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Dear Sirs

Child Custody and Access: Whether to Implement the “Joint Parental Responsibility Model” by Legislative Means

We write in response to the Government’s public consultation on child custody and access and whether “joint parental responsibility model” should be implemented in Hong Kong by legislative means to replace the existing custody and access arrangements under the family law.

Hong Kong Federation of Women Lawyers was set up in 1976. We focus not only on issues relating to the legal profession but are also strongly committed to improving the well-being of women and children in Hong Kong.

As one of the organizations consulted before the release of The Report on Child Custody and Access by the Law Reform Commission of Hong Kong in 2005, we reiterate our support of the implementation of the joint parental responsibility model by legislative means.

Before we delve into the various specific questions posed in the public consultation document, we lay out below our guiding beliefs and observations:

- 1 We believe that our society has been and should continue to develop with a set of values based on families, communities and civil society, and which places value on raising children, keeping families together, taking care of elderly people, and making the planet sustainable.
- 2 We believe a child is not an asset, but a valuable human being, entitled to develop into a healthy and vibrant person and maintain healthy and personal relations and direct contact with both parents, except where it is contrary to the child’s best interests.
- 3 As highlighted in the public consultation paper, Hong Kong’s legislation on child custody and access is contained in a number of ordinances, developed largely on the basis of the framework adopted in England and Wales. However, such laws have all the archaic concepts and stop short of following the legislative improvements that followed in other common law jurisdictions since 1989.
- 4 In respect of custody and access, it is acknowledged in the public consultation paper that there is no general definition of the terms “custody” and “access” in our laws. Common misunderstandings on such concepts resulted. This is clearly explained by Hon Hartmann JA in an appeal case *PD v KWW (CACV 188/2009)* in the Court of Appeal as follows:

“The concepts of “custody” and “care and control”

S.19 of the Matrimonial Proceedings and Property Ordinance, Cap. 192, directs that, in any proceedings for divorce, nullity of marriage or judicial separation, our courts may make such orders as they think fit for “the custody and education” of any child.

Although the discretion given by s.19 is a wide one, it is not unfettered...

As our law has developed and now presently stands, when a marriage breaks down and the court must ensure the best interests of any child of the union, it will invariably do so by bringing into play the dual concepts of “custody” – whether it be sole or joint custody – and “care and control”. Neither concept, however, is defined in our statute books.

Regrettably, empirical evidence suggests that there is a large measure of misunderstanding as to the nature and extent of the two concepts, certainly among lay persons.

At a practical level, a convenient way of understanding the two concepts is to compare the nature of the decision-making that is required to put them into practice.

The decisions to be made by a custodial parent are those of real consequence in safeguarding and promoting the child’s health, development and general welfare. They include decisions as to whether or not the child should undergo a medical operation, what religion the child should adhere to, what school the child should attend, what extracurricular activities the child should pursue, be it learning a musical instrument or being coached in a sport. A parent vested with custody has the responsibility of acting as the child’s legal representative.

By contrast, the decisions to be made by a parent who (at any time) has care and control of the child are of a more mundane, day-to-day nature, decisions of only passing consequences in themselves but cumulatively of importance in moulding the character of the child. They include a host of decisions that arise out of the fact that the parent has physical control of the child and the responsibility of attending to the child’s immediate care. They include decisions as to what the child will wear that day, what the child may watch on the television, when the child will settle down to homework and when the child will go to bed. They also include the authority to impose appropriate discipline.

We have spoken of the misunderstanding that exists as to the nature and extent of the two concepts. This is most often manifested in the misperception that, if sole custody is given to one parent, that parent thereby “wins” the right to determine all matters big and small in the upbringing of that child while the parent who is not given custody “loses” the right to have any say in the child’s upbringing...

Invariably, therefore, the giving of the sole custody to one parent does no more than recognize that, in the circumstances of the breakdown of the marriage, the best interests of the child are secured by giving to that parent the authority, if necessary, to make a final decision concerning matters of consequence in the upbringing of the child but only after the other parent's views have been given full and rational consideration. In summary, an order of sole custody does no more than add a qualification to the otherwise joint endeavour of both parents in raising their child, that qualification being that the final decision will rest with one parent.

For this reason it is often said that there is a thin line between sole custody and joint custody.”

- 5 Hon Hartmann JA recognized that social imperatives change. The outdated concepts such as the father had almost absolute authority over his child, the mother was best left to care for the child while the father was best left to provide financial support and to exercise rights of guardianship with visitation deemed sufficient are sexist views and obsolete. In his words,

“When they are important and lasting, the common law can, and should, keep pace with that change.

It is widely recognized today that the long-term best interests of a child are invariably best protected if, despite the breakdown of the marital union, both parents are able to continue to play an equal role in making the important decisions that will determine the child's upbringing.”

- 6 Hon Hartmann JA did not say that because of this, more joint custody orders could be granted. Instead, he referred to the legislative reforms in the United States, England and Wales and Australia, and then 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 recommendation legislative form.”

