

REPRESENTATION OF CHILDREN
IN HONG KONG:
PROTECTING CHILDREN IN CHILD
PROTECTION PROCEEDINGS



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Introduction

This article discusses the rights of representation of children in Hong Kong. The focus of my interest is the way the rights and welfare of children are safeguarded in Hong Kong while legal proceedings, especially care or protection proceedings, are being taken for their protection.

In Hong Kong, such actions are taken under the Protection of Children and Juveniles Ordinance¹ (PCJO). This legislation was first enacted in 1951 as the Protection of Women and Juveniles Ordinance and was renamed the Protection of Children and Juveniles Ordinance as one of many far-reaching amendments made to the ordinance in 1993. It was originally intended to protect women and juveniles against the evils of the abduction and kidnapping of young girls for resale into prostitution, adoption or as domestic servants (*mui-tsai* or *mooijai*).² In more recent

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¹ Cap 213.

² See A. Liu "Hong Kong: Strengthening the Protection of Children" (1994-1995) 33 *University of Louisville Journal of Family Law* 3 and n 2.

times, it has formed the basis for the protection of children against the perils of child abuse and neglect.

Under this ordinance, intervention can be made into the realm of the private family to assist a child who falls within the definition of “a child in need of care or protection”. Under section 34(2) of the PCJO, this 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 others, and who requires care or protection.”

Once a care order has been made, the court³ may make any of a number of orders under section 34(1) which can have the effect of radically changing the circumstances of that child’s life, such as:

- “(a) appoint the Director of Social Welfare to be the legal guardian of such child or juvenile; or
- (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; or
- (c) order his parent or guardian to enter into recognisance to exercise proper care and guardianship; or
- (d) without making such order or in addition to making an order under paragraph (b) or (c), 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.

Provided that no order shall be made under paragraph (a) without the consent of the Director of Social Welfare.”

³ The court here is the Juvenile Court (a specialised Magistrates Court).

Further, under section 34(5), where the Director of Social Welfare (DSW) has been vested with the legal guardianship of a child or juvenile, he may, subject to any order to the contrary by a Juvenile Court:

“(a) make any order (including if he thinks fit an order for removal to and detention in a place of refuge) regarding the custody and control of the child or juvenile which he thinks desirable in the interests of that child or juvenile.”

This section is interesting in that it purports to give the DSW “quasi-judicial discretion”⁴ to make “orders” for the removal of a child from its home, a power which is usually vested solely in the court.

Practice and Procedure in Hong Kong

In Hong Kong, the DSW is charged with the responsibility of investigating allegations of child abuse or other situations in which a child may be in need of care and protection, and for bringing care proceedings.⁵ If the DSW has “reasonable cause to suspect that a child or juvenile is, or is likely to be, in need of care or protection” they can issue a notice to be served on any person who has custody or control of that child or juvenile to produce that child for an assessment by a medical practitioner or other authorised person, or to allow the DSW to observe the condition of that child or juvenile.⁶ If that notice is ignored, or if the situation is urgent, the DSW can enter the premises of the person having control of the child, but cannot force entry unless or until the DSW has a warrant to do so issued by a magistrate, Juvenile Court, or the District Court for that purpose.⁷ In this respect, the DSW works in conjunction with the police.

Section 34 provides for an application for a care order to be made to the Juvenile Court only by the DSW⁸ or any police officer. A parent,

⁴ The Law Reform Commission of Hong Kong, Sub-Committee on Guardianship and Custody, Consultation Paper, para 2.127.

⁵ See s 34, PCJO (Cap 213) includes “The Director of Social Welfare or of any person authorised by the Director of Social Welfare ...”

⁶ See s 45, PCJO.

⁷ See s 44 and 45, PCJO.

⁸ “... or of any person authorised by the Director of Social Welfare in writing in that behalf either generally or specially or of any police officer ...”.

guardian or other relative of the child or juvenile cannot make an application. The process is such that any person concerned about the welfare of a child would normally contact the police, or even go directly to the DSW. It is then up to the police or the DSW to determine whether or not intervention can be made. Investigations by them can be limited and hurried and based solely on questions directed at the alleged abuser who would normally deny any wrongdoing. This restricted access to the court creates a strong barrier at the most basic level to action being taken on behalf of such abused children. Most people are reluctant to involve the police in what appears to be a purely intra-family issue. The overtones of a criminal investigation are strong.

