

**Legislative Council Panel on Welfare Services**

**Hong Kong Law Reform Commission Report  
on Child Custody and Access**

**Purpose**

The Law Reform Commission has published its Report on Child Custody and Access putting forward 72 recommendations, the main thrust of which relates to the introduction into Hong Kong's family law of a new "parental responsibility model", emphasising the continuing responsibilities of both parents towards their children rather than their individual parental rights even after divorce. Underlying the new approach is the principle that the "best interests" of children (best interest principle) should guide all proceedings concerning children. The Administration has conducted a public consultation exercise on LRC's recommendations and briefed Members at the meeting of the Panel on Welfare Services held on 9 January 2012 vide LC Paper No. CB(2)717/11-12(03). This paper briefs Members on the results of the public consultation and sets out the way forward.

**Background**

**The LRC Report**

2. The Report on Child Custody and Access was the final one in a series of four reports published by LRC on guardianship and custody of children. The first report in this series on Guardianship of Children, published in January 2002, concerned the law governing the appointment of guardians for children in the event of the death of one or both parents. The recommendations were followed up by the Labour and Welfare Bureau (LWB), resulting in the enactment of the Guardianship of Minors (Amendment) Bill 2012. The second report on International Parental Child Abduction, published in April 2002, examined the law relating to the abduction of children by parents in contested custody disputes. LWB is following up on the legislative exercise with a view to introducing the Bill into the Legislative Council shortly. The third report on the Family Dispute Resolution Process, published in March 2003, considered the

various approaches that could be adopted in resolving family disputes, and is being followed up by the Home Affairs Bureau (HAB). The fourth report on Child Custody and Access, published in March 2005, is the subject of this paper. Members were briefed on these LRC Reports at the meeting of the Panel on Welfare Services held on 8 February 2010 vide LC Paper No. CB(2)845/09-10(05).

3. The LRC Report on Child Custody and Access (the Report) observes that Hong Kong's existing law in this area defines parent-child relationship in terms of the "rights and authority" that parents have over their children. In the past, when a couple divorce or are engaged in other matrimonial proceedings, the courts would often award one parent sole custody of the child – with all the decision-making power that implied – while the other parent's involvement with the child was limited to the right of access only. Over time, this often resulted in dwindling contact between the child and the non-custodial parent. In recent years, the courts have recognised the importance of maintaining the direct involvement of both parents in the child's life as far as possible, and so more orders for joint custody are now being made.<sup>1</sup> Under these orders, although one parent may have daily care and control of the child, both parents continue to be actively involved in the child's life and in making major decisions affecting the child.

4. On the other hand, LRC observes that in England, Scotland, Australia and New Zealand, former child custody laws similar to our own have been replaced with laws reflecting a new parental responsibility model. This new approach emphasises the continuing responsibilities of both parents towards their children rather than their individual parental rights. It also emphasises the child's right to enjoy a continuing relationship with both parents if this is in the child's best interests in line with the best interest principle. Allied to this change in concept, a range of new court orders was introduced in England, Scotland, Australia and New Zealand to sweep away the old "custody" and "access" terminology in family proceedings, with its connotations of ownership of the child.

5. The main thrust of the Report relates to the introduction of this new "parental responsibility model" (the Model) into Hong Kong's family law. As part of this approach, LRC recommends the introduction of new court orders to govern the arrangements affecting children when

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<sup>1</sup> Judge Melloy expressed a contrary view in her judgment in TRRV RAR, FCMC 8382/2008 (dated 16 March 2010) "17. The father has said that joint custody order 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 that the Law Reform Commission Report on Child Custody and Access dated March 2005 challenges this."

their parents divorce. LRC further recommends the removal of the current limitation on the right of interested third parties, such as close relatives, to apply for court orders affecting children. Other important recommendations in the report relate to: how the views of the child (up to 18 years old) may be better expressed in family proceedings which affect them; how the current care and protection provisions may be improved to better protect children's rights; and how the custody and access cases involving domestic violence may be better dealt with under the law. LRC also recommends that all parental rights and responsibilities shall apply in respect of a child until the child reaches the age of 18. For the removal of doubt, LRC recommends that it should be made clear that the best interest principle should guide all proceedings concerning children under the Guardianship of Minors Ordinance (Chapter 13), the Matrimonial Causes Ordinance (Chapter 179), the Matrimonial Proceedings and Property Ordinance (Chapter 192) and the Separation and Maintenance Orders Ordinance (Chapter 16), including questions of guardianship, maintenance or property.