- 7 Hon Lam J in the same case also echoed,

“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 toward 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.”

- 8 After *PD v KWW*, another Justice of Appeal Hon Cheung JA in *SMM v TWM* (CACV 209/2009) also said that,

“It should be noted that the Hong Kong Law Reform Commission Report on Child Custody and Access (7th 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 recommendation of legislation soon.”

- 9 The public consultation paper recorded that some stakeholders who the Administration consulted expressed reservations about the introduction of the joint parental responsibility model. They suggested that as the common law can evolve, the courts could grant more joint custody orders in the best interests of the child. The Administration also looked into the example of Singapore and alluded that Hong Kong could follow Singapore’s conclusion of its Review of Child Custody Law in 2005 that legislative amendments are not necessary.

- 10 We believe that our judges have since the publication of the Report on Custody and Access clearly indicated that the need for legislative amendments are absolutely necessary whether or not more joint custody orders could be granted. In fact, the principle of granting joint custody orders was laid down in an English case *Caffell v Caffell* [1984] *FLR* as follows:

“In many cases joint custody of a child should only be ordered if there was a reasonable prospect that the parents would co-operate. But such an order might be equally appropriate to recognize the responsibility and concern of the parent who did not have the day-to-day control of the child; and might ease any bitterness between the parties.”

The court looked not only to the reasonable prospect that the parents would co-operate but also to the future prospect of such co-operation as Hartmann JA did in *PD v KWW*. However, the basis is still on parents’ co-operation and the judge is entitled to proceed on the presumption that:

“competent, loving parents possessed of sufficient objectivity to be able to make rational decisions in the interests of the child will be able to co-operate with each concerning matters of importance in the upbringing of the child.”

Joint custody orders would not be suitable to be granted to parents who have no reasonable or future prospects of co-operating with each other.

- 11 As to the experience of Singapore, while the public consultation paper cited the Singapore case of *CX v CY (minor: custody and access)* [2005] 3 *SLR* 690, [2005] *SGCA* 37) where the Court of Appeal of Singapore ruled that the concept of joint parenting should be promoted, and that it should be done by making the joint custody or no custody

arrangement the norm in normal cases, and making sole custody orders only in exceptional cases. A closer look at the Review of Child Custody Law of Singapore however details as follows:

“61 This view has been endorsed by the Court of Appeal in their landmark decision of CX v CY. In the judgment of the court, delivered by the Honourable Justice Lai Siu Chiu, it was declared that ...

How the law of custody can support joint parenting

...

26 This idea of joint parental responsibility is deeply rooted in our family law jurisprudence. Section 46(1) of the Women’s Charter (Cap. 353, 1997 Rev Ed) (“the Charter”) exhorts both parents to make equal co-operative efforts to care and provide for their children...

68 In fact, the concept of parental responsibility is not entirely new. Reference has been made to it in the Women’s Charter (Matrimonial Proceedings) Rules.

71 Considering that it is possible for the courts to emphasize joint parental responsibility by making joint custody or no custody orders, and that such an approach has now received the endorsement of the Court of Appeal in CX v CY, there appears to be no pressing impetus to amend the Women’s Charter and other related legislation in order to emphasize parental responsibility. A radical legislative change at this stage might create more confusion and uncertainty and dilute the positive impact of CX v CY. The law on parental responsibility can be left to be developed by the courts under existing legislation.”

The law of parental responsibility has a legislative basis in Singapore’s legislation the Women’s Charter where the courts could develop.

Hong Kong does not have such a legislative basis.

- 12 At the same time, as The People's Republic of China ratified the UN Convention on the Rights of the Child in 1989, the United Kingdom in 1991, and the Convention was extended to Hong Kong in 1994, the Administration should ensure that the substantive legislative provisions, and the way disputes on custody and access are resolved, comply with the Convention. The Convention refers to the Declaration of the Rights of the Child, where it stipulates that the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection. Article 3(1) of the Convention provides, *"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."*
- 13 While it is without a doubt that there is a pressing need for introduction of the joint parental responsibility model, after all it has been advocated since 2005, we recognize that it is not and should not be taken as a panacea to the issues and problems facing divorcing

couples or their children, many of such stem from practical issues such as available housing and the increasing marriage between Hong Kong residents and mainland residents. Education on marriage, family and parenthood; accessible, affordable and quality childcare; measures that allow better work-life balance; family and children dispute mediation; and divorce counseling and resources centres should be introduced, reinforced or realigned.

