



**THE PROPOSED LEGISLATION TO IMPLEMENT
THE RECOMMENDATIONS OF THE LAW REFORM
COMMISSION REPORT ON CHILD CUSTODY AND ACCESS**

SUBMISSIONS

Introduction

1. The Law Reform Commission of Hong Kong published a Report on Child Custody and Access ("LRC Report") in March 2005 and put forward 72 recommendations. The main focus of the LRC Report is the introduction of a "parental responsibility model" ("PR Model") into Hong Kong family law.
2. In November 2015, the Labour and Welfare Bureau ("LWB") released a consultation paper entitled "*The Proposed Legislation to Implement the Recommendations of the Law Reform Commission Report on Child Custody and Access*" ("the Consultation Paper") to seek public's views on a draft *Children Proceedings (Parental Responsibility) Bill* ("draft Bill") and the support measures to implement the recommendations put forward in the LRC Report.
3. The Law Society of Hong Kong has reviewed the Consultation Paper and has the following comments.

A long awaited law reform

4. We have been engaged with the LWB, the Home Affairs Bureau and the Social Welfare Department in pressing for the implementation of the LRC Report since 2005. The implementation progress has been disappointingly slow. This delay of over a decade is unacceptable, especially in light of the

importance of the children related matters the Bill is intended to cover. Such delay cannot be allowed to occur again.

5. We submit that the law reform on child custody and access is necessary and should be implemented as a matter of priority.
6. We support the law reform on child custody and access for a number of reasons.
7. The existing law on child custody and access is highly undesirable. First, the concept of "custody" emphasizes parents' ownership of rights over children (as if they were chattels), and thereby fails to encourage separating parents to act in a manner which is in the best interests of their children, with their rights treated as a priority. Second, the terms "guardianship", "custody", "care and control", "access" are confusing. Third, the laws affecting children are scattered over various ordinances and ought to be consolidated into one ordinance.
8. The existing law on child custody and access dates back to the 1970s and is outdated. Most of the common law jurisdictions have already abolished the concept of custody which is still adopted in Hong Kong. There has been a shift away from the parental rights and authority over a child, towards a more child-focused concept of "parental responsibility" and the rights of a child in common law jurisdictions. This is reflected in legislation such as the English Children Act 1989, the Children (Scotland) Act 1995, the Australian Family Law Reform Act 1995, the New Zealand Care of Children Act 2004. It is high time to bring Hong Kong in line with its common law counterparts.
9. The United Nations Convention on the Rights of the Child 1989 ("UNCRC") was extended to Hong Kong in 1994. Article 18(1) of the UNCRC states that *"States Parties...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..have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."* Hong Kong needs to fulfill its obligation, to protect and ensure the rights of children at the international level.
10. It is widely recognized today that the PR Model, which underlines the

paramount importance of the best interests of a child, has merits. The increase in the number of the joint custody orders is a good indication that the adoption of a modern approach to parenting and its responsibilities, and that just because a couple can no longer be partners / spouses, does not mean their child should be deprived of having both parents being involved in his / her upbringing. The increase in number is also indicative of more parents wanting to continue to play a co-parenting role post separation. The law should keep pace with the social changes in the approach to parent-child relationship.

11. The Hong Kong courts have on several occasions called for the implementation of the LRC Report.

(a) In *PD v. KWW* (CACV 188/2009) Hartmann JA said:

"The Hong Kong Law Reform Commission Report on Child Custody and Access of 2005 recommended changes in line with the Children Act 1989 but regrettably, to date at least, little appears to have been done to give the Commission's recommendations legislative reform." (§ 51 of the judgment)

while Lam J (as he then was) said *"Likewise, as observed by my Lord, the recommendations of our Law Reform Commission in 2005 regarding Child Custody and Access have not been taken forward. Had such recommendations been implemented, the respective rights and responsibilities of the parents towards their children would be more clearly and specifically defined. Judging from the submissions advanced by the parties in this case, I cannot help from observing that with the implementation of such reforms appeals like the present one could have been avoided. Speaking for myself, I would like to take this opportunity to urge the administration to make some progress in these directions." (§ 80 and 81 of the judgment)*

