.

Both the UK and Australia have addressed this by creating a statutory checklist of factors that should be considered when evaluating whether a decision is in the best interests of a child.¹³

13 See Children Act 1989 (UK), s. 1(3); Family Law Act 1975 (Australia), s. 60CC.



Best Interests Checklist

Under the UK checklist, which was adopted by the Hong Kong Courts in 2006¹⁴ and has been used by them since, the courts would consider:

- a. the ascertainable wishes and feelings of the child concerned (considered in the light of his/her age and understanding);
- b. his/her physical, emotional and educational needs;
- c. the nature of the relationship of the child with each of his/her parents, siblings and with other persons;
- d. the likely effect on him/her of any change in his/her circumstances;
- e. his/her age, maturity, sex, religious faith, social and cultural background and any other characteristics which the court considers relevant;
- f. any harm which he/she has suffered or is at risk of suffering;
- g. his/her relationships and emotional ties to a parent, sibling, relative, or other member of his/her extended family or member of his/her community;
- h. any family violence involving the child or a member of the child's family;
- i. how capable each of his/her parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; and
- j. the practical difficulty and expense of the child having contact with a parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with his or her parents on a regular basis;
- k. the rights of the child;
- l. the range of powers available to the court under the Children Act 1989 (UK) in the proceedings in question and any other fact or circumstances that the court considers relevant.¹⁵

These factors should all be weighed and assessed holistically. In practice, this is often a very discretionary practice, and the ultimate decision will typically lie with the court.

14 See *P v P (Children: Custody)* [2006] 2 HKFLR 305, paras 52-53 which states that "[A]lthough we do not have the equivalence of section 1(3) or 8 in our statute, I agree that most of the matters referred in the checklist...would be of helpful guidance and assistance to the Court in the assessment of the requirement of the children's welfare"; *SMM v TWM (Relocation of Child)* [2010] HKFLR 308, para 27 states that "[I]t is clear, however,...Judges in Hong Kong have also adopted the welfare checklist in section 1(3) of the Children's Act...". See also *LWY v YCT* [2015] HKEC 2198 English Judgment at 16.

15 See *Children Act 1989 (UK)*, s. 1(3). But note the powers referred to in Hong Kong should be those available to the Hong Kong Court, e.g. under the Guardianship of Minors Ordinance.



WHAT IF THERE IS MORE THAN ONE CHILD?

Sometimes, the issues may affect more than one child, for example a teenage mother and baby, conjoined twins, or other siblings. The issue of whose interests should take priority in these circumstances has been considered by the courts. It has been held that the court should give priority to the interests of the child who is the subject of the application.¹⁶ However, if that is not possible without detriment to others, then it has been suggested that the courts should balance the children's interests and make a decision which causes the least detriment to all the children involved.¹⁷

¹⁶ Birmingham City Council v. H (A Minor) [1994] 2AC 212

¹⁷ Re T and E (Proceedings: Conflicting Interests) [1995] 1FLR 581; A (Children) (conjoined twins: surgical operation) [2001] 1FLR 1

NOTE

The Importance of Reducing Delay

“Delay”, or in other words the **impact of time passing**, is an important factor to consider when dealing with children. One year in a child’s life is very different from one year in the life of an adult. Child development is time sensitive and children are deeply affected by even short periods of instability and insecurity.¹⁸ In many places, including the UK, the impact that delay may have on a child is a *compulsory consideration* in all children’s matters.¹⁹

The Science Behind Reducing Delay

Studies have shown there are critical windows of time during a child’s early years when brain development occurs that will impact the rest of the child’s life.²⁰ Having interactions and experiences at the right time is crucial for how a child’s brain develops.²¹

In particular, early consistent interactions between a baby and his/her primary care giver are necessary for the building of healthy neural connections and for future healthy cognitive and social development.²²

When babies and young children experience stress, it can have particularly devastating effects on their developing brains.²³ When children experience prolonged exposure to stress, and they do not have adequate buffering relationships, such as a healthy relationship with a caregiver, the result can be *toxic stress*. This can lead to damaged systems and brain development, with lifelong repercussions.²⁴ It is therefore critical that instabilities or stressors in a child’s life, particularly for a very young child, are dealt with as quickly as possible.

18 See e.g., WARD ET AL., SAFEGUARDING BABIES AND VERY YOUNG CHILDREN FROM ABUSE AND NEGLECT (2012)

19 See [Children Act 1989 \(UK\)](#), s. 1(2) and Adoption and [Children Act 2002 \(UK\)](#), s. 1(3).

20 See Eric I. Knudsen, [Sensitive Periods in the Development of the Brain and Behaviour](#), JOURNAL OF COGNITIVE NEUROSCIENCE 16:8, pp. 1412–1425.

21 See e.g., NATIONAL SCIENTIFIC COUNCIL ON THE DEVELOPING CHILD, [The Timing and Quality of Early Experiences Combine to Shape Brain Architecture: Working Paper No. 5](#), (2007).

22 See HARRIET WARD AND REBECCA BROWN, [SAFEGUARDING CHILDREN IN THE EARLY YEARS \(2014\)](#), 2.

23 See [Harvard University \(2020\) Center on the Developing Child](#).

24 See NATIONAL SCIENTIFIC COUNCIL ON THE DEVELOPING CHILD, [Excessive Stress Disrupts the Architecture of the Developing Brain: Working Paper No. 3 \(2014\)](#).

NOTE

The Importance of Permanency

As explained above, the bonds that a child forms with his/her primary care givers play a vital role in that child's development, both in terms of the physical development of the brain, as well as the psychological development of stable relationships and social skills.²⁵ Children are also negatively affected by stress and instability. It is critically important for children to have a permanent and stable home as quickly as possible.

"Permanency planning", meaning planning aimed at placing a child into a safe permanent placement as soon as reasonably possible, is at the core of best practice child welfare planning from around the world and is critical to acting in the *best interests* of the child.²⁶ Because of this evidence, in many places around the world, it is a legal requirement to consider *permanency* when planning for the best interests of a child.²⁷ Permanency planning aims to secure stability and continuity of nurturing relationships for the child.²⁸

25 See footnotes 19-25

26 See [Government of Western Australia, Department for Child Protection, Policy on Permanency Planning](#); [Government of Western Australia, Department for Child Protection and FAMILY Support, Casework Practice Manual, 3.4.16](#); [Northamptonshire Safeguarding Children Board, Northamptonshire Children's Services Procedure Manual, 5.1.4](#); [Permanence Planning Guidance \(2016\)](#); [Department of Children and Families, New Jersey, United States, Path to Permanency: An Overview \(2012\)](#).

27 See e.g., [Children, Youth and Families Act 2005 \(Victoria, Australia\), s. 10\(f\)](#) ("the desirability of continuity and permanency in the child's care"); the following pieces of U.S. state legislation: [Colo. Rev. Stat. Ann. § 19-1-102\(1\)\(1.5\)](#); [D.C. Code Ann. § 16-2353](#); [Idaho Code § 16-1601](#); [705 Ill. Comp. Stat. Ann. 405/1-3\(4.05\)](#); [Iowa Code Ann. § 232.104\(1\)\(c\)](#); [Kan. Stat. Ann. § 38-2201\(b\)](#); [Mich. Comp. Laws Ann. § 722.23.amended](#); [Mo. Ann. Stat. § 211.443](#); [Mont. Code Ann. § 41-3-101](#); [Neb. Rev. Stat. Ann. § 43-533](#); [N.J. Stat. Ann. § 30:4C-1 1\(a\), \(b\), \(f\)](#); [N.Y. Soc. Serv. Law § 384-B\(1\)](#); [Ohio Rev. Code Ann. § 2151.414\(D\)\(1\)](#); [Okla. Stat. Ann. Tit. 10A, § 1-1-102](#); [R.I. Gen. Laws § 42-72-2\(1\)-\(2\)](#); [Wash. Rev. Code Ann. § 13.34.020](#); [Wis. Stat. Ann. § 48.426\(2\)-\(3\)](#); [Wyo. Stat. Ann. § 14-3-201](#). See also the [best practices and model law as described by The Protection Project, THE JOHNS HOPKINS SCHOOL OF ADVANCED INTERNATIONAL STUDIES and International Centre for Missing AND Exploited Children](#), ("Permanency shall be a key goal, choosing the least intrusive intervention in the life of the child to assure stability of the child's personal relationships and social environment and to guarantee the continuity of the child's education, training, or employment"), [Child Protection Model Law – Best Practices: Protection of Children from Neglect, Abuse, Maltreatment and Exploitation \(January 2013\)](#), Art.4(2)(c), p. 21.

28 [Appendix 1 to Chapter 8 Long-term Care Plan for Children Receiving Residential Child Care Services](#)

NOTE

Considering the Wishes and Feelings of the Child

Under both international law and Hong Kong law, if a child is capable of forming his or her own views, he/she has a legal right to express those views and to have his/her voice heard regarding proceedings affecting his/her interests.²⁹

Respecting the views of the child is a two-step process. First, it is important to hear and take into account the child's views and opinions. Second, the child should be an active participant in any process involving or concerning him/her.

How far the wishes and feelings of the child should be followed depends on the circumstances of the individual case. In particular, the wishes of the child must always be considered in light of their age and understanding.³⁰

As a child becomes older, more knowledgeable and more competent to make decisions, his/her right to make decisions regarding his/her own life increases.³¹ This includes a legal right to make medical decisions.³²

In this sense, the weight of a child's opinion increases over time. This means that although parents have a legal right to make decisions regarding the child, this right is not absolute. The right slowly diminishes over time as the child grows and develops.³³

Child's legal right to make decisions increases

Birth

Turns age 18

A child's wishes are not the only determining factor. A court will consider all the other relevant factors when making a decision.³⁴ A court can override the wishes of a child, even when that child is considered mature enough to make competent decisions, if the court believes that the child's stated wishes are against his/her best interests.³⁵

- 29 See Guardianship of Minors Ordinance (Cap. 13) s.3(1). Convention on the Rights of the Child, Art. 12. See also the Judiciary's Practice Direction PDSL 5, Guidance on Meeting Children. Protecting Children from Maltreatment Procedural Guide for Multi-disciplinary Co-operation Para. 1.3.
- 30 See Convention on the Rights of the Child, Art. 12.
- 31 See *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112, [1985] 3 All ER 402 (HL), approved in *PD v KWW (Child: Joint Custody)* [2010] 4 HKLRD 191, [2010] HKFLR 184 (CA), para 44. See also *Re S (Transfer of Residence)* [2011] 1 FLR 1789, [2010] All ER (D) 88 (Aug), para 58; *Re Roddy (A Child) (Identification: Restriction on Publication)* [2003] EWHC 2927 (Fam) paras 50-52, [2004] EMLR 127, [2004] 2 FLR 949, [2004] 1 FCR 481, [2004] Fam Law 793; *Re S (a minor)(change of surname)* [1999] 1 FCR 304, [1999] 1 FLR 672 (CA).
- 32 See *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112 (HL).
- 33 See *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112 (HL), pp 129, 160, 162, 172, and 186.
- 34 See *Re L (Medical Treatment: Gillick Competence)* [1998] 2 FLR 810, [1999] 2 FCR 524, [1999] 51 BMLR 137, [1998] Fam Law 591.
- 35 See *Re W (a minor) (medical treatment: court's jurisdiction)* [1992] 2 FCR 785, [1992] 4 All ER 627, [1992] 3 WLR 758.

Children's Wishes

Case 1

Eve's parents were divorced. Eve lived with her father, but was supposed to have regular contact with her mother. Eve began to refuse to have contact with her mother. To make things more complicated, her father was transferred to a job overseas in Singapore and wanted to relocate Eve to Singapore. Eve's mother applied for Eve to be in her and Eve's father's joint custody.

The judge interviewed Eve without her parents being present to understand her feelings and wishes.³⁶ He determined that Eve felt a grievance against her mother, was happy living with her father, and wished to go with him to Singapore. The judge determined that "[i]n matters like this, the interest and welfare of the child are paramount to the feelings of the parents...I can only consider what is best for the child... In this instance the welfare of the child is, so far, that she has stayed happily with her father and stepmother and she has expressed the desire to go with her father to Singapore." The judge explained that if Eve later wanted a different relationship with her mother, this would still be an option, but at this point in her life it was in her best interests to continue living with her father.³⁷

Case 2

When Clare was 5 years old, her parents separated. After her parents' divorce, Clare lived with her mother until she was 7 years old when she moved in to live with her father for 2 years at her mother's request. This was occasioned by the mother's enrollment into a part-time Masters course whilst working full-time for six or seven days a week.

Near the end of the two years, Clare's father made plans to re-marry and to move back to Singapore and to bring Clare with him. The court dismissed his application to relocate Clare to Singapore. In making this decision, the judge determined that "the only legal principle remains that the welfare of the child is the first and paramount consideration."

To assist the court to determine what was in Clare's best interests, the judge relied on the social welfare reports made available to the court. The judge was of the view that the social welfare reports provided material information, since the social welfare officer had personally met Clare and spoken and interacted with Clare and formed a view as to her wishes and feelings. The social welfare officer had determined that Clare clearly showed her wish to stay with her mother and to remain in Hong Kong.³⁸

36 The Judge has discretion as to whether to do this: *D v D* (1980) 10 Fam Law 53.

37 See *Boulter v. Boulter* [1977-1979] HKC 282.

38 See *LSWY v SKYM* [2015] HKEC 2776

EXAMPLE CASES

Case 3

Adam is six years old and has been living in out-of-home care ever since leaving the hospital after his birth. Adam's birth parents visited him every few months for the first year of his life, but they have not visited since Adam was 18 months old. His parents continue to strongly indicate to their social worker that they want to parent Adam, however they have not shown any action steps toward family reunion for more than four years. The Social Welfare Department applies to the High Court for a freeing order for Adam to terminate his parents rights so that Adam can be adopted.

To assist the court to determine what was in Adam's best interests, the Social Welfare Department submitted social welfare reports to the court. The social welfare reports were among the material evidence considered by the court, since the welfare officer had personally met Adam and spoken and interacted with Adam and formed a view as to his wishes and feelings. The social welfare officer had determined that Adam clearly showed his wish to be adopted so that he could grow up in a family.

QUESTIONS TO CONSIDER

Q: How can you balance the wishes of a child against the wishes of a parent?

A: As set out above, the primary legal question is what is in the best interest of the child, not what either the child or his/her parent wants.³⁹ The court makes its decision having regard to, but is not restricted by, the wishes of the child and his/her parent.⁴⁰

Q: How can you best understand the wishes of a child?

A: In some cases, the court can decide that the child should be separately represented. This means that the child can either (1) have his/her own lawyer appointed⁴¹; and/or (2) have someone appointed to represent the child's interests (known as a guardian ad litem)⁴². They may assist with the understanding of what the child's wishes are. However, they are appointed to represent the child's interests which may differ from his/her wishes.⁴³

Q: When a child is very young, are there still ways to communicate with the child and understand his/her wishes and needs?

A: Yes. As the Practice Direction for Judges on whether to meet children in family cases (PDSL5) makes clear, "some younger children may have a clear understanding of their circumstances which they wish to express".⁴⁴

39 Guardianship of Minors Ordinance (Cap. 13), s3(1)(a)(i).

40 H v N [2012] 5 HKLRD 498, para 27-32.

41 Rule 72 of the Matrimonial Causes Rules (Cap. 179A).

42 Rule 108 of the Matrimonial Causes Rules (Cap. 179A).

43 Practice Direction PDSL6, para 5.

44 Practice Direction PDSL5, para 4.

If the Judge decides to meet with the child, then in advance of the meeting the Judge will tell the parties to the litigation (such as the child's parents):

- The purpose of the meeting;
- When and where the meeting will take place
- Who will attend the meeting (a Judge should never see a child alone)
- How the meeting is to be recorded; and
- Who is to prepare the child for the meeting
 - » At the beginning of the meeting, the Judge should explain that the meeting will be recorded and the contents of the meeting conveyed to the child's parents. The Judge should tell the child that the Judge cannot keep secrets. The child should be assured that the outcome is never the child's responsibility.



CHAPTER 2

Child Maltreatment





Introduction

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

Article 19

“States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

“Such protective measures should, as appropriate, include effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.”

WHAT ROLE CAN A SOCIAL WORKER PLAY?

Social Workers can play a key role in identifying cases of child maltreatment, referring them to the appropriate departments and services, collecting evidence and information to determine best interests and ensuring that there is follow up on the case to guarantee that the child remains safe. By learning about maltreatment, and how to best intervene, it is possible for social workers to make a huge difference in such cases.

WHAT ROLE CAN A CHILD WELFARE PROFESSIONAL PLAY?

All professionals who work with children have a duty to be alert to signs of child maltreatment, and to take proper measures such documenting concerns and reporting cases of child maltreatment in the course of their work.

Children have the right to be free from **all forms** of maltreatment, including physical or mental violence, injury or abuse, sexual abuse, neglect, maltreatment, or exploitation.¹ The government has a legal responsibility under international law to take all appropriate legislative, administrative, social and educational measures to protect children from maltreatment.

¹ Convention on the Rights of the Child, Art. 19.

While children should, as a general rule, not be separated from their parents, the law requires the best interests of the child to be the primary and paramount consideration.² Therefore, in cases of maltreatment by parents or guardians it may be necessary to remove children into appropriate care arrangements.

Governments are also required to establish social programs to provide necessary support for the child and their family, as well as putting in place procedures for prevention, identification, reporting, investigation, treatment and follow-up of instances of child maltreatment.³

Everyone, particularly professionals who work with children, should be alert to signs of child maltreatment, and to take measures to protect children who may be in need of special care and "intervention.

WHAT IS THE DEFINITION OF CHILD MALTREATMENT?

In the Social Welfare Department's *Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (SWD Procedural Guide)*, child maltreatment is defined in a broad sense as "any act of commission or omission that endangers or impairs the physical/psychological health and development of an individual under the age of 18"⁴. Note that the SWD definition of maltreatment is not limited to immediate physical harm, but also covers situations that will endanger or harm the child in the long term. The Guide specifically outlines the four main categories of harm or abuse: Physical harm/abuse, Sexual abuse, Neglect, and Psychological harm/abuse.

Physical Harm/Abuse refers to physical injury or suffering inflicted on a child by violent or other means (e.g. punching, kicking, striking with an object, poisoning, suffocation, burning shaking an infant or Factitious Disorder Imposed on Another, formerly known as Munchausen's Syndrome by Proxy), where there is a definite knowledge, or a reasonable suspicion that the injury has been inflicted non-accidentally⁵.

Sexual Abuse refers to forcing or enticing a child to take part in any acts of sexual activity for sexual exploitation or abuse and the child does not consent to or fully understand or comprehend this sexual activity that occurs to him/her due to mental immaturity. This include acts that have or do not have direct physical contact with children (e.g. rape, oral sex, procuring a child to masturbate others/expose his/her sexual organs, or to pose in an obscene way/watch sexual activities of others, production of pornographic material, forcing a child to engage in prostitution, etc.). It may be committed inside or outside the home or through social media on the internet. It includes luring a child through rewards or other means for abuse, including sexual grooming.⁶

Consensual sexual activity between an adolescent and another person may also involve sexual exploitation by a person who, by his/her characteristics, is in a position of differential power to the adolescent. Cases where the adolescent is not mentally mature, too young (e.g. under the age of 13) or the sexual activity leads to sexually

2 Convention on the Rights of the Child, Art. 18.

3 Convention on the Rights of the Child, Art. 19.

4 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020), pg. 24, para. 2.1. https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_fcwprocedure/id_1447/

5 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020), pg. 26, para. 2.10.

6 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020), pg. 26-27, para. 2.10.

transmitted diseases (“STDs”) or pregnancy may be considered and handled as suspected sexual abuse.⁷

Neglect refers to a severe or a repeated pattern of lacking of attention to a child’s basic needs that endangers or impairs the child’s health or development. Neglect may be:

- Physical (e.g. failure to provide necessary food, clothing or shelter, failure to prevent physical injury or suffering, lack of appropriate supervision or left unattended, a pregnant woman fails to receive treatment for drug /alcohol abuse or make every effort to reduce her drug/alcohol use during pregnancy resulting in signs of poisoning (e.g. being tested positive for dangerous drugs or alcohol) of the newborn or withdrawal symptoms for dangerous drug or alcohol of the infant)
- Medical (e.g. failure to provide necessary medical or mental health treatment)
- Educational (e.g. failure to provide education or ignoring educational needs arising from a child’s disability)⁸

Psychological Harm/Abuse refers to a repeated pattern of behaviour and/or an interaction between carer and child, or extreme incident that endangers or impairs the physical and psychological health (including emotional, cognitive, social and physical development)⁹.

Chapter 2 of the SWD Procedural Guide also includes sets of helpful indicators, check-lists and risk factors.

The above definitions are not legal definitions and do not apply directly to the criminal law.¹⁰ Instead, whether a person has committed a crime will depend upon the offence with which they are charged. There are a number of offences that relate specifically or especially to maltreatment of children (see annex 10.2 of *Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation*). The most directly relevant to child harm and maltreatment are sections 26 (exposing child whereby life is endangered) and 27 (ill-treatment or neglect by those in charge of child or young person) of the Offences Against the Person Ordinance (Cap 212) (OAPO)¹¹. In relation to sexual abuse, there are a wide variety of offences set out in the Crimes Ordinance (Cap 200) and the Prevention of Child Pornography Ordinance (Cap 579).

Section 27 of the OAPO makes it an offence where any person “over the age of 16 years who has the custody, charge or care of any child or young person under that age wilfully assaults, ill-treats, neglects, abandons or exposes such child or young person or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight, or hearing, or limb, or organ of the body, or any mental derangement)”¹². Ill-treatment includes emotional and psychological abuse such as “bullying or frightening”, or any course of conduct calculated to cause unnecessary suffering or

7 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020), pg. 27, para. 2.10.

8 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020), pg. 27-28, para. 2.10.

9 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) (Annexes) p. 15, para. 2

10 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020), pg. 28, para. 2.10.

11 Offences against the Person Ordinance (Cap 212), s 26 and s 27.

12 Offences against the Person Ordinance (Cap 212), s 27(1).

injury to health. The phrase “injury to his health” is understood in light of modern understanding of children’s health and development, and may be proved by expert evidence from child development, medical and psychological experts.

If you suspect that a crime has been committed, you should work with your supervisor to agree on information sharing arrangements with the police and SWD (where appropriate) in order to safeguard the child.

NOTE

DIFFERENCES BETWEEN CORPORAL PUNISHMENT AND ABUSE

The line between corporal punishment and child abuse is often difficult to determine. Studies show, however, that excessive corporal punishment can have a variety of negative outcomes and cause long-term harm for children, including increased anxiety, aggressive behavior, decreased academic success, and lower self-esteem.¹³

When determining whether an incident of corporal punishment amounts to child abuse, often it is necessary to weigh a variety of factors such as the severity of the injury, the age and development of the child, the manner of discipline, whether there is a pattern of abuse, the emotional effects of the incident, and the parent’s motivation.¹⁴

EXAMPLE CASE

F v L [2007] HKEC 1524

Father: “I was at home cooking noodles for the children to eat. After they finished eating, the elder son told me that he wanted to go downstairs to play. I said it was raining outside and asked him not to play downstairs in the street. At the time, I was not wearing any top, only a pair of shorts. I was washing the dishes in the kitchen. My elder son was very angry and scratched my back with his hands. So I walked out to the living room and got a rattan stick to discipline him I scolded the elder son loudly, saying that he was disobedient to his father. So I beat the elder son with the rattan stick. I aimed at the elder son’s hand, but the elder son dodged around. That’s why I ended up hitting him on his body and on his face. I did not use a lot of force in beating the son. Perhaps the end of the rattan stick was starting to split open, so it led to marks being left on the wound.”

Judge: “In his later affidavits, the husband changes his story and says that the N-H used a sharp object to scratch his back. Whatever the reality I am satisfied, having seen the photographs of the injuries suffered by the son, that the husband completely over reacted and that the punishment inflicted was out of all proportion to any act of naughtiness allegedly committed by N-H. In the discharge summary at the UC Hospital, the injuries are described as follows:

13 Doriane Lambelet Coleman et al., Where and How to Draw the Line Between Reasonable Corporal Punishment and Abuse, 73 LAW AND CONTEMPORARY PROBLEMS 107-166 (Spring 2010), 145, available at <http://scholarship.law.duke.edu/lcp/vol73/iss2/6/>.

14 Id.

NOTE
CONT'D

'A 8.5 cm linear reddish mark over the left face, two 3 cm linear marks over the left arm, a 2 cm reddish mark at the right forearm and a 2 cm mild reddish mark at the left upper buttock.'

I do not accept that this level of corporal punishment inflicted on a young child, N-H was then only 6 years of age at the time, is acceptable. So-called discipline of this severity cannot and should not be countenanced in a civilized society."¹⁵

CARE OR PROTECTION ORDERS (CPOS)

While some instances of child maltreatment may not constitute criminal offences, the legal system can respond to the types of conduct described in the SWD definition of child maltreatment by issuing a Care or Protection Order under the Protection of Children and Juveniles Ordinance (Cap 213) (PCJO). A court may issue a Care or Protection Order if a child is deemed in need of 'care or protection'.

Specifically, the PCJO states that, "[f]or the purposes of this Ordinance, a child or juvenile in need of care or protection means a child or juvenile-

- a. who has been or is being assaulted, ill-treated, neglected or sexually abused; or
- b. whose health, development or welfare has been or is being neglected or avoidably impaired; or
- c. whose health, development or welfare appears likely to be neglected or avoidably impaired; or
- d. who is beyond control, to the extent that harm may be caused to him or to others, and who requires care or protection."¹⁶

Accordingly, where a court is of the view that a child is suffering from child maltreatment or is otherwise exposed to a harmful situation, it may intervene pursuant to the PCJO.

WHEN CAN A CPO BE APPLIED FOR AND WHAT INPUT CAN AN NGO HAVE?

The PCJO enables action to be taken to protect a child or juvenile in need of care or protection (in accordance with the definition set out above) by applying to the Juvenile Court for a Care or Protection Order.¹⁷ The Juvenile Court may also make a Care or Protection Order of its own motion.

An application for a CPO can be made by the Director of Social Welfare, by a police officer, or by any person authorized by the Director of Social Welfare.¹⁸ If the court determines that the child or juvenile is in need of care and protection, it may carry out the following actions as deemed necessary and appropriate to the child's circumstances;

- appoint the Director of Social Welfare to be the legal guardian of the child or juvenile;
- commit the child or juvenile to the care of any person or institution who is willing to provide such care;

15 F v L [2007] HKCU 1419, FCMC 11896/2005, at 28, 29 and 30.

16 Protection of Children and Juveniles Ordinance (Cap 213), s 34(2).

17 Protection of Children and Juveniles Ordinance (Cap 213), s 34.

18 Protection of Children and Juveniles Ordinance (Cap 213), s 34(1).

- order his parent or guardian to enter into recognizance to exercise proper care and guardianship; and/or
- make an order placing the child or juvenile for a specified period under the supervision of any person appointed by the court.¹⁹

Not every suspected child maltreatment or child protection case warrants an application for a CPO under the PCJO. Such application should be considered on a case-by-case basis taking into account the parents'/carers' views and attitude towards professional intervention, the child's safety, psychological state, behaviour and views, and the seriousness of the incident(s), etc. In light of the possible adverse effects (e.g. distress to the child) caused by the legal proceedings, solicitation of the parents'/carers' co-operation in the intervention process should first be considered before resorting to statutory action to protect the child.²⁰

Many NGO social workers are not authorized to make an application for a CPO directly. However, NGO social workers play a key role by providing support, evidence and recommendations to the court and to persons authorized to make CPO applications, for example, Social Welfare Department (SWD) social workers. Importantly, NGO social workers can communicate elements of risks and insight from their interaction with families. They should seek all possible channels to provide their opinions and evidence relating to the case, including attendance at court hearings, particularly when the child is in institutional care or when the social worker is acting as the primary service provider.

19 Protection of Children and Juveniles Ordinance (Cap 213), s 34(1).

20 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) p. 154, para. 11.41

SIGNS OF CHILD ABUSE

1. Withdrawal from friends or usual activities
2. Changes in behavior – such as aggression, anger, hostility or hyperactivity – or changes in school performance
3. Depression, anxiety or unusual fears, or a sudden loss of self-confidence
4. An apparent lack of supervision
5. Frequent absences from school
6. Reluctance to leave school activities, as if he or she doesn't want to go home
7. Attempts at running away
8. Rebellious or defiant behavior
9. Self-harm or attempts at suicide



Physical Harm/Abuse	Sexual Abuse	Psychological Harm/Abuse	Neglect
<ul style="list-style-type: none"> • Bruises that are unlikely to be accidental • Bite marks • Lacerations over the hands, arms or feet/to the frenulum • Burns and scalds • Fractures Brain/head injuries including Shaken Baby Syndrome • Abdominal injuries • Fabricated or induced illness, Factitious Disorder Imposed on Another • Poisoning • Hair loss by pulling or burning • Drowning • Multiple injuries sustained at different times • Ordered to carry out duties/activities that are beyond the child's physical ability for excessive hours • Sudden death of the infant • Explanations regarding injury are unconvincing/contradictory to or inconsistent with the injuries sustained • Failure or delay in seeking medical advice • Excessive amount of clothes worn to cover body • Enacting/reproducing scenes of harm/maltreatment in play or daily behaviours 	<ul style="list-style-type: none"> • Torn, stained or bloodstained underclothes • Complaints of pain, swelling or itching in the genital area • Complaints of pain during urination • Bruises, bleeding, or lacerations in external genitalia, vaginal area, anus, mouth or throat • Vaginal/penile discharge • Bowel control or bladder control weakened despite toilet trained • Repeated urinary tract infection • Sexually transmitted disease • Pregnancy • Child showing particular interest in body parts of adults or touching adults' sensitive body parts repeatedly • Enacting/reproducing scenes of sexual abuse in play or daily behaviour • Child disclosing that his/her parent or other person has played secret games with him/her • Knowledge about sex or sexual behavior that is beyond the expectation for the age of the child 	<ul style="list-style-type: none"> • Underweight or frail • Developmental delay • Eating disorder • Psychosomatic symptoms • Resisting contact with others and the outside world • Anxiety symptoms • Wetting/soiling • Language delay • Self-harm or suicidal thoughts/attempts 	<ul style="list-style-type: none"> • Newborn showing symptoms of Neonatal Withdrawal Syndrome after birth • Newborn's urine sample is tested positive for dangerous drugs • Malnutrition, underweight or frail • Abnormal changes in weight • Delayed development • Severe rash or other skin problems • Unattended physical problems or unmet medical/dental needs • Inappropriate/inadequate diet • Persistently inappropriately dressed • Poisoning/accidental ingestion of dangerous drugs or hazardous substances • Frequent accidental injuries • Left unattended/inadequate supervised for long periods of time • Being abandoned completely or for long periods of time • Left in the care of inappropriate carer • Child being confined at home • School-aged child being persistently absent from school or deprived of schooling

** Keep in mind that warning signs are just possible signs. The presence of warning signs does not necessarily mean that a child is a subject of maltreatment.

** Please see the SWD's Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation p. 50-56 for a detailed checklist for identifying possible signs of child maltreatment.²¹

IS IT MANDATORY TO REPORT SUSPECTED CHILD MALTREATMENT CASES?