- 14 The Administration did not include cases of domestic violence in the public consultation exercise. However we believe that while such cases could be dealt with in a separate context, not addressing them in the public consultation heightened the worries the victims of domestic violence have over the joint parental responsibility model, while in fact the Law Reform Commission had specifically addressed such concerns.
- 15 In particular, the Law Reform Commission recommended that the proposed legislation should specify those decisions relating to the child that require other parent's express consent, and those that only notification is required. There are only four in the list where other parent's express consent is required and they are: consent to change the child's surname, consent to the adoption process, consent to removal of the child out of the jurisdiction for more than one month, and consent to permanent removal of the child out of the jurisdiction. If consent is not forthcoming, the parent can seek a court order. For other matters such as a major operation or long-term medical or dental treatment for the child; major change in the child's schooling; bringing the child up in a particular religion; consent to the child's marriage; moving house with the child; removing the child from the jurisdiction temporarily but for less than one month; changes in the child's domicile or nationality; and any other major or important decisions in the life of the child only require notification. Notification in these days can take any form such as email and SMS where there is no personal contact. Also, the Law Reform Commission also recommends that the court be giving power to vary or dispense with any of the consent or notification requirements in domestic violence cases. We believe that this is well considered and taken into account the issues of non-cooperating couples, and also fear and practical concerns of the victims of domestic violence. If the joint parental responsibility model is introduced, we also believe that the Administration should take a holistic approach and review the needs and issues relating to cases of domestic violence.
- 16 There were views that since the husbands could not or would not even pay maintenance, why should or would they discharge their parental responsibilities. We can see that non-payment on maintenance is a real and pressing issue and believe that the Administration should look into providing effective enforcement measures. However, this should not negate the parental responsibility which exists from the day of conception of the child of the union.
- 17 There were views that joint parental responsibility model will also allow difficult spouse to be even more difficult. However, as stated above, we believe with the consent and notification list, such cases would not be common. Further, if one spouse is proving to be difficult, the Law Reform Commission recommends that there would be mechanism available to the other spouse to apply for a specific issue order.

18 There were also views that unlike England and Wales, US or Australia, Hong Kong remains a Chinese dominated society where parental responsibility is part of our culture and engrained in our behavior. Hence, there is no need to promote parental responsibility in the first place, let alone legislate it. The society should not have to legislate on parental responsibility to promote parental responsibility. We agree and believe that parental responsibility is part of our culture. We don't however believe that the Law Reform Commission was trying to legislate parental responsibility. Rather, it is legislating the right of the children.

Against the above background, beliefs and observations, our responses to the questions in the public consultation paper are as follows:

Q1. Do you agree that the concept of the joint parental responsibility model has the merits listed out in paragraph 3.3 of the consultation paper? If so, why? If not, why not?

A1: We agree that the concept of the parental responsibility model has the merits listed out in paragraph 3.3 of the consultation paper. However, more importantly, there is a pressing need for such introduction as stated in points 4 -12 above.

Q2. Should the concept of the joint parental responsibility model be promoted in Hong Kong? If so, why? If not, why not?

A2: We think the concept of continuing parental responsibility as referenced in the Law Reform Commission report should be introduced as an underlying concepts to the body of family laws to replace the existing concept of parental right.

Q3. If your answer to Q2 above is affirmative, do you agree that we should introduce legislative amendments to support and promote the concept of the joint parental responsibility model in Hong Kong? If so, why? If not, why not?

A3: Yes, we should introduce legislative amendments to support the concept of the continuing parental responsibility in Hong Kong. Reasons as stated in points 4-12 above. Please also refer to points 13, 14 and 15 on the need for supporting services for the implementation of the legislative amendments such as education and counseling and issues relating to domestic violence.

Q4. If your answer to Q2 is affirmative and that to Q3 is negative (i.e. you think that the joint parental responsibility model should be promoted in Hong Kong but it should **not** be done through legislative reforms), how do you think the concept of the model should be promoted in Hong Kong?

A4: Not applicable.

Q5. If your answer to Q3 is affirmative, what are your views on the recommendations made in the LRC's Report to implement the joint parental responsibility model (set out in paragraphs 3.4 to 3.8 of the consultation paper)?

A5: We fully support the recommendations made in the Law Reform Commission's report and we urge the Administration to take full account on all the recommendations made in the report.

Q6. Do you agree with the views of those in support of reforming Hong Kong's family law to implement the joint parental responsibility model? If so, why? If not, why not?

A6: Yes as stated above.

Q7. Do you agree with the view that the concept of the joint parental responsibility model should be promoted through the development of case law and public/ parent education only? If so, why? If not, why not?

A7: We do not agree that the concept of parental responsibility can be promoted through development of case law and public/parent education. Please see points 4-12 above.

Q8. What lessons do you think we can learn from these overseas jurisdictions?

A8: We should learn from the experiences of England and Wales and Australia and other common law countries, and introduce a Hong Kong concept. We also note that in Australia, more litigation is resulted as the concept legislated is "shared parental responsibility".

Q9. Which jurisdiction(s) do you think can serve as the best reference for Hong Kong in considering our way forward, and why?

A9: We believe the Law Reform Commission report has recommended a Hong Kong model based on experiences from overseas jurisdictions.

Q10. Do you have any other views on the concept of the joint parental responsibility model and whether it should be implemented in Hong Kong by legislative means?

A10: Please refer to points 13-18 above.

Yours faithfully

Hong Kong Federation of Women Lawyers