(b) In *SMM v. TWM* (CACV 209/2009), Cheung JA said:

"It should be noted that the Hong Kong Law Reform Commission Report on Child Custody and Access (7 March 2005) has recommended changes to the GMO, by, among other things, replacing custody orders with

residence and contact orders. There has been no implementation of the recommendation yet. In my view, the Administration should make a serious effort in implementing the recommendations by legislation soon." (§ 29 of the judgment)

(c) In *TRR v RAR* [2010] HKEC 1531, H.H. Judge Melloy said:

"The father has said that joint custody is the normal or usual order in our courts. I do not agree. Rightly or wrongly it is one option open to both parents. It is fair to say though the Law Reform Commission report on Child Custody and Access dated March 2005 challenges this...Unfortunately, the Law Reform Commission's recommendations have still to be acted upon." (§ 17 of the judgment)

Comments on the draft Bill

12. We acknowledge the complexities of issues involved, but regrettably, it has taken the Administration almost 10 years to produce the draft Bill. We have had a detailed review on the draft Bill, which contains 8 parts and 1 schedule. A marked-up version of the draft Bill is annexed to this submission for easy reference.
13. Before we comment on specific provisions of the draft Bill, we would like to point out that the proposed title of the draft Bill and of the new Ordinance is misleading in two aspects:
 - (a) The word "Proceedings" appearing in the title may be easily misinterpreted by the public to mean that parental responsibility arises only if there is litigation in place, rather than an ongoing obligation *from the birth of the child onwards*.
 - (b) The words "(Parental Responsibility)" is likely to be misinterpreted as the only ambit of the Bill / Ordinance and do not clearly convey the scope of the legislation, which is intended to cover a wide range of children related matters and is intended to be an ordinance consolidating related ordinances on children issues. Thus the title of the draft Bill and of the new Ordinance are not appropriate.

14. We propose the alternative of the "*Children Arrangements Bill*" and "*Children Arrangements Ordinance*" as the title of the draft Bill and of the new Ordinance respectively because:

(a) the overriding aim of the law reform is to move away from a "parent-centred" approach to a "child-focused" approach. Our proposed title can reflect the spirit of the law reform, i.e. to stress the rights of the children and make it clear that this legislation is for the interest of the children rather than of the adults in their lives.

(b) this name would aptly reflect that the legislative provisions in the draft Bill relate to a wide range of arrangements for children.

(c) by avoiding a narrowly interpreted title, it allows for greater flexibility for making legislative amendments and further consolidation of other child related ordinances / provisions to the ordinance, where circumstances deem necessary or appropriate.

15. Following from the above, we suggest that the long title of the draft Bill be amended to read as follows:

"Reform and consolidate the law relating to rights of children and responsibilities and rights of parents for children, particularly in relation to ~~proceedings involving~~ arrangements for children; to provide for the appointment and powers of guardians; and to make related and consequential amendments."

16. We now turn to comment the specific provisions of the draft Bill as follows.

Part 1: Preliminary

Clause 2 - Interpretation

17. "*child of the family*" - the wordings "parties to a marriage" only denotes one category of parents and does not provide for other family dynamics, such as

unmarried parents, single parent, same sex relationship or divorced parents. Since the existing Guardianship of Minors Ordinance (Cap.13) (“GMO”) and the provisions in the draft Bill also deal with unmarried parents, we consider it more appropriate to define it as "parties to a family".

18. "**children proceedings**" - we suggest the following enactments be included in this definition:
- *the Child Abduction and Custody Ordinance (Cap.512)*
 - *the Protection of Children and Juveniles Ordinance (Cap.213)*
 - *the Legitimacy Ordinance (Cap.184).*

Part 2: General Principles

Clause 3 - General Principles

19. Clause 3(2) sets out a list of factors for determining what is in the child's best interests ("Welfare Checklist").
20. It was recommended in the LRC Report to include the consideration of "*the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents*" (under the Australian model) in the Welfare Checklist. (§ 7.27 of LRC Report refers). However, such consideration is missing in Clause 3(2). The Administration is invited to explain why such consideration has not been set out as one of the factors for determining what is in the child's best interests.