6. Interim recommendations on the Model were included in the consultation paper issued by LRC's Sub-committee on Guardianship and Custody in 1998. These proposals were generally well supported by the consultees, although a minority expressed opposition to the reform. Their primary concern was that in situations where domestic violence was involved in the break-up of the marriage, the introduction of the reform might allow greater scope for abusive ex-spouses to continue to harass their former partners and children after the divorce. LRC has considered these views and further developed its original proposals to take account of these and other concerns raised by the consultees.

7. After presenting an overview of Hong Kong's current law on child custody and access as well as other related areas of our family law and an analysis of the child custody and access regimes in England, Scotland, Australia and New Zealand, LRC sets out its 72 recommendations, as summarised in **Annex A**. These recommendations are in five parts –

- (a) Part A (Recommendation 1 to 19) covers the underlying principles of the Model;
- (b) Part B (Recommendation 20 to 32) recommends the replacement of the existing custody and access orders by a new range of court orders;

- (c) Part C (Recommendation 33 to 41) puts forward a set of supplementary recommendations in response to the concerns expressed by some respondents to the 1998 public consultation (as referred to in paragraph 6 above) that the Model might be used by perpetrators of domestic violence to further harass and abuse the ex-spouse and children;
- (d) Part D (Recommendation 42 to 53) focuses on the child's participation in family proceedings affecting them; and
- (e) Part E (Recommendation 54 to 72) brings together a number of reform proposals which are collateral to the general laws of child custody and access. One of the recommendations (Recommendation 71) is to consolidate the provisions dealing with disputes relating to children, arrangements on divorce, guardianship, disputes with third parties, or disputes between parents without accompanying divorce proceedings into one existing ordinance; and further, to incorporate the legislative provisions resulting from the recommendations in the Report and the existing substantive provisions on guardianship and custody into one consolidated ordinance.

## **Public Consultation**

8. As LRC had recommended a major reform of the existing law on custody and access and there were concerns expressed by some sectors of the community as reflected to LWB through informal meetings with major stakeholders( including social workers, women's groups and children rights groups etc.), a public consultation exercise was conducted by LWB in December 2011. Some 230 written submissions were received during the four-month consultation. Among them, about 60 associations/ groups submitted their views.

9. The respondents could be broadly categorized as –

- (a) those who supported the legislative reform (mainly the legal professions and some children's groups; a typical submission from the Hong Kong Bar Association is at **Annex B**);
- (b) those who objected the proposal (mostly individual single-parents;



please see the submission from a group of single-parents (港島單親互助社) at **Annex C**); and

- (c) those who had reservations on the proposal or expressed concerns over legislation at this stage and pressed for additional services and resources (social workers, women's groups and welfare NGOs; please see the submission from the Hong Kong Council of Social Services at **Annex D**).

Their views are summarized as follows –

(a) Those who supported –

- (i) the Model is more child-focused and can promote the continued involvement of both parents in the lives of their children even after divorce. Legislative reform could help shift the focus of the existing family law from parental rights toward parental responsibilities;
- (ii) parental hostility during divorce proceedings would be reduced as both parents could be involved in the lives of their children in the Model;
- (iii) the Model is in line with the latest international trend in family law, and Hong Kong should develop its own successful model riding on the experience of the other major common law jurisdictions such as England and Wales, Australia and New Zealand; and
- (iv) the concept of the Model could not be adequately promoted through evolving case law under the existing legislative framework, and the mindset of the public, in particular divorced parents could not be changed merely by public education without legislative reform. Legislative backing would be necessary to set out the relevant principles and court powers.

(b) Those in opposition or have reservation –

- (i) the courts already have the flexibility to make the appropriate type of custody order (either sole or joint) according to the circumstances of each case within the existing legal framework. On the contrary, joint parental responsibility would be the default arrangement under the Model. It may not be able to cater for the needs of families where the divorced parents can no longer cooperate with each other;
- (ii) the new consent and notification requirements may be used by trouble-making or hostile parents to obstruct and harass ex-spouses, or to purposely delay the making of major decisions relating to the child, thus causing distress to and adversely affecting the well-being of the child. Moreover, high-conflict families especially those involving psychological (rather than physical) abuse may not be readily identifiable. Requiring the parent with the residence order to contact the ex-spouses with a view to informing, or seeking consent from him/her would further inflict harm on the child;
- (iii) the number of litigated cases may rise since the consent and notification requirements may prolong the hostility between divorced parents and lead to continuous legal disputes over issues concerning the child; and
- (iv) Hong Kong is a Chinese society and has a different culture from other western common law jurisdictions. Our community may not be ready for such a paradigm shift in parenting concept. The Model should be further developed and promoted under the existing legislative framework without legislative reform; and
- (v) support services to divorced families should be enhanced to tie in with the proposed legislative reform, including strengthening pre-marital and divorce counseling, mediation services for couples, improving visitation and access arrangements, etc.