In urgent situations, the police or the DSW can remove the child from the home to a place of refuge, that is, away from the care and control of the alleged abuser. After further investigations, the DSW can make an application to the Juvenile Court for an order under s 34(1) PCJO. Neither the parent or guardian nor the child are parties to the application, though the PCJO requires the Juvenile Court to give directions "as it thinks fit" for notifying a parent or guardian of the child or juvenile of the motion or application. This means that neither the parent or guardian nor the child has a right to appear before the court to make representations to that court against the application by the DSW. The decision to transfer the guardianship of the child, and with it concomitant rights of custody and control, can be made without consultation of the people who are most directly affected by that order.

Jurisdictionally, these proceedings are held to be civil in nature, but as applied in Hong Kong, they still carry with them the odium and stigma of proceedings of an inherently criminal nature. The terms "child", "young person" and "Juvenile Court" are all defined with reference to the Juvenile Offenders Ordinance⁹ (JOO). A "child" is a person under the age of 14 years, and a "young person" a person 14 years of age or upwards and under the age of 16 years.¹⁰ A "juvenile" means "a person who is ... 14 years of age or above and under the age of 18 years".¹¹ A

⁹ Cap 226.

¹⁰ See s 2, JOO (Cap 226), Laws of Hong Kong.

¹¹ *Ibid.*

Juvenile Court consists of a permanent magistrate appointed by the Chief Justice and has all the powers of a permanent magistrate under the JOO and, subject to the JOO, the Magistrates Ordinance (Cap 227) applies to proceedings before a Juvenile Court as it applies to proceedings before a magistrate.¹² The Magistrates Court in Hong Kong only has jurisdiction to deal with criminal actions. It does not have a civil jurisdiction. The procedure applicable in the Juvenile Court is set out in the JOO, but there is no provision for any special or separate procedures applicable whilst the court is in session for care and protection matters. There is no appeal from a decision of the Juvenile Court.

Section 3A(1) of the JOO also refers to Juvenile Courts as courts “sitting for the purpose of hearing *any charge* against a child or young person” or “for the purpose of exercising any other jurisdiction conferred on Juvenile Courts by ... any other Ordinance.”¹³ It is in this context that child care proceedings are brought whereby children or juveniles are effectively charged with being either neglected, abused or assaulted and brought before the court by the DSW for a decision to determine the course of their lives. Section 34 also talks about children being “committed” to the care of a person or institution under an order made by the court.

The Juvenile Court may only deal with care proceedings two or three times a week. Care proceedings are only a part of the work that it has to do. On other days it operates as a magistrates court exercising criminal juvenile jurisdiction. The same magistrates preside over both. The legal culture in the two jurisdictions overlap, but they are inherently different in nature. In care proceedings, the child is the victim, not the perpetrator, of a crime.¹⁴ Given the context of the alleged abuse and the nature of the proceedings, in my opinion, the Juvenile Court, as currently established in Hong Kong, is an inappropriate venue in which to deal with care proceedings.

¹² See s 3A, *ibid.*

¹³ Emphasis added.

¹⁴ If the incident is the result of physical or sexual abuse the perpetrator will usually be charged with a criminal offence and tried in a criminal court in which the child is, or may be, a witness.

Representation of Children in Care Proceedings: What is Representation?

The concept of representation in legal proceedings encompasses the relationship between a lay client and a professional adviser, whereby the professional adviser makes an appearance before the court on behalf of the lay client, and presents that client's point of view to the court. Professional skills are relied upon in the identification of relevant issues and facts, the framing and submission of legal arguments, and in forming a conduit of communication between the lay client and the court and other legal entities such as other parties and their legal representatives. Representatives are also seen as facilitators for the benefit of the court. Judges and magistrates prefer to communicate with legal representatives rather than with unrepresented litigants.

A client will usually be present in court with their representative, and will be privy to the events that affect them. However, it is not uncommon for only the representative to be present, and for that representative to portray the client's wishes. The traditional relationship between the client and the representative includes a formal interview (at least one) whereby the representative can take instructions from the client, and ascertain what that client wants. The representative will not usually interject their own views or wishes into the submissions beyond advising the client as to the legal implications of any course of action.

This concept of representation is a vital part of our adversarial legal system which functions on the basis that each person who is a party to the proceedings has a right to present their point of view to the court and for that point of view to be taken into account before any decision or judgment is made. In this context, then, it seems unusual that children have traditionally been excluded from this inherent right.