Clause 5 - Meaning of parental responsibility

21. "parental responsibilities" and "parental rights" are two different concepts. We welcome the separate statutory lists of "parental responsibilities" (Clause 5(2)) and "parental rights" (Clause 5(3)).
22. Recommendation 5 of the LRC Report suggested adopting the Scottish provisions which specifically come with a qualification on the statutory statement on the rights of the parents. We consider it necessary to qualify the rights of the parents by modeling the Scottish Act 1995 that these rights are conferred "*in order to enable [the parent] to fulfill his parental*

responsibilities in relation to his child." (§6.13, 6.14 and 9.59 of the LRC Report refers) so as not to be confused with a general right of a parent of a child in the outdated custody model.

23. We suggest to revise Clause 5(3) in the following:

*"~~The rights are the rights of a parent~~ A parent, in order to enable a parent to fulfil his or her parental responsibilities in relation to the child, has the right:
(a) to have"*

Clause 6 - Acquisition of parental responsibility by father

24. We consider that the legal standing of unmarried fathers is improved.
25. We further suggest to amend clause (6)(1)(b) to cover overseas birth registration:

"(b) he becomes registered as the father of the child ~~under section 12 of the Births and Deaths Registration Ordinance (Cap.174)~~ on a birth certificate."

Clause 10 - Consent or notification required for certain acts relating to children

26. Under the existing law on child custody and access, parents with sole custody usually have the misconception that they have full authority over their children and can exclude the non-custodial parent from the decision making process related to a child. In fact, there remains a duty on the custodial parent to consult the non-custodial parent in making major decisions. A custodial parent must also give full and rational consideration to the non-custodial parent's views. This obligation is further elevated in the joint custody scenario where the mutual consent is required for major decisions and neither can act unilaterally.
27. Clause 10 sets out a list of actions requiring consent of every other person who has parental responsibility for the child and a list of major decisions requiring notification only to every other person who has parental responsibility for the child. The term "major decision" is defined and the classes of major decision are listed.

28. We support the introduction of the new consent and notification requirements as they provide flexibility for a parent or a person who has parental responsibility for a child to make certain major decisions in relation to a child by notification rather than consultation (under the old regime). Such notification can be by way of an email, a text message via Whatsapp etc. However, some clarity needs to be given on the meaning of “reasonable time” under Clause 10(3).
29. There is also an express provision that the court has power to vary or dispense with any of the consent or notification requirements. It could address the concerns that in extreme cases, some vexatious parents would make use of the consent or notification requirements to obstruct and harass the other parent, rather than with the true intention out of concern for the best interests of a child.
30. Further, we note that the LRC Report recommended adoption process is one of the items in the consent list (§ 9.95 of the LRC Report). We suggest to include "*freeing a child for adoption*" under Clause 10(2).
31. To be accurate, we suggest to amend Clause 10(1) as follows:
- " If a child arrangements order is in force with respect to a child, a parent and/or a person having a parental responsibility for the child may not do any act specified in subsection(2)....."*
32. Corresponding amendments should be made to Clause 10(3):
- " If a child arrangements order is in force with respect to a child, a parent and/or a person having a parental responsibility for the child must, before making a major decision in relation to the child, notify every other person who has parental responsibility for the child of the parent's intention to make that major decision in writing within a reasonable time."*

Part 3: Appointment and Powers of Guardian Taking Effect on or after Death of Parent or Guardian

33. We note that the draft provisions under Part 3 of the draft Bill are modeled on the GMO. We have no comments on Part 3.