10. In addition to views received during the public consultation

exercise, we also note that the Court of Appeal has urged the Administration to implement the LRC's recommendations in the Report by legislation in two recent judgements in 2010.<sup>2</sup> Specifically, some judges opined that the respective rights and responsibilities of the parents towards their children would be more clearly defined and relevant court cases could have been avoided should the recommendations be implemented. They urged the Administration to make a serious effort in giving the LRC's recommendations legislative form.

## **Overseas Experience**

11. Apart from examining the views upon completion of the consultation, LWB met with LRC Secretariat to discuss issues of concern raised during the consultation. Since there have been further developments on the Model in other jurisdictions subsequent to the issue of the Report in 2005 and LWB's public consultation in 2011-2012, further research was conducted to look into the latest developments in other countries in implementing the Model.

12. The Report made reference to four common law jurisdictions, namely, England and Wales, Scotland, Australia and New Zealand, which introduced legislative reform in the period between 1989 and 2005 to implement the Model. For England and Wales and Australia, studies were conducted to evaluate the effectiveness of the legislative reform. While none of the studies questioned the fundamental merits of the reform, some concerns such as failure in changing the mindset of parents, increase in court disputes and abuse by trouble-making parents were noted. Both England and Wales and Australia conducted subsequent legislative amendments with a view to addressing the problems identified.

13. In Australia, in light of a review<sup>3</sup> on the implementation of the Model, amendments were made by the Family Law Amendment (Shared Parental Responsibility) Act 2006 to further introduce a new presumption of equally shared parental responsibility, with the emphasis that both parents have an equal role in important matters concerning their children. The Act also introduced the requirement that parent must attend family dispute resolution sessions before taking a parenting matter to court and replaced the residence order and contact order with an all-in-one

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<sup>2</sup> SMM v TWM [2010] 4 HKLRD 37 and PD v. KWW [2010] 4 HKLRD 191

<sup>3</sup> House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Enquiry into Child Custody Arrangements in the Event of Family Separation* (2003, Canberra: Commonwealth of Australia).

“parenting order”. To provide further protection for children and families at risk of violence and abuse, the Australia Family Violence Act 2011 was enacted, further amending relevant provisions in the law so that the court could give greater weight to the need to protect the child’s safety. It also enhanced the reporting requirements for family violence and abuse, ensuring that courts would have better access to evidence.

14. New Zealand implemented the Model through the Care of Children Act 2004 which came into operation in 2005. While parents continue to be guardians of their children under the Act, the definition of “guardianship” was amended to emphasise parental responsibilities rather than parental rights. To put in practice the principle of joint parental responsibility, the Act provides that a guardian of a child must act jointly with any other guardians of the child in exercising the duties, powers, rights, and responsibilities of a guardian in relation to the child. The Act abolished the custody and access order and introduced the new parenting orders which determine who would have the role of providing day-to-day care for a child and who would have contact with the child.

15. In England and Wales, the Model was implemented through the Children Act 1989. In light of a review in 2004<sup>4</sup>, amendments were made by the Children and Adoption Act 2006 which mainly provided the courts and relevant agencies with new powers to better enforce contact orders for ensuring their compliance. Another review was conducted in 2011 which observed that there has been an increase in the number of applications to the court<sup>5</sup>. The review recommended the Government, among others, to develop new child arrangements order to replace the residence and contact orders in the Children Act 1989 and to further promote the use of alternative family dispute resolution methods such as mediation and in-court conciliation. The UK government accepted most of the review’s recommendations in 2012<sup>6</sup> and the Children and Families Bill is currently in passage through the UK Parliament.

16. In addition to the four jurisdictions covered in the Report, we understand that a new Family Law Act has come into operation in Canada (British Columbia) in March 2013. The Act replaces the former “custody and access” regime with a new child-centred model which focuses on parental responsibilities, introduces new terminology for the court orders

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<sup>4</sup> UK Department for Constitutional Affairs, *Parental Separation: Children’s Needs and Parents’ Responsibilities* (2004).