In Hong Kong, neither the child or juvenile nor the parents or guardian are parties to the care proceedings, nor is there any provision as to a right of appeal, though a "parent or guardian" may make an application to a Juvenile Court for an application to discharge or vary an order made under section 34(1)(a), (b) or (c). Nor is there any provision for separate representation for the child or juvenile in the Protection of Children and Juveniles Ordinance (PCJO). However, under the Official Solicitor Ordinance (Cap 416), "If requested by the Juvenile Court," the official

solicitor can “act for any party involved in proceedings under the PCJO relating to the care and protection of a child or juvenile.”

This is a discretionary power that can be exercised by the presiding magistrate requesting the official solicitor to represent either a child or a parent if they are involved in the proceedings. The Rules do not exclude the parents from attending the hearing or from putting forward their views, though they have no right to do so. However, neither the Official Solicitor Ordinance nor the PCJO make any provision for the appointment of the official solicitor on request by the child or juvenile themselves, or by the parent. Nor are there guidelines as to the foundation for the request by the Juvenile Court for the appointment of the official solicitor. In practice, this appointment is to facilitate the Juvenile Court, not to give any direct assistance to the child for the purpose of independent representation.

This is in contrast with private law proceedings where some limited provision is made for separate representation. Rule 108 of the Hong Kong Matrimonial Causes Rules gives the court a broad discretion to order that a child ought to be separately represented. It can appoint the official solicitor if they consent, or, if another person applies, to appoint that person to be *guardian ad litem* with authority to take part in the proceedings on the child's behalf.¹⁵

Another example is Rule 72 of the Hong Kong Matrimonial Causes Rules which allows for separate representation when an application is made to vary a settlement order. This compels the court to appoint separate representation “unless it is satisfied that the proposed variation does not adversely affect the right or interest of any children”.

Involving the Child

One of the most important developments in the area of law concerning children has been the recognition of the importance of the direct

¹⁵ The Chief Justice has issued a Practice Direction on separate representation which provides that, “Where it is felt by a Court to be desirable or necessary that an infant shall be separately represented in any proceedings, the Director of Legal Aid, in the exercise of his powers as official solicitor, shall, unless the Court otherwise directs, be appointed as *guardian ad litem* where no other person is available for appointment.” Reported in *Hong Kong Law Digest*, October 1993, at J89.

involvement of children in decision making processes that affect them directly. In this context, it is the decision making process which will result in a change in their legal status *vis-à-vis* their parents or guardians in care and protection proceedings.

Recent sociological and psychological studies with children have indicated that the appropriate and careful involvement of children in decision making and other processes is very likely to be beneficial in the short term and to contribute to their resilience in the long term.¹⁶ There is far more acknowledgement today of the importance of the role of children in decision making which concerns their own future.

These influences, as well as the gathering moment of the human rights movement, have stimulated a new way of legal thinking which has changed the way children are viewed by the law. I will now discuss some of the background developments which have effected these changes, and then consider some specific changes which have been made to the law in other common law jurisdictions.

Background: International Law

The United Nations Convention on the Rights of the Child 1989 (CRC)

The international instruments that have had the most important impact on juvenile justice are the International Covenant of Civil and Political Rights (ICCPR) and the United Nations Convention on the Rights of the Child (CRC) 1989. The CRC was ratified by the United Kingdom in 1991, and extended to Hong Kong in 1994. The Government of the People's Republic of China ratified the CRC on 2 March 1992, and it continues to apply to Hong Kong with effect from 1 July 1997. The impact of the principles incorporated in the CRC on this particular area of child law are of particular interest.

The history of the Convention and its implementation in the domestic laws of Convention signatories marks a definite change in the way that children were viewed within the legal system. The CRC was built on a history of concern for children's welfare including the Geneva

¹⁶ Family Law Council of Australia, *Involving and Representing Children in Family Law*, Discussion Paper, May 1995. See also the review in Ch 2 of the Discussion Paper on Australian and overseas studies about the effects of family breakdown on children.

Declaration of the Rights of the Child dating back to 1924, and the UN Declaration of the Rights of the Child adopted in 1959. But the CRC is seminal in its approach to recognition of the autonomy of the child in ways that the earlier documents did not.

The CRC developed two very important concepts. First, that where decisions were made concerning children they should be made in "the best interests" of the children, ie for their welfare.¹⁷ Second, that children have a right of participation and representation in proceedings in which they are involved, sometimes to the point of advocating some situations where, when children are directly involved, they should automatically have independent party standing with the right to instruct a legal representative.¹⁸

The CRC as a whole has been described as a Children's Charter that has upgraded the status of children from being the passive recipients of welfare to the holders of independent rights. The CRC still incorporates the concept of "protectionism of the child", as exemplified in Article 3.¹⁹ But the recognition of the child as an autonomous being is seen in the acceptance of the idea that children have a right to participate in decisions concerning them. The most important article of the CRC in this respect, is Article 12 which states:

- “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.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

¹⁷ Art. 3, CRC.