While there is no legal duty to report crimes in Hong Kong save for limited circumstances, the Social Welfare Department has stated that, in handling cases with a child suspected to be harmed/maltreated, professionals should report it to the Police for investigation when they consider that a case may involve criminal elements.²²

Professionals may report a suspected child maltreatment case to the Police through normal procedures, or alternatively, to a Child Abuse Investigation Unit (CAIU), which is designated to investigate child maltreatment cases. Under no circumstances will the child being harmed/maltreated be obliged to report the case in person at a police station.²³ After reporting the case, professionals may subsequently complete a Report Form and Written Dated Notes and submit them to the CAIU (or the Family and Child Protective Services unit as the case may be).²⁴

There are exceptions within the Personal Data (Privacy) Ordinance (Cap. 486) allowing usage and sharing of personal data for cases where (a) the personal data related to the physical or mental health of the subject and maintaining privacy of that information would cause serious physical or mental harm to the subject or other individuals (Section 59), or (b) the personal data is necessary for detection or prevention of crime or seriously improper conduct and maintaining privacy of such information would hinder such purposes (Section 58). However, each case must be determined on its own merit.²⁵

Additionally, it may be part of the duty of social workers to report cases of maltreatment in order to protect their clients. Depending on the facts of the case, a social worker may owe a duty of care to the child, and if the child is harmed because the social worker has breached this duty, the child or his or her representative can bring a lawsuit against the social worker.²⁶ If a child discloses suspected maltreatment incident(s) and asks for confidentiality, the professional should explain to him or her that such a promise cannot be made in order to safeguard his or her best interests.²⁷

22 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) p. 111, para. 10.1

23 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) p. 111, para. 10.2

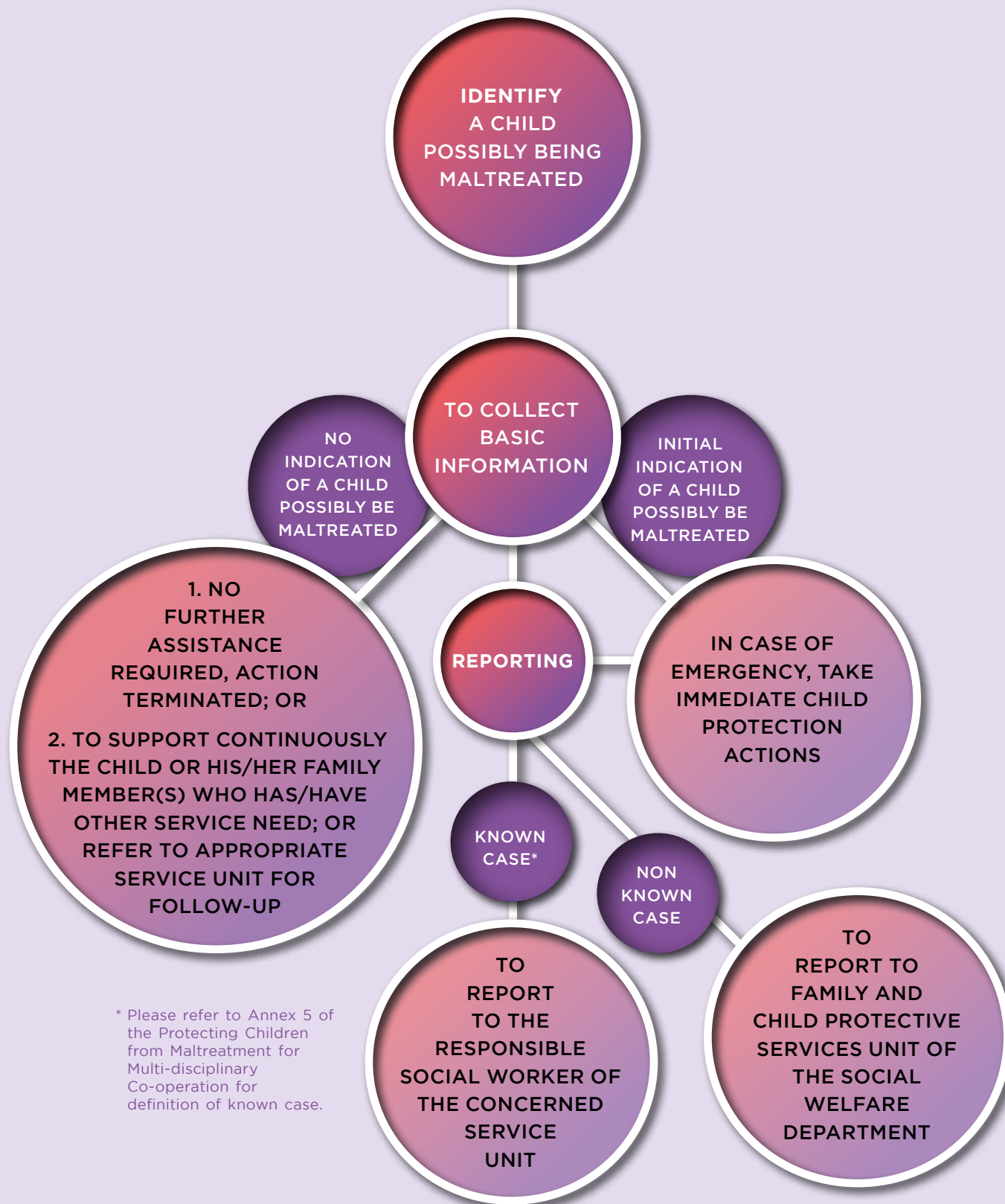
24 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) p. 112, para. 10.5

25 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) (Annex 2) p. 9, para. 8

26 *CN & GN v Poole BC* [2019] UKSC 25, para 88-89

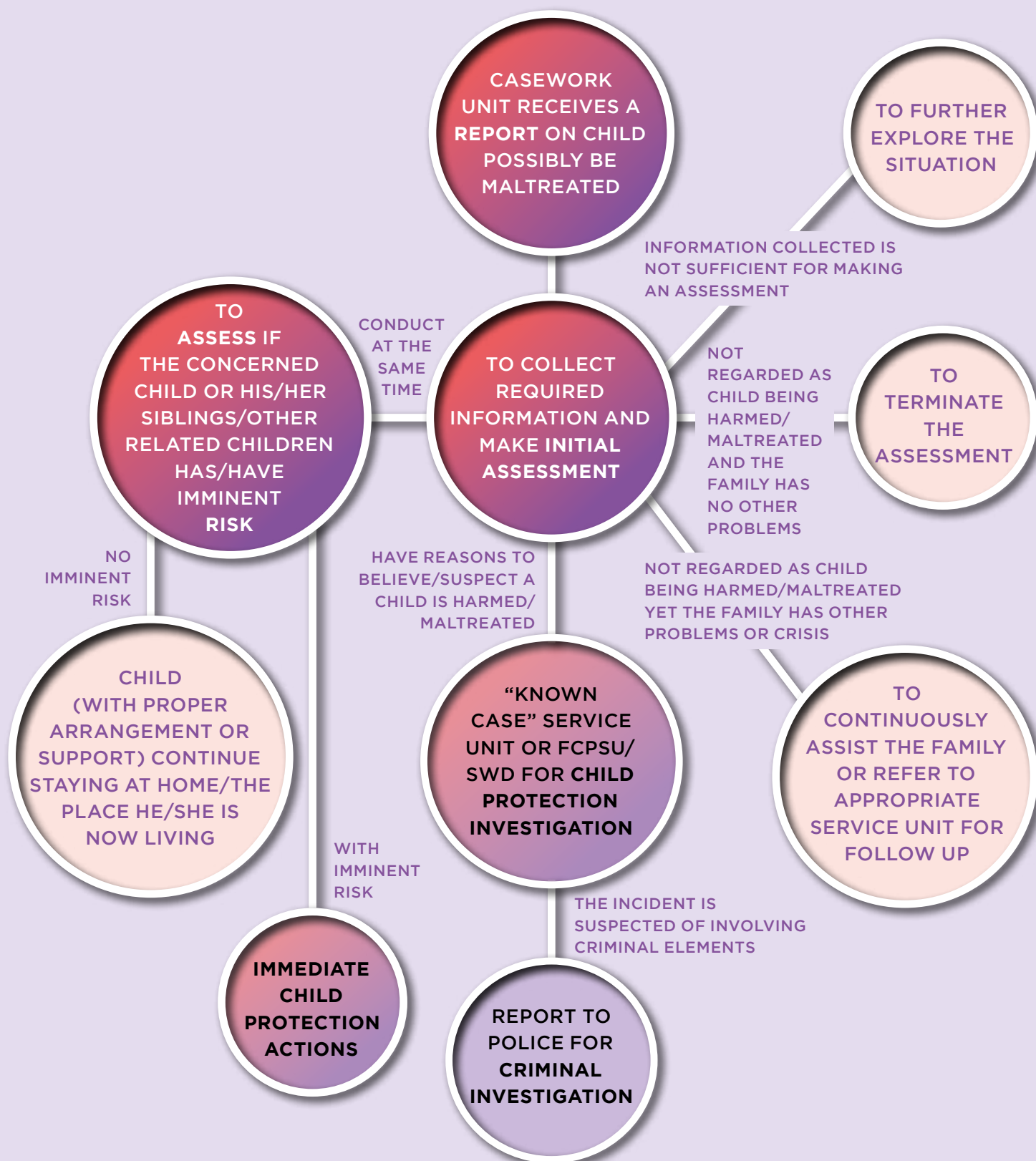
27 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) p. 59-60, para. 4.15

Identification and Reporting of a Suspected Child Maltreatment Case²⁸



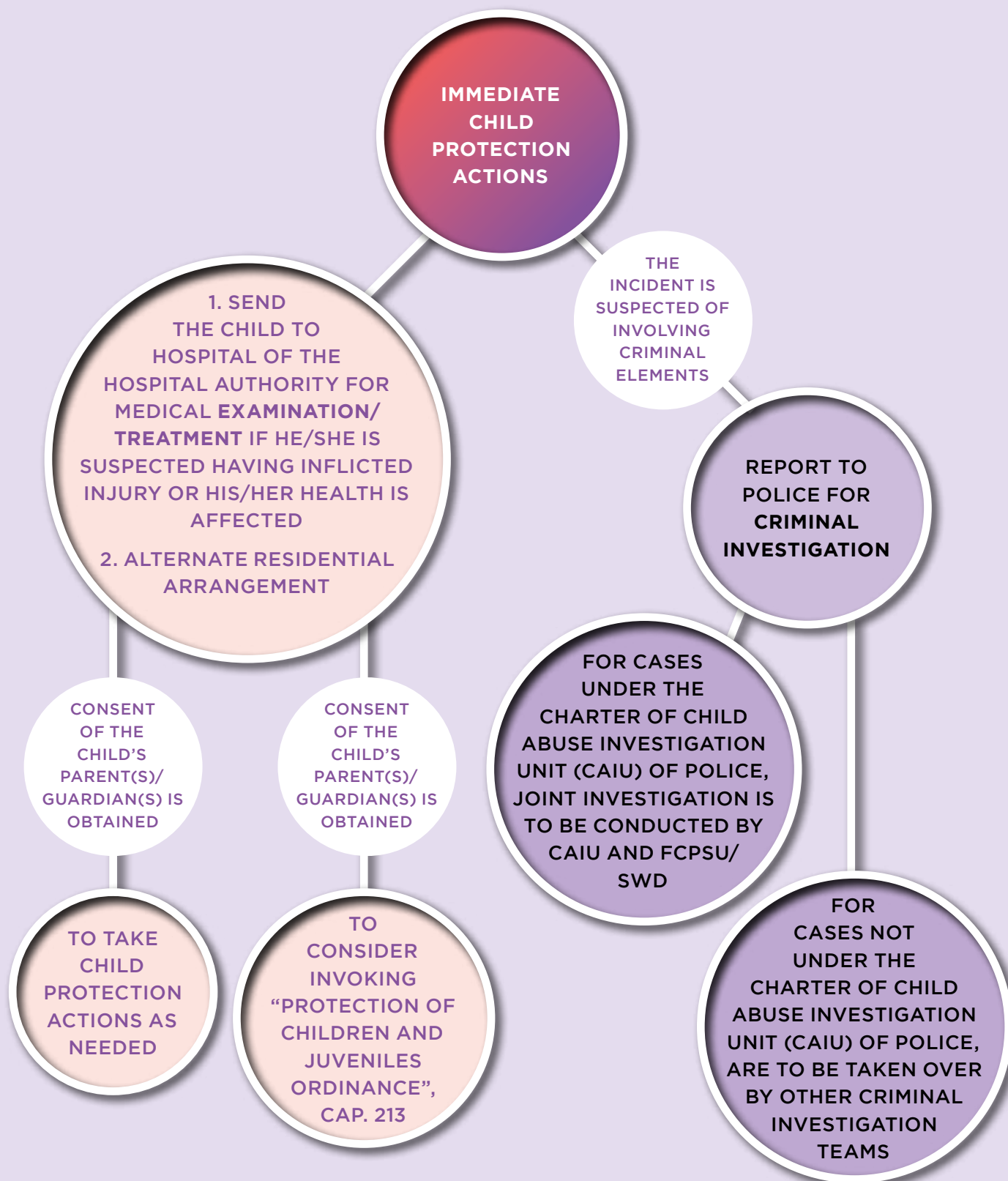
28 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) p. 43

Conducting Initial Assessment and Immediate Child Protection Actions²⁹



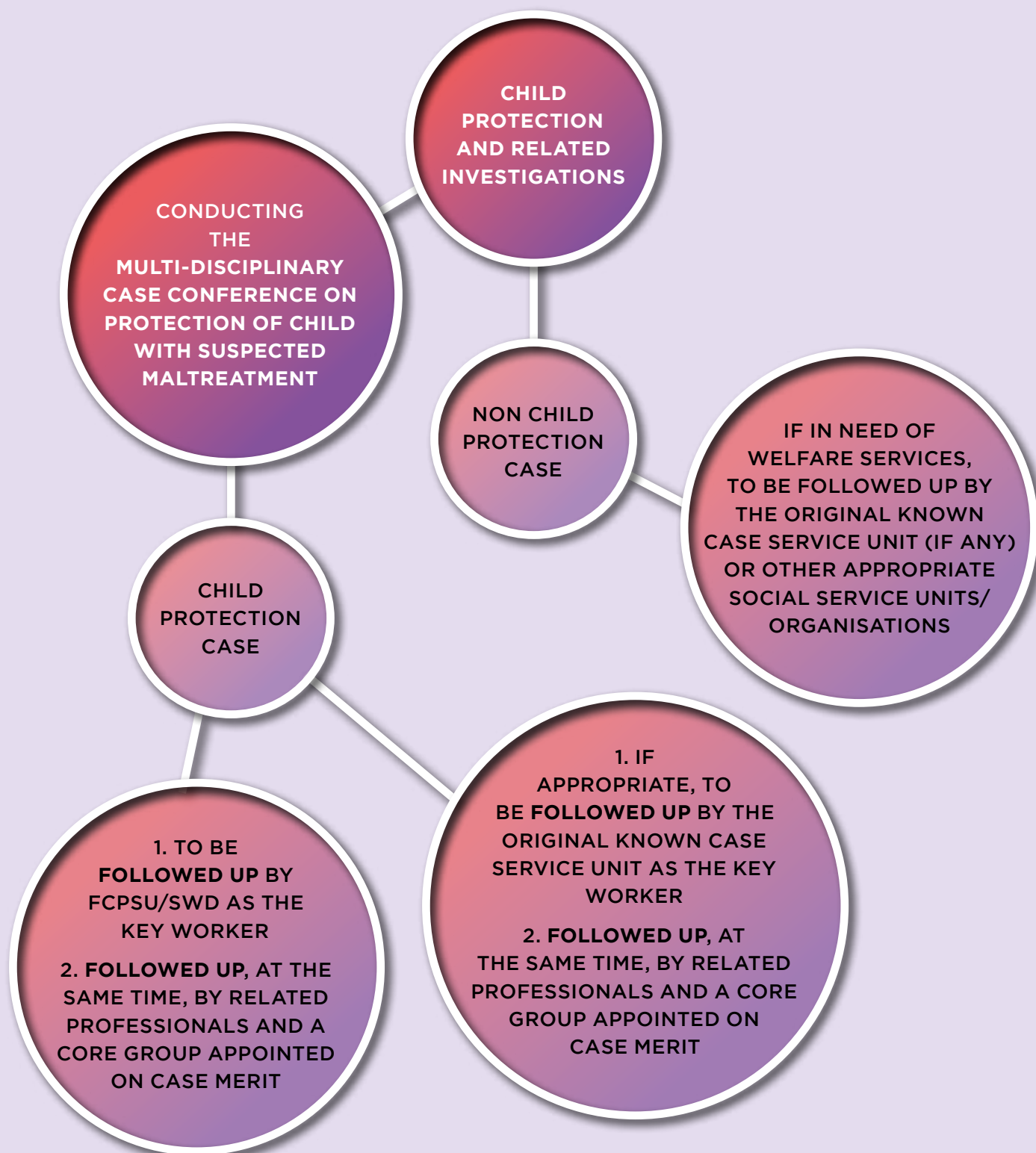
29 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) p. 44

Immediate Child Protection Actions and Investigations³⁰



³⁰ Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) p. 45

Conducting the Multi-disciplinary Case Conference on Protection of Child with Suspected Maltreatment and Follow-up Services³¹



31 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) p. 46

MULTI-DISCIPLINARY CASE CONFERENCE

In addition to reporting to the relevant authorities, there are other intermediate steps that should be taken in response to concerns about child maltreatment. An MDCC (Multi-disciplinary Case Conference) is a meeting of all professionals involved in the case from a variety of disciplines. An MDCC should always be called when it is suspected that the physical or mental health and development of a child is endangered.³² The purpose of the conference is to allow professionals to share knowledge and concerns, plan for the protection and welfare of the child, and recommend a follow-up plan for the child and his/her family.³³

TIP

MDCCs should be used not only after an incident of child maltreatment has already occurred, but as a way to plan for the future welfare of a child and to prevent child maltreatment from occurring.

When a case of child maltreatment is referred to the SWD, it is their practice to search the Child Protection Registry to see whether the case is already known to the SWD or whether it is a new case.³⁴

Cases will be divided into different types, and handled by different units accordingly (see above flowcharts on "Identification and Reporting of a Suspected Child Maltreatment Case" and "Conducting Initial Assessment and Immediate Child Protection Actions"). MDCC is required when there is/are suspected child maltreatment incident(s) with investigation conducted by social worker and other professionals. It should be conducted unless there are exceptional situations, which are highlighted in para 11.5 of the Procedural Guide³⁵. Usually the chairperson of the MDCC will be the officer-in-charge, supervisor, or senior social worker of the units providing casework service and conducting the investigation.³⁶ If the relevant personnel is not experienced in conducting MDCC or for other reasons is not the appropriate chairperson for that case, the FCPSU of the SWD will provide support and assistance including helping to chair the MDCC if necessary. FCPSU social worker will also act as chairperson of the MDCC if the youth service unit of NGOs is the agency conducting the child protection investigation.³⁷

An MDCC should be conducted within **10 working days** of when the case was received by the investigating social welfare unit.³⁸

32 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) (pg. 143)

33 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Chapter 11 (pg. 143)

34 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Chapter 5 (pg. 65, para 5.4)

35 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Chapter 11 (pg. 144, para 11.5)

36 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Chapter 11 (pg. 144, para 11.11)

37 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Chapter 11 (pg. 144, para 11.12)

38 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Chapter 11 (pg. 145, para 11.9)

In addition to the investigating social worker, the chairperson may invite other professionals, including other social workers, to participate in the MDCC.³⁹ Each participant of the MDCC is responsible for preparing a written report or notes on the child for reference of the MDCC, and such materials should be distributed to other members as soon as practicable.⁴⁰

In the MDCC, participants should consider the following factors: nature of the incident; level and nature of risk to the child and other children of the family; formulation of a safety/follow-up plan to protect the child; parents'/guardians' suggestions and attitudes on the plan; and the needs and views of the child and other family members.⁴¹ The MDCC will also discuss if the child should be placed on the Child Protection Registry.⁴² Participants of the MDCC are required to share their findings of the investigation on the incident, contribute their professional knowledge and experience, represent their organisation's views and to share relevant information and concerns with the child's family members.⁴³ However, if any participants have reservation about giving views, they should not be compelled to do so and their reasons can be included in the notes of MDCC if necessary.⁴⁴ More detailed information about these procedures is available in the SWD's Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation.⁴⁵

WHAT ROLE CAN THE CHILD PLAY IN A CHILD MALTREATMENT INVESTIGATION? CAN THEY SPEAK ON THEIR OWN BEHALF?

Under the Convention on the Rights of the Child, children have the right to be heard and to express their views in all matters affecting their own lives.⁴⁶

Family participation in a child maltreatment investigation aims to enhance parents' understanding of the issues of concern, tap their contribution to the formulation of the welfare plan, and enlist their involvement in the implementation of the welfare plan. It is also an empowering process. However, the welfare and rights of the child should always be the paramount concern throughout the process of this investigation.⁴⁷

The MDCC normally consists of two parts. The first part is for professional sharing and discussion while the family members will be invited to join the second part. The Chairperson, with consultation with members as appropriate, will decide at which time point the family members will join the MDCC according to individual case merit but at least when the initial welfare plan is formulated. All members are expected to attend the MDCC including the part of meeting with the family unless there is a specific

39 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Chapter 11 (pg. 144, para 11.15)

40 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Chapter 11 (pg.155, para 11.44)

41 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Chapter 11 (pg. 143, para 11.3)

42 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Chapter 11 Sample agenda for reference (pg. 173)

43 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Chapter 11 page 154, para 11.43

44 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Chapter 11 page 152, para 11.37

45 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Chapter 11

46 Convention on the Rights of the Child, Art. 12.

47 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) p.156, para. 11.50

reason. It is not appropriate for the social worker of a refuge centre, where the mother and the child concerned are residing, to meet the father who is the suspected perpetrator of child maltreatment.⁴⁸

If the parents or the child are not attending the MDCC they may express their views on the incident and follow-up plan to the investigating social worker or other members of the MDCC for their consideration.⁴⁹

A pre-conference meeting with the child/ren and their parents/guardians should be held so they may be briefed regarding the objectives, focus and ambit of the MDCC, the proceedings and issues to be discussed, the roles of the participants and how the child/ren and their parents/guardians may give their views and contribute.⁵⁰ A post-conference meeting should also be held to address their possible emotions, clarify any queries and allow the family to recapitulate their roles and contribution in the process of child protection.⁵¹

If criminal proceedings eventuate, and the child is required (or wishes) to give evidence of the maltreatment, special rules apply to evidence provided by children to make it easier and more comfortable for children to give testimony. For example:

- children under the age of 14 can give evidence in the form of an unsworn deposition (a written statement made outside of the court)⁵²
- children may also be allowed to testify via CCTV⁵³
- in some cases, previous interviews with the child may be presented as evidence.⁵⁴

WHAT HAPPENS TO CASES THAT ARE NOT ESTABLISHED AS A CHILD PROTECTION CASE?

One of the major functions of the MDCC is to decide whether a case is a child protection case, which refers to cases in which there have been incident(s) which the MDCC thought constituted harm/maltreatment to a child, the MDCC thought the harm/maltreatment incident was very likely to have happened, or there is high risk of harm/maltreatment in the future. If, after assessing the case, the MDCC determined it is not a child protection case, the MDCC can suggest follow-up services be rendered by a social service unit/organisation as appropriate if welfare services are required.⁵⁵

If a social worker still has concerns, it is incumbent on that social worker to use their own initiative and continue to follow up and check on the case, providing ongoing support to the family to maximize the ongoing welfare and safety of the child. Sometimes in these cases, an MDCC may still be arranged to plan for the welfare of the child.

48 Protecting Children from Maltreatment — Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) p. 156, 157, para. 11.51

49 Leaflet on Child Protection Investigation and Multi-disciplinary Case Conference for the Protection of Child with Suspected Maltreatment - Notes to Parents (https://www.swd.gov.hk/storage/asset/section/1447/en/Leaflet_MDCC_Supp_EN.pdf).

50 Protecting Children from Maltreatment — Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) pg. 159, para 11.64

51 Protecting Children from Maltreatment — Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) pg. 160, para 11.66, 11.67

52 Evidence Ordinance (Cap 8), s 4.

53 Criminal Procedure Ordinance (Cap 221), s 79B. See also Live Television Link and Video Recorded Evidence (Cap 221J).

54 Criminal Procedure Ordinance (Cap 221), s 79C. See also Live Television Link and Video Recorded Evidence (Cap 221J).

55 Protecting Children from Maltreatment — Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) pg. 148-150, para 11.26

IF A CASE OF CHILD HARM/MALTREATMENT IS ESTABLISHED FOR ONE CHILD IN A FAMILY, WHAT HAPPENS TO OTHER CHILDREN IN THE FAMILY?

When one child in a family is harmed/maltreated, there is a high risk that other children in the family may also be harmed/maltreated. At the initial assessment stage, any imminent or future risk of harm/maltreatment to other children in the family (e.g. whether the alleged perpetrator can harm other children) should also be assessed. If there are reasons to believe or suspect harm/maltreatment, consideration should be given to whether actions should be taken to ensure the safety of the other children.⁵⁶

A major purpose of the MDCC is to assess the level of risk to the other children in the family, make recommendation and concrete arrangement in relation to follow-up plan, and determine whether the names of the siblings should also be placed into the Child Protection Registry.⁵⁷

WHAT IF A PREGNANT WOMAN USES DRUGS WHILE SHE IS PREGNANT? IS THIS A FORM OF CHILD HARM/MALTREATMENT?

An unborn child does not generally have legal rights until after it is born. Therefore no offence of child harm/maltreatment normally arises. However, if a mother engages in a dangerous activity while pregnant, such as using drugs and/or alcohol, this may constitute neglect. In considering whether the case constitutes neglect, personnel consider whether the behaviour has harmed or may harm the physical/psychological health and development of the infant or child. Appropriate support/services should also be provided to pregnant women with drug/alcohol abuse, with a view to protecting the safety of the infant or child concerned. If necessary personnel may call for an MDCC and develop a follow-up plan in such cases.⁵⁸

WHAT IS THE CHILD PROTECTION REGISTRY?

The Child Protection Registry (CPR) is a computerized record system designed to keep a record of all instances of child maltreatment. The main objectives of the CPR are to:

- facilitate better communication among government departments and NGOs and make it easy to check whether a case is known to any other departments or organizations;
- collect statistical information on the problem of child maltreatment in Hong Kong; and
- plan and develop services and public education using a preventative approach to child maltreatment.⁵⁹

Different service units are invited to report child maltreatment cases and children found at risk to the CPR.

56 Protecting Children from Maltreatment — Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) pg.66-68, para 5.9

57 Protecting Children from Maltreatment — Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) pg.149, para 11.26

58 Protecting Children from Maltreatment — Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Annex 1 to Chapter 2, pg. 35

59 Protecting Children from Maltreatment — Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Annex 14, para 2.

Only registered users can make enquiries to the CPR.⁶⁰ The information that can be obtained is restricted to:

- whether or not the child/sibling(s) is registered;
- whether the case is active or closed; and
- the name and telephone number of the officer-in-charge/supervisor of the service unit handling/last handled the case.

WHAT HAPPENS IF A PARENT HAS BEEN SENTENCED IN A CHILD HARM/MALTREATMENT CASE? WOULD THIS RESULT IN PERMANENT REMOVAL OF CUSTODY?

Being convicted of a child harm/maltreatment offence does not automatically mean that a CPO will be imposed, that a child will be removed from their parents, or that the parents will lose their parental rights.

The immediate placement of a child will depend on the determination of the MDCC or a court order. In severe child maltreatment cases, it is highly likely that the child will be placed into foster care or other temporary care (following a CPO). It is a decision for the court to determine if, and how soon, the child can be returned to the parents if the child was removed from the parents under a court order.

Save for cases of adoption by consent, the parental rights of a parent will only be terminated if the child is: (a) in the care of the Social Welfare Department; and (b) the Director of Social Welfare applies for a *freeing order*. This will only happen in extreme cases, for example if the child has been “abandoned, neglected, or persistently ill-treated.”⁶¹

EXAMPLE CASES

“Children’s rights advocates say case of malnourished girl, 7, highlights serious flaws in Hong Kong’s child welfare system”

South China Morning Post, Jennifer Ngo and Emily Tsang, Sept 10, 2015

“[A] girl moved to Hong Kong from the mainland in November last year to stay with her birth parents, brother and half-sisters. She has been in hospital since July, is said to weigh less than 15kg, has gangrene on her thighs, buttocks and feet and has skin ulcers all over her body.

Lawmakers and social work scholar[s] said there were obvious gaps between departments, which allowed the girl’s plight to go unreported.

“Family social workers usually don’t look too deep. If there’s a financial problem they help the family apply for welfare; if there is a marriage issue they offer counselling. They may not look into the children if they do not suspect abuse,” he said. “What I’d ask is why the school didn’t report the case – it was a red flag when the girl withdrew from school after staff questioned her mother about her wounds.”

60 Protecting Children from Maltreatment — Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) p. 65, para 5.4 Staff of service units from SWD/NGOs, police officers of CIAUs and senior medical officers/medical officers in charge of dealing with child abuse cases who wish to be registered as users of the CPR are required to send in the completed Record Form for Access. Process outlined at <http://www.swd.gov.hk/doc/en/O8Appendix%20VI.pdf>

61 Adoption Ordinance (Cap.290) s. 5A, 6

The girl is in a stable condition, but has been unresponsive to all attempts of stimulation since being admitted. Her parents and older twin sisters have been released on bail.”

See: www.scmp.com/news/hong-kong/law-crime/article/1856831/childrens-rights-advocates-say-case-malnourished-girl-7

“Child abuse has no place in society”

South China Morning Post, Editorial, Jan 15, 2018

A five-year-old girl died after what was suspected to be long-running physical abuse in the home. Her eight-year-old brother also suffered from malnutrition and multiple injuries. Her father and step-mother were charged with murder.

Questions were raised as to why the case went unnoticed. In the alleged murder case, a court heard that the siblings were subject to physical abuse on an almost daily basis. Furthermore, the family at one point stopped sending the girl to school and eventually withdrew her altogether. However, the kindergarten in question did not report the situation. The primary school at which the brother attended noticed the bruises on the boy and had called the Social Welfare Department, but the department denied handling the case. A social work staff union later stated the case might only have been treated as seeking views from the government as opposed to referral, which takes further procedures.

See: <https://www.scmp.com/comment/insight-opinion/article/2128222/child-abuse-has-no-place-our-society>

These cases raise serious questions not just for Hong Kong’s child protection network, but also the roles of individual professionals handling child welfare cases.

Child Maltreatment Rates in Hong Kong

*Research Findings*⁶²

A 2005 study by Chan, based on a territory wide household survey, found: around 45% of children had been physically assaulted by one or both parents at some point; around 9% of children had encountered severe physical assault by their parents; around 72% of children reported having encountered psychological aggression by their parents; and 27% of children reported having encountered neglect.⁶³

-
- 62 The below studies are cited from Patrick Ip and Chun-Bong Chow, *Child Abuse and Child Policy, PREVENTING FAMILY VIOLENCE: A MULTIDISCIPLINARY APPROACH* (ed. Ko-Ling Chan) (2012).
- 63 Chan, K.L., *Study on Child Abuse and Spouse Battering: Report on Findings of Household Survey, Hong Kong: Department of Social Work and Social Administration, the University of Hong Kong* (2005).

A 2010 study by Patrick Ip, analyzing the data from the Hospital Authority's Clinical Management System, found that from 2000 to 2008 there were 5,400 admissions into public hospitals because of child abuse. The data also showed an increasing trend of admissions to the hospital for child abuse. In 2000 there was an admission rate of 3.3 per 10,000 individuals under the age of 19. In 2008 this went up to 7.3 admissions per 10,000 children.⁶⁴

The number of newly registered cases in the Child Protection Registry in 2019 was 1006. Amongst these, 42.7% of them were physical abuse cases, 30.3% were sexual abuse cases, 23.6% were neglect, 0.8% were psychological and 2.6% were multiple abuse cases⁶⁵

64 Ip, P., Child abuse and neglect in Hong Kong, 5 HONG KONG JOURNAL OF PAEDIATRICS 61-64 (2010).

65 Social Welfare Department, Child Protection Registry Statistical Report 2019, available at https://www.swd.gov.hk/storage/asset/section/3219/en/Annual_CPR_Report_2019_Final.pdf



CHAPTER 3

Sexual Offences





Sexual Offences

United Nations Convention on the Rights of the Child

Article 34

“States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent;

- a. The inducement or coercion of a child to engage in any unlawful sexual activity*
- b. The exploitative use of children in prostitution or other unlawful sexual practices*
- c. The exploitative use of children in pornographic performances and materials”*

Introduction

The government has a legal duty to take appropriate steps to protect children from sexual exploitation and sexual abuse. One way to do this is to criminalize such acts and prosecute offenders effectively and strictly in accordance with the relevant laws.