<sup>5</sup> UK Ministry of Justice, Family Justice Review Panel, *Family Justice Review: Final Report* (Nov 2011)

<sup>6</sup> UK Ministry of Justice, *The Government Response to the Family Justice Review* (Feb 2012)

and promotes out-of-court dispute resolution for family cases.

17. We also looked into the legislation relating to child custody and access arrangements in Singapore. The Women's Charter which governs Singapore's laws on custody provides that the parents would be "mutually bound to cooperate" with each other in caring for the children. With the Court of Appeal handing down a judgement in July 2005 that the concept of joint parenting should be promoted by making the joint custody or no custody arrangement the norm in normal cases under the existing legislative framework, Singapore decided that legislative amendments are not necessary and the matter can be left to judicial development by the courts under the concept of custody in existing legislation.<sup>7</sup> Members may wish to refer to the Hong Kong Bar Association's submission as attached at **Annex B** which has included comments on the Singapore arrangements.

## **Our analysis**

18. LRC's recommendations aim to shift away from the traditional emphasis on parental rights over the children towards a more child-focused concept of parental responsibility. While there seems to be more submissions having reservations on the proposal to introduce the Model through legislative means, most of the respondents who have expressed concerns or those who have reservation about legislation do not question or some even support the underlying concept of the Model. In other words, a clear majority support or do not dispute the concept. We agree in principle that the concept should be pursued. The question is whether the Model should be implemented by legislative means, and if so, whether it is an opportune time to take forward the legislative reform at this stage given the divided views received during public consultation.

19. Most respondents agree that the concept would be conducive to the well-being of children. Some of them are mostly concerned about the practical issues when the Model is put into implementation. We note that the concerns have been addressed by LRC (paragraph 6 above). In response to the worries expressed by some consultees that the default joint parental responsibility arrangement may lack flexibility to cater for individual cases, LRC has expressed the view that the Model should on the contrary allow great flexibility including where parents cannot co-operate or it is not in the best interests of the child to have close parental

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<sup>7</sup> "Review of Child Custody Law" published by the Attorney-General's Chambers of Singapore (2005), Executive Summary

contact with one party. Under LRC's recommendations, the court is given express power to make the most appropriate orders/directions upon considering factors affecting the child and taking into account the circumstances of each individual case. Subsequent orders may also be granted to settle arrangements between parties.<sup>8</sup> This would help prevent trouble-making or hostile parents from obstructing the decision made by the other side or bringing unnecessary disruptions to the children and former spouse.

20. On the possible impact on cases involving domestic violence, at present the court and relevant departments have been handling such cases with care and caution and in accordance with established procedures. LRC has suggested safeguards to be incorporated into the new system to provide protection to those cases.<sup>9</sup> Among others, the court would consider a list of factors affecting the child during the proceedings, including any harm which the child has suffered or is at risk of suffering and any family violence involving the child or a member of the child's family, etc.. LRC has also suggested that consideration be given to making available more information such as relevant criminal records of parents to the court hearing contact applications to enable a proper assessment of risk to a child.

21. Regarding concerns over the possible increase in litigation and prolonged disputes between divorced parents, both the UK and Australia made further amendments to their family laws in 2006 to strengthen the enforcement of court orders, introduce the use of alternative family dispute resolution methods and enhance relevant support measures. Later research<sup>10</sup> has recorded a decline in court filings in cases involving children and a shift away from automatic recourse to legal solutions in response to post-separation relationship difficulties. Similarly in Hong Kong, we have been promoting the employment of mediation service in recent years. Specifically, recognising that family mediation can help resolve family disputes and help family members to alleviate the adverse effects arising from litigation, the Family Council launched a two-year pilot scheme (the Scheme) on family mediation to provide sponsorship to

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<sup>8</sup> For example, LRC recommends that the court would have: the express power to vary or dispense with any of the consent or notification requirements where this is considered necessary; the power to include directions or conditions in any of the court orders applicable under the Model e.g. to impose directions in a contact order for supervised contact with the child where there has been a history of violence or abuse in the family; a "specific issues order" or "prohibited steps order" to give direction to address the disagreements between parents on specific issues relating to their children, etc..

<sup>9</sup> Recommendations 33 to 41, Chapter 11, LRC Report.