Part 4: Orders with respect to Children in Children Proceedings

Clause 28 - Child arrangements order and other orders with respect to children

34. It is worth noting that in England and Wales, "residence orders" and "contact orders" are replaced by "Child Arrangements Orders". We consider it appropriate to model the English provisions relating to Child Arrangements Orders to remove the outdated "custody" and "access" terminology in family proceedings.
35. We note that Clause 28(1)(b) provides for "Prohibited Steps Order" which allows the court to prohibit the exercise of certain aspects of parental responsibility and Clause 28(1)(c) provides for "Specific Issue Order" which allows the court to determine a specific question. The court is empowered to deprive a person of parental responsibilities under Clause 28(1)(d). We consider these provisions could, to a certain extent, relieve the concerns related to vexatious individuals who have parental responsibility for a child abusing their role, for example in the context of domestic violence.
36. We welcome the proposal that the court can make no order pursuant to Clause 28(3).

Clause 29 - Power of court to make orders under section 28(1)

37. We welcome the interpretation of a "person" pursuant to the Interpretation and General Clauses Ordinance (Cap. 1), to "*includes any public body and any body of persons, corporate or unincorporate, and this definition shall apply notwithstanding that the word "person" occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation.*" In such circumstances, Clause 29(4)(b) covers applications made by a third party and Clause 29(4)(c)(iii) covers application made by non-governmental organizations.

38. This is a positive advancement of the legal standing of relatives and other non-parents having an interest in particular children. We support the introduction of this extended regime providing concerned non-parents with access to the courts for the purpose of seeking the new range of court orders introduced by the new Ordinance.
39. In terms of drafting, we consider that Clause 29(4) should be amended to "a party to a family" instead of "a party to a marriage". This is because the word "marriage" is inappropriately restrictive. Please see our comments at paragraph 17 above.

Clause 31 - Order for prohibiting removal of child out of Hong Kong

40. Under the existing drafting, a third party cannot make the application. The Administration should re-consider this position because pursuant to the draft Bill, both a parent and a non-parent can have parental responsibility for a child, and thus a third party who has parental responsibility for a child should also be entitled to make applications.
41. We therefore suggest that Clause 31(1) be read as follows:

"If a parent of a child or a person who has parental responsibility for a child is a party to any proceedings under section 28(1), that parent or that person may apply to the court for an order that the removal of the child out of Hong Kong is prohibited unless the removal is made..... "

42. Under section 31(2), the Administration is invited to explain why the application to court is limited to the scenario of "*if a parent of a child who is a child of the family is a party to any proceedings under the Separation and Maintenance Orders Ordinance (Cap.16) or the Matrimonial Causes Ordinance (Cap.179)*".

Clause 32 - Duration of orders made under section 28(1)

43. We consider that the order for prohibiting removal of child out of Hong Kong made under section 31 (i.e. Clause 31 of the draft Bill) should also be ceased to have effect when the child reaches the age of 18 years.

Clause 33 - Maintenance order against parents

44. We note that most of the provisions are repeated and copied from the GMO and therefore have no comment.

Clause 38 - Evidence on application under section 29, 33, 51 or 54(1)

45. The Administration is invited to explain why a social welfare report may be required in dealing with application under section 33 (i.e. maintenance order against parents).
46. In dealing with application under section 28(1) (i.e. child arrangements order and other orders with respect to children), a social welfare report may be required by the court and we suggest to add "section 28(1)" to Clause 38(1).

Part 5: Care Order and Supervision Order

47. We note that under the new Ordinance, the application of care order and supervision order in children proceedings can be heard by either the Court of First Instance or the District Court. The Administration should look into the resources implications for the Judiciary and more resources should be allocated to the Judiciary on recruiting of judges with appropriate family / child law experience and background, supporting staff etc.

Part 6: Views of Child and Separate Representation for Child

48. We consider that a "solicitor advocate" should also be entitled to appear and to represent the parties, in addition to solicitors and counsel. We therefore ask that the term "solicitor advocate" be added to the Clauses 60 and 62 under Part 6 and Clause 38 in Part 4.