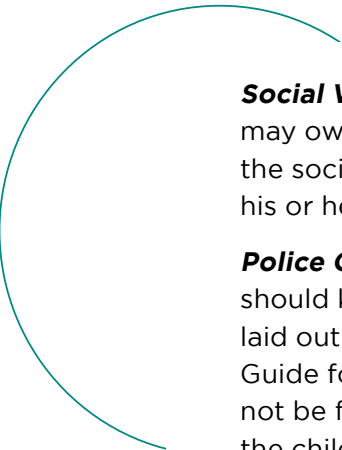
In order to best protect child victims of sexual abuse, it is important to understand the legal definitions of various sexual offences (including rape, underage sex and other types of sexual assault) under Hong Kong law. It is also necessary to know how to report crimes to the police, the subsequent procedures involved and the kind of evidence required to establish a case. There are many parties who can play a role in ensuring that children have the best possible support and protection.

WHAT ROLE CAN PROFESSIONALS PLAY?

There is generally no *legal* requirement to report suspected sexual offences or other crimes to the police. However, the Social Welfare Department recommends that when a child is suspected of having been maltreated, professionals should take preliminary actions (including connection of basic information) and conduct initial assessment or report to an appropriate unit (such as the Family and Child Protective Services unit of the Social Welfare Department, the responsible social worker of the concerned service unit for known cases, or the police)¹.

Professionals can also play an important role in supporting the recovery of children and their families in cases of sexual abuse as well as supporting them to report where appropriate, acting as an advocate through criminal justice investigations and implementing case plans which uphold safety, dignity and protection.

¹ Protecting Children from Maltreatment — Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) p,47 para 4.1, p. 43



Social Workers – Depending on the facts of the case, a social worker may owe a duty of care to the child, and if the child is harmed because the social worker has breached this duty by failing to report, the child or his or her representative can bring a lawsuit against the social worker.²

Police Officers – In investigating sexual abuse cases, police officers should keep in mind the governing principles and specific requirements laid out in the Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation. In particular, the child must not be further traumatized by the investigation and the best interests of the child must always be protected. Police officers may achieve this by minimizing the number of times a child is interviewed and employing special procedures to reduce the stress on child witnesses.³

Parents, medical professionals, schools and government officials have a responsibility to report cases as well as to cooperate with any investigations and/or meetings relating to the child’s safety. All involved professionals have a responsibility to respond sensitively to cases of abuse, upholding confidentiality where it does not pose additional risk and taking care not to impose feelings of shame, blame or guilt upon child and family victims.

WHAT IS THE LEGAL DEFINITION OF RAPE?

A man commits rape if:

- a. he has unlawful sexual intercourse with a woman or girl who at the time of the intercourse does not consent to it; and
- b. at the time he knows that she does not consent to the intercourse or he is reckless as to whether or not she consents to it.⁴

It is important to know the definition of the relevant terms:

- a. “**Sexual intercourse**” means penetration of the vagina by the penis.⁵ Any other types of sexual acts do not qualify as rape. For example, penetration of the mouth, non-vaginal penetration by the penis or non-penile vaginal penetration will not be considered rape, though they may amount to other offences, such as indecent assault.⁶
- b. “**Consent**” means that a woman or girl agrees to sexual intercourse. A woman or girl can change her mind and withdraw her consent during intercourse. A man who continues with sexual intercourse after the woman or girl has told him to stop commits rape.⁷

2 CN & GN v Poole BC [2019] UKSC 25, para 88-89

3 Protecting Children from Maltreatment — Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) Chapter 10

4 Crimes Ordinance (Cap 200), s 118(3).

5 R v Lee Wing On [1994] 1 HKC 257, at 262 (CA).

6 The Law Reform Commission of Hong Kong Review of Sexual Offences Sub-Committee Consultation Paper on Rape and other Non-Consensual Sexual offences, September 2012 <https://www.gov.hk/en/residents/government/publication/consultation/docs/2012/Rape.pdf>

7 Tamaitirua Kaitamaki v The Queen [1985] A.C. 147.

c. “**Reckless**” means the defendant could not care less whether the woman or girl was consenting or not but pressed on regardless.⁸ On the other hand, where the defendant genuinely, but mistakenly believed that the woman or girl was consenting, this element is not satisfied.⁹

A man who commits rape is liable on conviction to imprisonment for life.¹⁰ In practice, depending on the facts and the circumstances of a case, the terms of imprisonment start, at the very least, at 5 years.¹¹

SEX WITH AN UNDERAGE GIRL AND/OR MENTALLY INCAPACITATED GIRL OR WOMAN

It is illegal for a man to have sexual intercourse with any girl under the age of 16.¹² Consent is irrelevant in underage sex cases.¹³ In other words, if the girl is under the age of 16, any man engaging in sexual intercourse with her has committed a crime, irrespective of whether the girl has consented to the intercourse.

If the girl is under the age of 16, but above the age of 13, the man could face a sentence of up to five years imprisonment.¹⁴ If the girl is under the age of 13, the man could be sentenced to life imprisonment.¹⁵ In practice, the precise age of the girl and the accused are most relevant to the sentence. Sentences in the range of 6 to 18 months’ imprisonment in cases of girls above 13 years of age will fall for consideration.¹⁶

It is also a crime for a man to have sexual intercourse with a mentally incapacitated girl or woman of any age, where the man committing the act knows that the girl or woman is mentally incapacitated.¹⁷ It is irrelevant whether the mentally incapacitated girl or woman has given consent as she is deemed not to have legal capacity to consent to sexual activities. A mentally incapacitated person is described in legal terms as a mentally disordered person or a mentally handicapped person whose mental disorder, or mental handicap, as the case may be, is of such a nature or degree that the person is incapable of living an independent life or guarding himself against serious exploitation, or will be so incapable when of an age to do so.¹⁸

8 R v Kimber [1983] 1 WLR 1118.

9 HKSAR v Ho Yin Ting [2013] HKEC 278. See also HKSAR v Chan Mei Wah Yummy [2017] para.19

10 Crimes Ordinance (Cap 200), s118(1).

11 Sentencing in Hong Kong, I Grenville Cross, SC, Patrick WS Cheung, Eighth Edition (2018), p. 824.

12 Crimes Ordinance (Cap 200), s 123, 124.

13 Crimes Ordinance (Cap. 200) S. 122(1).

14 Crimes Ordinance (Cap 200), s 123.

15 Crimes Ordinance (Cap 200), s 123.

16 Sentencing in Hong Kong, I Grenville Cross, SC, Patrick WS Cheung, Eighth Edition (2018), p. 825.

17 Crimes Ordinance (Cap 200), s 125.

18 Crimes Ordinance (Cap 200), s 117(1).

SEXUAL OFFENCES UNDER THE CRIMES ORDINANCE (CAP 200)

Section 47	Incest by men
Section 48	Incest by women of or over 16
Section 118	Rape
Section 118A	Non-Consensual Buggery
Section 118B	Assault with intent to commit buggery
Section 118C	Homosexual Buggery with or by a man under 16
Section 118D	Buggery with a girl under 21
Section 118E	Buggery with a mentally incapacitated person
Section 118G	Procuring others to commit homosexual buggery
Section 118H	Gross indecency with or by a man under 16
Section 118I	Gross indecency by a man with a male mentally incapacitated person
Section 119	Procurement of an unlawful sexual act by threats or intimidation
Section 120	Procurement of an unlawful sexual act by false pretences
Section 121	Administering drugs to obtain or facilitate an unlawful sexual act
Section 122	Indecent Assault
Section 123	Sexual Intercourse with a girl under 13
Section 124	Sexual Intercourse with a girl under 16
Section 125	Sexual Intercourse with a mentally incapacitated person
Section 126	Abduction of an unmarried girl under 16
Section 127	Abduction of an unmarried girl under 18 for sexual intercourse
Section 128	Abduction of mentally incapacitated person from parent or guardian for sexual act
Section 129	Trafficking in persons to or from Hong Kong for the purpose of prostitution
Section 130	Control over persons for the purpose of unlawful sexual intercourse or prostitution
Section 131	Causing prostitution
Section 132	Procurement of a girl under 21
Section 133	Procurement of a mentally incapacitated person to have unlawful sexual intercourse
Section 134	Detention for intercourse or in a vice establishment
Section 135	Causing or encouraging prostitution of, intercourse with, or indecent assault on, a girl or boy under 16.

CONT'D

- Section 136 Causing or encouraging prostitution of a mentally incapacitated person
- Section 138A Use, procurement or offer of persons under 18 for making pornography or for live pornographic performances.
- Section 140 Permitting a girl or boy under 13 to resort to or be on premises or vessel for intercourse, prostitution, buggery, or homosexual act.
- Section 142 Permitting a mentally handicapped person to resort to or be on premises or vessel for intercourse, prostitution or homosexual act.
- Section 146 Indecent conduct towards a child under 16

PREVENTION OF CHILD PORNOGRAPHY ORDINANCE (CAP 579)

Section 3 – Offences relating to Child Pornography

RELATED OFFENCES

- Inciting another to commit any of the above offences
- Aiding, abetting, counselling or procuring the commission of any of the above offences
- Conspiracy to commit any of the above offences
- Attempted to commit any of the above offences

Note: In Hong Kong law, while rape refers to male perpetrators only, other sexual offences refer to 'any person' as potential perpetrators (See individual offences for clarity).

Buggery: The act of Buggery (anal sexual intercourse with a man by a man or with a woman by a man) is in itself not illegal in Hong Kong where both parties are over 16, if both male and consenting (this changed in 2014), or where the woman is over 21 and consenting, if with a woman by a man.

NOTE

CAN YOUNG BOYS BE GUILTY OF COMMITTING RAPE OR UNDERAGE SEX?

“**Man**” in both the Hong Kong legal definition of rape and the legal definition of illegal underage sex means **any male over the age of 10**.

This means that in Hong Kong even young boys, for example those under the age of 14, can be guilty of committing rape or underage sex under Hong Kong law. This is true even if the boy is close in age to the girl. In these cases, it is up to the government prosecutor to decide whether to bring criminal charges against the boy.¹⁹

19 See paragraph 3.2.6.2 below for the test for prosecution.

In the past, there was a legal presumption that boys under 14 were not capable of committing a sexual offence. This was however changed in 2012. Boys under 14 can now be found guilty of such crimes.²⁰ In Hong Kong, children under 10 cannot be guilty of ANY criminal offences, and therefore cannot be found guilty of rape, underage sex, or any other sexual offences.²¹

CAN A BOY BE A VICTIM OF RAPE?

In Hong Kong, rape or underage sex can only be committed by a man upon a woman. This definition means that, under current law, a **boy cannot** be the victim of rape or underage sex. **However**, sexual assault against a boy amounts to a different type of crime, for example indecent assault or homosexual buggery with a man under 16. (See table of sexual offences above)

IS IT COMPULSORY TO REPORT A CASE OF RAPE OR UNDERAGE SEX?

Generally, there is no legal duty to report crimes in Hong Kong.

However, the Social Welfare Department has recommended that where there is a suspected child maltreatment case, it is best practice to (a) refer such cases to the Family and Child Protective Services Units of the Social Welfare Department (if it is a new case) or to the responsible service units (if it is a known case) and/or (b) make a report to the Police for investigation or assistance as soon as possible.²² There are exceptions within the Personal Data (Privacy) Ordinance (Cap. 486) allowing usage and sharing of personal data for cases where (a) the personal data related to the physical or mental health of the subject and maintaining privacy of that information would cause serious physical or mental harm to the subject or other individuals (Section 59), or (b) the personal data is necessary for detection or prevention of crime or seriously improper conduct and maintaining privacy of such information would hinder such purposes (Section 58). However, each case must be determined on its own merit.²³

In addition, depending on the facts of the case it may be that social workers owe a duty of care to their clients²⁴ to report cases of abuse. In that case, if a child is harmed because a social worker breached such duty and did not report a case, the child or their representative may be able to bring a lawsuit arguing that the social worker breached their professional duties by allowing harm to come to that child.

Government policy requires that **civil servants** report crimes or suspected crimes to the proper officials, regardless of whether they heard about the crime through their official or personal capacity.²⁵ In addition, the government asks that every other

20 Crimes Ordinance (Cap 200), s 118O.

21 Juvenile Offenders Ordinance (Cap 226), s 3.

22 Social Welfare Department, Procedural Guide for Multi-disciplinary Co-operation (2020 Version), p.43, Flowchart 1

23 Protecting Children from Maltreatment – Procedural Guide for Multi-disciplinary Co-operation (Revised 2020) (Annex 2) p. 9, para. 8

24 CN & GN v Poole BC [2019] UKSC 25, para 88-89

25 Civil Bureau Circular, Civil Bureau Circular No. 7/2012 (2012), para. 1, available at http://hksargegu.org.hk/public_html/GOV_CIR/2012%20CSB%20CIR_072012.pdf

member of the community help law enforcement agencies by reporting crime.²⁶

HOW TO REPORT A RAPE OR SEXUAL OFFENCE TO THE POLICE²⁷

Anyone wishing to report a crime to the Police can call “999” for urgent matters or go directly to a Police Station.²⁸ If a victim wishes to report the case directly in a Police Station, it is best to report the case to the Police Station within the District where the crime took place. If requested to do so by the victim and/or his/her parents, professionals working with the family staff may support attendance.

If the offence was recent, the police may request the victim to not clean or throw away any clothes, sheets, or tissues used to clean themselves, or other evidence.

The victim will be interviewed by an officer of the same sex as the victim (unless the victim requests otherwise). Parents/guardians may accompany the parent²⁹. He or she will be asked to give a formal statement.

If the victim is under 17 years of age, they will be asked to be interviewed while being video-recorded, and if the child is under 18 years of age at the time of the court hearing, the video may be shown.³⁰

Actions may be taken at the scene and/or follow-up enquiries will be carried out:³¹

- a. Medical services will be arranged immediately if required.
- b. Police will visit the scene to collect evidence.
- c. Forensic evidence may be collected from the victim (if the victim or their parent/guardian consents to this). There are various different forms of evidence, depending on the nature of the offence but may include clothing, bedsheets and bodily swabs to detect DNA.
- d. A police photographer may take photographs of any injuries.
- e. With the victim’s consent, a referral may be made to the Social Welfare Department for specialized crisis intervention and after-care.
- f. An identification parade may be conducted.

The time needed by the police to investigate will depend on a number of factors, for example whether the suspect can be located. If the woman or girl becomes pregnant as a result of the incident, the police may wait until after the girl gives birth in order to collect DNA evidence.

26 The Victims of Crime Charter https://www.doj.gov.hk/en/publications/pdf/vcc_e.pdf

27 Social Welfare Department – Procedural Guidelines for Handling Adult Sexual Violence Cases (revised 2007) S.2 p.14-19 [https://www.swd.gov.hk/doc/fcw/proc_guidelines/sexual_violence/Procedural%20Guidelines%20\(Sexual%20Violence\)%20\(Red%202007\)%20\(Eng\)%20\(080911\).pdf](https://www.swd.gov.hk/doc/fcw/proc_guidelines/sexual_violence/Procedural%20Guidelines%20(Sexual%20Violence)%20(Red%202007)%20(Eng)%20(080911).pdf)

28 Advice to Persons Reporting a Crime – Procedures of Handling Sexual Violence, Hong Kong Police Force (retrieved Dec. 10, 2020), available at http://www.police.gov.hk/info/doc/cpa/sexvio_en.pdf

29 Advice to Persons Reporting a Crime – Procedures of Handling Sexual Violence, Hong Kong Police Force (retrieved Dec. 10, 2020), available at http://www.police.gov.hk/info/doc/cpa/sexvio_en.pdf

30 Criminal Procedure Ordinance (Cap. 221), s.79A, s. 79C.

31 Advice to Persons Reporting a Crime – Procedures of Handling Sexual Violence, Hong Kong Police Force (retrieved Dec. 10, 2020), available at http://www.police.gov.hk/info/doc/cpa/sexvio_en.pdf

AFTER A REPORT IS MADE TO THE POLICE, WHAT HAPPENS NEXT?

Where a suspect is identified, the suspect will be arrested and brought before a police officer in charge of the relevant police station, provided that the police officer in arresting the suspect has a reasonable suspicion of the person being guilty of an offence.³² The police will decide whether to bring charges, usually in consultation with the Department of Justice (which holds ultimate responsibility for commencing criminal prosecution in Hong Kong).³³ After charging, unless the offence appears to be of a serious nature or the police officer reasonably considers that the person ought to be detained, the charged person will be granted bail on the understanding that s/he will return home and appear at the court on a specified date. If the charged person is to be detained in custody, the police are required to bring him/her before a magistrate as soon as practicable and generally within 48 hours after his arrest.³⁴ At this first appearance, the magistrate has full power to make a decision to remand the defendant in custody or release him/her on bail.³⁵

Following charging and investigation the police will present the case to the Department of Justice for them to decide whether to continue the prosecution of the defendant by proceeding with the same charge(s) laid by the police, or may amend, withdraw or add to the charges. Generally, a prosecutor will only prosecute an individual if (a) the evidence available is sufficient to justify instituting or continuing proceedings, and (b) the general public interest requires a prosecution to be pursued. In deciding where the public interest lies in a particular case, the prosecutor must consider the justice of the situation and examine all of the factors, including, among other things, the seriousness and circumstances of the offence, and the age or aptitude of the suspect or victim.³⁶

If the Department of Justice decides to proceed with the prosecution, the case will go to court. Depending on the offences involved, the defendant may have to plead either guilty or not guilty on their first or subsequent appearance before the magistrate. If he/she pleads guilty, the victim will not need to appear in court. If the defendant pleads innocent, the victim will be required to go to court to testify.

For certain serious offences, including rape, the matter can only be tried by the Court of First Instance.³⁷ In those circumstances, there will usually be initial proceedings called "committal proceedings" held in the Magistrates Court. Unless the defendant elects otherwise, the magistrate will conduct a preliminary inquiry to determine whether the defendant should be committed to the Court of First Instance (but the magistrate has no power to determine the guilt of the defendant).³⁸ During this preliminary inquiry, the victim may be called as a prosecution witness to give evidence and be cross-examined by the defendant's lawyers.³⁹ If the magistrate determines that the defendant has a case to answer, he or she should also ask if the defendant wishes to plead guilty.⁴⁰ If the defendant pleads guilty, s/he will be committed for sentence in

32 Police Force Ordinance (Cap. 232), ss. 50(1), (1A) and (1B).

33 Criminal Procedure Ordinance (Cap. 221), s.14(1); see also paragraph 3.2.6.2 below.

34 Police Force Ordinance (Cap. 232), s. 52(1).

35 Criminal Procedure Ordinance (Cap. 221), ss. 9D and 9G; Magistrates Ordinance (Cap. 227), ss. 79 and 102.

36 Prosecution Code, Department of Justice 2013, paras 5.1 – 5.10.

37 Indictable offences listed in Part III of the Second Schedule to the Magistrates Ordinance can only be determined by the Court of First Instance, see Magistrates Ordinance (Cap.227), s. 88.

38 Magistrates Ordinance (Cap. 227), s.80A-C.

39 Magistrates Ordinance (Cap. 227), s.81.

40 Magistrates Ordinance (Cap. 227), s.82(1).

the Court of First Instance.⁴¹ This means that the victim will not be asked to go to court again. If the defendant does not plead guilty, however, and there is sufficient evidence to put the defendant upon the trial for an indictable offence or if the evidence raises a strong or probable presumption of the defendant's guilt, s/he will be committed to a trial at the Court of First Instance⁴², during which the victim may be called to testify as a prosecution witness again.

If the case is a rape case, the whole process can often take over a year. Where the victim is a child or a mentally incapacitated person, a magistrate may order that the accused is committed to the Court of First Instance for trial without the option of a preliminary inquiry first.⁴³

NOTE

SPECIAL PROTECTIONS FOR CHILD VICTIMS AND WITNESSES

If necessary, the victim may request the use of a one-way viewing facility at an identification parade.⁴⁴

On the day the victim goes to the court, police accompaniment through a separate entrance can be put in place. There should also be a support person sitting with the victim in the waiting room.⁴⁵

In some cases, particularly when interviewing a child about a sensitive or traumatic topic such as a sexual or violent offence, a video recording may be used as evidence and/or the child may be allowed to give testimony via a closed circuit television link or a live video link, so that he/she does not have to appear in the courtroom.⁴⁶

WHAT EVIDENCE IS CONSIDERED IN A CASE OF RAPE OR UNDERAGE SEX?

There is direct and indirect evidence.

- a. Direct evidence is what a person saw, heard, smelled, tasted, or felt.
- b. Indirect evidence is evidence other than direct evidence that can also help to prove a case. Examples of indirect evidence might include: bed sheets with the bodily fluid of the suspect, torn clothing, CCTV of the building in which the crime took place, tissues used by the victim to clean themselves, fingerprints of the suspect, photographs, witnesses, or a record of communication between the victim and the suspect (both before and after the sexual offence).

It is important to collect any evidence and submit it to the police as this can be critical in establishing a case.

41 Magistrates Ordinance (Cap.227), s.81B(2).

42 Magistrates Ordinance (Cap. 227), s.85(2).

43 Criminal Procedural Ordinance (Cap 221), s.79F.

44 Rights of Victims and Witnesses of Crime, Hong Kong Public Force, December 2020, available at http://www.police.gov.hk/ppp_en/04_crime_matters/rvwc.html

45 Ibid.

46 Criminal Procedure Ordinance (Cap 221), s 79B, 79C, 79D.

WHAT ARE A VICTIM'S RIGHTS IN REGARDS TO REPORTING A SEXUAL ASSAULT CASE? DO THE POLICE HAVE TO PROVIDE UPDATES ABOUT THE CASE?

The relevant police officers and prosecutors should inform victims of their role in, and the procedures of, the prosecution and court process. They should also update victims of the progress and result of the investigation.⁴⁷ For serious crimes, including rape, victims should be updated at least every six months in any event.⁴⁸

The victim should be given the contact number of the Investigating Officer of the case and the police reference number for the case. The victim is entitled to call the responsible Investigating Officer at any time for an update. Social workers can obtain information about the investigation on the client's behalf so long as they have given consent to the police.

SOURCES OF ADDITIONAL SUPPORT (The following is non-exhaustive, please check the internet for the most up-to-date services in your area)

Rain Lily

Provides hotline and crisis center for female victims of sexual violence.

Tel: 2375 5322 / www.rainlily.org.hk

Tung Wah Group of Hospitals CEASE Crisis Centre

Crisis intervention and support services for victims of sexual violence.

Tel: 18281 / <https://18281.tungwahcsd.org/>

The Victims of Crime Charter

www.doj.gov.hk/eng/public/pub200004.html

Criminal and Law Enforcement Injuries Compensation (CLEIC) Scheme

https://www.swd.gov.hk/en/index/site_pubsvc/page_socsecu/sub_criminalan/

LAW REFORM COMMISSION'S REVIEW OF SUBSTANTIVE SEXUAL OFFENCES

In December 2019, the Law Reform Commission ("LRC") of Hong Kong published a report on Review of Substantive Sexual Offences. The LRC recommends various amendments to the Crimes Ordinance (Cap 200), including creation of various non-consensual sexual offences, unification of age of consent at 16 years old, creation of new sexual offense involving children and reform of miscellaneous sexual offences. The report had taken into account three consultation exercises launched by the LRC in September 2012, November 2016 and May 2018.⁴⁹

Some of the major recommendations contained in the report include:

- a. the creation of a statutory definition of "consent" to sexual activity to the effect that a person consents if the person freely and voluntarily agrees and has the capacity to consent;
- b. discard of the term "rape", to name the offence "sexual penetration without consent", and the offence should cover penetration of the vagina or anus, and penile penetration of the mouth of another person;

47 Department of Justice, 2009 'The Statement on the Treatment of Victims and Witnesses', available at <https://www.doj.gov.hk/en/publications/pdf/tvw20090901e.pdf>

48 Performance Pledge, Hong Kong Police, August 2015, available at http://www.police.gov.hk/info/doc/pledge/2016/pdf/pp-crime_en.pdf

49 Review of Substantive Sexual Offences, 5 December 2019, available at https://www.hkreform.gov.hk/en/publications/rsubstantive_sexual_offences.htm

- c. the addition of the mental element of "recklessness" to the act of sexual penetration without consent and to the relevant acts in the other non-consensual sexual offences (i.e. the act must be committed intentionally or recklessly);
- d. the abolition of the offence of "non-consensual buggery", so that the conduct which is the subject of such an offence would be covered in future by the gender neutral offence of sexual penetration without consent;
- e. substituting the offence of "indecent assault" with a new offence of "sexual assault" focusing on conduct which is "sexual" rather than "indecent", with a proposed definition of "sexual". It is considered that this would best accord with the principle of respecting one's sexual autonomy;
- f. there should be a uniform age of consent in Hong Kong of 16 years of age, which should be applicable irrespective of gender and sexual orientation;
- g. offences involving children and young persons should be gender neutral with two separate types of offences, one involving children under 13 and the other involving children under 16, and capable of being committed by either an adult or a child;
- h. consensual sexual activity between persons who are aged between 13 and 16 should remain to be criminalised while recognising the existence of prosecutorial discretion;
- i. the creation of a new offence of sexual grooming to protect children against paedophiles who might groom them by communicating with them on a mobile phone or on the internet to gain their trust and confidence with the intention of sexually abusing them;
- j. the proposed new offences involving persons with mental impairments should apply to a mentally disordered person or mentally handicapped person (as defined in the Mental Health Ordinance (Cap 136)) whose mental disorder or mental handicap, as the case may be, is of a nature or degree that the person is incapable of guarding himself or herself against sexual exploitation;
- k. the offence of incest should be reformed to become gender neutral; to cover all penile penetration of the mouth, vagina and anus and other forms of penetration; and be extended to cover uncles (aunts) and nieces (nephews) who are blood relatives as well as adoptive parents;
- l. the proposed creation of a new offence of sexual exposure to cover exposure of one's genitals in private or public in a sexual manner targeting a specific victim;
- m. the existing offence of bestiality be replaced by an offence of sexual intercourse with an animal;
- n. the creation of a new offence of sexual activity on a dead person; and
- o. the abolition of a number of the existing homosexual-related offences.

As the next stage of sexual offences reform, in November 2020 the LRC published consultation paper regarding sentencing and other matters relating to the proposed sexual offenses, though the recommendations in the consultation paper do not necessarily represent the LRC's final conclusions,⁵⁰ nor will their recommendations necessarily be incorporated into future policy.

50 Views sought on sexual offence laws, 12 November 2020. https://www.news.gov.hk/eng/2020/11/20201112/20201112_154153_944.html



CHAPTER 4

Pregnancy Rights





Pregnancy Rights

Laws and policies that protect those who are pregnant are extended to all women, no matter their age. However, children under 18 who are pregnant also are rights holders under the United Nations Convention on the Rights of the Child.

The UN Committee on the Rights of the Child recognizes the high rates of pregnancy among teenagers globally and the additional risks of associated morbidity and mortality, and makes clear that children who are pregnant must be able to:

- Access counseling
- Ensure their voice is heard
- Know what medical procedures, including abortion, can take place with or without parent consent¹.

United Nations Convention on the Rights of the Child

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views **the right to express those views freely in all matters affecting the child**, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. **States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.**
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures;
 - a) To diminish infant and child mortality
 - b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care
 - d) To ensure appropriate pre-natal and post-natal health care for mothers
 - e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breast feeding, hygiene and environmental sanitation and the prevention of accident

¹ UN Committee on the Rights of the Child (CRC), *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, 17 April 2013, CRC/C/GC/15, available at: <https://www.refworld.org/docid/51ef9e134.html> (III, B, 56).

Pregnancy Counselling

In accordance with their evolving capacities, children should have access to confidential counselling and advice without parental or legal guardian consent, where this is assessed by the professionals working with the child to be in the child's best interests.

States should clarify the legislative procedures for the designation of appropriate caregivers for children without parents or legal guardians, who can consent on the child's behalf or assist the child in consenting, depending on the child's age and maturity.

States should review and consider allowing children to consent to certain medical treatments and interventions without the permission of a parent, caregiver, or guardian, such as HIV testing and sexual and reproductive health services, including education and guidance on sexual health, contraception and safe abortion.²

PREGNANCY COUNSELLING SERVICES IN HONG KONG

Mother's Choice

Mother's Choice Pregnant Girls Services is a safe space where girls in crisis are embraced, equipped, and empowered for a hopeful future of their choice. Services include a crisis hotline, counselling, peer support, workshops and training, and a residential hostel for girls needing a safe space to live during her pregnancy.

Phone 2313 5678 | WhatsApp 5633 5678 | Email bigsisiter@motherschoice.org

Family Planning Association of Hong Kong (FPAHK)

The Family Planning Association of Hong Kong (FPAHK), a non-profit making organization, advocates, promotes and provides information, education, medical and counselling services in Sexual and Reproductive Health for the community. All Birth Control Clinics offer consultation for unplanned pregnancy. FPAHK Youth Health Care provide pregnancy counseling to unmarried people under the age of 26.

FPAHK Clinic Services Hotline 2572 2222

The Birthright Society Limited

The Birthright Society provides medical, psychological, counseling and other services to pregnant women, which they may need but could not obtain, so as to ensure that the birthright of their children and their own human dignity may be safeguarded and to provide educational programmes that promote respect for human life.

Phone 2337 5551

PathFinders Limited

Provides a crisis hotline, case management, healthcare and support for foreign domestic workers facing a crisis pregnancy.

Phone 5190 4886

Evangelical Lutheran Church Social Service: "Jockey Club Support Project for Parents of New Generation"

Provides comprehensive support services to young parents aged 24 or below.

Phone 5132 2155

² UN Committee on the Rights of the Child (CRC), General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, available at: <https://www.refworld.org/docid/51ef9e134.html> (III, A, 31).

Department of Health Family Health Service

The Family Health Service provides a comprehensive range of health promotion and disease prevention services for children and women through a network of Maternal and Child Health Centres (MCHCs) and Woman Health Centres (WHCs).

24-Hour Information Hotline 2112 9900

Pregnant Girls' Rights in Education and Employment

United Nations Convention on the Rights of the Child

Article 28

States Parties recognize the right of the child to education...with a view to achieving this right progressively and on the basis of equal opportunity.”

Introduction

All children have a right to education. This right is protected both by Hong Kong law and by international law.³ This right applies to each child, as part of his or her human dignity and inherent rights.⁴

The Convention on the Rights of the Child makes it clear that education should be directed to “[t]he development of the child’s personality, talents and mental and physical abilities to their fullest potential.”⁵ This means that each child has a right to education that meets his or her particular needs.

States should work to ensure that girls can make autonomous and informed decisions on their reproductive health. Discrimination based on adolescent pregnancy, such as expulsion from schools, should be prohibited, and opportunities for continuous education should be ensured⁶.

Discrimination in education is strictly prohibited.⁷ This includes discrimination based on gender.⁸ The government is required under international law to take steps to prevent discrimination on the basis of maternity or pregnancy,⁹ as well as to reduce

3 Education Ordinance (Cap 279), s 74; Convention on the Rights of the Child, Art. 28; International Covenant on Economic, Social and Cultural Rights, Art. 13.

4 Committee on the Rights of the Child, General Comment 1 (CRC/GC/2001/1), para. 1; Committee on Economic, Social and Cultural Rights, General Comment 13 (1999) (E/C.12/1999/10), para. 4.

5 Convention on the Rights of the Child, Art. 29(1)(a).

6 UN Committee on the Rights of the Child (CRC), *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health* (art. 24), 17 April 2013, CRC/C/GC/15, available at: <https://www.refworld.org/docid/51ef9e134.html> (III, B, 56).