<sup>10</sup> 2006 Reforms Evaluation Report (2009) by Australian institute of Family Studies , Executive Summary

interested organisations on family service. A total amount of \$1.84 million was allocated to four NGOs<sup>11</sup> in 2012-13. Another round of applications for 2013-14 has already been invited, and around \$2 million has been earmarked for allocation to these eligible organisations. The Family Council will review the cost-effectiveness of the Scheme and recommend the way forward towards the end of the Scheme in the latter half of 2014. With the enhancement of mediation service and its gradual prevalence in family disputes, the concerns regarding the upsurge of litigated cases may be addressed.

22. In response to concerns over the enhancement of existing support services for divorced families, we have all along attached importance to the welfare of families and are committed to providing services to meet their needs. At present, a spectrum of preventive, supportive and remedial welfare services are provided by the extensive network of 65 Integrated Family Service Centres (IFSCs) and two Integrated Service Centres (ISCs) over the territory to cater for needy families (including divorced families). Services provided include family life and parenting education, groups and programmes to strengthen the resilience of divorced individuals and families as well as counselling services and referral services to address the needs of divorced families. In early 2013, to promote the concept of continuing responsibilities of the divorced parents, the Social Welfare Department (SWD) has also launched a territory-wide publicity campaign, namely “Marriage may end but parenthood goes on”.

23. For high-conflict families, the 11 Family and Child Protective Services Units (FCPSUs) of SWD have been providing services to safeguard the interest of the children affected by custody disputes and referred by the courts, including those involved in domestic violence. The social workers of FCPSUs provide investigation reports to courts and render statutory supervision to cases as ordered by courts. While conducting social investigation, the social workers of FCPSUs will provide the separated/ divorced parents with information on the importance of co-parenting. For cases under statutory supervision, social workers will render counselling and other assistance as appropriate, including psychological service, to the parents as well as children to facilitate smooth arrangement of access, cooperation in parental responsibilities and reduction of negative impacts of parents’ divorce on children. In view of the difficulties encountered by some

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<sup>11</sup> The four NGOs are the Caritas Hong Kong, the Hong Kong Catholic Marriage Advisory Council, the Hong Kong Family Welfare Society, and Yang Memorial Methodist Social Service.

separated/divorced parents with history of domestic violence in meeting with their children, since August 2012, child visitation service for children to meet their parents not living together because of the parents' admission to refuge centres/ multi-purpose crisis intervention and support centre has been provided under the Victim Support Programme for Victims of Family Violence. With effect from 1 July 2013, the child visitation service has been extended to families with violence problem living outside the abovementioned centres. We will continue to monitor and review the services and resources required with the aim to provide adequate support for nurturing and fostering positive parenting and family relationships.

24. We also note that some respondents are concerned about the enforcement of maintenance orders in divorce cases. Over the past few years, HAB has been streamlining the procedures for collecting maintenance payments and application for legal aid, and working on publicity and education programmes to strengthen public understanding of the responsibilities of maintenance payers, rights of maintenance payees and services available to maintenance payees for the arrears of maintenance. HAB is also preparing legislative amendments to relax the service requirements on judgment summons to combat the problem of maintenance payers evading service of the judgment summons.

## **Way Forward**

25. Our responses to LRC's 72 recommendations seriatim are included in **Annex A**. Noting that the majority of concerns relate to how the Model is to be implemented in practice, it is important for the Administration to work out the legislative details and implementation arrangements to show how the concerns could be addressed in practical terms. To pursue the legislative route for implementing the Model, the exercise would inevitably be a massive one, involving changes to be made to different parts of our various matrimonial and custody-related ordinances.<sup>12</sup> In light of the evolving overseas legislation in the area, we also need to take into account the latest developments and see how Hong Kong could develop our own model riding on the experience of other jurisdictions.

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<sup>12</sup> At present, there are a number of ordinances in Hong Kong dealing with custody and access matters, including the Guardianship of Minors Ordinance (Cap.13), the Separation and Maintenance Orders Ordinance (Cap.16), the Matrimonial Causes Ordinance (Cap.179), the Matrimonial Proceedings and Property Ordinance (Cap.192), the Protection of Children and Juvenile Ordinance (Cap.213) and others.