¹⁸ Art. 12, CRC.

¹⁹ The Convention has been described as being a compromise between the conservative elements who still view the family as having primacy, and those elements who see the most important aspect as being the autonomy of the child. The Convention stresses the importance of the family as the fundamental group of society, and the natural environment of children in which they should develop. But within this family there is recognition of the limitation of the authority of the parents and a recognition of the autonomous rights of the child.

The radical shift in thinking behind the rhetoric of this article lies, firstly, in the assumption of the existence of independent rights of autonomy of the child and, secondly, in the requirement for providing procedural mechanisms for their implementation. In addition to this, there should also be in existence (in states that are parties to the convention) the means whereby such rights reflecting the autonomy of the child can be enforced or implemented. This reflects a move away from the welfare oriented “best interests of the child” principle, to an acceptance that the “child’s wishes”, which may differ from what is considered to be in their “best interests”, are also important in the final decision making process. Therefore, children should be placed in a position where they can contribute directly to an understanding by the court of what they want, and are able to express their needs. This has effectively created a new tension in this area of the law where, in some situations, there has arisen a conflict where satisfying these two objectives would result in different conclusions.

This view of the child presupposes that a child is capable of forming his or her own opinion, and that the child has the maturity to be able to understand the position in which he or she finds themselves, ie before a court or involved in some form of legal proceedings. It also implies that a child, if of sufficient maturity based on observation and fact, and not an arbitrary cut off age such as 18, has the right to be able to put his or her opinion across to the decision maker, and that this opinion should be taken into account.

United Nations Conventions are intrinsically exhortative in nature and are expressed in broad and general terms. The extent of their influence can only be ascertained by examining the ways in which they are incorporated either directly within the domestic laws of their signatory states, or indirectly by the incorporation of their principles and norms by judicial recognition and application in judicial decision making.

Common Law Developments

The concept of a “competent child” had already been recognised in English common law by the English Court of Appeal in the case *Gillick v*

²⁰ [1985] 1 All ER 533.

West Norfolk and Wisbech Area Health Authority.²⁰ This case was actually concerned with defining the limits of parental rights. The decision held that children can acquire the comprehension to make decisions for themselves as they gain maturity with age and the ability to assess the relevant issues and make a reasoned choice. The issue centred on whether or not a doctor could prescribe contraception to a girl under 16 years without her parent's consent. The answer was "yes". In his seminal judgment in the House of Lords, Lord Scarman said that "It is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision."²¹

Though particularly concerned with parental rights in the context of medical treatment, the implications of this case have spread far wider. The notion of "*Gillick* competency" has been incorporated in later English legislation, most importantly The Children Act 1989, as well as being absorbed into the domestic law of other common law jurisdictions, such as Australia.

The Children Act 1989

The multiplicity of separate legislation that regulated the public and private law relating to children in England and Wales²² was unified in this single Act. Procedural anomalies that had resulted from the divergent Acts were erased and a common set of principles clearly set out in Part I of the Children Act 1989, ie the welfare or best interests principle and the non-intervention principle,²³ now assist the interpretation of the provisions of the Act which the courts must apply in considering whether certain children should be removed from the parental home or subject to an order of the court.

²¹ [1985] 3 All ER 402, at p 422.

²² These include the Guardianship of Minors Act 1971, the Guardianship Act 1973, much of the Children and Young Persons Act 1969 and all of the Nurseries and Childminders Regulation Act 1948, the Children Act 1975, the Child Care Act 1980, the Foster Children Act 1980, the Children's Homes Act 1982 and the Children and Young Persons (Amendment) Act 1986. The issue of child support was dealt with separately under the new and reformed Child Support Act 1993.

²³ Masson and Morris, *The Children Act Manual* (London: Sweet & Maxwell, 1992).

Although enacted before the adoption by the UN of the CRC, the Children Act 1989 (England and Wales) also incorporated the principle of child autonomy whereby children are given the opportunity to articulate their own views and it similarly provides mechanisms allowing child participation in decision making processes which concern them. Consistent with current thinking regarding children, section 1 of the Act lays down the general principle that “the child’s welfare shall be the court’s paramount consideration”.²⁴ “Welfare” is not defined, but the Act goes on to provide a checklist in section 1(3) that sets out some of the issues which are relevant.