7 International Covenant on Economic, Social and Cultural Rights, Art. 2(2), 3; Convention on the Rights of the Child, Art. 2; Committee on Economic, Social and Cultural Rights, General Comment 13 (1999) (E/C.12/1999/10), para. 31; Committee on the Rights of the Child, General Comment 1 (CRC/GC/2001/1), para. 10; Sex Discrimination Ordinance, s. 25; Disability Discrimination Ordinance, s. 24; Family Status Discrimination Ordinance, s 18; Race Discrimination Ordinance, s. 26.

8 Ibid.

9 Convention on the Elimination of All Forms of Discrimination Against Women, Art. 11(2). The

the number of girls dropping out of school.¹⁰ Discrimination in education may include acts:

- a. depriving any person or group of persons of access to education of any type or at any level;
- b. limiting any person or group of persons to education of an inferior standard; and
- c. establishing or maintaining separate educational systems or institutions for persons or groups of persons.¹¹

Education is a human right in itself, but it is also a critical means of realizing other rights, such as the right to access healthcare or the right to work.¹² Education can play a critical role in the future life of a child, and is often the primary way in which children can lift themselves out of poverty or challenging backgrounds.¹³

WHAT ROLE CAN A SOCIAL WORKER PLAY?

Social workers and other professionals can provide significant support to children and pregnant girls, making sure that their right to education is not violated. They can help girls understand that they have the right to stay in school, should they wish to, and help to explore the additional support which may be available in practice. They can also play a role in speaking to school officials, parents and others to make sure that they are upholding their responsibilities to the girl.

WHAT ROLE CAN A CHILD WELFARE PROFESSIONAL PLAY?

Hong Kong Government – The government has a legal duty to provide all children with an education that meets their needs, and not to discriminate against anyone within the education system.

School Officials – School administrators and employees have a duty to provide equal education to all students, and are strictly forbidden from discriminating against students based on gender or pregnancy (or race, disability, marital status or family status).

Committee on Economic, Social and Cultural Rights interprets articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights in light of the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women, (Committee on Economic Social and Cultural Rights, General Comment 13, E/C.12/1999/10 (8 December 1999), para. 31).

10 Convention on the Elimination of Discrimination Against Women, Art. 10 (f).

11 UNESCO Convention Against Discrimination in Education (1960), Art. 1. The Committee on Economic, Social and Cultural Rights interprets articles 2 and 3 of the International Covenant on Economic, Social and Cultural Rights in the light of the UNESCO Convention against Discrimination in Education (Committee on Economic, Social and Cultural Rights, General Comment 13, E/C.12/1999/10 (8 December 1999), para. 31).

12 Committee on Economic Social and Cultural Rights, General Comment 13 (1999) (E/C.12/1999/10), para. 1. The right to work is enshrined in Article 23.1 of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, Article 6. The right to healthcare can be found in the Universal Declaration of Human Rights, Art 25 and the International Covenant on Economic, Social and Cultural Rights, Art. 12.

13 Committee on Economic Social and Cultural Rights, General Comment 13 (1999) (E/C.12/1999/10), para 1.

Can schools expel a girl because she is pregnant?

No. In Hong Kong, the Sex Discrimination Ordinance specifically prohibits discrimination against pregnant women, i.e. when pregnant women or girls are treated less favorably than they would be if they were not pregnant¹⁴. Accordingly, if a school expels a girl based solely on the fact that she is pregnant, that would amount to unlawful discrimination. Under the Sex Discrimination Ordinance, it is unlawful for a service provider to refuse to provide goods, services, or facilities on the basis of gender (or pregnancy or marital status)¹⁵. It is also unlawful for an **educational establishment** to deny admission or access to a student because of gender (or pregnancy or marital status)¹⁶.

School attendance is **compulsory** in Hong Kong from 6 years old (Primary 1) until the completion of Secondary Education Form III¹⁷.

Can a school expel a young mother, or treat her differently, because she has child care duties?

No, discriminating against someone because she has responsibility for the care of an immediate family member is unlawful under the Family Status Discrimination Ordinance (Cap 527)¹⁸.

What can a girl do if a school discriminates against her on the basis of her pregnancy or her family status?

If a school discriminates against a girl on the basis of her pregnancy or her childcare responsibilities, she may either make a complaint to the Equal Opportunities Commission (the "**Commission**") or file a claim in the District Court. Frontline professionals may want to refer such cases to the Commission for conciliation and/or legal advice/assistance. The Commission is an independent body funded by the government that works towards the elimination of discrimination through three main functions; *investigation and conciliation, legislation and codes of practice and guidelines, education and promotion*. Through its first function it can investigate complaints lodged and conduct conciliation between parties or (in appropriate cases) provide assistance for legal action where conciliation fails.

14 Sex Discrimination Ordinance (Cap 480), s 8.

15 Sex Discrimination Ordinance (Cap 480), s 28.

16 Sex Discrimination Ordinance (Cap 480), s 25.

17 Education Ordinance (Cap 279), s 74.

18 Family Status Discrimination Ordinance (Cap 527), s 5.



Pregnancy Rights in Employment

INTRODUCTION

Women and girls who are employed and are facing a crisis pregnancy may be concerned about their job and their rights in employment during pregnancy. In particular, a young mother may encounter workplace discrimination on the basis of her pregnancy. In such cases, it is important to understand the extent of a pregnant woman's employment rights under Hong Kong law.

WHAT EMPLOYMENT BENEFITS IS A PREGNANT GIRL OR WOMAN ENTITLED TO?

A woman or girl who is working under a “continuous contract” is entitled to take maternity leave of up to 14 weeks (plus a further period equal to the number of days, if any, beginning on the day after the expected due date up to and including the actual date of birth) and up to four weeks of additional leave in the event of illness or disability arising out of the pregnancy or confinement¹⁹. The maternity leave must be taken in a continuous period beginning between two to four weeks before the due date²⁰.

“Continuous contract” means a contract of employment under which an employee has been employed to work 18 or more hours per week for at least four weeks²¹.

A pregnant employee is entitled to paid maternity leave if her contract of employment so provides the same on terms better than the ones provided under s. 14 of the Employment Ordinance (Cap. 57)²² or if she has worked under a continuous contract for at least 40 weeks immediately before taking maternity leave and has given notice of the pregnancy and her intention to take maternity leave to her employer²³ (a presentation of a medical certificate to her employer confirming her pregnancy is considered as a sufficient notice to that effect²⁴). If her confinement takes place before such notice is given, or after such notice is given but before the commencement of her maternity leave, she is required to give a notice to her employer of her confinement date and of her intention to take the 14 weeks of maternity leave within seven days of her due date²⁵.

Where an employee is entitled to maternity leave pay for the initial 14 weeks of maternity leave, the rate of pay must be at least 4/5th of the employee's average daily wages during the 12 months immediately before the date of commencement of her maternity leave, or if she has been employed for a period shorter than 12 months, the shorter period²⁶.

19 Employment Ordinance (Cap 57), s 12.

20 Employment Ordinance (Cap 57), s 12AA.

21 Employment Ordinance (Cap 57), s 3, citing Schedule I.

22 Employment Ordinance (Cap 57) s 14(1).

23 Employment Ordinance (Cap 57), s 14(2)(a).

24 Employment Ordinance (Cap 57) s 12(4).

25 Employment Ordinance (Cap 57), s 12 (5).

26 Employment Ordinance (Cap 57), s 14(3A).



If the pregnant woman or girl has worked under a continuous contract for **fewer than 40 weeks** prior to her scheduled maternity leave, she is still eligible for maternity leave **WITHOUT PAY** if she has given notice of her confirmed pregnancy and her intention to take maternity leave²⁷.

CAN A PREGNANT EMPLOYEE BE ASSIGNED HEAVY, HAZARDOUS OR HARMFUL WORK?

A pregnant employee may request not to be assigned heavy, hazardous or harmful work on producing a medical certificate with an opinion that she is unfit to handle heavy materials, or to work in places where gas injurious to pregnancy is generated, or to do other work injurious to pregnancy. Upon such request, the employer may not allocate the employee the work covered by the medical certificate²⁸. If the employee is already performing such work, the employer should reassign her to other types of work as soon as practicable, but in any case not later than 14 days after the date of the receipt of the request²⁹.

However, within 14 days after the date of the request, the employer may arrange for the employee to attend another medical examination, at the employer's expense, to obtain a second opinion as to the employee's fitness to undertake the work at issue³⁰. The employer must give the employee at least 48 hours' notice of the examination³¹. If the second opinion provides that the employee is fit to do the specified work or if the employee refuses to attend the medical examination as arranged by the employer, the employer may refer the employee's request to the Commissioner for Labour for a ruling³². However, pending the result of the second medical opinion, the employer should still act upon the pregnant employee's request.

Despite any changes in the earnings of the employee as a result of her transfer from heavy, hazardous or harmful work in accordance with the above arrangement, payment for maternity leave should be calculated on the basis of the average daily or monthly wages (as appropriate) earned by the employee during the period of 12 months immediately before re-assignment of her work, or if she has worked for the employer for less than 12 months, the shorter period³³.

27 Employment Ordinance (Cap 57), s 12.

28 Employment Ordinance (Cap 57), s15AA(1) and (2).

29 Employment Ordinance (Cap 57), s 15AA(2).

30 Employment Ordinance (Cap 57), ss 15AA(2) and (3).

31 Employment Ordinance (Cap 57), s15AA(4).

32 Employment Ordinance (Cap 57), ss15AA(5) and (6).

33 Employment Ordinance (Cap 57), s15AA(8).

CAN AN EMPLOYER DISCRIMINATE AGAINST AN EMPLOYEE BECAUSE SHE IS PREGNANT?

No. Pregnancy is a protected class under the Sex Discrimination Ordinance³⁴. It is therefore illegal for an employer to discriminate against an employee on the basis of her pregnancy.

Conduct is discriminatory if the employer “treats her less favorably than he treats or would treat a person who is not pregnant”³⁵ **or** if the employer applies the same condition or requirement to her as everyone else, but the condition is something she cannot comply with because she is pregnant, and the employer cannot objectively justify that condition or requirement³⁶.

The employee’s pregnancy or family responsibilities do not have to be the sole reason for the discriminatory treatment in order for it to be prohibited. It is sufficient if the pregnancy or family responsibilities (as applicable) is one of the reasons for discriminatory treatment, even if it is not the main reason³⁷.

CAN AN EMPLOYER DISMISS AN EMPLOYEE WHEN SHE BECOMES PREGNANT?

Generally no. After an employee who is working under a continuous contract has informed her employer that she is pregnant, it is illegal for an employer to dismiss her, starting from the date on which the pregnancy is medically confirmed to the date that the employee returns from maternity leave³⁸. In addition, if the employee informs her employer of her pregnancy immediately after having been given notice of termination, the employer must withdraw such notice³⁹. Note however that the above prohibition does not apply in cases where the employee is summarily dismissed (e.g. for serious misconduct) in accordance with section 9 of the Employment Ordinance⁴⁰.

If an employer violates this prohibition, it will be liable to pay the pregnant employee:

- a. the sum which would have been payable if the contract had been terminated by the employer by giving a payment in lieu of notice (unless such amount has already been paid);

34 Sex Discrimination Ordinance (Cap 480), s 8.

35 Sex Discrimination Ordinance (Cap 480), s 8(1).

36 Sex Discrimination Ordinance (Cap 480), s 8(2). See also section 11(1) and (2).

37 Sex Discrimination Ordinance (Cap 480), s. 4(b); Family Status Discrimination Ordinance (Cap 527), s. 4.

38 Employment Ordinance (Cap 57), s 15(1)(a).

39 Employment Ordinance (Cap 57), s 15(1)(b).

40 Employment Ordinance (Cap 57), s 15(1).

- b. a further sum equivalent to the monthly average of the wages earned by the employee during the 12 month period immediately before the dismissal date (or if the period is shorter than 12 months, the shorter period); and
- c. maternity leave pay for 14 weeks (if she would have been entitled to such payment)⁴¹.

In addition, the employer may be liable on conviction to a fine of up to HK\$100,000⁴². If any director, manager, secretary or other officer of the employer was involved in or complicit in the offence by the employer, such person may also be liable on conviction to such penalty⁴³.

The Minimum Employment Age in Hong Kong

Children **under 13** are **not allowed** to be employed⁴⁴. Children between the ages of **13 and 15** may work in **non-industrial** jobs or in the preparation of food on the premises for consumption and sale thereon, subject to certain conditions⁴⁵. In particular, if they have not completed Form III of secondary education they must still attend full time education⁴⁶. Children between the ages of 15 and 17 (inclusive) are considered “young persons”⁴⁷ and may be employed, though they are also subject to certain restrictions. For example, where they are employed in an industrial undertaking, their working hours can neither exceed 8 hours a day nor exceed 48 hours a week in general, but it is allowed if the employer and the young person have reached an agreement to that effect, provided that the total hours worked by the young person in that week and the next following week do not exceed 96 hours⁴⁸.

Adoption

CAN A PREGNANT WOMAN PLACE HER CHILD FOR ADOPTION?

No, a pregnant woman may have already made a decision to place her child for adoption, but she cannot place a child for adoption until after the baby is born. After the baby is born, she may work with the Social Welfare Department Adoption Unit to give consent to adoption under the Adoption Ordinance (Cap. 290). Social workers working with a woman placing her child for adoption should ensure she is provided with comprehensive counselling to support her through the decision.

DOES A GIRL UNDER AGE 18 NEED PARENTAL CONSENT TO PLACE HER CHILD FOR ADOPTION?

The Adoption Ordinance (Cap. 290) does not differentiate birth mothers based on their age.

41 Employment Ordinance (Cap 57), s 15(2).

42 Employment Ordinance (Cap 57), s 15(4); Criminal Procedure Ordinance (Cap 221), Schedule 8.

43 Employment Ordinance (Cap 57), s 64B.

44 Employment of Children Regulations (Cap 57B), reg 4.

45 Employment of Children Regulations (Cap 57B), regs 4 (3), 5 & 6.

46 Employment of Children Regulations (Cap 57B), reg 6.

47 Employment Ordinance (Cap 57), s 2.

48 Employment of Young Persons (Industry) Regulations (Cap 57C), reg 8.

Termination of Pregnancy

TERMINATION OF PREGNANCY INTRODUCTION

An unplanned pregnancy is often a crisis in a woman or girl's life, meaning it can be a time where tough decisions are required.

Social workers play an important role in this situation, including helping the woman/girl to understand her options—becoming a mother, placing her baby for adoption, or terminating the pregnancy – and the legal and practical issues surrounding these options, so that the woman/girl can make an informed decision.

Individuals counselling women and girls on this decision should be careful to examine their own values and biases, and to provide **non-judgmental counselling**, restricting their advice to clear factual information about the law and about each of the three options.

States should ensure that health systems and services are able to meet the specific sexual and reproductive health needs of adolescents, including family planning and safe abortion services⁴⁹.

WHAT ROLE CAN A SOCIAL WORKER PLAY?

Social workers can play a critical role in educating women and girls about the law regarding termination of pregnancy and her options. A social worker's role is to help her make an informed decision and provide support and advocacy with transitional steps following decision making. This may include hospital attendance, residential placements, changes in education and support to meet health, emotional and other needs.

Social workers can also help ensure pregnant women and girls are living in places of safety, mediate between girls and parents and respond appropriately to any pregnancies that have resulted from abusive acts such as rape or control in relationships.

WHAT ROLE CAN OTHERS PLAY?

Parents – Although not required by law, it is the policy of many Hong Kong hospitals to require consent from the girl's parents before they will perform a termination where she is under 18. Parents therefore play a critical role in the decision-making process. Parents are often also a key source of support for the girl but social workers should be mindful to provide independent support and maximize additional support available by third parties such as friends, schools, partners and relatives where safe and appropriate.

Medical Professionals – Medical professionals play a primary role in determining the medical needs of a woman/girl and what her available options are. As with all professionals involved with the care of unplanned pregnancies, medical professionals must be careful not to let their personal ethics or values affect their professional judgment.

49 UN Committee on the Rights of the Child (CRC), General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, available at: <https://www.refworld.org/docid/51ef9e134.html> (III, B, 56).

UNDER WHAT CIRCUMSTANCES CAN A PREGNANCY BE TERMINATED LEGALLY?

Termination of pregnancy can only be legally performed if

- a. it takes place within 24 weeks of pregnancy, unless it is necessary for saving the life of the pregnant woman;⁵⁰
- b. it is performed by registered doctors in specific hospitals and clinics.⁵¹ This requirement does not apply if the termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman;⁵² and
- c. two registered medical practitioners agree in good faith that the termination of pregnancy should be performed. The doctors would only determine that a termination should be performed if:
 1. continuance of the pregnancy would involve risk to the life of the pregnant woman/girl or be of injury to the physical or mental health of the pregnant woman/girl, greater than if the pregnancy were not terminated; or
 2. there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormality as to be seriously handicapped.⁵³

In cases where the pregnant woman/girl is under 16 or has been the victim of a sexual offence (and has made a report to the police within 3 months of the offence), the doctor will automatically presume that the continuance of her pregnancy would involve risk of harm to the pregnant woman/girl and may therefore perform a termination of pregnancy if requested.⁵⁴

WHAT ARE THE LEGAL CONSEQUENCES FOR ILLEGAL TERMINATION OF PREGNANCY?

Any termination of pregnancy not performed by medical practitioners, or not in a designated clinic or hospital is illegal.

Any termination of pregnancy performed by medical practitioners after 24 weeks is illegal, unless it is necessary to save the life of the pregnant woman/girl.⁵⁵

For women who attempt to abort their own baby with unlawful administration of poison or other noxious thing or by use of any form of instrument, the maximum sentence is 7 years.⁵⁶ The gestation time or age of pregnant person has no bearing on this offence.

Any person who with intent to procure the miscarriage of any woman has unlawfully administered substances or instruments shall be liable to a fine and imprisonment with up to life sentence.

Anyone who supplies substances or instruments with knowledge of intended use for illegal abortion is liable to 3 years imprisonment.⁵⁷

50 Offences Against the Person Ordinance (Cap 212), s 47A(2C).

51 Offences Against the Person Ordinance (Cap 212), s 47A(3). Unless immediately necessary to save the life of the woman. See section 47A(4).

52 Offences Against the Person Ordinance (Cap 212), s 47A(4).

53 Offences Against the Person Ordinance (Cap 212), s 47A(1).

54 Offences Against the Person Ordinance (Cap 212), s 47A(2A).

55 Offences Against the Person Ordinance (Cap 212), s 47A(2C).

56 Offences Against the Person Ordinance (Cap 212), s 46(a).

57 Offences Against the Person Ordinance (Cap 212), s 46, 47.

Is anyone obligated to report illegal termination of pregnancy or attempted illegal termination of pregnancy?

Generally, a person or entity is not under any positive obligation to report crimes or provide assistance in any criminal investigation. Failure to report crimes does not generally attract any criminal liability.

However, there is a possibility for a person to be charged with (i) conspiracy with others to commit the offence of “illegal abortion” or (ii) aiding and abetting the commission of such offence by another if such person had gotten involved in the process thereof, such as unlawfully administering to and causing to be taken by a woman certain noxious things or operating on a woman with an instrument, with the intent to procure the miscarriage of the woman⁵⁸.

SEEKING TERMINATION OF PREGNANCY OUTSIDE OF HONG KONG

If a woman or girl obtains an abortion abroad after 24 weeks, it is unlikely that she will face any criminal charges in Hong Kong. This is because the Hong Kong courts only have jurisdiction over criminal acts that take place within Hong Kong territory.⁵⁹ Whether or not she is criminally liable in the country where the abortion is sought would depend on that country’s domestic laws.

However although the woman/girl herself will not be liable, anyone in Hong Kong who assists her in seeking a termination of pregnancy outside Hong Kong may still face criminal charges for the actions they took inside Hong Kong in helping the woman/girl to obtain an abortion.

IS PARENTAL CONSENT REQUIRED FOR A TERMINATION OF PREGNANCY FOR GIRLS UNDER 18 YEARS OLD?

Whether parental consent has to be obtained for medical decisions of a child (including termination of pregnancy) depends on the capacity and ability of the child to make an informed decision.

Under the Medical Council of Hong Kong’s Code of Professional Conduct Guide, children under 18 may consent to medical treatment if they are capable of understanding the nature and implications of the proposed treatment.⁶⁰ This is also supported by case law.⁶¹ If the child is not capable of sufficient understanding, consent has to be obtained from the child’s parent or legal guardian.

In practice, although it is not a legal requirement, many public and private hospitals in Hong Kong require parental consent for a girl under 18 to undergo termination of pregnancy.⁶²

58 (*R v Whitchurch* [1809] 24 QBD 420, *R v Sockett* [1908] 72 JP 428, 24 TLR 893), *HKSAR v Tam Chi Shing* CACC 443/2000 20 September 2001, <https://www.scmp.com/news/hong-kong/law-crime/article/2107682/two-women-jailed-over-illegal-abortions-carried-out-hong>

59 Since Section 46 of the Offences Against the Person Ordinance (Cap 212) does not fall under Sections 2(2) and 2(3) of the Criminal Jurisdiction Ordinance (Cap 461), the common law principle applies that Hong Kong courts only have jurisdiction over criminal offences which are committed within the territorial limits of Hong Kong.

60 Section 2, Code of Professional Conduct for the Guidance of Registered Medical Practitioners (2016), Part II Section 2.12.1, available at https://www.mchk.org.hk/english/code/files/Code_of_Professional_Conduct_2016.pdf.

61 *Gillick v West Norfolk and Wisbech Health Authority* [1986] AC 112 (HL), approved in *PD v KWW (Child: Joint Custody)* [2010] 4 HKLRD 191, [2010] HKFLR 184 (CA).

62 See Suet Lin Hung, Access to safe and legal abortion for teenage women from deprived backgrounds in Hong Kong, 18(36) REPRODUCTIVE HEALTH MATTERS (2010), at 107, available at <https://pubmed.ncbi.nlm.nih.gov/21111354/>.

Where a hospital requires parental consent for a termination of pregnancy, but the parents refuse to give such consent, it may still be possible for a girl to undergo abortion. For example, it may be possible to obtain a court order allowing the girl to have the procedure without parental consent where it is deemed in the girl's best interests. In these cases, the social worker involved should seek legal advice.

DOES THE BIOLOGICAL FATHER OF THE BABY HAVE ANY LEGAL RIGHTS REGARDING THE DECISION TO TERMINATE A PREGNANCY?

No, the biological father of the baby has no legally enforceable right to stop the girl from terminating a pregnancy. This is the case whether or not the couple is married.⁶³

CONTACT INFORMATION

List of Approved Hospitals and Clinics providing treatment for the termination of pregnancy⁶⁴

Hong Kong Adventist Hospital – Stubbs Road
Hong Kong Sanatorium & Hospital Limited
Kwong Wah Hospital
Matilda & War Memorial Hospital
North District Hospital
Pamela Youde Nethersole Eastern Hospital
Pok Oi Hospital
Prince of Wales Hospital
United Christian Hospital
Gleneagles Hong Kong Hospital
Princess Margaret Hospital
Queen Elizabeth Hospital
Queen Mary Hospital
Tsan Yuk Hospital
Tseung Kwan O Hospital
Hong Kong Adventist Hospital – Tsuen Wan
Tuen Mun Hospital
Union Hospital
The Family Planning Association of Hong Kong (Wanchai Nursing Home)

This chapter has highlighted that any person who is pregnant has rights under Hong Kong law (and the UN Convention on the Rights of the Child, where under age 18). These include the right to receive information, understand their options regarding termination or continuing their pregnancy, and to protect their education and employment.

63 Paton v British Pregnancy Advisory Service Trustees [1979] QB 276, [1978] 2 All ER 987, [1978] 3 WLR 687.

64 Department of Health, List of Hospitals/Clinics Approved under Section 47A (3) of the Offences Against the Person Ordinance (Cap. 212), retrieved from https://www.orphf.gov.hk/en/useful_information/approved_hospital_clinic_under_cap_212A. (last visited on 28 August 2020)

CHAPTER 5

Birth Registration and Immigration





Birth Registration

UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

Article 7

“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality.....”

Introduction

It is the legal right of every child to have his or her birth registered.¹ A child’s right to be registered is a fundamental right, and is closely linked to many other rights, such as access to healthcare and education.² Despite this, anecdotal evidence suggests that there are still cases in Hong Kong where children remain unregistered.

The right to be registered applies to **all** children born in Hong Kong, including children of immigrants and migrant workers.³

In order to ensure that all children born in Hong Kong are registered, it is important to know who has a duty to register a child, the procedures involved, and whose names can be registered on the birth certificate.

WHAT ROLE CAN A SOCIAL WORKER PLAY?

Social workers can play an important role in educating parents about the importance of registering their child and helping them understand both how to register and the type of information to be included on the birth certificate. In particular, it is important to help parents understand whether, and how, the biological father can be registered on the birth certificate.

WHAT ROLE CAN OTHERS PLAY?

Officials at the Birth and Deaths General Register’s Office have a duty to register **all** children, including children of immigrants or migrant workers, or those whose parents are not available at the time of registration.

Parents have a duty to register a child’s birth. If the parents are not available, this duty will fall on others (see below).

- 1 Convention on the Rights of the Child, Art. 7; International Covenant on Civil and Political Rights, Art. 24(2).
- 2 Report of the Office of the United Nations High Commissioner for Human Rights, ‘Birth registration and the right of everyone to recognition everywhere as a person before the law’ (17 June 2014) (A/HRC/27/22), para. 3; United Nation Human Rights Council, Birth registration and the right of everyone to recognition everywhere as a person before the law (19 March 2013) (A/HRC/22/L.14/Rev.1), preamble.
- 3 United Nation Human Rights Council, Birth registration and the right of everyone to recognition everywhere as a person before the law (19 March 2013) (A/HRC/22/L.14/Rev.1RE), s 2; Report of the Office of the United Nations High Commissioner for Human Rights, ‘Birth registration and the right of everyone to recognition everywhere as a person before the law’ (17 June 2014), (A/HRC/27/22), para. 10, 11.

WHO HAS A DUTY TO REGISTER BIRTH?

The following individuals have a duty to register a child:

- a. His or her father; *or*
- b. His or her mother (if the father is unavailable); *or*
- c. The occupier of the house where child was born or any person who was present at the birth (if the parents are unavailable); *or*
- d. The person having charge of a public institution (when the child is born in, or admitted to, such an institution); *or*
- e. The person who found the child (where the child is found exposed).⁴

Children Living in Institutional Care

It is a legal requirement that any child born in, or admitted to, an institution or residential care facility must be registered. It is the duty of the person in charge of this institution to obtain as much information as possible from the mother or other person admitting the child into their care and to duly register that child within 42 days.⁵

WHAT IS THE TIME FRAME IN WHICH BIRTH REGISTRATION MUST OCCUR?

Registration should occur within **42 days** after a child is born.⁶ When registered on time, there is no registration fee.⁷

After 42 days, however, the person registering the child will have to pay a registration fee of HK\$140.⁸ If more than 12 months have passed since the child's birth, the child can be registered only with the consent of the Registrar, and on payment of a HK\$680 registration fee.⁹

WHAT HAPPENS IF A PERSON DOES NOT REGISTER A CHILD?

By not registering a child, a person is potentially preventing the child from having access to healthcare, education, or other social services later in life.

In addition, anyone with a duty to register a child who fails to perform his or her duty to register a child may be liable, on conviction, to a fine of up to HK\$2,000 or imprisonment for up to 6 months.¹⁰

WHOSE NAMES SHOULD BE INCLUDED ON THE BIRTH CERTIFICATE? DOES THE BIOLOGICAL FATHER'S NAME NEED TO BE REGISTERED?

If the mother's identity is known, her name should be included on the birth certificate.

If the mother is married, her husband may be presumed at law to be the father of the child, unless proven otherwise (on the balance of probabilities)¹¹

4 Births and Deaths Registration Ordinance (Cap 174), ss 7 & 8.

5 Births and Deaths Registration Ordinance (Cap 174), s 8.

6 Births and Deaths Registration Ordinance (Cap 174), ss 7 & 8.

7 Births and Deaths Registration Ordinance (Cap 174), s 9(1).

8 Births and Deaths Registration Ordinance (Cap 174), s 9(2).

9 Births and Deaths Registration Ordinance (Cap 174), s 9(3).

10 Births and Deaths Registration Ordinance (Cap 174), s 28; Criminal Procedure Ordinance, Schedule 8.

11 Parent and Child Ordinance (Cap 429), s 5.

If the child is born outside of wedlock, the biological father of the child may be included on the birth certificate only in the following circumstances:¹²

- a. At the joint request of the mother and the father;
- b. At the request of the mother who personally attends the registry and produces:
 1. **a declaration stating that the person is the child's father; AND**
 2. **a statutory declaration made by that other person stating that he is the child's father;**
- c. At the request of the person claiming to be the father who personally attends the registry and produces:
 1. **a declaration stating that he is the father; AND**
 2. **a statutory declaration made by the mother stating that person is the father of the child;**
- d. At the request of the mother or the alleged father where either personally attends the registry and produces:
 1. **a certified copy of a court order; AND**
 2. **if the child has attained 16 years of age, his or her written consent to the registration of that person as his or her father.**

What is a Statutory Declaration?

A statutory declaration is a legal document in which a person declares or swears in writing that something is true. It must be made in a particular format in order to be valid. In Hong Kong, a justice, notary, commissioner or other person authorized by law to administer an oath may take and receive the declaration.¹³

If the father was not included on the birth certificate at the time of birth, it is possible to register him at a later time. The Registrar of Births and Deaths can re-register the birth to show that a person is the father if any of the four requirements is fulfilled.¹⁴

The child may also apply to court for a declaration that a person is his or her parent – essentially altering the birth certificate.¹⁵ The court will respond to such requests where, at the time of application, the application is domiciled in Hong Kong or has been resident for 1 year or more, or has a substantial connection with Hong Kong. If the Registrar is satisfied that the birth should be re-registered, he or she will authorize it.¹⁶

DOES INCLUSION ON THE BIRTH CERTIFICATE HAVE AN IMPACT ON A MOTHER OR FATHER'S PARENTAL RIGHTS AND RESPONSIBILITIES?

A birth certificate is a piece of evidence indicating that certain persons are the parents of the child, but it does not actually prove that they have any parental rights.

For children born within wedlock, there is a presumption that the legal husband of the

12 Births and Deaths Registration Ordinance (Cap 174), s 12(1).

13 Oaths and Declarations Ordinance (Cap 11), s 12.

14 Births and Deaths Registration Ordinance (Cap 174), s 12A.

15 Parent and Child Ordinance (Cap 429), s 6.

16 Births and Deaths Registration Ordinance (Cap 174), s 12B.

child's mother is the father of the child.¹⁷ This means that it is assumed that he is the father and has parental rights. However, this presumption can be challenged if there is enough evidence showing that he is not, in fact, the biological father.¹⁸ If the evidence proves that the legal husband is not the biological father, his name on the birth certificate **would not give him any parental rights**.

Currently, for children born out of wedlock, "parent" refers only to the biological mother and not the father. The biological father also currently has **no automatic legal parental rights with regards to the child**, even if his name is on the birth certificate.¹⁹ The only way for a biological father that is not married to the biological mother (unmarried biological father) to gain parental rights is through applying for a court order (note, however, below).²⁰

Rights of the Unmarried Biological Father

Unmarried biological fathers do not automatically have any parental rights under Hong Kong law. They must instead seek these rights through a court order under the Guardianship of Minors Ordinance (Cap 13). In a recent case, however, the court ruled that there should be "some efforts" made to locate the biological father, in order to give him an "opportunity to decide whether to make application under the Guardianship of Minors Ordinance".²¹ This means that even if unmarried biological fathers do not have any automatic parental rights, they may have the right to be **contacted**, in order to enable them to seek these rights.

IF A BABY IS FOUND ABANDONED AND THE PARENTS CANNOT BE LOCATED, HOW CAN THE BABY'S BIRTH BE REGISTERED?

There is no definitive or comprehensive answer to this question through research and case law. On a case-by-case basis, social workers should remain in close contact with the Social Welfare Department and Department of Justice to ensure that the child's rights are upheld in all areas including right to an identity and birth certificate.

DOES AN ADOPTION CERTIFICATE FUNCTION AS A BIRTH CERTIFICATE?