26. We propose that (LWB in conjunction with the Department of Justice) commence the initial stage of the follow-up work of the Report: conduct research on the latest developments in overseas jurisdictions, and prepare legislative proposals and implementation arrangements (especially on the safeguards in handling cases involving domestic violence or hostile parents). In the process, we will closely liaise with all relevant parties including the Judiciary, the Law Society of Hong Kong and other stakeholders. We will work with concerned parties including the Judiciary and the relevant Bureaux/ Departments and consider how to take forward some of the recommendations through administrative means, e.g. issue of guidelines, provision of training, and review and research on relevant arrangements. Moreover, as the concept represents a significant change in the mindset of parents, we will continue our efforts on the publicity and education front to promote the concept of parental responsibility. Upon working out the detailed legislative and administrative proposals, we will further engage the stakeholders and interested parties before embarking on legislation.

### **Advice Sought**

27. Members are invited to note the content of this paper and provide comments on the proposed way forward.

**Labour and Welfare Bureau**  
**July 2013**

**Summary of the LRC recommendations and  
the Administration's response**

**Part A. Parental Responsibility and Rights**

**LRC Recommendation 1 (Applicable proceedings)**

For the removal of doubt, we recommend that it should be made clear that the welfare or "*best interests*" principle guides all proceedings concerning children under the Guardianship of Minors Ordinance (Cap 13), the Matrimonial Causes Ordinance (Cap 179), the Matrimonial Proceedings and Property Ordinance (Cap 192) and the Separation and Maintenance Orders Ordinance (Cap 16), including questions of guardianship, maintenance or property.

Administration's response:

We agree in principle with the welfare or "best interests" principle. The question is whether it is the opportune time to implement the joint parental responsibility model by legislative means as there are divided views in the community. Some of the concerns expressed by the respondents could only be addressed or allayed after the legislative details and implementation arrangements are sorted out, having regard the latest developments in other jurisdictions. It will take some time to sort out the legislative details and implementation arrangements to ensure consistency among different relevant Ordinances.

**LRC Recommendation 2 (Best interests)**

To reflect our view that the term "*best interests*" is more appropriate for modern conditions in Hong Kong than the term "*welfare*," and is more in compliance with our international obligations under the United Nations Convention on the Rights of the Child, we recommend that section 3(1)(a)(i) of the Guardianship of Minors Ordinance (Cap 13) should be amended to read, "*shall regard the best interests of the minor as the paramount consideration ...*."

We also recommend that consequential amendments should be made to the other matrimonial Ordinances.

Administration's response:

Section 3(1)(a)(i) of the Guardianship of Minors Ordinance (Cap.13) has been amended. Consequential amendments will be made to other matrimonial Ordinances when the legislative route is pursued.

### **LRC Recommendation 3 (Statutory checklist of factors)**

We recommend the introduction of a statutory checklist of factors to assist the judge in exercising his discretion in determining the proceedings that will replace custody or guardianship proceedings under these reforms. This checklist should be broadly based on that set out in section 1(3) of the Children Act 1989 in England.

We also recommend the inclusion in the checklist of the following additional factors based on section 68F(2) of the Family Law Act 1975 in Australia:

- (i) section 68F(2)(b) (in part) in relation to the child's relationship with each of his parents and other persons;
- (ii) a broader formulation of section 68F(2)(d) of the Australian Act, in relation to the practical difficulty of maintaining contact with either parent;
- (iii) section 68F(2)(f) (in part), in relation to any characteristics of the child that the court considers relevant;
- (iv) section 68F(2)(h) in relation to the attitudes of each of the parents towards the child and towards the responsibilities of parenthood;
- (v) section 68F(2)(i) in relation to any family violence involving the child or a member of the child's family; and
- (vi) a catch-all factor along the lines of Section 68F(2)(l).

#### **Administration's response:**

A statutory checklist should ensure that all courts hearing cases in this area will consistently take into consideration the same set of factors affecting the child. The checklist proposed by the LRC is wide-ranging which allows the court wide discretion in hearing individual cases. The "catch-all" factor recommended would also allow the court to take into account any factors it considers relevant and ensure flexibility provided to the court. We will refine and finalize the list in consultation with the Judiciary. Also see recommendation 43.

### **LRC Recommendation 4 (Concept of parental responsibility)**

We recommend that the concept of parental responsibility should replace that of guardianship, except that the concept of guardianship should be retained in relation to a third party's responsibilities for a child after the death of a parent.

#### **Administration's response:**

Agree with the concept. Also see our response to recommendation 1.

### **LRC Recommendation 5 (Parental rights)**

We recommend the adoption of a provision based on sections 1 and 2 of the Children (Scotland) Act 1995, which specifies separately a list of parental responsibilities and a list of parental rights.