The first factor, section 1(3)(a), is “the ascertainable wishes and feelings” of the child concerned (considered in the light of his age and understanding). However, the court need only have regard to these particular factors in relevant circumstances that are defined in subsection 4 of section 1.²⁵

The Participation of the Child

When talking about the child’s right to participate in decisions affecting them, it is important to explain what we mean. Children are able to participate in legal proceedings in a number of different ways. For example, they could attend the court to watch the examination of witnesses; or attend as witnesses themselves. They could be given the right to initiate legal proceedings themselves, for example, to apply for a supervision or care order. In other cases, children could be permitted to be parties to existing proceedings where orders are being sought which would directly affect them, such as custody proceedings in matrimonial disputes. And also, in those circumstances where a child’s opinion is sought, the question arises whether that child could or should have the benefit of separate legal representation to present their independent views to the court. A separate question on representation also arises: should a child be able to directly instruct a solicitor, or should a child only be represented by a *guardian ad litem*?

²⁴ The Children Act (1989) (England and Wales), s 1(1)(b).

²⁵ These circumstances arise in applications concerning an s 8 order where the application is opposed by a party to the proceedings; or where the court is considering whether or not to make, vary or discharge an order under Part IV, ie Care and Supervision Orders.

How are these achieved in the Children Act 1989? "Specified proceedings" designated in the Act are, in general terms though not entirely the same as, care and public law proceedings in which the child is automatically a "party" to the proceedings.²⁶ The court is under a duty to appoint a *guardian ad litem* unless satisfied that it is not necessary in order to safeguard the child's interests.²⁷ The duty of the *guardian ad litem* is to "safeguard the interests of the child in the manner prescribed by such rules";²⁸ and the *guardian ad litem* would still continue to operate with solicitors (rule 11(2)). The child also has the potential availability of representation by a solicitor independently of the *guardian ad litem* (section 41(4)), and can, with leave of the court, apply to have the appointment of a *guardian ad litem* terminated (section 6(7)(b)).

Children do not have this autonomous right in private family law proceedings, except for "section 8 orders" that can be made in any family proceedings that regulate arrangements about children and the exercise of parental responsibility. These include "residence" and "contact" orders which replace the former orders for custody, custodianship, care and control orders and access orders. Parents and guardians can apply for these orders without leave, but the child can also apply for these orders, independently of the parent, with the leave of the court.²⁹ This gives the child an opportunity to apply to maintain contact with some person, eg grandparent or friend, against the wishes of the parent or guardian. However, the court is specifically given directions to the effect that it can only grant leave to a child applying for a section 8 order where the court is satisfied that the child "has sufficient understanding to make the proposed application",³⁰ the qualification applied in the *Gillick* decision. The court still has a discretion, based on its own interpretation of the requirement of "sufficient understanding", whether or not to grant leave to a child to make their own autonomous application.

²⁶ Family Proceedings Rules 1991 (FPR), r 4.7(1).

²⁷ See section 41(1)

²⁸ See r 11(4)(a) and (b) FPR, s 42 (2). Generally the duty of the *guardian ad litem* is to act in the "best interests" of the child, but they are also required to put the child's view before the court. The two situations may be different. One effect of this and similar legislation is to put the spotlight on the role of the *guardian ad litem*, especially with the increased potential for conflict between the *guardian ad litem* and the child him or herself, given the great scope being given to the "wishes of the child" concept.

²⁹ Masson and Morris, (see n 23 above) p 10.

³⁰ See s 10(8), The Children Act.

In terms of participation rights, The Children Act 1989 has considerably widened the circumstances in which children are given an opportunity to present their own views and, especially in regard to care and public law proceedings, to participate directly as a separate party, and even to directly instruct a solicitor in some circumstances. Even in the private family law domain the court can, in some circumstances, appoint a *guardian ad litem* for the child. In Hong Kong, this is a role subsumed by the official solicitor.

Comparative Developments in Australia

Australia is one of a number of common law jurisdictions which have recently engaged in the process of changing legislation in accordance with the general principles of the CRC. The Commonwealth Government of Australia ratified the CRC in December 1990 and is, therefore, committed to implementing its principles. The CRC has not, however, been incorporated into Australian domestic law though it was incorporated in the Schedule to the Human Rights and Equal Opportunity Commission Act 1986 (HREOC) which required HREOC to monitor Australia's compliance with the CRC. It can be argued that, in principle, this constitutes incorporation into the domestic law. However, it is a jurisdiction in which there has been a recent spate of legislative reform directly incorporating the major principles of the CRC. This was largely in response to a number of reports published by the Australian Law Reform Commission (ALRC)³¹ recommending many changes to the procedural provisions pertaining to the representation of children in both family law and care and protection proceedings.³²