An adopted person will be re-registered in the Adopted Children Register.²² The original birth entry will be marked with the word 'Adopted.'²³

Under Hong Kong law, a certified copy of an entry in the Adopted Children Register, if sealed and stamped by the register's office and if it has a record of the date and country of birth, can be used as evidence of the date and country of birth, just as if it was an ordinary birth registration.²⁴

Any person is entitled to ask for a certified copy of an entry in the Adopted Children Register, under the same terms as they could ask for a certified entry under the Births and Deaths Registration Ordinance.²⁵

17 Parent and Child Ordinance (Cap 429), s 5(1)(b).

18 Parent and Child Ordinance (Cap 429), s 5(3).

19 Guardianship of Minors Ordinance (Cap 13), s 3(1)(c).

20 Guardianship of Minors Ordinance (Cap 13), ss 3(1)(c)(ii) & 3(1)(d).

21 Director of Social Welfare v HSP (Adoption) [2013] HKFLR 489, para 113.

22 Adoption Ordinance (Cap 290), s 19.

23 Adoption Ordinance (Cap 290), s 19.

24 Adoption Ordinance (Cap 290), s 18(2).

25 Adoption Ordinance (Cap 290), s 18(2).

PROCEDURES AND CONTACT INFORMATION

Where to Apply:

The birth of a child should be registered at a birth registry in the district in which the birth occurred. The child is not required to be present. In the case of married parents, only one parent has to be present. If the child was born outside of a hospital or clinic or the birth has not been registered within 1 year, the birth should be registered at the Births and Deaths General Register Office.

What to bring:

When applying to register the birth of a child, the parent(s) should bring originals of the following documents:

- Hong Kong identity cards or valid travel documents (e.g. passports, documents of identity etc.) of the mother (and spouse, where applicable);
- Married couples must also provide the husband's information as well as the mother's, along with a marriage certificate;
- If the biological father is not the legal husband and wishes to be listed, he will either need to come to the birth registration in person, or submit a Statutory Declaration.

CONTACT INFORMATION

Online Booking for Birth Registration Appointments

www.gov.hk/en/residents/immigration/bdmreg/birth/birthreg/bookbirthreg.htm

The Births and Deaths General Register Office

Address: 3/F, Low Block, Queensway Government Offices, 66 Queensway

Tel: (852) 2867 2785

General Enquiries:

Hotline: (852) 2824 6111

Email: enquiry@immd.gov.hk





Immigration Status

WHEN WILL A CHILD BE A HONG KONG PERMANENT RESIDENT?

A child born in Hong Kong will be a Hong Kong Permanent Resident (and therefore has the right of abode in Hong Kong) if:

- a. The child is a person of Chinese nationality. If one of the child's parent is a person of Chinese nationality he or she will be of Chinese nationality.²⁶ Both Hong Kong Chinese and the mainland Chinese are persons of Chinese nationality.
- b. The child is not a person of Chinese nationality but at least one of his or her parents is a Hong Kong Permanent Resident at if at the time of the child's birth or at any later time before he or she becomes 21, one of his or her parents has the right of abode in Hong Kong.²⁷ Please note that on attaining 21 years of age, the child ceases to be a Hong Kong Permanent Resident by virtue of his or her parent's permanent residency status. However, he or she may apply to be a permanent resident if he or she has ordinarily resided in Hong Kong for a continuous period of not less than seven years, has taken Hong Kong as his or her place of permanent residence, and was permitted to remain Hong Kong by an immigration officer or an immigration assistant.²⁸

A child born outside of Hong Kong will be a Hong Kong Permanent Resident if:

- a. The child is a person of Chinese nationality with a parent who is also a person of Chinese nationality who was born in Hong Kong or at the time of the child's birth had resided in Hong Kong for a continuous period of not less than seven years.²⁹
- b. The child is a person of Chinese nationality who has ordinarily resided in Hong Kong for a period of not less than seven years.³⁰

It **does not** matter whether the child's parents were **married** in order for the child to receive the right of abode. If either the biological mother or biological father is a Chinese national and had the right of abode at the time that the child was born, the child will have the right of abode.³¹

If a child is not entitled to permanent residence at birth, he or she can apply to become a Hong Kong Permanent Resident if he or she:

- a. is a Chinese citizen and has ordinarily resided in Hong Kong **continuously** for **seven years**,³² or
- b. is a non-Chinese citizen and has entered Hong Kong with a valid travel document, has ordinarily resided in Hong Kong **continuously** for **seven years** and has taken Hong Kong as his place of permanent residence. The seven years is calculated back from the date on which the child applies for Right of Abode.³³

26 Nationality Law of the People's Republic of China Article 4; Basic Law Article 24(1); Immigration Ordinance (Cap 115), Sch 1(2)(a).

27 Basic Law, Article 24(5); Immigration Ordinance (Cap 115), Sch 1(2)(e).

28 Basic Law, Article 24(4); Immigration Ordinance (Cap 115), Sch 1(2)(d), 3(3)(b) and 4(1).

29 Basic Law, Article 24(3); Immigration Ordinance (Cap 115), Sch 1(2)(c); Ng Ka Ling and Another v. The Director of Immigration [1999] HKCFA 72; [1999] 1 HKLRD 315; (1999) 2 HKCFAR 4; [1999] 1 HKC 291; FACV 14/1998 (29 January 1999).

30 Basic Law, Article 24(2); Immigration Ordinance (Cap 115), Sch 1(2)(b).

31 Ng Ka Ling and Another v. The Director of Immigration [1999] HKCFA 72; [1999] 1 HKLRD 315; (1999) 2 HKCFAR 4; [1999] 1 HKC 291; FACV 14/1998 (29 January 1999).

32 Basic Law, Article 24(2); Immigration Ordinance (Cap 115), Sch 1(2)(b).

33 Basic Law, Article 24(4); Immigration Ordinance (Cap 115), Sch 1(2)(d).

WHAT DOES IT MEAN FOR A CHILD TO HAVE “PERMANENT RESIDENCE?”

Permanent residence is not nationality; it is a separate legal status that allows a child to stay in Hong Kong indefinitely and to receive certain benefits. In particular, it gives the child the **right of abode**, which entitles him or her:

- to land in the HK Special Administrative Region;
- to be free from any condition of stay (including a limit of stay) in the HK Special Administrative Region;
- not to be deported from the HK Special Administrative Region; and
- not to be removed from the HK Special Administrative Region.³⁴

In addition, it gives the child the right to obtain social welfare assistance from the Social Welfare Department and receive other government and welfare benefits.³⁵ These include:

- Comprehensive Social Security Assistance (CSSA);
- low payment rate/free care in Hong Kong’s public health system;
- Hong Kong kindergarten voucher or Student Financial Assistance; and
- subsidized child care services.

WHAT IF THE CHILD DOES NOT QUALIFY FOR PERMANENT RESIDENCE? WHAT IS HIS OR HER IMMIGRATION STATUS?

A baby’s immigration status is always tied to his or her parents’ immigration status on the date that the baby’s birth is registered.

If only the biological mother’s name is registered on the birth certificate, the baby’s immigration status will be tied to that of the mother. If the biological father has his name on the birth registration, the baby’s immigration status will be tied to either the father or mother’s status, whichever is more favorable for the child.

The baby’s immigration status will be marked on his or her birth certificate:

- “Established” means that the child has Hong Kong Permanent Resident status;
- “Not Established” means that:
 - a. the baby has a permit to stay in Hong Kong (with Form ID235B) or
 - b. the baby has no permit to stay (without Form ID235B).

IF A BABY IS FOUND ABANDONED AND THE PARENTS CANNOT BE LOCATED, WHAT WILL THE CHILD’S IMMIGRATION STATUS BE?

In the case of an abandoned child, the nationality and immigration status of the parents can often be hard to determine. This decision is therefore to be made by the Director of Immigration. If the Director determines that the child appears to be of Chinese descent, the Director may grant him or her the right of abode.


The Immigration Ordinance (Cap 115) states that:

- a. A new-born infant, who appears to the Director to be of Chinese descent, is taken, in the absence of evidence to the contrary, to be the legitimate child of a Chinese citizen who was a permanent resident of the Hong Kong Special Administrative Region at the time of birth of the child;

³⁴ Immigration Ordinance (Cap.115), Section 2A(1).

³⁵ Basic Law, Article 36.

- b. A new born infant, who appears to the Director to be **not** of Chinese descent, is taken, in the absence of evidence to the contrary, to be the legitimate child of a parent not of Chinese nationality but who had the right of abode in Hong Kong at the time of birth of the child.³⁶



This determination by the Director of Immigration can be challenged if there is evidence to the contrary. Legal advice should be sought in this scenario.

36 Immigration Ordinance (Cap 115), Schedule 1(1)(3).



I  MY FAMILY

CHINA daughter
cheer Hug. TEACH Hold v
child Smile people gri
S ZEST rejoice thrill da
adoption parent lau
celebrate mom LOVE vill
embrace support thi
family journey JOY
heart baby wow LIFE
HAPPY hooray
together

CHAPTER 6

Children in Alternative Care





Children in Care

Introduction¹

The residential care system operated by governments or other institutions is designed to shelter, protect and care for children in need. However, substantial evidence has shown that long-term stay or placement in the residential care system is associated with negative developmental outcomes for children.² At Mother's Choice, it is our belief that placement in residential homes should be treated as a temporary solution only and long-term placement should be taken as a last resort. Yet it is noted that for various reasons in Hong Kong, it is not uncommon for children in need to have to spend their entire childhood under the residential care system.

THE PROBLEM: STATISTICS ON THE NUMBER OF CHILDREN IN CARE

For the year 2019-2020, the Social Welfare Department reported 3,570 placements for children in the residential care system in Hong Kong.³ The vast majority of children are placed in the residential care system with the consent of their parents.⁴ Under this system, parents still maintain legal rights and guardianship over their children.⁵ Typically, the assumption is that a child is only temporarily placed into care so that his or her parents could have the time and help needed to get back on their feet with the view that the child could reunite with them in due course.⁶

Government data reports that 18% of children are in residential care due to abuse or suspected abuse, with 82% of children in care due to temporary lack of appropriate care - the definition of the latter includes situations where parents are ill, imprisoned, missing, or carers are unable to handle emotional or behavioural problems of children⁷, which implies the temporary nature of care is to support parents to reunify with their children.

While 90% of children in care have a plan for family reunion, in reality, only 57% of children were discharged from care to family reunion in 2017, and 2% were adopted, leaving the remaining 37% in or ageing out of care.⁸

Further, those children who were reunited with their family often spent numerous years in the system before they moved back with their parents. The average length of stay for a child in foster care, as of 2017, was 35.2 months.⁹

THE COSTS: THE SOCIETAL AND FINANCIAL IMPACT OF RAISING CHILDREN IN CARE

There is a common assumption in Hong Kong that children growing up in the residential care system face little risk of harm to their mental or physical health as their basic needs are taken care of, they have adequate housing, nutrition and access to education. The reality, however, is that raising a child within a residential care system has serious and long-lasting effects on physical and social development. Raising children in residential care also comes at tremendous financial and social cost to the community at large.

The Physical and Social Impacts on a Child's Development

A child's early experiences have a lasting impact on the development of his or her brain. During these early "sensitive periods", the brain is developing the neural circuitry, or "architecture", on which it will rely and build for the rest of the child's life.¹⁰ The nerve connections and neurotransmitter networks that are being created during these early years can be influenced by a variety of conditions and traumas.¹¹ Having appropriate interactions and experiences at the right time is therefore crucial for how the brain develops.¹² It is particularly important that the child experiences consistent

interactions with a primary care giver during this period.¹³ These early experiences shape a child's healthy cognitive and social development, and have long-lasting effects on their learning, behavior and health.

The effect of stress is particularly devastating on the young developing brain. While learning to deal with stress is a critical part of healthy development, experiencing prolonged exposure to stress, particularly when children do not have adequate buffers such as a healthy relationship with a caregiver, can result in toxic stress. This leads to long-term damage of a child's brain development and the development of insecure attachments.¹⁴ In particular, prolonged exposure to stress during critical early periods of development can have a strong effect on the areas of the brain tied to learning and reasoning.¹⁵ Adverse childhood experiences impact not only a child's brain development, but have also been documented to affect a person's physical health more generally, including increasing the risk for chronic health conditions such as heart disease, diabetes, back pain, stroke, mental illness and asthma.¹⁶

Children growing up in residential care systems are particularly vulnerable to these types of long-term physical and developmental damage. Children in care often do not have access to a primary care giver, and do not have the types of consistent, comforting interactions needed to promote healthy neural development. Indeed, children in care often have their primary social relationships disrupted.

Moreover, children in care are also especially vulnerable to exposure to highly stressful or traumatic experiences. Statistics from other jurisdictions show high levels of exposure to trauma among children who grow up in care.¹⁷ One study in the U.S. revealed Post Traumatic Stress Disorder rates among children in foster care were higher than those in returning military combat veterans.¹⁸ Many children entering care may come from families with drug abuse problems, mental illness, poverty and/or family violence and may have already experienced trauma or neglect. In other cases, foster care itself may be an unstable and even traumatic experience for the child.

Research also indicates that children who grow up in residential care are more likely to struggle with anti-social behavior and to engage in harmful activities such as drug use, criminal activities and delinquency, homelessness or teenage crises pregnancy than children who do not grow up in residential care.¹⁹ Children in foster care have also been documented to have higher rates of mental health problems, as well as higher suicide rates, than those children who are not.²⁰

The harmful effects of residential care are often multi-generational. Children who grow up with the long-term effects of adverse childhood experiences are at a higher risk of developing dysfunctional behavioral traits and relationships as adults, leading to harm to their own children and families.²¹

There is also a negative correlation between the length of time that a child spends in care and their likelihood of family reunification. The longer a child spends in care, the less likely it is he or she will be reunited with his family. Studies have shown that after the first year, reunification rates typically decrease for every additional year that a child spends in care.²² Additionally, reunification rates for adolescents in care are significantly lower than reunification rates for younger children.²³

The Financial Impacts

At a financial level, the cost of raising children in residential care is significant. For 2020-2021, the estimated government expenditure for foster care, small group homes and residential homes for children in Hong Kong is \$267.7 million, \$316.2 million and \$496.9 million respectively.²⁴ This does not include expenditure outside of government funding spent by private organizations, hospitals, religious groups and NGOs like Mother's Choice.

These numbers also do not take into account the financial costs that result from generations of children and youths leaving care with higher risks of becoming homeless, unemployed, incarcerated, engaged in risky behavior and dependent on the welfare system. Nor does it account for the long-term economic costs on the health-care system associated with an increased risk of health problems.²⁵

CASE STUDY

MAK-YIN'S STORY²⁶

Mak-yin was born to a mother who was mentally unstable and physically abusive. When Mak-yin was a baby, he was placed into a children's home. Within a year, despite evidence of serious physical abuse, he was returned to his mother. The abuse grew worse. When Mak-yin was at a young age, his mother dangled him from the balcony of their flat, more than 20 stories from the ground, threatening to kill him. Her attempt was thwarted and, as a result of this incident, Mak-yin went back into care. Thus Mak-yin started his journey through five different foster homes and he struggled to fit in wherever he went.

Although it was clear from the beginning that Mak-yin's mother was both unable and unwilling to care for him, and that family reunion was not an option available to him, Mak-yin was also not released for adoption for many years. At age 11, after 7 years in the residential care system, he was finally released for adoption. However, Mak-yin's paperwork for him to join an adoptive family was not processed until he was almost 16 years old. By then it was too late – Mak-yin was not adopted and "aged out" of the foster care system at age 18 with no family to support him. Whether such delay in processing the required paperwork for Mak-yin was due to insufficient law and policy to govern the timeline or a lack of understanding of what was in his best interests, his case highlights that practice, systems and legal frameworks are worth examining.





Residential Care Services



United Nations Convention on the Rights of the Child

Article 18

1. *"States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."*
2. *"For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children."*

Article 20(1) & (2)

1. *A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*
2. *States Parties shall in accordance with their national laws ensure alternative care for such a child.*
3. *Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."*

Introduction

Article 18(1) of the United Nations Convention on the Rights of Child ("**Convention on the Rights of the Child**") sets out that the primary responsibility for "the upbringing and development of the child" lies with their parents or legal guardians. Generally speaking, it is preferable for children to remain with their parents unless this contravenes what is in their best interests. Consistent with this, Article 9 of the Convention on the Rights of the Child provides that, *"States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child..."*.²⁷

Caring for children is also the responsibility of the government and of society as a whole. Public and private social welfare institutions, courts of law, administrative authorities and legislative bodies should all regard the best interests of the child as the "primary consideration".²⁸ The government also has a responsibility to *"render appropriate assistance"* to parents and legal guardians in their performance of their child-rearing responsibilities.²⁹

It may not be in the best interests of the child in every situation to stay with its parents. This is especially true when there has been mistreatment or abuse of the child, in which case the government is obliged to take "appropriate legislative, administrative, social and educational measures" to protect children from any sort of abuse or maltreatment.³⁰ These appropriate measures includes "*effective procedures for the establishment of social programs to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore and, as appropriate, for judicial involvement*".³¹

In the situation where it is not in the child's best interest to remain in the family environment or where "*a child is temporarily or permanently deprived of his or her family environment*", the government also has a duty to provide alternate care for such a child, such as foster care, adoption and placement in suitable institutions for the care of children.³²

In 2009, the UN General Assembly adopted a resolution on the **Guidelines for the Alternative Care of Children**³³. These Guidelines:

Set out desirable orientations for policy and practice with the intention of enhancing the implementation of the Convention on the Rights of the Child and of relevant provisions of other international instruments regarding the protection and well-being of children deprived of parental care or who are at risk of being so

They are designed for wide dissemination among all sectors directly or indirectly concerned with issues relating to alternative care, and seek in particular:

- a. To support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and permanent solution, including adoption and kafala of Islamic law;
- b. To ensure that, while such permanent solutions are being sought, or in cases where they are not possible or are not in the best interests of the child, the most suitable forms of alternative care are identified and provided, under conditions that promote the child's full and harmonious development;
- c. To assist and encourage Governments to better implement their responsibilities and obligations in these respects, bearing in mind the economic, social and cultural conditions prevailing in each State; and
- d. To guide policies, decisions and activities of all concerned with social protection and child welfare in both the public and the private sectors, including civil society.

The Guidelines do not have the force of law in Hong Kong but are taken into account by the UN Committee on the Rights of the Child when examining its reports to the Convention and in formulating its observations and recommendations.

WHAT ROLE CAN I PLAY?

Social workers can play some of the most important roles in residential care cases. Social workers can help to make sure that a child is placed into an appropriate placement and schedule regular case review meetings to follow up on the case so as to ensure that the placement and care of the child continue to be in the best interests of the child.

WHAT ARE THE SITUATIONS WHERE A CHILD CAN BE PLACED INTO RESIDENTIAL CARE?

There are generally three types of situations where a child can be placed into residential care:

1. Voluntary Placement

Parents can voluntarily commit their child to the residential care system on a temporary basis. In these type of cases the parents will retain all of their legal parental rights, whilst the social workers and foster parents may have limited scope to make decisions on behalf of the children.

CASE STUDY

Eric's mother has been struggling with mental health, unemployment, and housing challenges and cannot currently provide a safe environment for Eric. She does not have any family support or friends who are able to help her. She is committed to accessing psychiatric services, seek job training, find employment, and safe accommodation so that Eric can return to her care as soon as possible.

2. Care or Protection Order

The child or juvenile is removed from the parents and committed to residential care by a juvenile court.³⁴ The juvenile court may:

- a. *"appoint the Director of Social Welfare to be the legal guardian of such child or juvenile";*
- b. *"commit him to the care of any person whether a relative or not, who is willing to undertake the care of him, or of any institution which is so willing";*
- c. *"order his parent or guardian to enter into recognizance to exercise proper care and guardianship"; or*
- d. *"make an order placing him for a specified period, not exceeding 3 years under the supervision of a person appointed for the purpose by the court".³⁵*

These orders (CPOs) can be made where the juvenile court is satisfied that a child or juvenile is "in need of care or protection", which include situations where the child or juvenile has been or is being assaulted, ill-treated, neglected or sexually abused, or the health, development or welfare of the child or juvenile has been, is being or appears likely to be neglected or avoidably impaired, or that the child or juvenile is beyond control to the extent that harm may be caused to him or to others.³⁶ Any person or institution to whose care a child or juvenile is committed by the juvenile court shall, whilst the order is in force, have the like control over the child or juvenile as the parent and shall be responsible for his or her maintenance.³⁷ The juvenile court also has the power to order the parent or other people liable to maintain the child or juvenile to contribute to his maintenance.³⁸

CASE STUDY

A newborn baby, Mia, has tested positive for in-utero exposure to methamphetamine, despite their mother insisting that she did not use substances throughout her pregnancy. Professionals working with the mother are concerned that she does not have safe and stable housing and there are a number of potential risks to Mia if she was to go home. A Multi-Disciplinary Case Conference (MDCC) was held, and the professionals involved in the case established a case of child abuse and neglect. A Care or Protection Order was granted, and the Court ordered that Mia be placed in the care of an institution for a period of 12 months, subject to ongoing review of the mother's progress.

3. Wardship

The child is made a ward of court.³⁹ Wardship jurisdiction lies in the Court of First Instance, which "*has inherent jurisdiction to deal with the custody of any child who is a Hong Kong subject and irrespective of where the child may be at the relevant time or of the fact that one parent may be resident out of the jurisdiction*".⁴⁰ While there is no stated limit on the court's powers to make orders in relation to wardship, the wardship jurisdiction of the Court of First Instance has been invoked in the following circumstances:

- a. to resolve disputes regarding custody of a minor, including where the applicant has no standing to seek custody under statutes (e.g. a relative of a minor);
- b. to prevent a minor from being abducted, or to secure the return of a minor already abducted;



- c. to allow a minor to be adopted overseas as there was no procedure permitting a child to leave the jurisdiction to be adopted overseas; and
- d. to order an operation to be performed for a minor when the parents of the minor refused to give consent.⁴¹

Any person can make an application for an order that a child be made a ward of court and that child will become a ward of court immediately upon the making of such an application.⁴² Once warded, the minor will come under the guardianship of the court, which has authority to make any order both in respect of the ward's (the child's) person and property.⁴³ The court usually delegates actual care and control of the ward to another person. No major decision affecting the child can be made without the consent of the judge – the court may even make orders relating to the maintenance, education, religion and marriage of the ward.⁴⁴

CASE STUDY

Tony is two years old and his parents have been missing since he was born. Tony has been living with grandparents, but they can no longer care for him. He has been waiting for a medical procedure, but as the grandparents have no parental rights to the child, they cannot give consent to medical care. Wardship is granted so that decisions about the child's medical care and placement in residential care can be made by a Court-appointed guardian.

CAN A CHILD BE PLACED INTO RESIDENTIAL CARE BY ONE PARENT WITHOUT THE CONSENT OF THE OTHER?

Assuming that the father has parental rights, then both parents have the right to apply to the court for an order to determine where the child lives.⁴⁵ Apart from the parents, the Director of Social Welfare is the only person who can otherwise make the application.⁴⁶ Neither grandparents, aunts, nor uncles etc. of the child have the ability to do so.

If the child is placed into residential care by one parent who is living in Hong Kong, but the other parent lives elsewhere (such as mainland China) and does not consent to the placement, then the first issue for the court to determine would be the child's place of habitual residence. If the child is not habitually resident in Hong Kong, then he or she may be returned to his or her place of habitual residence for such decisions to be made.⁴⁷ Depending on the laws of the place where the child habitually resides, the grandparents and other family members of the child may then have the right to apply for orders in respect of the child's custody.



WHAT ARE THE REVIEW PROCEDURES FOR RESIDENTIAL CARE CASES?

The government has a legal obligation under the Convention on the Rights of the Child to regularly review all residential care placements to make sure that the placements continue to be best suited to each child's needs and best interests.⁴⁸ Hong Kong law does not specify how often a residential care case must be reviewed, though in some cases, review procedures are specified in the contracts and agreements between the different residential care agencies and the government.

As defined by the Social Welfare Department, “**Permanency planning**” for a child under out-of-home care is a systematic, goal-directed and timely approach of care planning to maintain the child with his or her family of origin or live in a safe and permanent environment, aiming at securing stability and continuity of nurturing relationships for the child. When professionals plan to refer a child for residential child care services, the best interests of the child are paramount. A comprehensive assessment and accurate information of the family's situation, in respect to the child's genuine need for out-of-home care, are very essential for formulation of a follow-up plan.⁴⁹

WHEN A CHILD IS LIVING IN RESIDENTIAL CARE, ARE THERE ANY CIRCUMSTANCES WHERE THE BIRTH PARENTS OF THE CHILD WILL LOSE THEIR PARENTAL RIGHTS? IN THESE CASES, CAN THE CHILD BE ADOPTED?

Section 5(5)(a) of the Adoption Ordinance (Cap. 290) requires that parents must give their consent before the court makes any order to authorize an adoption of their child.⁵⁰ The parents shall cease to have any parental rights, duties, obligations or liabilities in respect of their child with effect from the execution of the form of consent.⁵¹ The court may dispense with the parents' consent and free the minors for adoption (which is called a 'freeing order') in the following situations⁵²:

1. in the case of a parent or guardian of the minor, that he has abandoned, neglected, or persistently ill-treated the minor;
2. in the case of a person liable by virtue of an order or agreement to contribute to the maintenance of the minor, that he has persistently neglected or refused so to contribute;
3. the person whose consent is required is incapable of giving consent or cannot be found or that his consent is unreasonably withheld.⁵³

In some cases, particularly where it seems unlikely that the child will ever be returned to his or her parents, it is possible for the Director of Social Welfare to apply for a freeing order on behalf of the child if the Director is the legal guardian of the child or the child is in the care of the Director.⁵⁴ Social workers working with the child must prepare all of the evidence available in order for the Judge to make a decision in the child's best interests.

Freeing Orders are covered in greater detail in the chapter “Adoption” of this manual.



Alternative Care Placements

What Residential Care Services are Available for Children in Hong Kong?

Residential child care services are provided for children and young persons under the age of 21 who cannot be adequately cared for by their families because of various reasons such as behavioural, emotional or relationship problems, or family crises arising from illness, death and desertion.⁵⁵

“Non-Institutional Care”, as defined by the Social Welfare Department includes:

- Foster care - for children under 18 years of age
- Foster care (Emergency) - for children under 18 years of age
- Small group homes - for children from 4 to under 18 years of age
- Emergency/Short-term Care in Small group Home - for children from 4 to under 18 years of age

“Institutional Care”, as defined by the Social Welfare Department includes:

- Residential child care centres (Residential creches) - for children under 3 years of age
- Residential child care centre (Residential nursery) - for children from 3 to under 6 years of age
- Children’s reception centre - for children under 18 years of age
- Children’s homes - for children and young persons from 6 to under 21 years of age
- Boy’s homes/girl’s homes – for children and young persons from 7 to under 21 years of age with behavioural or emotional problems.
- Boy’s hostels/girl’s hostels – for young persons from 14 to under 21 years of age with behavioural or emotional problems who are studying or working



INTRODUCTION TO HONG KONG'S FOSTER CARE SYSTEM

The foster care system in Hong Kong works under a system of subvention. While the system is centrally managed by the SWD, the management of the day-to-day care of the child is placed into the hands of a network of Foster Care Agencies.

The SWD has a dedicated foster care body named the Central Foster Care Unit (CFCU). This body oversees a team of referral workers, who are mobilized across family service centers. Families who cannot adequately care for their children due to various family problems or crises may apply for foster care services through social workers' referral. The application will be accepted if all parties agree that foster care is the most suitable service for the child. Once the application is approved, the CFCU will refer the case to Foster Care Agencies for matching and placement.

Once a child is matched, Foster Care Agencies will then work closely with referral worker in the planning and monitoring of the implementation and development of foster care services for both the child and the family. The Foster Care Worker is in charge of the day-to-day supervision of foster homes and foster children during placement. They will visit and stay in regular contact with the child, supervise and provide support to foster parents, record case notes, and facilitate regular case review meetings to develop the child's permanency plan and review case progress along with the referral worker.

Unlike many other countries, in Hong Kong the majority of children were placed in the residential care system with the consent of their respective parents. Because these placements were done voluntarily, the parents would generally retain the legal custody and guardianship over their children while their children are in care. Unlike in cases of wardship, in these voluntary placements there is typically no court involvement. Major decisions regarding the child's care and placement were not made through the courts but through the social welfare system and relevant social workers. However, in the case where professionals have concerns about the safety and welfare of the children, wardship applications can be made to the courts with the help of legal representation by social welfare professionals.



NOTE

RIGHT TO EDUCATION OF CHILDREN IN RESIDENTIAL CARE AND FOSTER CARE

As stated in previous sections, **all** children have the legal right to education, including all children living in residential care. This right is protected by both Hong Kong law⁵⁶ and international law⁵⁷ and applies to **every child**.⁵⁸ Discrimination in education is strictly prohibited.⁵⁹ This includes discrimination based on race, ethnicity, national origin, or gender. Even children who are not legal residents of Hong Kong have a legal right to education.

In addition, education should help children to develop “to their fullest potential.”⁶⁰ This means that each individual child has the right to education that meets their particular needs.

WHO PAYS FOR CHILDREN'S EDUCATION WHEN THEY ARE IN RESIDENTIAL CARE?

In most cases, even when a child has been placed in residential care, his or her parents would still have the legal responsibility to pay the school fees and similar expenses of the child.⁶¹ Where a child is receiving financial assistance from the Comprehensive Social Security Assistance (CSSA), his or her parents will typically be in charge of dispensing the money. In case of emergency, parents may apply for government money or emergency funds so as to cover the children's school fees and/or some schools may offer placements free of charge for the children who live in residential care.⁶²





Endnote

- 1 Scully-Johnson, A., Sihombing, Sala., & Lynch. (2016). *Reforming Hong Kong's Child & Family Justice System*. The Chinese University of Hong Kong Press.
- 2 Ijzendoorn, M., Bakermans-Kranenburg, M., Duschinsky, R., Fox, A., Goldman, P., Gunnar, M., Johnson, D., Nelson, C., Reijman, S., Skinner, G., Zeanah, C., & Sonuga-Barke, E. (2020). Institutionalisation and deinstitutionalization of children 1: a systematic and integrative review of evidence regarding effects on development. *Lancet Psychiatry*, 7(8). 10.1016/S2215-0366(19)30399-2.
- 3 Social Welfare Department The Government of the Hong Kong Special Administrative Region. (2021). 2019-20 Annual Service Provision and Statistics - Child Welfare Services. https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_familyspis/id_cws/
- 4 "As at 31 December 2014, there were 3,188 children placed in residential care with the consent of their parents or guardians. SWD does not keep statistics on the number of children in residential care because of a Care or Protection Order or of children in residential care by parental consent before a Care or Protection Order was made." Social Welfare Department The Government of the Hong Kong Special Administrative Region. (2015). *Replies to Questions Raised by Finance Committee Members in Examining the Estimates of Expenditure 2015-16*. Social Welfare Department The Government of the Hong Kong Special Administrative Region.
- 5 Guardianship of Minors Ordinance (Cap. 13), s. 10
- 6 Social Welfare Department The Government of the Hong Kong Special Administrative Region. (2021). Foster care service. https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_listofserv/id_fostercare/
- 7 Social Welfare Department The Government of the Hong Kong Special Administrative Region. (2018). *Replies to Questions Raised by Finance Committee Members in Examining the Estimates of Expenditure 2018-19*. Social Welfare Department The Government of the Hong Kong Special Administrative Region.
- 8 Ibid
- 9 As at 31 December 2017, the average length of stay in various foster families of each child was 35.2 months. The Government of the Hong Kong Special Administrative Region (2018, March 28). Press Releases. <https://www.info.gov.hk/gia/general/201803/28/P2018032800696.htm>
- 10 Knudsen, EI (2004). Sensitive Periods in the Development of the Brain and Behavior, *Journal of Cognitive Neuroscience*, 16(8), 1412-1425. <http://www.mitpressjournals.org/doi/pdf/10.1162/0898929042304796>.
- 11 Bellis, M.D.D and Zisk, A., (2014). "The Biological Effects of Childhood Trauma", *Child and Adolescent Psychiatric Clinics of North America*, 23(2), (2014) 185-222. <https://www.sciencedirect.com/science/article/abs/pii/S1056499314000030?via%3Dihub>
- 12 National Scientific Council on the Developing Child, (2007). *The Timing and Quality of Early Experiences Combine to Shape Brain Architecture Working Paper 5*, Centre on the Developing Child Harvard University, http://developingchild.harvard.edu/wp-content/uploads/2007/05/Timing_Quality_Early_Experiences-1.pdf; Greenough W.T. et al., (1987). Experience and Brain Development, *Child Development*, 58(3)539-559. http://www.jstor.org/stable/1130197?seq=1#page_scan_tab_contents.
- 13 Briggs-Gowan, M.J. et al. (2019). Adverse impact of multiple separations or loss of primary caregivers on young children. *European Journal of Psychotraumatology*, 10(1). <https://www.tandfonline.com/doi/pdf/10.1080/20008198.2019.1646965?needAccess=true>
See also Ward, H., & Brown R. (2014). *Safeguarding Children in the Early Years*. Pugh G., Duffy B.(Ed.), Contemporary Issues in the Early Years. Sage Publishing. [https://www.sagepub.com/sites/default/files/upm-binaries/55707_Pugh_&_Duffy_Sample_\(Chapter_14\).pdf](https://www.sagepub.com/sites/default/files/upm-binaries/55707_Pugh_&_Duffy_Sample_(Chapter_14).pdf)
- 14 See National Scientific Council on the Developing Child.(2014). *Excessive Stress Disrupts the Architecture of the Developing Brain: Working Paper 3*, Centre on the Developing Child Harvard University http://developingchild.harvard.edu/wp-content/uploads/2005/05/Stress_Disrupts_Architecture_Developing_Brain-1.pdf.