[Administration's response:](#)

[Agree to consider the recommendation when the legislative route is pursued. Also see our response to recommendation 1.](#)

### **LRC Recommendation 6 (Age at which parental responsibility ceases)**

We recommend that all the parental rights and responsibilities referred to in sections 1 and 2 of the Children (Scotland) Act 1995 should apply in respect of a child until the child reaches the age of eighteen.

[Administration's response:](#)

[Agree to consider the recommendation when the legislative route is pursued. Also see recommendations 29, 32 and 68 relating to the age issue.](#)

### **LRC Recommendation 7 (Father as natural guardian)**

We recommend that the common law right of the father to be natural guardian of his legitimate child should be abolished.

We also recommend the repeal of section 3(1)(b) of the Guardianship of Minors Ordinance (Cap 13).

[Administration's response:](#)

[Agree to consider the recommendation when the legislative route is pursued.](#)

### **LRC Recommendation 8 (Married parents)**

We recommend the adoption of a provision on the lines of section 2(1) of the Children Act 1989 in England, but amended, for the removal of doubt, to include reference to parents married subsequent to the birth of the child.

[Administration's response:](#)

[Agree to consider the recommendation when the legislative route is pursued.](#)

### **LRC Recommendation 9 (Acquisition of parental responsibility by unmarried fathers – language of the current law)**

We recommend that the language of section 3(1)(c)(ii) and (d) of the Guardianship of Minors Ordinance (Cap 13), which relates to the *"rights and authority"* of an unmarried father, should be changed to reflect the new language of responsibilities rather than rights.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

### **LRC Recommendation 10 (Acquisition of parental responsibility by signing the birth register)**

We recommend that an unmarried father should be capable of acquiring parental responsibilities and rights by signing the birth register. The proposed legislation should include this in a list of the ways in which parental responsibility can be acquired. We do not recommend the automatic acquisition of parental responsibility or rights by unmarried fathers.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

### **LRC Recommendation 11 (Parental responsibility agreements)**

We recommend that unmarried parents should be encouraged to sign parental responsibility agreements to ensure the best interests of their child.

We also recommend that unmarried mothers should be encouraged to appoint a testamentary guardian for their children.

Administration's response:

Agree to consider the recommendation; to be taken forward outside the legislative regime.

### **LRC Recommendation 12 (Parents acting independently)**

We recommend the adoption of a provision on the lines of section 2(7) of the Children Act 1989 enabling persons with parental responsibility to act independently, but restricted to the day-to-day care and best interests of the child.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued. It is noted that England has conducted a review on the implementation of parental responsibility in 2011. We will follow up on the latest development in England.

### **LRC Recommendation 13 (Scope of parental responsibility – when consent or notification is required)**

We recommend that the proposed legislation should specify those decisions relating to the child where the other parent's express consent is required, and those decisions where only notification to the other parent is required.

We further recommend that the court should be given express power to vary or dispense with any of the consent or notification requirements where this is considered necessary.

#### **Administration's response:**

Agree to consider the recommendation when the legislative route is pursued. The consent/notification requirements are aimed at promoting consultation on important decisions between divorced parents. There are concerns that if such requirements are stipulated in law, changes to such requirements would need to be effected by legislative amendments from time to time. LRC has recommended to build into the provisions flexibility for the judge to change or vary the content of the list in any particular case. Also see our response to recommendation 1.

### **LRC Recommendation 14 (Enforcement of maintenance orders)**

We recommend that the Administration should review the existing law and procedures relating to the enforcement of maintenance orders to see how they could be made more effective.

#### **Administration's response:**

Will review the existing law and procedures as an on-going exercise.

### **LRC Recommendation 15 (Acting incompatibly)**

We recommend that a provision on the lines of section 2(8) of the Children Act 1989 should be adopted.

#### **Administration's response:**

Agree to consider the recommendation when the legislative route is pursued.

### **LRC Recommendation 16 (Delegation of parental responsibility)**

We recommend the enactment of a provision based on section 2(9) to (11) of the Children Act 1989 in England, with the addition of words to the effect that no arrangement of a type referred to in that provision shall be enforced by the court if the court is of the opinion that it would not be for the benefit of the child to give effect to that arrangement.

We further recommend that section 4 of the Guardianship of Minors Ordinance (Cap 13) be repealed.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

#### **LRC Recommendation 17 (Continuing parental responsibility)**

We recommend a provision on the lines of section 11(11) of the Children (Scotland) Act 1995, in relation to the effect on the retention of parental responsibility and rights by one person when another person also acquires such rights.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

#### **LRC Recommendation 18 (Removal of surviving parent as guardian)**

We recommend that the right to remove the surviving parent as guardian under section 6(3) of the Guardianship of Minors Ordinance (Cap 13) should be repealed.

