

**CONSULTATION ON DRAFT FAMILY PROCEDURE BILL ON
PROCEDURAL REFORMS FOR THE FAMILY JUSTICE SYSTEM**

SUBMISSIONS

1. On 14 February 2022, the Judiciary Administration launched a public consultation on the draft Family Procedure Bill (“FPB”).
2. The present consultation is based on the recommendations set out in the Final Report on the Review of Family Procedure Rules published in May 2015 (“Final Report”). In our submission to the Judiciary Administration of 10 June 2014 on an earlier consultation paper on Review of Family Procedure Rules, we have already stated that, among other things,
 - (a) we welcomed the introduction of a set of stand-alone unified procedural code that could address the problems;
 - (b) we agreed in principle to introduce consequential amendments to the relevant principal Ordinances and/or subsidiary legislation to improve those procedures, and also to the setting up of a new Family Procedure Rules Committee, as proposed.
3. Although it has taken some time for the issuance of this consultation since the release of the Final Report in 2015, we are pleased to note that progress has been made and that a draft bill is put forward for procedural reforms to the family justice system in Hong Kong. We agree and reiterate the need “to legislate for a consolidated set of procedural rules to enhance the efficiency and cost-effectiveness of the family justice system. The objective is to provide accessible and comprehensive procedural rules for the courts and all court users”.¹

¹ See para 1.1 of the Consultation Paper; see also the [press release of 14 Feb 2022](#),

COMMENTS ON THE BILL

4. One of the aims in drafting the FPB is the use of plain language. It is said that “it is essential that parties have a clear understanding of the actions and associated consequences when taking forward legal proceedings” (§3.12, Consultation Paper). We agree to the use of plain language in the FPB. For example, “permission to appeal” instead of “leave to appeal” is used in the bill, with a definition (which is helpful) on references to such a permission (Clause 2(b), FPB). With guidance, the above could help lay court users to understand the legislation, without being confused by the legalese.
5. We note the FPB is relatively short. When passed, it provides the legal basis to implement the recommendations of the Final Report, in particular the setting up of a Masters system in the Family Court (Clause 15, FPB, see also §2.3 of the Consultation Paper) and the establishment of the Family Procedure Rules Committee (“FPRC”) as the single rulemaking authority for the family-related procedural rules (Clauses 24 – 26, FPB). Deliberations of procedural rules and issuance of the requisite practice directions thereof could take time, but as they are to be considered only subsequently, the establishment of the Masters system and also the FPRC would not be put back. This two-stage approach to the legislation is appreciated; that would help expedite the process.
6. The introduction of a Family Masters system in the first stage of the legislative exercise in particular is welcomed. Family Masters, when introduced, could provide *immediate* relief to the already heavy workload of Family Judges, before the detailed procedural rules are to be finalized in the second stage.
7. Apart from the above general observations, we have the following comments on the FPB itself.

(a) Clause 11 of the FPB provides that

“In a family proceeding, the court has power to make a declaration of beneficial ownership in favour of or against a third party”.

This clearly sets out the jurisdiction of the court vis-à-vis a third party

and is helpful. We agree to this proposal.

- (b) Clause 12(1) provides that

“(1) Unless otherwise provided by an enactment, an order of the court in a family proceeding is final and conclusive between the parties.”

A court order given in a matrimonial matter is subject to appeal. The reference to “finality” in the above clause requires clarification.

- (c) Clause 12(2) states that

“(2) The court has power to vary, suspend, rescind, discharge or revive an order made by it, including the following power - ...”

It is not clear whether the Family Court would now have power under the above proviso to vary an order for which the court has no jurisdiction to do so. For example, under section 11 of the Matrimonial Proceedings and Property Ordinance (Cap. 192), the Family Court has no power to vary orders for lump sum payment for spouse or children, or a transfer of property.

- (d) Clause 20(3) could affect how the docket system now being proposed is to operate. Clause 20(3) states that

“(3) An appeal lies as of right to a Family Judge in chambers from an order of a Master in a family proceeding.”

How the above is to be applied vis-à-vis the docket system requires further discussion. On other hand, there should be consideration on the new family procedure rules governing appeals from Family Court.

- (e) Clause 3(2)(i) refers to the short title of Cap. 192 as the “*Matrimonial Proceedings and Property Ordinance*”. This is the current name of Cap. 192. However, in Clause 4(2)(f) and Clause 17(f), Cap. 192 is referred to as “*Family Proceedings and Property Ordinance*”. Although we understand that the Judiciary Administration intends to later amend the short title of Cap. 192 to “*Family Proceedings and Property Ordinance*” to better reflect the nature of the matters to be dealt with under the legislation when the Family Procedure Rules come into operation, and

also those clauses naming Cap. 192 as the Family Proceedings and Property Ordinance may not come into effect at the same time as other clauses, this approach in drafting is without disrespect confusing and invites queries and arguments. Jurisprudentially, with this drafting, a piece of legislation in Hong Kong would have two names and that, if at all possible, should be avoided. We are also not aware of this drafting approach for other legislation.

In our views, the word “matrimonial” in “Matrimonial Proceedings and Property Ordinance” does not differ significantly from the word “family” in the context of Cap. 192:

- 1) Both “matrimonial” and “family” in the above contexts are easy to be understood. Even if there is not a change as proposed, there is no confusion from the profession or the public when they are to refer to the ordinance;
- 2) The Chinese translation for “matrimonial” is 婚姻 and that for “family” is 家事. The two basically mean the same to the local populace. In some cases, in the context of the matters set out in the Cap. 192, they are used interchangeably.
- 3) We are not aware of any causes of concern from the public or the Judiciary in the use of the word “Matrimonial” in Cap. 192.
- 4) We note that the short title to Cap. 192 provides that the Ordinance is to

“To consolidate and amend the law relating to ancillary and other relief in *matrimonial* causes and other *matrimonial* proceedings; to abolish the right to claim restitution of conjugal rights; and *for purposes connected with or relating to the matters aforesaid.*” (emphasis supplied).

The references in the short title are to matrimonial and not family matters. If there is a genuine and material difference between “matrimonial” and “family”, insofar as Cap. 192 is concerned, there will be a mismatch of the short title and the name of the

Ordinance. That should be avoided.

- 5) There are case laws, judicial deliberations and academic literatures (overseas and local) on / making references to the “Matrimonial Proceedings and Property Ordinance”. A change of the name of the Ordinance would *prima facie* disengage the Judiciary, the court users and the academia from these case laws, literatures etc. The disconnect causes not only inconvenience but also confusion in particular to litigants in persons. This runs contrary to the stated objective of the procedural reforms.

It seems to us that there is not much improvement by virtue of a change of name. On the other hand, the confusions arising from the proposed change, and also the drafting therefor, outweigh the benefit (if any).

If the draftsman does not agree to the above, we suggest to give guidance and also to set out a detailed explanation in the Explanatory Memorandum of the Bill.

OTHER COMMENTS

8. In anticipation of the establishment of the Masters system for the Family Court, we suggest an induction program for the appointed Masters to sit in at court hearings for a short period of time as judicial observers to familiarise themselves on the family court’s practice and procedure before they are to take up their formal position.

CONCLUSION

9. We are keen to see the FPB be introduced into the Legislative Council and ask the Judiciary Administration to expedite the legislative process. We also look forward to discussion with the Judiciary Administration in stage two consultation of the draft Family Procedure Rules, which we are eagerly awaiting.

**The Law Society of Hong Kong
26 April 2022**