- 15 Ibid. http://developingchild.harvard.edu/wp-content/uploads/2005/05/Stress_Disrupts_Architecture_Developing_Brain-1.pdf.
- 16 See Mock, S.E., & Arai S.M. (2011). Childhood trauma and chronic illness in adulthood: mental health and socioeconomic status as explanatory factors and buffers. *Frontiers in Psychology*. <https://doi.org/10.3389/fpsyg.2010.00246>; Felitti V.J., & Anda R.F., (2009). The Relationship of Adverse Childhood Experiences to Adult Medical Disease, Psychiatric Disorders, and Sexual Behavior: Implications for Healthcare. Lanius R., & Vermetten E. (Ed.), *The Hidden Epidemic: The Impact of Early Life Trauma on Health and Disease*. Cambridge University Press. <https://doi.org/10.1017/CBO9780511777042.010>;
- 17 Greeson, J. et al. (2011). Complex Trauma and Mental Health in Children and Adolescents Placed in Foster Care: Findings from the National Child Traumatic Stress Network. *Child Welfare*, 90(6) https://www.researchgate.net/profile/Johanna-Greeson/publication/224845521_Complex_Trauma_and_Mental_Health_in_Children_and_Adolescents_Placed_in_Foster_Care_Findings_from_the_National_Child_Traumatic_Stress_Network/links/09e4150b64c4710c70000000/Complex-Trauma-and-Mental-Health-in-Children-and-Adolescents-Placed-in-Foster-Care-Findings-from-the-National-Child-Traumatic-Stress-Network.pdf
- 18 Pecora, P.J. et al. (2005). Improving Family Foster Care, Findings from the Northwest Foster Care Alumni Study. Casey Family Programs. http://www.casey.org/media/AlumniStudies_NW_Report_FR.pdf.
- 19 Braga, T., et al. (2017). Unraveling the link between maltreatment and juvenile antisocial behavior: A meta-analysis of prospective longitudinal studies. *Aggression and Violent Behaviour*, 33, 37-50. <https://www.sciencedirect.com/science/article/abs/pii/S1359178917300150>; Norman, R.E., et al. (2012). The Long-Term Health Consequences of Child Physical Abuse, Emotional Abuse, and Neglect: A Systematic Review and Meta-Analysis. *PLOS Medicine*, 9(11). <https://pubmed.ncbi.nlm.nih.gov/23209385/>; White, C.R. et al. (2011). The Relationship Between Homelessness and Mental Health Among Alumni of Foster Care: Results from the Casey Young Adult Survey. *Journal of Public Child Welfare*, 5(4), 369-389. <https://doi.org/10.1080/15548732.2011.599754>; Middlebrooks, J.S., Audage N.C. (2008) *The Effects of Childhood Stress on Health Across the Lifespan*. Atlanta (GA): Centers for Disease Control and Prevention, National Center for Injury Prevention and Control https://drum.lib.umd.edu/bitstream/handle/1903/22891/Childhood_Stress.pdf?sequence=1&isAllowed=y ; Lopez, P. et al. (2007). Addressing the Health Needs of Adolescents Transitioning Out of Foster Care. *Pediatric Nursing*, 33(4), 345-355. http://www.medscape.com/viewarticle/563202_1; Smith, C.A., & Thornberry T.P. (2006). The Relationship Between Childhood Maltreatment And Adolescent Involvement In Delinquency. *Criminology*, 33(4), 451-481. <http://dx.doi.org/10.1111/j.1745-9125.1995.tb01186.x>; Smith, C.A. et al, Adolescent Maltreatment and Its Impact on Young Adult Antisocial Behavior, *Child Abuse & Neglect*, 29(10), 1099-1119. <https://www.sciencedirect.com/science/article/abs/pii/S0145213405002097>; Kelley B.T. et al. (1997) In the Wake of Childhood Maltreatment, U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention. <https://www.ncjrs.gov/pdffiles1/165257.pdf>; Roman, N.P., & Wolfe, P. (1995). Web of Failure: The Relationship Between Foster Care and Homelessness. National Alliance to End Homelessness. <https://abfe.issuelab.org/resources/3897/3897.pdf>
- 20 Brown, L.A. (2020). Suicide in Foster Care: A High-Priority Safety Concern. *Perspectives on Psychological Science*, 15(3), 665-668. <https://journals.sagepub.com/doi/abs/10.1177/1745691619895076#articleCitationDownloadContainer>; Evans, R., et al. (2017) Comparison of suicidal ideation, suicide attempt and suicide in children and young people in care and non-care populations: Systematic review and meta-analysis of prevalence. *Children and Youth Services Review*, 82, 122-129 <https://www.sciencedirect.com/science/article/pii/S0190740917305261>; Vinnerljung, B., et al. (2006). Suicide Attempts and Severe Psychiatric Morbidity Among Former Child Welfare Clients—A National Cohort Study. *Journal of Child Psychology and Psychiatry*, 47(7), 723-33 <https://pubmed.ncbi.nlm.nih.gov/16790007>
- 21 Madigan, S. (2019). Testing the cycle of maltreatment hypothesis: Meta-analytic evidence of the intergenerational transmission of child maltreatment, *Development and Psychopathology*, 31(1), 23-25 <https://doi.org/10.1017/S0954579418001700>; Thompson, R. (2008). Exploring the Link Between Maternal History of Childhood Victimization and Child Risk of Maltreatment, *Journal of Trauma Practice*, 5(2), 57-72. <https://doi.org/10.1017/S0954579418001700>



- org/10.1300/J189v05n02_04; Violence and Injury Prevention Programme WHO European Centre for Environment and Health. (2007). The Cycles of Violence: The Relationship Between Childhood Maltreatment and the Risk of Later Becoming a Victim or Perpetrator of Violence. WHO Regional Office For Europe http://www.euro.who.int/__data/assets/pdf_file/0008/98783/E90619.pdf; Mapp, S.C. (2006). The effects of sexual abuse as a child on the risk of mothers physically abusing their children: a path analysis using systems theory. *Child Abuse and Neglect*, 30(11), 1293-1310. <http://www.sciencedirect.com/science/article/pii/S0145213406002365>; N, Assubj et al., The intergenerational transmission of child maltreatment: A three-level meta-analysis, *CHILD ABUSE AND NEGLECT* 84, 131-145 ;
- 22 Wulczyn, F. (2004). Family Reunification. *Children, Families, and Foster Care*, 14(1), 94-113, at 101-102 <http://files.eric.ed.gov/fulltext/EJ795826.pdf>.
 - 23 Leathers S.J., et al. (2010). Predicting Family Reunification, Adoption, and Subsidized Guardianship Among Adolescents in Foster Care. *American Journal of Orthopsychiatry*, 80(3), 422-431. <https://doi.org/10.1111/j.1939-0025.2010.01045.x>
 - 24 The Government of the Hong Kong Special Administrative Region, The 2021-2022 Budget, Head 170 – Social Welfare Department, <https://www.budget.gov.hk/2021/eng/pdf/head170.pdf>
 - 25 Dolezal, T. (2009). Hidden Costs in Health Care: The Economic Impact of Violence and Abuse. *Academy on Violence & Abuse*.
 - 26 Disclaimer: To respect the privacy of those who shared with us their stories, client names may have been changed.
 - 27 Convention on the Rights of the Child, Art. 9.
 - 28 Convention on the Rights of the Child, Art. 3(1); Guardianship of Minors Ordinance (Cap 13) s 3(1)(a)(i).
 - 29 Convention on the Rights of the Child, Art. 18(2),
 - 30 Convention on the Rights of the Child, Art. 19(1).
 - 31 Convention on the Rights of the Child, Art. 19(2).
 - 32 Convention on the Rights of the Child, Art. 20.
 - 33 UN General Assembly (64th sess: 2009-2010). (2010). Guidelines for the Alternative Care of Children: resolution / adopted by the General Assembly. United Nations Digital Library.
 - 34 Protection of Children and Juveniles Ordinance (Cap.213), s 34(1).
 - 35 Protection of Children and Juveniles Ordinance (Cap.213), s 34(1). The order referred to in paragraph (d) above can either be made alone or in addition to the order under paragraph (b) or (c).
 - 36 Protection of Children and Juveniles Ordinance (Cap.213), s 34(2).
 - 37 Protection of Children and Juveniles Ordinance (Cap.213), s 34(4)(a).
 - 38 Protection of Children and Juveniles Ordinance (Cap.213), s 34(4)(b).
 - 39 High Court Ordinance (Cap. 4), s. 26; Rules of the High Court (Cap. 4A), Order 90 (Proceedings concerning Minors).
 - 40 LexisNexis. (2018, July 30). Halsbury's Laws of Hong Kong, ¶180.353



- 41 Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China. (2011). Bills Committee on Guardianship of Minors (Amendment) Bill 2011. Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China. [yr10-11/english/bc/bc57/papers/bc571103cb2-2447-2-e.pdf](https://www.legco.gov.hk/yr10-11/english/bc/bc57/papers/bc571103cb2-2447-2-e.pdf), accessed on 24 June 2020.
- 42 High Court Ordinance (Cap. 4), s. 26(2).
- 43 Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China. (2015). Administration's response to issues raised by members of the Bills Committee at previous meetings. Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China.
- 44 LexisNexis. (2018, July 30). Halsbury's Laws of Hong Kong, ¶180.356
- 45 Guardianship of Minors Ordinance, s10(1).
- 46 Ibid.
- 47 Child Abduction and Custody Ordinance.
- 48 Convention on the Rights of the Child, Art. 2
- 49 Social Welfare Department The Government of the Hong Kong Special Administrative Region. (2021). Protecting Children from Maltreatment - Procedural Guide for Multi-disciplinary Co-operation (Revised 2020). https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_fcwprocedure/id_1447/
- 50 Adoption Ordinance (Cap.290), s. 5(5)(a).
- 51 Adoption Ordinance (Cap.290), s.5(5B).
- 52 Adoption Ordinance (Cap.290), s.6,
- 53 Adoption Ordinance (Cap.290), s. 6(1).
- 54 Adoption Ordinance (Cap.290), s 5A.
- 55 Social Welfare Department (2020) Residential Child Care Services, https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_listofserv/id_residchildcare/
- 56 Education Ordinance (Cap.279), s.74,
- 57 Convention on the Rights of the Child, Art. 28; International Covenant on Economic Social and Cultural Rights, Art. 13
- 58 UN Committee on the Rights of the Child (CRC). (2001). General comment No. 1 (2001), Article 29 (1), The aims of education. UN Committee on the Rights of the Child (CRC).
- 59 International Covenant on Economic, Social and Cultural Rights, Art. 2(2), 3; Convention on the Rights of the Child, Art. 2; Committee on Economic Social and Cultural Rights. (1999). CESCR General Comment No. 13: The Right to Education (Art. 13). Office of the High Commissioner for Human Rights.
- 60 Convention on the Rights of the Child, Art. 29(1)(a).
- 61 Protection of Children and Juveniles Ordinance (Cap.213), s 34(4)(b).
- 62 Based on conversation with Mother's Choice staff.



CHAPTER 7

Adoption: Law and Practice





Adoption

United Nations Convention on the Rights of the Child

Article 20

1. *A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.*
2. *States Parties shall in accordance with their national laws ensure **alternative care for such a child**.*
3. *Such care could include, inter alia, foster placement, kafalah of Islamic law, **adoption** or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.*

Article 21

"States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- a. *Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;*
- b. *Recognize that intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin."*

Adoption

INTRODUCTION

Under the United Nations Convention on the Rights of the Child (UNCRC), a child permanently deprived of his or her family environment may be adopted where it is considered to be in the child's best interests.

An adoption recognizes a new legal relationship between a child and their adoptive parents. The birth parents are released on all legal connections with the child, and the adoptive parents take on legal parental responsibility towards the child.¹

OVERVIEW OF THE ADOPTION PROCESS IN HONG KONG

The adoption process in Hong Kong is administered by SWD and governed by the Adoption Ordinance, Cap 290. The Adoption Unit of SWD takes the application and handles the matters in relation to adoption in Hong Kong. For intercountry adoptions (where a child habitually resident in one jurisdiction has been, is being, or is to be moved to another jurisdiction)², articles 2 to 37 of the Hague Convention have the force of law under the Adoption Ordinance³.

An adoption is only legal and effective under an Adoption Order. The proposed adopter or adopters are required to apply to the District Court for an Adoption Order. As a general rule, an Adoption Order would only be made by the court if consent is obtained from every person who is a parent or guardian of the child, or who is liable by virtue of any order or agreement to contribute to the maintenance of the child⁴ ("**Adoption Order with Consent**"). In extreme circumstances, the court may dispense with any consent required where adoption is deemed in the child's best interests⁵.

If the Director of Social Welfare is the legal guardian of the child or the child is in the care of the Director of SWD, the Director can apply to the court to release or "free" the child for adoption if the court is satisfied that consent required should be dispensed with ("**Freeing Order**"). Upon the making of the Freeing Order, all rights, duties, obligations and liabilities of the parents or guardians of the child shall vest in the Director as if the order were an Adoption Order and the Director were the adopter. The Director or an accredited body could then place the child for adoption.

If the necessary consent or a Freeing Order is obtained, the Director of Social Welfare could place the child for adoption.

Local Adoption in Hong Kong Local Adoption means the adoption of an infant resident in Hong Kong by a person resident in Hong Kong⁶.

1 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), art. 26; Adoption Ordinance (Cap 290), s 13.

2 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), art. 2; Adoption Ordinance (Cap 290), Sch 3.

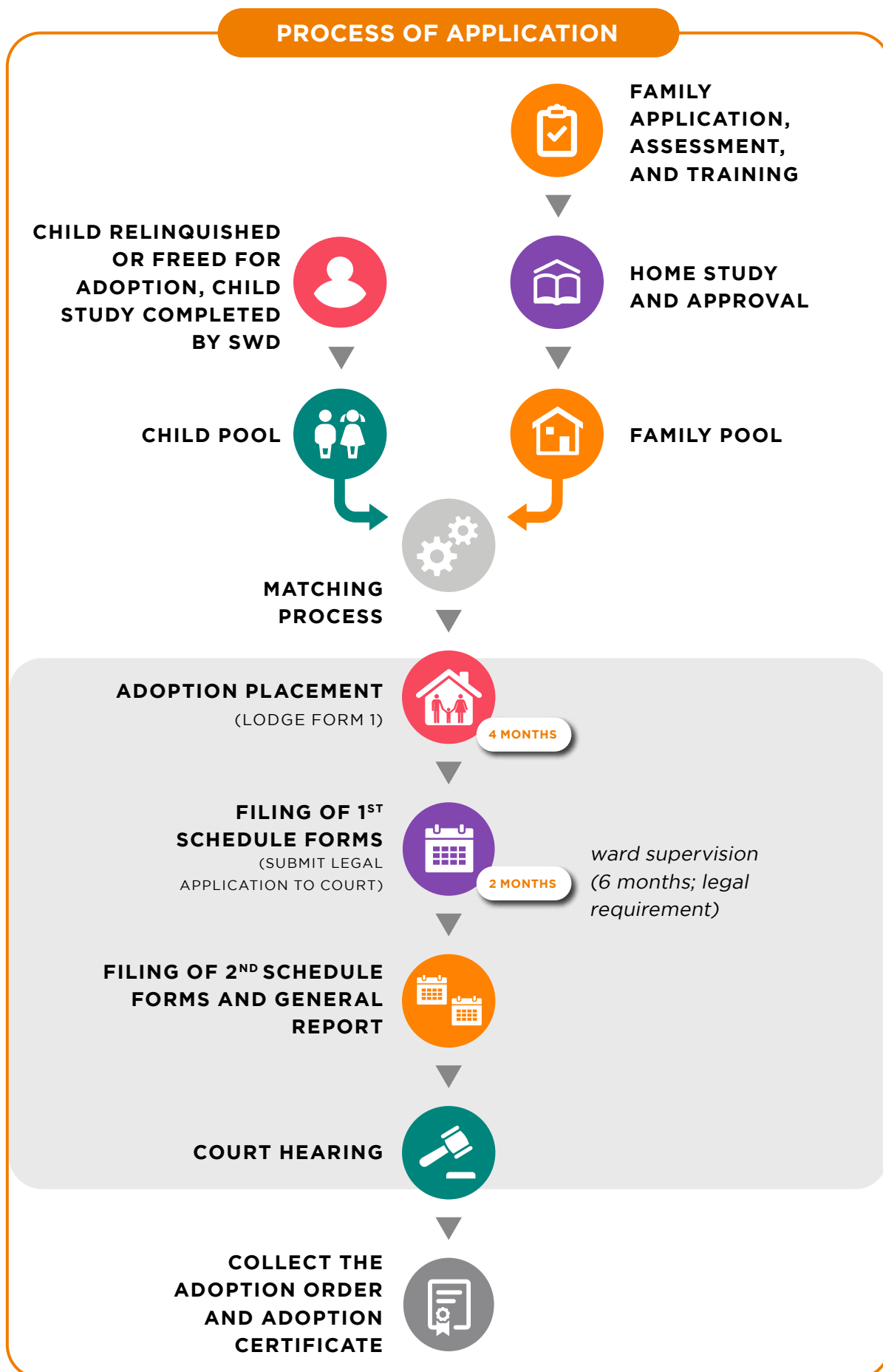
3 Adoption Ordinance (Cap 290), s 20B, Sch 3.

4 Adoption Ordinance (Cap 290), s 5(5)(a).

5 Adoption Ordinance (Cap 290), s 6.

6 Adoption Ordinance (Cap 290), s 7(25).

PROCESS OF LOCAL ADOPTION OF CHILDREN WHO ARE WARDS OF THE DIRECTOR OF SOCIAL WELFARE



OVERVIEW OF INTERCOUNTRY ADOPTION IN HONG KONG

Hong Kong, as a Special Administration Region of the People's Republic of China, the Convention is party to the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption (the "**Convention**"). All intercountry adoptions in Hong Kong have to meet the requirements of the Convention according to s.20B of the Adoption Ordinance (Cap. 290). The Convention seeks to protect the rights of the adopted child and the basic principles under the Convention are detailed below.

The Convention recognizes that the best place for the full development of a child is to "grow up in a family environment, in an atmosphere of happiness, love and understanding."⁷ International law requires that governments which are signatories to the Convention should prioritize taking steps to assist families, and enable a child to remain in their family of origin.⁸ In some cases, however, this is not possible. In these cases, the Convention still recognizes the importance that a child grows up in a family environment.⁹

The Convention states that the first consideration in all adoptions, for both in-country and international adoptions must always be the **best interests** of the child.¹⁰

While there is a preference for a child to be adopted within their original country, in some cases intercountry adoption may offer the possibility of a permanent family to a child for whom a suitable family cannot be found in locally.¹¹ Adoption of a child must be done in accordance with all applicable laws and procedures in the state of origin.¹² It is important that consent is obtained from all appropriate persons,¹³ and that these individuals have all been properly counselled on the process and meaning of adoption¹⁴.

Children have a legal right to have their opinions and wishes considered during the adoption process.¹⁵ The adoptive child should also be counselled about the process of adoption.¹⁶

7 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), preamble.

8 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), preamble.

9 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), preamble.

10 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), preamble, art. 1(a); Convention on the Rights of the Child, art. 21.

11 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), preamble; Convention on the Rights of the Child, Art. 21(b).

12 Convention on the Rights of the Child, Art. 21(a); Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), art. 1.

13 Convention on the Rights of the Child, Art. 21(a); Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), art. 4(c).

14 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), art 4(c)(1).

15 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), art 4(d)(2).

16 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), art 4(d)(1).

PROCESS OF OVERSEAS ADOPTION OF CHILDREN WHO ARE WARDS OF THE DIRECTOR OF SOCIAL WELFARE



ADOPTION ORDER WITH CONSENT – WHOSE CONSENT IS REQUIRED TO FREE A CHILD FOR ADOPTION?

Consent is needed from any individual who has legal parental rights over the child¹⁷. Generally, this means that at a minimum the birth mother must consent to the adoption.

In cases where the birth mother is married, it is assumed that her husband is the biological father and also has parental rights over the child.¹⁸ In such cases, consent is typically also needed from the legal husband. If there is evidence that shows on the balance of probabilities the legal husband is NOT the biological father, however, his consent is not needed (see box below).

An unmarried biological father does **not** have any automatic parental rights over the child.¹⁹ Currently, the consent of an unmarried biological father would only be legally required if he has been given parental rights through a court order, for example an order for custody, guardianship, or access.²⁰ This is true even if his name is on the child's birth certificate.²¹ Under recent case law, however, he may have a legal right to be contacted, to see if he would like to seek a court order which gives rise to his parental rights (see box below).

In the case that the parents of the child are both deceased, consent is required from the child's guardian or someone who is liable by virtue of any order or agreement to contribute to the maintenance of the child.²²

NOTE

What if the Legal Husband is not the Biological Father?

The legal husband of the mother of the child is presumed to be the biological father of a child. If there is evidence that the legal husband is NOT the biological father of the child, this presumption is rebuttable on the balance of probabilities (i.e. meaning the burden of proof is on the applicant to show that it is more likely than not).²³ Evidence that could prove this might be, for example, DNA test results, interview statements or immigration records proving the legal husband was not physically present in Hong Kong during the conception period.

However, if the legal husband is appointed to be the guardian of the child or if he applies to be and is ordered by the court to be the guardian of the child, the legal husband's consent is still required.

WHAT IS THE DIFFERENCE BETWEEN GENERAL CONSENT AND SPECIFIC CONSENT ADOPTIONS?

General consent adoption refers to cases where the parents or guardian of the child give consent to adoption without specifying the adoptive parents. General consent

17 Adoption Ordinance (Cap 290), s 5(5)(a).

18 Parent and Child Ordinance (Cap 429), s 5(1).

19 Guardianship of Minors Ordinance (Cap 13), s 3(1)(c)(ii).

20 Guardianship of Minors Ordinance (Cap 13), 3(1)(c)(ii).

21 The name on the birth certificate is considered evidence of paternity, but does not on its own provide the putative father with any parental rights or responsibilities. See Chapter on Birth Registration, as well as The Law Reform Commission of Hong Kong, Report on Illegitimacy (1991), p. 52, para 5.15, p. 61, para 5.45.

22 Adoption Ordinance, s 5(5)(a).

23 Parent and Child Ordinance (Cap 429), s 5(2).

should be given under a prescribed form²⁴ and once the general form of consent is executed, the parent who gives the consent ceases to have any parental rights, duties, obligations or liabilities in respect of the child.²⁵ The Director of Social Welfare immediately becomes the guardian ad litem of the child.²⁶

Specific consent adoption refers to adoptions where the parents or guardian of the child give consent to specific, named adoptive parents. Specific consent is given under a prescribed form.²⁷ A parent does not lose his or her parental rights upon giving specific consent and his or her parental rights will only be permanently lost when the Adoption Order is made.²⁸

According to the forms provided under the Adoption Rules (Cap. 290A, forms 4 and 4B), specific consent adoption can occur in a wide variety of situations, including step parent situations, situations where the parents or guardian know the adopter's names, or even situations where the parents or guardian only know the adopter's serial number because the adopter wishes to remain anonymous (Rule 6).

CAN THE CONSENT TO ADOPTION BE REVOKED?

Specific consent does not relinquish parental rights. It could be revoked at any time before an Adoption Order is made.²⁹

General consent relinquishes the parental rights of the parent who gives consent. A general consent adoption can be revoked within three months by written notice to the Director of SWD.³⁰ After three months, it is necessary to seek the permission of the court to revoke the general consent.³¹

CAN BIRTH PARENTS REQUEST SPECIFIC REQUIREMENTS OF THE ADOPTIVE PARENTS, FOR EXAMPLE RACE OR RELIGION, WHEN THEY SIGN A GENERAL CONSENT FORM TO FREE THEIR CHILD FOR ADOPTION?

Birth parents have no general rights to make any special requests when freeing their child for adoption. If there are any special considerations taken, this will be on a case-by-case basis and would be up to the discretion of the SWD worker assigned to the case. Ultimately, the SWD has a legal duty to act in the best interests of the child, even when conflicts arise with respect to any requests made by the birth parents.

ADOPTION BY FREEING ORDER – CAN A CHILD BE ADOPTED EVEN WITHOUT THE BIRTH PARENTS' CONSENT?

Under s.5(5)(a) of the Adoption Ordinance, an Adoption Order shall not be made except with the consent of every person who is a parent or guardian of the child. However, in extreme cases, a child could be adopted even without the consent of the parents. The court may dispense with the consent requirement under s.6 of the Adoption Ordinance if it is satisfied that:

- a. the parent or guardian of the child has abandoned, neglected, or persistently ill-treated the child;

24 Form 4A of Adoption Rules (Cap 290A).

25 Adoption Ordinance (Cap 290), s.5(5B).

26 Adoption Ordinance (Cap 290), s.5(5F).

27 Form 4 or Form 4B of Adoption Rules (Cap 290A).

28 Adoption Ordinance (Cap 290), s.8(1)(a).

29 Adoption Ordinance (Cap 290), s.8(1)(a).

30 Adoption Ordinance (Cap 290), s 5(5C).

31 Adoption Ordinance (Cap 290), s 5(5D).



- b. the person liable by virtue of an order or agreement to contribute to the maintenance of the infant has persistently neglected or refused so to contribute;
- c. the person whose consent if required cannot be found, or is incapable of giving his consent or has unreasonably withheld consent; or
- d. it is of the opinion that such consent ought, in all the circumstances of the case, to be dispensed with.³²

In these cases, the Director of Social Welfare can apply for a Freeing Order to free the child for adoption if the Director is the legal guardian of the child or the child is in the care of the Director.³³

When applying for a Freeing Order, any person whose consent would normally be required (normally the child's parents) must still be notified that such order is being sought and they must be given the opportunity to be heard.³⁴ This is because an order which dispenses with the consent of a parent, if granted, would permanently sever the legal relationship between the parent and the child. It is an extremely serious invasion of parental rights, and would only be sanctioned by the court after hearing the parent or after making all reasonably practicable efforts to notify him or her of the proceedings.

WHAT COUNTS AS ABANDONMENT UNDER S6 OF THE ADOPTION ORDINANCE?

Abandonment has been described in Hong Kong case law as a situation where the parent completely disregards their parental duty and “gives up the child and has left it to its fate”³⁵

The Director of Social Welfare must have taken all reasonably practicable steps to get in contact with the parents regarding the child and the future welfare plan for the child.³⁶ This may include trying to reach the birth parent by phone, post, home visits, etc.³⁷

In some cases, the court may also require that there be “substituted service” as a means of trying to reach the birth parents. This means that in addition to trying to reach the parents by traditional means, a notice must be advertised in public newspapers.³⁸

32 Adoption Ordinance (Cap 290), s 6.

33 Adoption Ordinance (Cap 290), s 5A(1)-(2).

34 Adoption Ordinance (Cap 290), s 5A(3).

35 *Re C* [2011] HKCFI 1669, [2012] 1 HKLRD 308, HCMP 1292/2011 (18 November 2011), at para. 25, citing *Watson v Nikolaisen* [1955] QB 286, at 295.

36 *Re C* [2011] HKCFI 1669, [2012] 1 HKLRD 308, HCMP 1292/2011 (18 November 2011) at para. 29, citing *In re F(R) (an infant)* [1970] 1 QB 385, per Salmon LJ at p.389C and *Re A (adoption of a Russian child)* [2000] 1 FCR 673, per Charles J at p.683a-e; *D v W & Anor* HCMP 1566/2015.

37 *Re C* [2011] HKCFI 1669, [2012] 1 HKLRD 308, HCMP 1292/2011 (18 November 2011), at para. 30.

38 *Re C* [2011] HKCFI 1669; [2012] 1 HKLRD 308; HCMP 1292/2011 (18 November 2011), at para 2.

CASE EXAMPLE

***D v 王 & Anor* HCMP 1566/2015**

WKY's birth mother and biological father were both residents of mainland China. WKY was born during a visit to Hong Kong. Both parents were suspected of having mental illnesses and could not properly care for the baby. The parents had signed a letter of authorization authorizing an aunt, Madam Wong, to bring WKY to Hong Kong and to care for the baby. Both of the parents disappeared sometime in 2010. Madam Wong and WKY's other family members were no longer able to care for her and approached the SWD for assistance. Repeated attempts to locate the birth parents were not successful. Newspaper notices were posted in mainland China and broadcasts were made on the radio. Notices were also posted in Social Welfare Offices, police stations, and other government and NGO offices. The parents could still not be located.

In light of all the evidence, the court therefore found that the parents had abandoned and/or neglected the baby and that the SWD had taken all reasonably practical steps to locate the birth parents and inform them of the proposed welfare and adoption plan for WKY. The court ordered that WKY be freed for adoption.

WHAT COUNTS AS NEGLECT UNDER S6 OF THE ADOPTION ORDINANCE?

A parent is considered to have neglected their child where they do not make the proper arrangements for the care and nurturing of the child. Neglect involves a very serious dereliction of parental responsibility, in that the parent fails to provide for "adequate and proper food, nursing, clothing, medical aid, accommodation, education or any other special needs of the child."³⁹

CASE EXAMPLE

***Re C* [2012] 1 HKLRD 308**

The court found that there was overwhelming evidence on both abandonment and neglect. The mother had four children, all between the ages of one and thirteen. All four children were in residential care. The mother had a long history of drug abuse, had been in and out of drug treatment, and had a history of disappearing. She had no regular employment or stable relationships. She continued to take drugs during pregnancy, completely ignoring the health of her children and did not take good care of them or have any concrete welfare plan. Two of her children exhibited drug withdrawal symptoms at birth. After giving birth to her youngest child, she was discharged from hospital for treatment of her own drug withdrawal symptoms and since then she has become untraceable.⁴⁰

39 *Re C* [2011] HKCFI 1669; [2012] 1 HKLRD 308; HCMP 1292/2011 (18 November 2011), at para. 26.

40 *Re C* [2011] HKCFI 1669; [2012] 1 HKLRD 308; HCMP 1292/2011 (18 November 2011).

WHERE THE BIRTH PARENTS ARE MISSING, WHAT ARE THE PROCEDURES AND TIMELINES FOR TRACING THE PARENTS FOR THE PURPOSE OF OBTAINING CONSENT AND/OR PROVING ABANDONMENT?