Part 7: Procedure, Jurisdiction and Subsidiary Legislation

49. We have no comments on Part 7.

Part 8: Repeal, Transitional and Savings Provisions and Consequential or Related Amendments

50. We note that Clause 74(2)(a) and (b) specify the transitional arrangement under which the new law will not have retrospective effect. The benefit of the transitional arrangement is that it will not cause confusion to the public, in particular those already with custody orders under the old regime. We therefore agree.

Comments on support services

51. We now set out our comments on support services for implementing the law reform.

52. The present reform is a legal reform on the law related to children. In order to complement this law reform for the better protection of children, it is important that the Administration provides sufficient and relevant support services to children, as well as separated/divorced parents in handling child care matters arising from the breakdown of the family.

53. The Consultation Paper is 110 pages long and has three chapters, but only 3 paragraphs are on support service. The scanty reference in the Consultation Paper would suggest the lack of importance the Administration has placed in this regard and the limited commitment it is prepared to provide to the provision of these essential support services.

54. In England and Wales, when the British Government introduced the new law in 1989, it had two main aims. They were clearly stated as:

(a) to gather together in one place all the law relating to the care and upbringing of children and **the provision of social services for them**; and

(b) to provide **a consistent set of legal remedies available in all courts** and in all proceedings affecting children. (§79 of the LRC Report refers)

55. In Australia, after the reform from custody to parental responsibility in 1995, further reform was made in 2006. This was a reform to Part VII of the Family Law Act 1975 in Australia (the "2006 Reform") which introduced the equal shared parental responsibility in the Family Law Amendment (Shared Parental Responsibility) Act 2006. Although the changes in law has not been well received in particular by the legal sectors, the Australian Government has committed to provide more resources for support services. Hence, the 2006 Reform also came with other investments:

(a) **Increased funding for new and expanded family relationships services**, including

- the establishment of 65 Family Relationship Centres
- the Family Relationships Advice Line
- the Family Relationships Online

(b) **Increased funding for mediation** or family disputes resolution

(c) **Widespread changes** to the Australian **Child Support Scheme** introduced

(d) Further **family violence reforms** introduced – in response to the emphasis placed on protecting children in the 2006 Reform leading to the 2011 Family Violence Reforms

56. Among other things, the Administration has in the Consultation Paper stated that Social Welfare Department will launch a 2-year pilot project on children contact centre to facilitate the arrangement of children contacts with separated/divorced parents [§ 50 of the Consultation Paper].

57. We consider that the intended pilot scheme for contact centre must be more than one. In the past few years there is an average of approximately 20,000 new divorce cases alone, each year. In addition, there are pure children cases and also existing and ongoing cases from previous years. If 2% of just these new divorce cases require such service, we are talking about approximately 400 cases and if it is 1%, we still have approximately 200 cases. One contact centre, no matter whether it is located in Hong Kong, would not be realistically sufficient to meet the needs.

58. The centre should also act as a **child-focused centre** rather than just a place for supervised access. A child-focused centre is a place where any child in need or those who have parental responsibility for a child may seek support and assistance from appropriate professionals, such as social workers, counsellors and clinical psychologists. This centre should be run by social workers specialised in child works. The social workers would assist and direct the child for help from counsellors and clinical psychologists for emotional support and treatment, if necessary, and arrange meeting with lawyers for legal advice.

59. In order to address the problems faced by separated/divorced parents in handling children matters, it is time for the Administration to formulate useful complementary policies and commit to allocating adequate resources on the following:

(a) **mandatory parenting course**

We suggest that prior to the filing of an application or petition for separation or divorce, couples are required to attend a mandatory parenting course or alternatively to certify that they have received relevant information, such as the existing certification they acknowledge their receipt of information on mediation services. The course or the information aims to educate those who have parental responsibility for a child or a person named in a child arrangements order as the person with whom the child is to live with or spend time / have contact with, on how to explain to the children of their parents' separation, how to come to an arrangement for future care of their children and what could be the consequences to the related children in the future if they fail to handle their children in an appropriate manner. This enables the relevant parties to be more informed and encourages them to make child-centric decisions during the process of the breakdown of the family.