³¹ The ALRC is a federal statutory authority constituted under Commonwealth authority that examines, by referral from the Commonwealth Attorney-General, legal issues requiring reform. Its recommendations and terms of reference apply to courts and tribunals in the exercise of federal jurisdiction. Each state of Australia has a separate jurisdiction and refers matters to state Law Reform Commissions for application to courts exercising state jurisdiction. However, the recommendations of the ALRC were specifically intended to also "encourage the States and Territories of Australia to similarly amend or enact relevant legislation". ALRC 84, Overview.

³² The most extensive review of this area of law was commenced by the ALRC in 1995, IP 18, to "cover ... the roles of children in the decision-making processes of society." There was a special focus on "children within the legal process and the arrangements for children before Australian Courts." (Ch 3.1). After a period of consultation with the public, the ALRC released its report as, "Seen and heard: priority for children in the legal process", September 1997, ALRC 84. In considering the issues raised by its terms of reference, the ALRC had regard to the Commonwealth's obligations arising under the CRC, as well as other international human rights obligations and to relevant law, practice and overseas jurisdictions.

Australian law concerning children is very fragmented between the different States, Territories and Federal jurisdictions with the (Commonwealth) Family Law Act 1975 (FLA) providing one of the few pieces of legislation applicable Australia wide. This Act was substantially changed in 1996 when the Family Law Reform Act 1995 (the Reform Act) came into operation. A number of these changes were similar to those brought in by the Children Act 1989 (UK).³³ However, one of differences between the Children Act (UK) and the Family Law Act (Australia) is the Reform Act's inclusion "of a statement of underpinning principles, which derive in a general way from the UN CRC. Under the Reform Act, only children have rights, while parents have responsibilities."³⁴

However, in a similar way to the Children Act 1989 (UK), the fundamental principle in the FLA is that the child's best interests must be regarded as the paramount consideration when the court makes a parenting order.³⁵ In doing so, the court should take into account the child's wishes,³⁶ though there is nothing in the Act that requires the child to actually express their wishes.³⁷ There is no statement of principle in the FLA directed towards children's participation, though the FLA does provide some mechanisms that allow children to participate in decision-making. Under section 65C(b) children can be parties to proceedings.³⁸ However, this provision seems to have been very rarely used.³⁹ Section 68L provides that children can be separately represented by a person called the "child's representative",⁴⁰ and many are.⁴¹ These representatives are required to advocate for what they perceive to be the

³³ Helen Rhoades, "Child law reforms in Australia – a shifting landscape", (2000) *Child and Family Law Quarterly*, vol 12, no 2, p 117.

³⁴ *Ibid.*, pp 118–119.

³⁵ See s 65E, FLA.

³⁶ See s 68F(2)(a), FLA. This requirement was added by the 1975 amendments to the FLA.

³⁷ Richard Chisholm, "Children's Participation in Family Court Litigation" (1999) 13 *Australian Family Law Journal*, p 197. The court has emphasised the importance of giving appropriate weight to children's wishes in: *In the Marriage of Harrison and Wollard* (1994) 18 Fam LR 788.

³⁸ Similar to the Family Proceedings Rules 1991 in the UK which allow a child to be independently represented if the court is satisfied that the child is mature enough to provide instructions, r 9.2A.

³⁹ A rare example is *In the Marriage of Pagliarella* (1993) 16 Fam LR 688.

⁴⁰ The court has this discretion where it appears to the court that a child ought to be separately represented either on its own motion or an application by another person, including the child.

⁴¹ Richard Chisholm, (*see n 37 above*), p 202.

child's best interests, and do not act on the child's instructions or advocate their wishes, as would a lawyer for an adult.⁴² Other ways in which a child's wishes can be put before the court include a family report or an independent Order 30A report.⁴³

Care and Protection Proceedings

There is also provision for different levels of participation by children in the various care and protection jurisdictions in Australia.⁴⁴ For example, in both South Australia and Victoria, legislation requires children to be represented, and the representative acts on the instructions of the child unless they are not capable of properly instructing the representative or are not sufficiently mature.⁴⁵ Other states provide for representation to be made available, but no guidelines are provided for the basis on which representation is to be made.⁴⁶ There is no statutory provision for representation of children in care and protection matters at present in Queensland.