There are no legally required timelines or procedures regarding the tracing process. Tracing guidelines are internal guidelines of the SWD and are not made public.

This makes it especially important that social workers continue to monitor a case and advocate for agreed upon deadlines to be met. Otherwise it is possible that the child's case could become "stuck" because of an impasse in the tracing process.

It appears that the current procedure is first to check with the Immigration Department, to see whether the birth parents or other relevant individuals remain in Hong Kong.

LOCAL TRACING - If these individuals are in Hong Kong, tracing is conducted internally within the Social Welfare Department and other Government Departments via memos to the Police and CSSA, Housing Department, Transport Department, and Utilities Units. Externally, advertisements will be placed on the radio and in local newspapers. In practice it appears that recent domestic tracing cases are typically completed within six months.

OVERSEAS TRACING - If these individuals are no longer in Hong Kong, the case will be referred to International Social Services to conduct overseas tracing. Overseas tracing can take at least four to six months and is heavily dependent on the country in which the birth parent or other individuals are currently living and the speed and capabilities of the overseas partnering agency in that country.

WHAT COUNTS AS "UNREASONABLE WITHHOLDING OF CONSENT" UNDER S6 OF THE ADOPTION ORDINANCE?

The courts have explained that "unreasonable withholding of consent" means that a parent, in refusing to give consent to free the child for adoption, is "refusing to acknowledge the realities that point so clearly to his or her inability – past, present and future – to be able to care for the child and in that refusal, is prejudicing the child's manifest best interests and thereby acting unreasonably."⁴¹

The fundamental question is what a reasonable parent, placed in the position of the parent in question, would do.⁴² The unreasonableness of the parent who is withholding consent must, if he or she has ignored or disregarded some appreciable ill or risk, be likely to be avoided or some substantial benefit likely to accrue if the child is adopted.⁴³

A recent English case has stated that the important question to ask is whether a Freeing Order is a "**necessity**" in order to protect the best interests of the child.⁴⁴ This means that the bar for proving "unreasonable withholding of consent" is high. There is no Hong Kong case to date which follows this English decision on this point and it is not sure whether such a high threshold will apply in Hong Kong.

41 *Director of Social Welfare v DTTH* [2012] HKCFI 1423, [2012] 5 HKLRD 203, HCMP 1841/2008 at para 11 citing *Director of Social Welfare v DT* [2008] 3 HKLRD 192, per Hartmann J (as he then was) at para 29.

42 *Director of Social Welfare v DTTH* [2012] HKCFI 1423, [2012] 5 HKLRD 203 at para 10; *Re W (an infant)* [1971] AC 682.

43 *Director of Social Welfare v DTTH* [2012] HKCFI 1423, [2012] 5 HKLRD 203 at para 11 citing *In re W (an infant)* [1971] AC 682, per Lord MacDermott at p 709A-C.

44 *In Re B (A child)* [2013] UKSC 33.

Examples of circumstances where parents have been “unreasonably withholding consent” include cases where they continue to abuse drugs and/or alcohol⁴⁵, have been criminally convicted⁴⁶, suffered from mental health disorder⁴⁷, and/or have no concrete plan to care for their children.⁴⁸ Under these circumstances, the Hong Kong courts have dispensed with the need for consent from a parent or guardian, thereby

CASE
EXAMPLE

***Director of Social Welfare v DTTH* [2012] HKCFI 1423, [2012] 5 HKLRD 203, HCMP 1841/2008**

The mother was a long term drug addict and repeat criminal offender. She had three children, one of whom had already been freed for adoption. Her youngest child exhibited withdrawal symptoms at birth and was placed into foster care. The mother had no contact with the birth father. After the child's birth, the mother was imprisoned for nearly a year and a half on theft charges.

The court cited the following facts in justifying the making of its order:

1. The mother had **failed to put her life in order**. For example, even after she was released from prison, she did not have a stable residence, regular employment or relationships. She failed to keep her promises to resume her parental duties or cooperate with case workers. She had been involved in repeated criminal offenses and had a history of drug abuse.
2. She lacked child-care abilities and had **failed to show concern** for the infant. For example, she did not keep in touch with case workers and rarely enquired about the infant's conditions.
3. She **failed to come up with a concrete child-care plan** for the child.

In light of all of this evidence, the court determined that the mother was demonstrably unable to care for the infant, but she simply refused to give consent to the infant's adoption. In so doing, she was prejudicing the child's manifest best interests and thereby acting unreasonably. Any reasonable parent in her position would not withhold her consent to the infant's adoption. The court also stated that the advantages of adoption for the infant are sufficiently strong to justify overriding the views and interests of the mother. The court therefore held that she was “unreasonably withholding consent” and freed the child for adoption.

NOTE: Questions to consider on whether to apply for a Freeing Order

1. Is there any realistic long-term plan for the care of the child?
2. Do the birth parent(s) and the child continue to have any sort of substantial relationship?
3. What is in the best interests of the child?

Having asked these questions, if the social worker feels that freeing a child for adoption is the best course of action, he or she should consider seeking legal advice before moving forward. Note – only the Director can make the application for the freeing order.

45 *Director of Social Welfare v DTTH* [2012] HKCFI 1423, [2012] 5 HKLRD 203, HCMP 1841/2008; *Director of Social Welfare v DT* [2008] 3 HKLRD 192, HCMP 1620/2007.

46 *Director of Social Welfare v DTTH* [2012] HKCFI 1423, [2012] 5 HKLRD 203, HCMP 1841/2008, *Director of Social Welfare v DT* [2008] 3 HKLRD 192, HCMP 1620/2007.

47 *Director of Social Welfare v L* [2006] 3 HKLRD 789, HCMP 972/2006.

48 *Director of Social Welfare v DTTH* [2012] HKCFI 1423, [2012] 5 HKLRD 203, HCMP 1841/2008.

WHAT EVIDENCE CAN BE COLLECTED BY A SOCIAL WORKER TO PROVE THE NEED FOR A FREEING ORDER?

Courts have considered the following when deciding whether or not to free a child for adoption. Social workers should record case-note evidence on these topics.

- Does the parent have a stable residence?
- Does the parent have regular employment?
- Is drug use occurring?
- Has the parent kept his or her promises around parental duties?
- Has the parent kept in touch with child-care workers?
- Has the parent inquired about the child's condition?
- Does the parent have a concrete plan on how to care for the child?

DOES DEATH OF A PARENT DISPENSE WITH THE REQUIREMENT TO SEEK CONSENT?

If a parent dies, the surviving parent (if any) is the guardian of the minor either alone or jointly with any guardian otherwise appointed.⁴⁹ As such the death of a parent will dispense with the need to seek that parent's consent to a Freeing Order. Consent however will need to be obtained from the child's surviving parent and/or guardian.

Do factors such as long-term incarceration, criminal record, or continued substance abuse dispense with the requirement to seek consent?

When deciding whether to free a child for adoption, courts must balance all of the available evidence and factors of the case. Long-term incarceration, criminal records, or continued substance abuse are not reasons to dispense of parental consent by themselves.⁵⁰ Courts would seriously consider whether these factors prevent the parents from carrying out their parental duty and responsibility and these concerns may be used as evidence in court to show whether the parent is carrying out their parental duty.

Case law has shown incarceration is one of the factors the Court will take into account when considering whether a parent has unreasonably withheld their consent to a Freeing Order.⁵¹ However, consent must always be sought from the parent or legal guardian. Depending on the circumstances, their refusal to provide consent may be viewed by the Court as indication that consent is unreasonably withheld.

49 Guardianship and Minors Ordinance, s 5.

50 *Director of Social Welfare v DTTH* [2012] HKCFI 1423, [2012] 5 HKLRD 203, HCMP 1841/2008 at para 10, "[W]hether a parent has unreasonably withheld his consent is a question of fact to be determined objectively with regard to the totality of all the circumstances of the case."

51 *Director of Social Welfare v DT* [2008] 3 HKLRD 192, HCMP 1620/2007; *Director of Social Welfare v DTTH* [2012] HKCFI 1423, [2012] 5 HKLRD 203, HCMP 1841/2008.



Prospective Adoptive Parent Suitability Assessment

WHAT ROLE CAN A SOCIAL WORKER PLAY?

Social workers screen prospective adoptive parents to make sure that they are a good match for the child. They can help counsel birth parents to make sure that they understand what it means to give a child up for adoption and what the process would look like. They can counsel children and help prepare them for the adoption process. They can also counsel adoptive parents and help support them as they transition into their new parenting roles.

Social workers can help advocate for both families and children during matching panels, and make sure that the “best interests of the child” always remains the top priority. Social workers can also be advocates for the children by presenting information about them in a way that draws interest and gives them the best possible chance at adoption.

It is important that social workers consider their own values on adoption, inter-racial families and other related issues to make sure that their judgments are not affected by their own personal biases.



WHAT ARE THE BASIC REQUIREMENTS OF A PROSPECTIVE ADOPTIVE PARENT?

The following are the basic requirements for a married or single person to apply to be an adoptive parent:⁵²

- he or she is at least 25 years old and mature enough to make the life-long commitment to adopt a child and to take up parental responsibilities;
- he or she has good physical and mental health without serious illness/disability and is thus able to raise the child until the child can be independent;
- he or she is reasonably educated, preferably with at least six years of post-kindergarten primary-level education;
- he or she is in stable employment and has sufficient financial resources, and a stable accommodation in which to bring up a child;
- he or she has resided in Hong Kong for 12 months or longer so as to be familiar with the social environment and community resources, and can stay for a continuous period of 12 months or more to complete the adoption process (not applicable to intercountry adoption);
- (if married) he or she has been married for at least 3 years and the marriage is stable enough to provide the child with secure home care; and
- he or she has no criminal record.

HOW ARE PROSPECTIVE ADOPTIVE PARENTS ASSESSED ON THEIR SUITABILITY TO BECOME PARENTS?

Under both international and Hong Kong law, prospective adoptive parents must be evaluated to determine whether or not they are suitable to become adoptive parents.⁵³

Under the Adoption Ordinance, the Director of SWD or an accredited body may decide whether an applicant is suitable to become an adoptive parent. The accredited bodies registered by SWD are Mother's Choice, Po Leung Kuk and International Social Services, Hong Kong. For overseas adoptions the Director may take into account any recommendations made by the relevant accredited body.⁵⁴ Social workers therefore have the duty to provide their professional judgment on whether or not a prospective family is suitable to become adoptive parents.

If a prospective adoptive family raises red flags, it is important to investigate and deal with this early on in the application process. If a prospective adoptive family is found to be highly unsuitable, the SWD should be alerted to prevent the parents from "agency-shopping" by later re-applying through other agencies.

52 See further details in the "Considering Adoption" leaflet published by the SWD at http://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_listofserv/id_adoptionse/

53 Adoption Ordinance (Cap 290), ss. 27 and 29; Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), arts. 5(a), 15.

54 Adoption Ordinance (Cap 290), s 29(3).

WILL A CHILD'S VOICE/OPINION BE HEARD IN ADOPTION PROCEEDINGS? WHAT IF A CHILD DOES NOT WANT TO BE ADOPTED?

Under both international and Hong Kong law, a child has the right to have his or her voice and opinion considered in adoption proceedings. The Adoption Ordinance specifically requires that the court must give “due consideration” to the wishes and opinions of the child.⁵⁵

How much weight is given to a child's opinion is dependent on the age of the child and the other factors in the case.⁵⁶ The overarching factor in any adoption proceeding is always the best interests of the child.⁵⁷ The ultimate decision on this is always up to the court when deciding the case.

In practice, a child should typically be counselled regarding the adoption process and a social worker or clinical psychologist's assistance should be provided in order to prepare a child for adoption. This is especially true in cases of intercountry adoption.⁵⁸

If a child expresses that he or she does not want to be adopted, this is an important consideration. This must be weighed, however, against the long-term interests of that child in going to a permanent family and the knowledge that the child may not fully understand the adoption process. In practice, counselling the child to help him or her understand the process and prepare the child for the adoption is often necessary. The child will have an opportunity to express his or her views before the court, and it will be up to the court to decide whether adoption is in the child's best interests.

WHAT IS THE LEGAL STATUS OF AN ADOPTION CERTIFICATE AS COMPARED TO A BIRTH CERTIFICATE?

An adopted person will be re-registered in the Adopted Children Register.⁵⁹ The original birth entry will be marked with the word ‘Adopted.’⁶⁰

Under Hong Kong law, a certified copy of an entry in the Adopted Children Register, if sealed and stamped by the register's office and if it has a record of the date and country of birth, can be used as evidence of the date and country of birth, just as if it was an ordinary birth registration.⁶¹

Any person is entitled to ask for a certified copy of an entry in the Adopted Children Register, under the same terms as they could ask for a certified entry under the Births and Deaths Registration Ordinance.⁶²

55 Adoption Ordinance (Cap 290), s 8(1)(b).

56 Adoption Ordinance (Cap 290), s 8(1)(b).

57 Adoption Ordinance (Cap 290), s 8(1)(b).

58 Social Welfare Department, 2014 Submission on the 1993 Hague Intercountry Adoption Convention Country Profile, p.11.

59 Adoption Ordinance (Cap 290), s 19.

60 Adoption Ordinance (Cap 290), s 19.

61 Adoption Ordinance (Cap 290), s 18(2).

62 Adoption Ordinance (Cap 290), s 18(3).

The Right for Children to Know their Parents

ARTICLE 7

United Nations Convention on the Rights of the Child

*The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, **as far as possible, the right to know** and be cared for by **his or her parents**.*

INTRODUCTION

Under Article 7(1) of the Convention on the Rights of the Child, a child, whether adopted or not, **has the right to know his or her parents**.

The right to know his or her parents should always be extended to the child in consideration of his or her best interests save that the right of a child to know information about his or her birth parents in cases of adoption may be limited in some adoption contexts.

Closed Adoption: An adoption process where there is no interaction or communication between the birth family and adoptive families, nor any identifying information provided to either party.

Open Adoption: A form of adoption in which there are some kind of contact or link between the biological family and the adoptive family relating to the adopted child. Normally the identifiable information including contact are shared between both parties, and the birth family is able to maintain a relationship with the child.

In Hong Kong, under a “General Consent to Adoption”, the system is generally one of closed adoption. However, where known, the name(s) of the birth mother (or father) are included in the Child’s Adoption Order.

The Adoption Unit of the SWD collects relevant information on the background of the child, including medical records, and birth family history, which is passed to the child and adoptive family. However, all identifying information of the birth parents based on the file records is not shared.

The SWD cannot disclose any identification information of the birth parents based on the file records without the birth parents’ permission. The SWD cannot disclose any identification information of the adoptive parents or the child based on the file records without the adoptive child and/or their parents’ permission.

ROOT TRACING

“Root tracing”, as it is termed in Hong Kong, is the process by which an adopted person, or their adoptive family, seeks information about his or her birth family.

WHAT ROLE CAN A SOCIAL WORKER PLAY?

Social workers and NGO staff can play a critical role in helping a child to understand his or her story.

The first thing that they can do is to keep excellent records of the child's life when he/she is in care. This allows a child who later wants to root trace to be able to have a more accurate and detailed understanding of his or her own history.

A social worker or case worker supporting a birth mother who is choosing adoption for her child can encourage her to leave a letter, photos, gifts, and information in the child's case file.

Social workers and NGO staff can also be an important source of information regarding root tracing. They can share information with the adoptive parents and children about how to access root tracing services and can also share with both adoptive parents and birth parents the benefits that can come from allowing a child to access information about his or her birth family.

HOW CAN ONE COMPLETE ROOT TRACING?

The Adoption Unit of the SWD has a formal application process by which an adopted person or their adoptive family can apply for information about their birth parents.

In certain cases, it is also possible to **apply to the court** for an order requiring a search of the Adopted Children Registry to find an adopted person's record.⁶³

WHO CAN APPLY TO THE ADOPTION UNIT OF THE SWD FOR ROOT TRACING?

- An adopted person over 18,
- An adopted person under 18 with consent from their adoptive parents,
- Adoptive parents, whose child is under 18.

CAN A BIRTH PARENT APPLY TO THE ADOPTION UNIT OF THE SWD SEEKING INFORMATION ABOUT THE CHILD?

- A birth parent will be encouraged to leave their updated contact details with the Adoption Unit, in order for it to be possible for them to be contacted if the adopted child/person, or adoptive family request root tracing services. A birth parent may also be allowed to leave a letter or gift to the child to keep in the child's file.

63 Adoption Ordinance (Cap 290), s 18(4).

Individuals who want to start the process of root tracing should contact the Adoption Unit of SWD to explain the reason for contact and why the individual is root tracing, which may include:

- Seeking identifying information such as medical information,
- Seeking information regarding the names or last known location of their birth parents,
- Request to establish contact with their birth family through a social worker, through exchanging letters, emails, or phone calls, or meeting with birth family members,
- Seeking information on birth family members including parents, grandparents, and siblings.

The Adoption Unit of the Social Welfare Department should request the adopted person's documents as proof of identity before commencing the root tracing process:

- Passport
- Adoption Order
- Adoption certificate

Once the Adoption Unit receives the documentation, they will start a search for the adopted person's file. They will then send a short letter to the last known address of the birth parents, to inform them of the adopted person's search, and whether any information has been requested (for example, contact details, photographs, or permission to share photographs of the adopted person).

If the adopted person has a birth sibling who has been adopted by a different adoptive family, the Adoption Unit may contact the sibling's adoptive family to inform them of the adopted person's search.

Consent of the birth parents or sibling will be sought on whether to provide the information requested. The Adoption Unit cannot force the birth parents to consent to the adopted person's request.

If all parties have consented to contact, any contact between the adopted person and the birth parents will first be facilitated by a mediator from the Social Welfare Department.

The mediator may facilitate contact may include sending letters and photos, exchanging medical information, and arranging the first meeting between the parties.

The Adoption Unit may offer limited counselling services to all parties involved, including the birth parents, adopted person and adoptive parents, to discuss the expectations of both parties and to help parties prepare for the reunion.

Contact information

Social Welfare Department – Adoption Unit

auenq@swd.gov.hk

CHAPTER 8

Introduction to Data Privacy





Introduction

NGOs handle huge amounts of personal information of their staff, volunteers, donors, event participants, and clients, including children.

In the course of handling child abuse cases, NGOs will collect and receive personal information of clients. It may be necessary for this personal information to be shared with third parties (such as law enforcement officers and/or hospital workers) for the purpose of protecting a child.

The collection and use of personal information is governed by the Personal Data (Privacy) Ordinance ("**PDPO**") in Hong Kong.

Introduction to the Personal Data (Privacy) Ordinance

WHAT IS THE PERSONAL DATA (PRIVACY) ORDINANCE?

The Personal Data (Privacy) Ordinance (Cap. 486 of the Laws of Hong Kong) regulates the use of and prohibits the misuse of personal data by data users who control the handling, processing, transfer, collection, retention and use of the personal data from within Hong Kong, regardless of where the data subjects are located.

The Office of the Privacy Commissioner for Personal Data ("**PCPD**"), an independent statutory body, oversees the enforcement of the PDPO.

WHAT IS PERSONAL DATA?

"Personal data" means any data relating directly or indirectly to a living individual (i.e. the data subject), which can be used to identify that individual, and in a form in which access to or processing of the data is practicable.

NOTE

Data of a deceased individual is not "personal data", and is not afforded the protections of "personal data" under the PDPO. Thus, deceased individuals' data should be treated differently.

EXAMPLES OF PERSONAL DATA PROTECTED BY THE PDPO INCLUDE:

- NAMES
- PHONE NUMBERS
- ADDRESSES
- IDENTITY CARD NUMBERS
- PHOTOS
- MEDICAL RECORDS
- EMPLOYMENT RECORDS

WHO IS RESPONSIBLE UNDER THE PDPO?

A "data user" is defined as a person who, either alone or with others, controls the collection, holding, processing or use of the personal data of a data subject.¹



The definition of data user covers all legal entities, including corporations, partnerships and trusts, and organisations (both *private* and *public*).

An NGO worker becomes a data user when he/she collects personal information from a client, the data subject. An NGO is also regarded as a data user as the processor and holder of the personal data collected by the worker.

WHAT IS REGULATED UNDER THE PDPO?

1. Collection of personal data
2. Use and disclosure of personal data, with specific provisions for use and disclosure for the purposes of direct marketing
3. Retention of personal data, including how long it can be retained, accuracy and security
4. Granting of access to and correction of personal data

In their day-to-day work, social workers need to collect, use and if needed, disclose (share) the personal data collected from clients to third parties to protect the best interest of the client. All of such activities are regulated by the PDPO.

¹ Section 2 of PDPO.



General Practices

What are the **6** Data Protection Principles (Annex 1)?

Under the PDPO, there are data protection principles (DPPs) that all data users must comply to (with exemptions).

PRINCIPLE 1 – PURPOSE AND MEANS OF COLLECTION OF PERSONAL DATA

Personal data must be collected in a **lawful and fair manner**. The purpose of collection must be directly related to a function or activity of the data user. The data collected should be:

- i. necessary for or directly related to that purpose
- ii. must not be excessive.

Before collecting any data or first using the data for the purpose for which it was collected, data users must notify data subjects:

- a. the purpose for which the data is to be used
- b. to whom the data may be transferred
- c. whether it is obligatory or voluntary for them to supply the data. If obligatory, the consequences of failure to supply the data
- d. their rights to request access to and correction of the data
- e. the name or title and address of the individual who handles requests made to the data user.

The above would usually be contained in the data user's Personal Information Collection Statement ("**PICS**") to be provided to the data subject. Before collection of personal data from clients, NGOs should pass a copy of their PICS to them for noting/ signing, and be familiar with the contents of the PICS to address any potential queries from clients.

PRINCIPLE 2 – ACCURACY AND RETENTION OF PERSONAL DATA

The data user must take all practical steps to ensure the personal data is accurate and not being kept longer than necessary to fulfil the purpose for which it is collected.

If there is reasonable ground for believing personal data is inaccurate, the data must be erased or not used for the collection purpose until after rectifying the data.

PRINCIPLE 3 – USE AND DISCLOSURE OF PERSONAL DATA

A data user must only use or disclose personal data:

- a. for the purpose for which it was originally collected
- b. for a directly related purpose
- c. for a purpose to which the data subject has consented

In other words, a data user must not use personal data for a new purpose unless:

- a. with *prescribed consent* of the data subject. "Prescribed consent" means the express consent given voluntarily by the data subject².
- b. It fits an exemption in Part VIII of the PDPO, which will be discussed in Section 5³.

4-STEP GUIDING QUESTIONS to consider whether disclosure of personal data can be made :

1. Is there disclosure of personal information?
2. If there is disclosure, is the disclosure for a new purpose?
3. If the disclosure is for a new purpose, did the data subject give prescribed consent to such disclosure?
4. If no consent was given, are there any applicable exemptions?

If the answer is "**Yes**", to all questions, you can consider disclosing the personal data.



PRINCIPLE 4 – SECURITY OF PERSONAL DATA

A data user needs to take all practicable measures to protect personal data from unauthorised or accidental access, processing, erasure, loss or use.

The data user must consider:

- a. the nature of data and the damage that could result from unauthorised or accidental access, process, erasure, loss or use
- b. the physical location where the data is stored
- c. any security measures used for the equipment where the data is stored
- d. any measures taken for ensuring the integrity, discretion and competence of persons having access to the data
- e. any measure taken for ensuring the secure transmission of the data.

² Section 2 of the PDPO.

³ Sections 51 to 63 of the PDPO.

PRINCIPLE 5 – INFORMATION TO BE GENERALLY AVAILABLE

A data user must take practicable steps to ensure that any person can ascertain the personal data policies and practices in relation to personal data, including the types of personal data it holds and how the data is used.

PRINCIPLE 6 – ACCESS TO AND CORRECTION OF PERSONAL DATA

A data subject is entitled to access to his/her personal data and allowed to make corrections if it is inaccurate⁴.

When a data subject makes a personal data access or correction request, a data user must respond within 40 days of receiving the request or otherwise as soon as is practicable.

What Happens if PDPO is not Complied With?

Whilst non-compliance with the PDPO does not directly constitute a criminal offence, it may result in an inquiry and/or investigation being initiated by The Office of the Privacy Commissioner for Personal Data (PCPD).

Criminal Liability - If the PCPD determines that a DPP has been breached, they may serve an enforcement notice directing the data user to remedy the contravention and/ or instigate the prosecution action. Not responding to this enforcement notice is an offence which could result in a maximum fine of HK\$50,000 and 2 years of imprisonment, and a daily penalty of HK\$1,000 if the offence continues to be committed.

Civil Liability - An individual who suffers damage, including injured feelings, by reason of contravention of the PDPO in relation to his or her personal data may seek compensation from the data user concerned and/or an injunction prohibiting disclosure by way of civil proceedings.

4 A personal data access or correction request may be refused if specific exemptions to this data principle apply. The exemptions relate to staff planning and employment, personal references, the awarding of contracts/awards.



What are the Relevant Exemptions in Handling Child Abuse Cases ?

The PDPO provides a few exemptions to the DPPs in relation to crime, health, and emergency situations.

CRIME PREVENTION AND DETECTION

Section 58 of the PDPO provides an exemption from DPP3 (use and disclosure of data for original purpose, etc.) if the compliance would likely **prejudice the detection or prevention of crime or the prevention, preclusion or remedying** (including punishment) **of unlawful or seriously improper conduct**.

For example, you should consider disclosure to the Police if the client has provided you with information identifying himself/herself to be a victim of abuse.

HEALTH

Section 59 of the PDPO provides an exemption from DPP3 (use and disclosure of data for original purpose, etc.) for personal data relating to the physical or mental health of the data subject if the compliance would likely **cause serious harm to the physical or mental health** of the data subject or any other individuals.

For example, you should consider disclosure of client information to hospital staff if the client indicates he/she is suicidal.

PARAGRAPH 4.13

PROCEDURAL GUIDE FOR HANDLING CHILD ABUSE CASES⁵

Claiming this exemption, professionals (e.g. medical practitioners, residential child care staff) may share health record of service users, including suspected abusers and victims of child abuse, with other concerned professionals on a need-to-know basis **for the purpose of protecting a child from serious physical and/or mental harm**.

5 Social Welfare Department, December 2015 (https://www.swd.gov.hk/en/index/site_pubsvc/page_family/sub_fcwprocedure/id_1447/)



HANDLING LIFE-THREATENING EMERGENCY SITUATIONS

Personal data is exempt from DPPs 1 and 3 if applying these principles would be likely to prejudice:

- a. identifying the individual who is reasonably suspected to be, or is, involved in a life-threatening situation
- b. informing the individual's *immediate family members* or relevant persons of the individual's involvement in the life-threatening situation
- c. carrying out of emergency rescue operations or provision of emergency relief services.⁶

Immediate family member in relation to a data subject means another person who is related to that person by blood, marriage, adoption or affinity. Care must be taken when informing an immediate family member in circumstances where a suspected abuser is a close relative or caregiver (see section 6.5 below).

For example, you should consider disclosure to the client's parents or Legal Guardian if he/she is in a life-threatening situation, or disclosure to the Police/Fire Services to facilitate rescue from a life-threatening situation.

Can I Use and Disclose Personal Information in Child Abuse Cases?

CAN I DISCLOSE CLIENT'S PERSONAL INFORMATION TO RELEVANT THIRD PARTIES?

Social workers collect and use personal information from clients on a day-to-day basis for the purpose of taking case follow-up actions. There are situations where a social worker might find it necessary to disclose the personal information to a third party, e.g. to report crime to the Police, and/or to preserve the safety of the client. The disclosure constitutes a change of purpose to which the information is collected and requires consent of the data subject or an exemption to be made.

HOW DO I OBTAIN CONSENT FROM THE CLIENT (INCLUDING MINORS)?

The relevant consent should be obtained from the data subject, where possible or practicable.

Special treatment applies in the case where the data subject is a **minor**, an individual whose age is below 18. In the case of a minor, consent can be given by a **relevant person** to the minor, namely, a person who has parental responsibility for the minor or is their Legal Guardian⁷. The relevant person can also request for data access/correction on behalf of the minor.

However, the minor has the right to refuse disclosure of his/her personal data to his or her parents (i.e. relevant persons). The Education Bureau's *Points to Note on School Administration and Management*⁸ provides that if the minor objects to the disclosure of his/her data to his/her parents, the parent would not be considered to be acting on behalf of the minor. In this scenario, the consent of the relevant persons (i.e. the parents) would not suffice and the consent of the minor would be required.

6 Section 63C of the PDPO

7 Section 2 of the PDPO.

8 Accessible at Education Bureau's website: <https://www.edb.gov.hk/attachment/en/sch-admin/admin/about-sch/personal-data-ordinance-cap486-note/privacy.pdf> (at page 16)

DOES A CHILD HAVE THE RIGHT TO REFUSE HIS OR HER DATA TO BE DISCLOSED TO A PARENT OR GUARDIAN WHEN ARRESTED OR ADMITTED TO HOSPITAL?

A child may refuse his or her data to be disclosed to a parent or guardian when arrested or admitted to hospital. However, there are exemptions that may apply in both circumstances to make such disclosure, if certain conditions are met:

I. IF THE CHILD IS ARRESTED

If the child informs the Hong Kong Police Force or the Customs and Exercise Department that they do not want a parent or guardian informed, or otherwise refuses a parent or guardian to be notified of their arrest, then section 59A of the PDPO provides an exemption to DPP3 regarding use or disclosure of personal data. In these circumstances, the police or customs officer may disclose personal data to the parent or guardian where the purpose of the disclosure is:⁹

- a. to facilitate the parent or guardian to exercise proper care and guardianship of the child
- b. in the interest of the child, and
- c. the application of DPP3 would be likely to prejudice the exercise of proper care and guardianship of the child by the relevant person.

Further, if the child is under the age of 16 and the officer has applied section 59A and determined that they should disclose the personal data to the parent or guardian, the officer is required to make all reasonable efforts to inform the parent(s) or guardian of the child to come to the station where the child is being held.¹⁰

II. IF THE CHILD IS ADMITTED TO HOSPITAL

As noted in section 5.3, an exemption applies to disclose personal data to an immediate family member in a life-threatening situation, but taking care in circumstances where a suspected abuser is a close relative. Where a child seeks confidential medical advice (including admission to hospital) in non-life-threatening situations, common law principles apply. Doctors and healthcare providers are required to exercise their professional judgement to assess whether the child has sufficient understanding and intelligence to understand the nature and to consent to medical treatment, applying the following considerations:¹¹

1. If the doctor is of the view that the procedure could be said to be in a child's best interests;
2. If the doctor cannot persuade the child to tell his/her parents or guardian; and
3. The child is able to understand the nature and consequences of the medical procedure.

⁹ Section 59A of the PDPO.

¹⁰ Section 3 of the Police General Orders.

¹¹ This test is derived from UK case of *Gillick v West Norfolk and Wisbech AHA* [1986] AC112, [1985] 3 All ER 402.

WHAT SHALL I DO IF A CHILD HAS DISCLOSED CHILD ABUSE INCIDENTS BUT REQUESTED THE SOCIAL WORKER TO KEEP THE INFORMATION CONFIDENTIAL?

It should be explained to the child in a child-friendly way that a social worker can not make these promises. The social worker should assure the child that the goal of any follow up actions is for his/ her best interests to keep them safe and provide support services for the child.

SHOULD DISCLOSURE OF PERSONAL INFORMATION BE MADE EVEN IF THERE IS NO CONSENT FROM THE CLIENT?

The primary concern is always the welfare and safety of the client. Whilst the starting point is that client information is confidential, there may be circumstances that may justify disclosure (in case of crime, health, or emergency situations).

The social worker should balance the interest between confidentiality and protecting the best interest of the client, and make the necessary disclosure to prevent harm or perpetration of a crime.

WHAT INFORMATION SHOULD BE PROVIDED TO RELEVANT THIRD PARTIES SUCH AS LAW ENFORCEMENT OFFICERS AND/OR THE MEDICAL PROFESSIONALS?

In handling reports of child abuse, the paramount concern of all parties is to protect the safety and best interests of children, especially where the suspected abusers are often their close relatives or caregivers. The Police may need to gather evidence including testimonies of child(ren) concerned and witnesses, case exhibits, medical/ forensic evidence and any other circumstantial evidence, in order to establish the allegation.