(b) **parenting co-ordination for high conflict cases**

Children suffer a lot in the disputes of their high conflict parents. Very often these parents bring their issues back to court which takes away the court's time and escalates their respective legal costs. Parenting Coordinators could help educate, mediate and occasionally arbitrate parental disputes over children for high conflict parents. This

professional person has to be specially trained in various aspects which go beyond simply being a professionally trained mediator, counsellor or lawyer. They work to help parents in high conflict to resolve their disputes so they can get on with their life and more importantly their children can be reasonably free from stress and anxiety. The Administration should seriously consider introducing parenting coordination as part of the support services for high conflict parents. These Parenting Coordinators should be given appropriate authority to arbitrate on nitty-gritty issues by statute or subsidiary rules as it has been widely adopted in the United States of America.

(c) **specialized training to social workers**

We note that at present, there are 65 Integrated Family Services Centres ("IFSCs"). These are operated by the Social Welfare Department and subvented non-governmental organizations (NGOs) to provide a range of family services. However, there are concerns from the NGOs that the IFSCs are overloaded with cases and there are insufficient social workers specialized in dealing with children. As such, we suggest that the Administration should set up and fund a specialized team to handle children matters, ideally via the child focused centres.

(d) meaningful methods of **enforcement of maintenance**

The current system on the collection of maintenance payments and enforcement of maintenance orders (e.g. the attachment of income order, imposing interest or surcharge against defaulting maintenance payers) is unhelpful and ineffective. A lot of public fund has been paid out under the CSSA system to support divorced person and children which could have been paid for and recovered from the responsible persons through appropriate authority. It is high time for the Administration to reconsider setting up a Maintenance Board in Hong Kong.

(e) effective **enforcement of court orders** such as orders for contact and time spent with the children.

(f) effective **measures against domestic violence and child abuse**

Provision against domestic violence has already been in the statute but there is insufficient education both to the public and professionals involved. Therefore, those provisions are seldom applied for.

Domestic violence has always been an issue affecting family members in particular the children. A lot of the domestic violence went unnoticed until a tragedy has occurred. This could be a result of ignorant of the availability of protection under the existing law and lack of available funding for the application of injunction orders under the domestic violence law. Proper usage and understanding of our domestic violence law would facilitate the implementation of the PR Model and address concerns raised by victims of domestic violence. The Administration should have a holistic approach to stop domestic violence including providing more training to the frontline social workers and police officers in handling domestic violence and child abuse cases.

(g) **public education**

The concept of parental responsibility requires a change in the cultural mindset. The Administration should pay more efforts on educating the public and various professions about the concept of parental responsibility across the board, from schools, to social media, YouTube, television and on public transport.

Other comments

60. Apart from the above, we note that the Consultation Paper is silent on how to implement Recommendation 72 - "*a single policy bureau should take over responsibility for creating and implementing policy for families and children and, in particular, all the matrimonial and children's Ordinances. It is a matter for the Administration to decide whether the Health, Welfare and Food Bureau or the Home Affairs Bureau should assume this responsibility.*" The Administration is invited to explain how they are going to implement Recommendation 72.
61. In order to lobby support for the implementation of the PR Model by legislative means, we have held a number of meetings with various non-governmental organizations in the past years. We understand that they do not object to the concept of parental responsibility but are concerned about the service gaps to complement the implementation of the PR Model. In a recent such meeting held on 9th March 2016, it was proposed that a

committee should be set up, composing of representatives from the legal profession, non-governmental organizations and government officials to monitor and ensure that concrete support measures are provided and a timetable is set and adhered to, to facilitate the smooth implementation of these support measures.

Concluding Remarks

62. This is a long overdue law reform on child custody and access. The draft Bill represents efforts and attempts to bring forth the important concept of parental responsibility and the focus on children's best interests.
63. The draft Bill should receive support notwithstanding the need to continue to consider and to press for the related support services.

The Law Society of Hong Kong
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