Recent reform proposals of the care and protection legislation in New South Wales (NSW) show the influence of the CRC directly pertaining to children's rights. The NSW Department of Community Services, Legislation Review Unit recommended that:

"The Act [Children (Care and Protection) Act 1987 (NSW)] contains a principle concerning children's participation in decision making Those views [of children] shall be given due weight in accordance with the circumstances and developmental capacity of the child or young person."⁴⁷

⁴² ALRC 84, para 13.22.

⁴³ Order 30A of the Family Law Rules enables a person to be appointed as a court expert for the purpose of preparing a report on the child's wishes.

⁴⁴ There is no unifying single legislation in Australia which covers this area. Each state of Australia has its own separate legislation which is deemed to come under state jurisdiction.

⁴⁵ Children's Protection Act 1993 (SA) s 48, and Children and Young Persons Act 1989 (Vic) ss 20, 21. Also in the proposed Tasmanian care and protection legislation, the Children, Young Persons and Their Families Bill, 1997. As discussed in ALRC 84, Ch 13, "Legal representation and the litigation status of children."

⁴⁶ The Children's Services Act (ACT); the Community Welfare Act 1982 (NT) and the Children (Care and Protection) Act 1987 (NSW). ALRC 84, Ch 13.

⁴⁷ NSW Dept of Community Services, Legislatioxn Review Unit, "Review of the Children (Care and Protection) Act 1987: Recommendations for Law Reform", December 1997, p 16, Rec 1.8.

It can be seen that these views were heeded with the newly enacted Children and Young Persons (Care and Protection) Act 1998 (NSW) which has now replaced the Children (Care and Protection) Act 1987 (NSW). Section 10 of the new act specifically incorporates the "principle of participation" whereby the Director-General is responsible for providing the child with the "opportunity to express his or her views freely, according to his or her abilities".⁴⁸ In doing this, the Director-General must have "due regard to the age and developmental capacity of the child".⁴⁹

This piece of legislation is unique in that it provides detailed guidance for the provision of legal representation for the child, both in the appointment of a separate legal representative for the child, and as to how that legal representative should take instructions, and from whom.

The Rights of Representation of Children in Care and Protection Proceedings in Hong Kong

An earlier section of this article illustrates how the care and protection of children process works in Hong Kong, and what the current legislation requires in terms of the conduct of proceedings before the Juvenile Court. There is no provision for the representation of children before the Juvenile Court, nor is there any mechanism to enable children to express their views. This situation is not unique to the Juvenile Court, but this is a jurisdiction that has a most direct and traumatic impact on children's lives. It is also clear that, in this area of the law, Hong Kong has not maintained any degree of momentum of change, comparable with other common law jurisdictions as described above. Nor is there any overriding principle requiring the court to make a decision in the "best interests of the child" as is required in the recent Australian amendments and as is also required under the English Children Act 1989.⁵⁰

⁴⁸ See s 10(1)(b).

⁴⁹ See s 10(2).

⁵⁰ The Children Act 1989 s 31 (Part IV) authorises the court to make a supervision order placing the child in the care of a designated local authority or under the supervision of a probation officer. In doing so the court must give paramount consideration to the child's welfare and, in the course of doing so, should have regard to the expressed wishes of the child as per s 1(3)-(5).

Impact of International Norms and Rights

During the 1990s, Hong Kong became a party to a number of international treaties. The most relevant of these are the International Covenant on Civil and Political Rights (ICCPR) enacted as the Bill of Rights Ordinance (June 1991); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, October 1996) and, most importantly from the perspective of children's rights, the United Nations Convention on the Rights of the Child (CROC, September 1994).⁵¹

In his article, "Recent Developments in Hong Kong Family Law: The Impact of Human Rights Treaties",⁵² Dr Rwezaura has clearly highlighted those areas of law pertaining to children which have been amended following Hong Kong's decision to comply with some of its international treaty obligations, especially in the areas of family law and adoption, and child abduction proceedings. He also referred to some areas that still require further reform. However, the article does not refer to child and protection proceedings in particular. In the "Initial Report of the UK under Article 44 of the CRC" in respect of Hong Kong,⁵³ prepared by the Hong Kong Government, the issue of representation of children's interests in court is dealt with in paragraph 59:

"When a child and other parties concerned are present before the court, the Judge may ask for and ascertain the views of the child. The Judge may also appoint the Official Solicitor (the Director of Legal Aid) to represent the child under the Official Solicitor Ordinance."

This paragraph is misleading in that it implies that a child is a party to the proceedings, which it is not. Furthermore, the protection proceedings

⁵¹ Bart Rwezaura, "Recent Developments in Hong Kong Family Law: The Impact of Human Rights Treaties" in *Law Lectures for Practitioners 1998* (Hong Kong: Hong Kong Law Journal Ltd, 1998), p 140.