In an investigation, a social worker may need to provide information including full records of such interviews, whether in the form of a written report, audio/ video recordings or otherwise, including date, time, location, persons involved, purpose of the communications, process of the events, and personal observations, etc.¹²

You may also need to disclose personal information of a client to medical professionals on a need-to-know basis to facilitate appropriate treatment. Relevant information would include the client's medical history (including any allergies, pregnancies) and details of the acts causing harm to the client.

PARAGRAPH 4.4

PROCEDURAL GUIDE FOR HANDLING CHILD ABUSE CASES

Relevant information relating to child protection may include:

- a. health and development of a child and his/her exposure to possible harm
- b. child care ability of a parent or caregiver that may pose danger to the child under his/her care
- c. act that may cause harm to a child
- d. actual harm to the child.

12 Annex VI to Chapter 4 of the Procedural Guide for Handling Child Abuse Cases

When deciding whether disclosure should be made, it should be noted that each case is decided on its own merit, but the paramount concern is always the welfare of the client.

HOW MUCH INFORMATION SHOULD BE DISCLOSED TO THE RELEVANT THIRD PARTIES?

Social workers should disclose only the necessary (but not excessive) amount of confidential information that is directly relevant to the purpose for which the disclosure is made.

For example, for prevention of crime, only facts relating to the crime or facts that would facilitate the police to investigate the crime should be revealed. Other information that does not assist this purpose (e.g. medical history unrelated to the crime) should not be disclosed.

According to the **Guidelines on Code of Practice for Registered Social Workers**¹³, reasonable efforts should be made to remove any information from case material that may reveal the identity of clients to someone casually related to clients, such as neighbours, colleagues and school teachers.

CAN I VERBALLY DISCUSS PERSONAL INFORMATION OF THE CLIENT WITH OTHER SOCIAL WORKERS RELATING TO CHILD PROTECTION?

If the personal data are to be used and shared to prevent crime (child abuse investigation) or prevent harm to clients (for example, when a social worker is alerted of a child abuse case and it occurs to him/her to be necessary to involve another social worker who is the primary case handler of or has better access to that client), the disclosure may be exempt from DPP3.

REMEMBER

“4.17 Confidential information should not be discussed in any setting unless confidentiality can be ensured. Hence, discussion in public or semi-public areas such as hallways, waiting rooms, elevators and restaurants should be avoided.

...

4.19 All professionals should not disclose identifiable information of any service user in the course of discussion for teaching or training purposes or seeking advice from a third party outside their organisation unless the service user has consented to the disclosure of confidential information.”

Chapter 4 of the Social Welfare Department Procedural Guide

13 Social Workers Registration Board, 15 January 2010, at paragraph 8.2 (<https://www.swrb.org.hk/en/Content.asp?UId=15>)

A woman with dark, curly hair and glasses is sitting and holding a baby. She is feeding the baby with a clear plastic bottle. The baby is wearing a white onesie and orange shorts. The background is slightly blurred, showing a red basket and some shelves.

Conclusion

- Personal data of clients should be collected, used, stored and disclosed in accordance with the PDPO.
- Whether an exemption to disclose data applies to a particular case should be considered on a case-by-case basis, always having regard to the best interest of the client.
- Keep your organization informed as soon as practicable to facilitate discussion on whether disclosure should be made, and if so, the extent of disclosure.
- Keep a clear record of the considerations taken and the discussions made when deciding whether disclosure to be made, which can be used as evidence if and when a decision to disclosure is subject to any challenge by any parties. In the event of uncertainty or doubt, legal advice should be sought on whether disclosure should be made.

Annex 1 – 6 Data Protection Principles at a Glance

6 DATA PROTECTION PRINCIPLES



DATA COLLECTION PRINCIPLE

Personal data must be collected in a lawful and fair way, for a purpose directly related to a function or activity of the data user.

Data subjects must be notified of the purpose and the classes of persons to whom the data may be transferred. Data collected should be necessary but not excessive.



ACCURACY & RETENTION PRINCIPLE

Practicable steps shall be taken to ensure personal data is accurate and not kept longer than is necessary to fulfil the purpose for which it is used.



DATA USE PRINCIPLE

Personal data must be used for the purpose for which the data is collected or for a directly related purpose, unless voluntary and explicit consent with a new purpose is obtained from the data subject.



DATA SECURITY PRINCIPLE

A data user needs to take practicable steps to safeguard personal data from unauthorised or accidental access, processing, erasure, loss or use.



OPENNESS PRINCIPLE

A data user must take practicable steps to make personal data policies and practices known to the public regarding the types of personal data it holds and how the data is used.



DATA ACCESS & CORRECTION PRINCIPLE

A data subject must be given access to his/her personal data and allowed to make corrections if it is inaccurate.

CHAPTER 9

Appendices



Code of Practice for Registered Social Workers

PREAMBLE

In accordance with Section 10 of the Social Workers Registration Ordinance (Chapter 505), the Social Workers Registration Board approves and issues this Code of Practice for Registered Social Workers "for the purpose of providing practical guidance in respect of the professional conduct of registered social workers (including ethical matters relating to such conduct)".

The primary objective of the Code of Practice is for the protection of clients⁽¹⁾ and the members of society at large. To enhance public trust and confidence in the social work profession, the issue of a code of practice is essential.

This document serves as a guide to the everyday conduct of social workers. Under section 11 of Social workers Registration Ordinance, this Code of Practice will be used as a basis for adjudication when the conduct of a social worker is alleged to have violated the standards specified in this document. It represents standards of ethical behaviour for social workers in professional relationships with clients, with colleagues, with agency, with profession, and with society as a whole. It is applicable to any professional conduct of social workers.

Social workers are required to cooperate in the implementation of this Code of Practice and abide by any disciplinary rulings based on it. They should also keep abreast of the laws of Hong Kong which may be amended from time to time. Social workers should take adequate and appropriate measures and action to prevent, discourage, correct, or expose the unethical conduct of other social workers. They should also take reasonable and appropriate measures to monitor all staff under their supervision and other persons assisting them in delivering service not to violate the Code of Practice or jeopardize the interest of clients⁽²⁾.

PART 1 – BASIC VALUES AND BELIEFS

1. Social workers' primary mission is to help people in need and to strive to address social problems.
2. Social workers respect the unique value and dignity of every human being irrespective of one's ethnicity, colour, family/social/national origin, nationality, culture, birth, sex, age, language, beliefs, political and other opinion, family/social/economic status, disability, educational attainment, contribution to society, or sexual orientation.
3. Social workers believe that individuals have the potential to develop and thus accepts a responsibility to encourage and facilitate the self-realization of individuals with due regard to the interest of others.
4. Social workers accept responsibility to advance social justice and to safeguard the cause of human rights.
5. Social workers believe that each society, regardless of its form, should provide maximum benefits to its members.
6. Social workers accept responsibility to update, upgrade and devote their professional knowledge and skills to the betterment of individuals and society, with the aim to empower people to act on their own behalves as far as possible.
7. Social workers recognise the central importance of human relationships and seek to strengthen relationships among people in a purposeful effort to promote, maintain and enhance the well-being of individuals, families, social groups, organizations and communities for the prevention and relief of hardship and suffering.

Part 2 – Principles and Practices

RELATED TO CLIENTS

Responsibility

1. Social workers have a primary responsibility to the clients.

Cultural Awareness

2. Social workers should recognise the ethnic and cultural diversity of the communities being served.
3. Social workers should be acquainted with and sensitive to the cultures of clients and appreciate the differences among them in respect of their ethnicity, national origin, nationality, religion and custom.

Informed Decision and Self-determination

4. Social workers acknowledge a responsibility to inform clients of their rights and help them to obtain appropriate services. Clients should also be informed of, as far as possible, obligations and possible consequences associated with services provided to them.
5. Social workers should clearly inform clients, who are using services under compulsion, of their rights as well as the limits of their rights and assist them in attaining as much autonomy as possible.
6. Taking into account the limit of clients' rights to self-determination, social workers should encourage clients to participate as far as possible in decision-making about the goals, alternatives and services available to them.

Use of Information and Principles of Confidentiality

7. Social workers should respect clients' right to privacy and confidentiality of their information, subject to other statutory requirements including, in particular the Personal Data (Privacy) Ordinance (Cap.486). They should also, as far as possible, fully inform clients of the limits of confidentiality in a given situation, the purpose for which information is obtained, and how it may be used.
8. In disclosing case materials, social workers should make necessary and responsible efforts to remove all identifying information and to seek consent, as far as possible, from the client and the relevant agency.
9. Social workers should take precautions to ensure and maintain the confidentiality of information transmitted to other parties through the use of electronic media. Disclosure of identifying information should be avoided whenever possible.
10. Social workers should inform clients of the limitation and risks associated with such services provided via electronic media.
11. Social workers should not discuss confidential information in any setting unless privacy can be ensured.
12. Social workers should protect the confidentiality of clients during legal proceedings to the extent permitted by law.

Conflicts of Interest

13. Social workers should not abuse the worker-client relationship in pursuit of personal interests.

Sexual Relationship

14. Social workers should under no circumstances be engaged in any sexual activities or sexual contacts with clients, whether such activities or contacts are consensual or forced.
15. Social workers should not provide clinical services to individuals with whom they have had a prior sexual relationship.

Continuation of Service

16. If and when a fee for service is required, social workers should ensure that clients would not be denied timely services they need because of financial constraints.

Billing Practice

17. Social workers should establish and maintain billing practices that accurately reflect the nature and extent of services provided. Those being engaged in private or independent practice should also enable such billing practices to identify who has provided the service in the practice setting.
18. Social workers should clearly inform clients of all fee rates and charges before services are delivered.

RELATED TO COLLEAGUES

Respect

19. Social workers should pay due respect to different opinions and practices of other social workers, other professionals and volunteers. Any suggestion or criticism should be expressed and conflicts resolved in a responsible manner.

Interdisciplinary Collaboration

20. Social workers should discharge duties and treat co-workers, irrespective of which organizations they are from, in a fair and professional manner.
21. Social workers should collaborate as far as possible with other social workers and colleagues from other disciplines to enhance service effectiveness.
22. Social workers who are members of an interdisciplinary team should participate in and contribute to decisions that affect the well-being of clients by drawing on the perspectives, values, and experiences of the social work profession. They should induce and help the interdisciplinary team as far as possible to clearly define the professional and ethical obligations of the team as a whole and of individual team-members.
23. Social workers on whom a team decision raises ethical concerns should attempt to resolve the disagreement through appropriate channels. If the disagreement cannot be resolved, social workers should pursue other appropriate avenues to address their concerns consistent with clients' well-being.

Supervision and Training

24. Social workers, who provide supervision or professional consultation, should possess and maintain necessary knowledge, skills and methodology through appropriate education, training, consultation and research to facilitate them to perform the tasks in professional supervision and training competently. Social workers should provide training or instructions only within their areas of knowledge or competence.

25. Social workers who provide supervision should recognise a supervisor's educational, supportive, developmental and work-focused role and should not abuse the professional relationship with supervisees for any interests.
26. Social workers who provide supervision should monitor their supervisees to act in accordance with this Code of Practice.

Consultation

27. Social workers should seek the advice and counsel from colleagues whenever such consultation is in the best interests of clients.
28. Social workers should seek consultation only from colleagues who have demonstrated knowledge, expertise, and competence related to the subject of the consultation.
29. Social workers, for the purpose of consulting with colleagues about clients, should provide information on clients on a need-to-know basis.

Clients' Right of Choice

30. Social workers respect clients' right of choice. With due respect to other agencies and colleagues, they should not solicit the clients of other social workers.

Communications between Co-workers

31. Without the explicit permission of the author of the communications between co-workers, social workers should not convey to clients any contents of such communications that are beyond the scope of the clients' personal particulars.

Sexual Relationship

32. Social workers who function as supervisors or educators should not be engaged in any sexual activities or sexual contacts with supervisees, students, or trainees over whom social workers exercises professional authority.

RELATED TO AGENCY

33. Social workers should be responsible to the employing agency for the efficient and effective performance of professional duties.
34. Social workers should act constructively and responsibly to influence and to improve policies, procedures, and practice of their employing agencies in order to continuously improve the quality of service and to prevent social workers from violating this Code of Practice when enforcing agency policies.
35. Social workers should make clear in any public statements or when undertaking public activities whether they are acting in a personal capacity or on behalf of a group or an organization.
36. Social workers should not use institutional affiliation to recruit clients for private practice without the consent of the institution.

RELATED TO PROFESSION

Professional Responsibilities

37. Social workers should maintain honesty, integrity and responsibility in professional practice.
38. Social workers should uphold the values and ethics, and advance the knowledge of the profession.
39. Social workers should bring to the attention of appropriate bodies any violation of this Code of Practice that may put the interests of clients at risk, and should be ready to defend other social workers against unjust accusations.

Competence

40. Social workers should provide services and represent themselves as competent only within the boundaries of their education, training, license, certification, professional consultation, supervised experience, or other relevant professional experience.
41. Social workers should provide services in substantive areas or use intervention techniques or approaches that are new to them only after being engaged in appropriate studies, training, professional consultation, and supervision by people who are competent in those interventions or techniques.
42. When generally recognised standards do not exist with respect to an emerging area of practice, social workers should exercise careful judgment and take responsible steps, including appropriate education, research, training, professional consultation, and supervision, to ensure the competence in their work and to protect clients from harm.

Respect

43. In criticizing the profession, social workers should do so in a responsible and constructive manner.

Representation

44. Social workers should make no misrepresentation or false claim as to personal particulars, professional qualifications, credentials, education, competence, nature of service, and method of service or results to be achieved.

Independent Practice

45. Social workers who are engaged in private or independent practice should practise only within their areas of competence and offer suitable referrals when clients' needs go beyond their areas of competence. Any publicity on their practice should be made based on the actual qualifications, experience and expertise.

Professional Development

46. Social workers should accept responsibility for upgrading their professional skills and knowledge.
47. Social workers should take responsibility to help those who are entering the profession to establish, strengthen and develop their ethics, values, skills and knowledge.

Call to Duty

48. Social workers should respond to calls to duty⁽³⁾ when an explicit request is made and when a call is made specifically for social workers on the spot to render certain service under specific circumstances.

Related to Society

49. Social workers recognise the need to bring to the attention of policy makers or the general public any policies, procedures or activities of governments, societies or agencies which create, contribute to, or militate against the relief of hardship and suffering.
50. Social workers recognise the need to advocate changes in the formulation of policies and legislation to improve social conditions, to promote social justice and general welfare of the society. Social workers also recognise the need to contribute to the implementation of policies for human welfare and should not allow one's knowledge, skills or experience to be used to further unjust policies or inhuman practices.
51. Social workers recognise the need to prevent and eliminate discrimination, and the need to strive for a more reasonable distribution of resources and to ensure that all persons should have equal opportunity to access to the necessary resources and services.
52. Social workers recognise the need to promote conditions that encourage respect for diversity of cultures in the society.
53. Social workers recognise the need to encourage informed participation by the public in formulating and developing social policies and institutions.

Notes

1. "Clients" refers to direct service recipients currently receiving individual, group services or programme activities provided by social workers.
2. "Interest of clients" – Social workers should make professional judgement after considering and striking a balance among the interests of clients and those of other related bodies (including family members, agency, community and society, etc.).
3. "Call to duty" in this context is not applicable to calls made through mass media to social workers at large.

(Remark: The Chinese version of the "Code of Practice for Registered Social Workers" prevails over English version if there is any discrepancy.)

Source: Social Workers Registration Board, Online: Code of Practice - Social Workers Registration Board (swrb.org.hk)

First gazetted on 16 October 1998

Amended on 15 January 2010

Part 2 Paragraph 7 amended on 15 November 2013

List of Ordinances Relating to Child Abuse Offences

Protection of Children and Juveniles Ordinance, Cap 213

Evidence Ordinance, Cap 8

Section 4 Evidence given by children

Employment Ordinance, Cap 57

Criminal Procedure Ordinance, Cap 221

Section 79B Evidence by live television link

Section 79C Video recorded evidence

Section 79D Chief Judge to make rules

Live Television Link and Video Recorded Evidence Rules, Cap 221J

Rule 3 Evidence through live television link where witness is a vulnerable witness or is to be cross-examined after admission of a video recording

Education Ordinance, Cap 279

Section 74 Power of Permanent Secretary to order attendance at primary school or secondary school

Section 78 Enforcement of order

Adoption Ordinance, Cap 290

Section 22 Prohibition of certain payments

Section 23 Restriction upon advertisements

Section 23A Restriction on arranging adoption and placing of infant for adoption

Child Abduction and Custody Ordinance, Cap 512

Offences of Sexual Abuse

An offence of sexual abuse refers to the offences prohibited by one of the following Sections of the Crimes Ordinance, Cap 200 and the Prevention of Child Pornography Ordinance, Cap 579.

Crimes Ordinance, Cap 200

Part VI Incest

Section 47 Incest by men

Section 48 Incest by women of or over 16

Part XII Sexual and Related Offences

Section 118 Rape

Section 118A Non-consensual buggery

Section 118B	Assault with intent to commit buggery
Section 118C	Homosexual buggery with or by man under 16
Section 118D	Buggery with girl under 21
Section 118E	Buggery with mentally incapacitated person
Section 118G	Procuring others to commit homosexual buggery
Section 118H	Gross indecency with or by man under 16
Section 118I	Gross indecency by man with male mentally incapacitated person
Section 118J	Gross indecency by man with man otherwise than in private
Section 118K	Procuring gross indecency by man with man
Section 119	Procurement by threats
Section 120	Procurement by false pretences
Section 121	Administering drugs to obtain or facilitate unlawful sexual act
Section 122	Indecent assault
Section 123	Intercourse with girl under 13
Section 124	Intercourse with girl under 16
Section 125	Intercourse with mentally incapacitated person
Section 126	Abduction of unmarried girl under 16
Section 127	Abduction of unmarried girl under 18 for sexual intercourse
Section 128	Abduction of mentally incapacitated person from parent or guardian for sexual act
Section 129	Trafficking in persons to or from Hong Kong
Section 130	Control over persons for purpose of unlawful sexual intercourse or prostitution
Section 131	Causing prostitution
Section 132	Procurement of girl under 21
Section 133	Procurement of mentally incapacitated person
Section 134	Detention for intercourse or in vice establishment
Section 135	Causing or encouraging prostitution of, intercourse with, or indecent assault on, girl or boy under 16
Section 136	Causing or encouraging prostitution of mentally incapacitated person
Section 137	Living on earnings of prostitution of others
Section 138A	Use, procurement or offer of persons under 18 for making pornography or for live pornographic performances
Section 140	Permitting girl or boy under 13 to resort to or be on premises or vessel for intercourse
Section 141	Permitting young person to resort to or be on premises or vessel for intercourse, prostitution, buggery or homosexual act

Section 142	Permitting mentally incapacitated person to resort to or be on premises or vessel for intercourse, prostitution or homosexual act
Section 146	Indecent conduct towards child under 16
Section 147	Soliciting for an immoral purpose
Section 148	Indecency in public

Prevention of Child Pornography Ordinance, Cap 579

Section 3(1) Printing child pornography; making child pornography; producing child pornography; reproducing child pornography; copying child pornography; importing child pornography; or exporting child pornography

Section 3(2) Publishing child pornography

Section 3(3) Possession of child pornography

Section 3(4) Advertising child pornography

Offences of Cruelty

An offence of cruelty refers to Section 26 or 27 of the Offences Against the Person Ordinance, Cap 212.

Offences Against the Person Ordinance, Cap 212

Section 26 Exposing child whereby life is endangered

Section 27 Ill-treatment or neglect by those in charge of child or young person

Offences Involving an Assault on, or Injury or a Threat of Injury to, a Child

An offence involves an assault on, or injury or a threat of injury to, a child and the offence is triable on indictment or either summarily or on indictment refers to one of the following Sections of the Offences Against the Person Ordinance, Cap 212.

Offences Against the Person Ordinance, Cap 212

Section 17 Shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm

Section 19 Wounding or inflicting grievous bodily harm

Section 39 Assault occasioning actual bodily harm

Section 40 Common assault

Section 42 Forcible taking or detention of person, with intent to sell him

Section 43 Stealing child under 14 years

Escalating Best Interest Concerns in Practice

MOTHER'S CHOICE EXAMPLE

Mother's Choice case worker recognises that a child is at risk, is 'stuck' in institutional care or that permanency planning is unobtainable and / or unsafe.



1. **Mother's Choice** case worker to assess and document levels of risk and uncertainty from the best interest perspective.
2. Respond to immediate safety needs (involving supervisors if this requires Child Protection referral to the Police or Social Welfare Department).
3. Flag case to supervisor.

Case worker to work with **supervisor** to determine and implement a plan of action focussed on promoting best interest observations and recommendations to involved stakeholders (in line with the principles of this Manual).



Where there are complications, or the case is not progressing, supervisors may involve their seniors/ Head of team in the coordination of the next stage.

For very complex cases, there will be cross departmental efforts that work closely with legal professionals to be the voice for the child.



Abbreviations

CAIU	Child Abuse Investigation Unit
CCTV	Closed Circuit Television
CPR	Child Protection Registry
CPSIT	Child Protection Special Investigation Team
DH	Department of Health
DSW	Director of Social Welfare
FCPSU	Family and Child Protective Services Unit
HA	Hospital Authority
ICYSC	Integrated Children and Youth Services Centre
IFSC	Integrated Family Service Centre
ISC	Integrated Services Centre
MCCA	Medical Coordinator on Child Abuse
MDCC	Multi-disciplinary Case Conference on Protection of Child with Suspected Abuse
MO	Medical Officer
MSSU	Medical Social Services Unit
MSW	Medical Social Worker
NGO	Non-governmental Organization
PCJO	Protection of Children and Juveniles Ordinance
PD(P)O	Personal Data (Privacy) Ordinance
SWD	Social Welfare Department
SWO	Social Work Officer

Glossary of Terms

Affidavit	A statement of evidence sworn under oath for use in court
Adoption Certificate	A legal document which indicates a child's birth information. It replaces the child's birth registration. An official copy of an Adoption Certificate should have the same effect as a birth registration
Barrister	A qualified lawyer who is instructed by a firm of solicitors acting for the client to advocate before the court
Best Interests Standard	A legal standard which requires that in cases dealing with children, what is best for the child must be the primary or paramount consideration and must be considered above other considerations, for example what is best for the parents or other parties
Birth Registration	A legal process involving the registration of a child's details of birth in a register maintained by the government. Without this registration the child has no legal existence and will therefore have difficulties in accessing services and legal benefit in Hong Kong
Care and Protection Order	An order by a juvenile courts to (a) appoint the Director of Social Welfare to be the legal guardian of such child; or (b) commit him to the care of any person or institution who is willing to care of him; and/or (c) make an order placing him for a specified period under the supervision of any person
Child Protection Registry	A computerized record system, which is intended to record all cases of child abuse and make it easier to cross-check these cases between different departments and organizations
Continuous Contract	Employment of over 18 hours per week for at least 4 weeks
Convention on the Rights of the Child	An international treaty that sets out the basic rights of children under international law and the obligations of governments to fulfil those rights
Child Abuse Investigation Unit	A special unit of the police whose duty is to investigate sexual abuse cases of children below age 17 by family members, extended family members, or persons entrusted with their care, and certain cases of extreme physical abuse of children
Child Protection Special Investigation Team	A joint team of professionals, comprising of the Police (CAIU), social workers from CPSU, and clinical psychologists, that will be created to deal with cases of child sexual abuse or cases of severe physical abuse
Department of Justice	The department responsible for representing the Hong Kong Government in legal matters. It is also responsible for providing legal advice for the other departments of the Government, including advice regarding law reform
District Court	A court of record that includes the Family Court of Hong Kong. It has limited jurisdiction in civil and criminal cases as well
Evidence	Broadly speaking, evidence is anything that might prove something to be true. Evidence that can be used in a courtroom often includes things like "testimony" (meaning an oral or written statement), or documents or physical objects that help to prove whether something is true or not true

Equal Opportunities Commission	A government body that is responsible for eliminating discrimination, promoting equal opportunities, and helping people understand their rights and obligations under Hong Kong's anti-discrimination laws
Family Court	A division of the District Court that deals with matters related to children (including adoption) and families (e.g. divorces) in most cases. However, in more serious or complicated case, matters may be handled by the High Court (e.g. in wardship proceedings)
Family and Child Protective Services Unit	Specialized units operated by the Social Welfare Department to assist families in cases of child abuse or other domestic violence or abuse
Freeing Order	A legal order that a judge can make ending the birth parents' parental rights and freeing a child for adoption. Such orders will only be made under certain grounds indicating that a parent is unable or unwilling to fulfil their parental responsibilities
Foster Care	A type of residential care in which children whose parents cannot adequately take care of them are temporarily placed into an alternate family environment under the care of "foster parents" until they can re-unite with their families, join an adoptive family, or live independently
Guardian	A person who is legally entitled to parental rights and duties in relation to a child
High Court	The superior court of record that has unlimited jurisdiction to deal with most matters (including family, adoption, wardship), both civil and criminal. Wardship cases must begin in the High Court
Illegitimate Child	A child born to unmarried parents, who has not been subsequently legitimized under the Legitimacy Ordinance (Cap 184), such as by subsequent marriage of parents. The principle distinction between legitimate and illegitimate children is in respect of parental responsibility of natural/birth fathers. However, adoptive children are to be treated in all important respects as though they are the legitimate children of their adoptive parents (see Part 3 of the Adoption Ordinance, Cap 290)
Legitimate Child	A child born to married parents, or legitimized subsequently under the Legitimacy Ordinance (Cap 184), such as by subsequent marriage of parents
Mandatory Reporting	A legal requirement that exists in certain countries that requires all individuals, or certain types of professionals or categories of individuals, to report suspected cases of child abuse and neglect to government authorities
Minor (or Child)	A person who is under the age of 18
Multi-Disciplinary Case Conference	A joint meeting of various professionals that should be called in response to a suspected or potential child abuse case, at which they can share information and plan for the welfare of the child(ren) and their family
Ordinance	Another word for the individual laws of Hong Kong. They are organized by "chapters" based on specific topics or areas of law
Parental Rights- and Responsibilities	A legal term meaning that a person has specific legal rights, duties, and responsibilities in regards to a child, for example the right to have custody over them, to make legal decisions for them, and responsibilities to support, care for them, and act in the child's best interests
Presumption	A legal concept, meaning that a particular fact or idea is assumed to be true, unless proven otherwise

Protected Class	A group of people, or a characteristic of a group of people, which it is illegal to discriminate someone based on (for example, race, national origin, or sex)
Residential Care Services	Services provided by the government to house and take care of children and young persons under the age of 21 who cannot be adequately cared for by their families
Risk Factor	Factors that make it statistically more likely that a child may be in an abusive or dangerous situation or home environment
Right of Abode	A legal status that allows a person to stay in Hong Kong indefinitely, to be free from any condition of stay, and to receive certain legal and social benefits
Root Tracing	The process by which an adopted child later seeks information about their birth parents
Solicitor	A type of lawyer who may be instructed by clients directly and may also instruct barristers to appear in court on behalf of clients
Statutory Declaration	A legal document where a person “declares” or swears that something is true in front of a justice, notary, commissioner or other person authorized by law to administer an oath
Tracing Procedures	Steps that are taken to locate missing birth parents or other individuals in order to plan for the permanency of a child or to seek their consent in freeing the child for adoption
Unreasonably Withholding Consent	When parents refuse to give consent to have their child(ren) adopted, a court may find that this is unreasonable given the circumstances of the case, and rule that the parents are “refusing to acknowledge the realities” that they are unable to care for their child, either now or in the future. The court may then choose to issue a “freeing order,” freeing the child for adoption even without parental consent
Ward	A child who is under the care of a guardian or the supervision of the High Court
Ward of Court	A child for whom the court exercises parental rights. The court supervises big decisions for so long as the child remains a ward of the court. It is required to act in the best interests of the child
Ward of the DSW	A child placed under the guardianship of the Director of Social Welfare after being made a ward of court or following a Care and Protection Order by a juvenile court magistrate or by the High Court during wardship proceedings. When the parents of a child give consent for adoption, the child is automatically made a ward of the Director. That means that the Director is the acting parent of the child. It must exercise its rights in the best interests of the child
Wardship Proceedings	The procedure by which the High Court is invited to exercise its extensive and unfettered discretion to protect children. Anyone can apply for wardship who has a sufficient and sincere interest in the child – including the Director of Social Welfare. These proceedings are inquisitorial, and not adversarial. That means that the parties who are involved are not necessarily opposing each other – and are merely there to help the court
Witness Statement	An informal document prepared by a person with personal knowledge of a case in order to give information on the background of a case to lawyers. This document is not for submission to a court. These documents are helpful in quickly explaining the circumstances of a case so that advice can be sought quickly.

What are the Rights of the Child?

We have a responsibility to uphold children's rights. How does understanding the rights of children help us to be the voice for vulnerable children and families?

- 1** Everyone under 18 has these rights **2** All children have rights, and I should be treated fairly and equally no matter who I am, what I look like, where I live, what language I speak, what my religion is, whether I am a boy or a girl and whether I have a disability. **3** Adults must do what is best for me. **4** The government has a responsibility to make sure my rights are protected and respected. **5** My family has the responsibility to help me learn to exercise and protect my rights. **6** I should be supported to live and grow. **7** I have the right to a name, and to belong to a country. **8** I have the right to an identity which no one can take away. **9** I have the right to live with a family who cares for me. **10** I have the right to be together with my family if we live in different countries. **11** I have the right to be protected from kidnapping. **12** I have the right to be listened to, and to be taken seriously. **13** I have the right to find out and share information, unless it harms or puts someone in danger. **14** I have the right to have my own beliefs and choose my own religion, with my parents' guidance. **15** I have the right to meet with friends and join groups, unless it harms or puts someone in danger. **16** I have the right to my privacy. **17** I have the right to get information in lots of ways, and adults have a responsibility to make sure it is not harmful. **18** I have the right to be raised by both parents if possible. **19** I have the right to be protected from abuse – from being hurt or badly treated in body and mind. **20 & 21** I have the right to special protection, care and support if I cannot live with my parents. I have the right to have care and protection if I am adopted or living in foster care. **22** If I am a refugee (if I have been forced to leave my home country), I have the same rights as children in my new country. **23** If I have a disability, I have the right to special care and education. **24** I have the right to good quality healthcare, to clean water, and good food. **25** If I am waiting for my safe, loving, and permanent family, I have the right for my care to be reviewed regularly to make sure it is good for me. **26** I have the right to receive help from the government if my family doesn't have enough money. **27** I have the right to a safe place to live, food, and clothing to help me reach my potential. **28** I have the right to an education, and I should be encouraged to go to school to the highest level I can. **29** I have the right to an education which allows me to thrive, live peacefully, protect the environment, and respect others. **30** I have the right to speak my own language, and follow my family's religion and culture if I choose. **31** I have the right to play and rest. **32** If I work, I should be paid fairly, and I should not be made to do work that is dangerous or hinders my education and development. **33** I should be protected from dangerous drugs. **34** I have the right to be free from sexual abuse. No one should touch me in ways that make me feel uncomfortable, unsafe, or sad. **35** I should not be kidnapped, or sold. **36** I have the right to protection from being taken advantage of. **37** I have the right not to be punished in a cruel or hurtful way. **38** I have the right to not be enlisted in the army until I am 15 (18 years old in HK). **39** I have the right to help if I have been hurt, neglected, or badly treated. **40** I have the right to legal help and to be treated fairly if I have been accused of breaking the law. **41** If my country has laws that treat me better than the UNCRC, then those laws apply. **42** I have the right to know my rights! And everyone around me should learn about my rights. **43 - 54** These articles are about how governments and international organizations will work together to give children our rights.

Hong Kong agreed to the **United National Convention on the Rights of the Child (UNCRC)** in 1994.

I am a child, and I have all of these rights.

As I grow older, I have more responsibility to make choices and exercise my rights.

These rights will help me thrive and reach my full potential.