⁵² *Ibid.*

⁵³ The CRC does not have an individual complaints mechanism. Its implementation is dependent on the goodwill of the participant states. However, under Art 44 of the CRC each State Party to the CRC undertakes to submit to a Committee on the Rights of the Child (Art 43) a report on the measures they have adopted which give effect to the rights recognised in the CRC and on the progress made on the enjoyment of those rights. The process is one of comparative public scrutiny and compliance.

are brought before a magistrate, not a Judge. However, it does indicate the discretionary nature of the authority of the court to appoint the official solicitor. To my mind, this situation, which has not changed since the report was submitted in 1995, does not represent sufficient compliance with the general principle set out in Article 12 of the CRC.

However, this issue has not gone entirely unnoticed. In its consultation paper, the Sub-Committee on Guardianship and Custody of the Law Reform Commission of Hong Kong noted that proceedings in the care or protection jurisdiction were as relevant as orders made in the family law jurisdiction, which may result in a child being removed from the custody of its natural parents, and guardianship being made in favour of the DSW or, if removed to the High Court, resulting in wardship proceedings.

The following paragraphs of that consultation paper are relevant:

1 *Wishes of the child*

“There is no provision for the wishes of the child to be taken into account in the making of any orders. The parent or guardian’s wishes can be taken into account in the requirements laid down in supervision orders under section 34A. We have already seen that the matrimonial ordinances give powers to the court to order supervision orders, but no reference is made in those ordinances to similar provisions to section 34A or 34B”;⁵⁴

2 *Legal aid and parents*

“There is nothing in section 34 making the parent or guardian a party to the care proceedings, nor is there any provisions as to a right of appeal. They have no right to legal aid”;⁵⁵ and

3 *Separate representation*

“It seems strange that there is provision for separate representation in private law proceedings but there is no provision in the PCJO even though the DSW can intervene in private law

⁵⁴ Sub-Committee on Guardianship and Custody of the Law Reform Commission of Hong Kong consultation paper, para 2.132.

⁵⁵ *Ibid.*, para 2.135.

proceedings. However, under the Official Solicitor Ordinance the Juvenile Court could make a request for the Official Solicitor to 'act for any party involved in the proceedings under the PCJO relating to the care and protection of a child or juvenile.'⁵⁶

To date, no action in the way of reform or amendment of the PCJO has resulted, though the issue is on the agenda. The Law Society of Hong Kong Family Law Committee in its Comments on the Consultation Paper published in March 1999 stated:

"The criteria [for separate representation] should be spelt out in the Matrimonial Proceedings Rules at the very least. In doing this, particular attention should be placed, *inter alia*, on instances noted in para 6.135 of the Report. It is particularly important to pursue an active and visible policy of providing separate representation of children in all appropriate cases in line with Art. 12 CRC."⁵⁷

Conclusion

I would like to quote from something said by James P. Grant, the UNICEF Executive Director after the signing ceremony for the UN Convention at UN Headquarters in New York on 26 January 1990:⁵⁸

"The Convention has placed children high on national and international agendas. The international community has provided a firm foundation for a new ethic for children, an ethic that defines children as individuals with inalienable rights of no less value than those of adults."

My view expressed in this article is that Hong Kong has yet to incorporate this new ethic into its legal system in the way that it is conceptualised

⁵⁶ *Ibid.*, para 2.13b.

⁵⁷ Para 11, Comments by the Law Society of Hong Kong's Family Law Committee on the Law Reform Commission's Consultation Paper on Guardianship and Custody, 31 March 1999.

⁵⁸ Quoted by Christina M. Lyon, "Representing Children Towards 2000 and Beyond", in *Representing Children*, vol 8, no 2, p 18.

in the CRC and applied in the recently amended legislative provisions in countries such as England and Australia. I think that it is time for all legal scholars, practitioners and all social participants to start taking this development seriously and to consider ways in which the Hong Kong legal system can best incorporate the principles asserted in the Convention to the best advantage of Hong Kong children. And it is not only children who benefit. I would like to conclude with a further quote, this time by Javier Perez de Cuellar, the then UN Secretary General, in his message to the International Meeting on the Convention of the Rights of the Child in Lignano, Italy, September 1987:

“The way society treats its children reflects not only its qualities of compassion and protective caring, but also its sense of justice, its commitment to the future and its urge to enhance the human condition for coming generations.”