Administration's response:

Completed in the context of the Guardianship of Minors (Amendment) Ordinance 2012.

#### **LRC Recommendation 19 (Unmarried father as surviving parent)**

We recommend that a provision be inserted in the Guardianship of Minors Ordinance (Cap 13) to the effect that once an unmarried father is granted parental rights or responsibilities, he can be treated on the death of the mother as the surviving parent for the purposes of that Ordinance.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

## **Part B. Types of Court Orders for Children**

### **LRC Recommendation 20 (Custody orders)**

We recommend the repeal of the provisions in the matrimonial Ordinances (including the Guardianship of Minors Ordinance (Cap 13) and the Matrimonial Proceedings and Property Ordinance (Cap 192)) dealing with custody orders and their replacement with provisions introducing the new range of orders outlined later in this Chapter.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

### **LRC Recommendation 21 (Definition of a residence order)**

We recommend that there should be statutory provision for a *"residence order."*

We recommend that the definition of a residence order should incorporate a reference to the parent in whose favour the order is made having responsibility for *"the day-to-day care and best interests of the child."*

We recommend that the definition should be: *"a residence order is an order settling the arrangements as to the person with whom a child is to live and who has responsibility for the day-to-day care and best interests of the child."*

Administration's response:

Agree to consider the recommendation when the legislative route is pursued. England and Australia have conducted reviews. We will follow up on the latest developments in these jurisdictions.

### **LRC Recommendation 22 (Change of surname)**

We recommend the enactment of a provision similar to section 13(1)(a) of the Children Act 1989 in England, governing the changing of a child's surname.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

### **LRC Recommendation 23 (Non-parents)**

We recommend the enactment of a provision on the lines of section 12(2) of the Children Act 1989 in England regarding the granting of parental responsibility to non-parents who are awarded residence orders.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.



#### **LRC Recommendation 24 (Contact order)**

We recommend that there should be statutory provision for a "*contact order*," on the lines of section 11(2)(d) of the Children (Scotland) Act 1995.

We also recommend that this section should provide that the contact parent would have the right to act independently in respect of the day-to-day care of the child while contact with the child is being exercised.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued. England and Australia have conducted reviews and made recommendations/subsequent legislative amendments regarding "contact order". We will follow up on the latest development in these jurisdictions.

#### **LRC Recommendation 25 (Specific issues order)**

We recommend that there should be statutory provision for a "*specific issues order*," similar to section 8(1) of the Children Act 1989 in England.

Administration's response:

Appears to be a catch-all provision. Agree to consider the recommendation when the legislative route is pursued.

#### **LRC Recommendation 26 (Prohibited steps order)**

We recommend that there should be statutory provision for a "*prohibited steps order*," similar to section 8(1) of the Children Act 1989 in England.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

#### **LRC Recommendation 27 (Supplementary requirements)**

We recommend the adoption of a provision similar to section 11(7) of the Children Act 1989 in England which gives the court the power to include directions or conditions in a court order.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

### **LRC Recommendation 28 (Right of a third party to apply)**

We recommend the removal of the limitation in section 10 of the Guardianship of Minors Ordinance (Cap 13) on the right of third parties to apply to court for orders concerning children.

We recommend the introduction of a provision on the lines of section 10 of the Children Act 1989 in England, with the amendment of subsections (5)(b) and (10) to provide that leave of the court would not be required if the child has lived with the applicant for a total of one year out of the previous three years.

We further recommend that the one year period need not necessarily be a continuous period, but must not have ended more than three months before the application.

[Administration's response:](#)

[Agree to consider the recommendation when the legislative route is pursued. Also see recommendation 60.](#)

### **LRC Recommendation 29 (Arrangements for the children)**

We recommend that section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192) should be amended to provide that the court should have regard to the views of the child and the desirability of a child's retaining contact with both parents, as is set out in section 11(4) of the English Family Law Act 1996.

We also recommend that parents should have to satisfy the court that arrangements for the children are the best that can be arranged. The court should examine the future plans as to the child's place and country of residence and the proposed contact with both parents, especially if one parent proposes to emigrate from Hong Kong.

We further recommend that, for consistency with the other provisions in matrimonial legislation, section 18(5)(a)(i) should be amended to refer to the age of eighteen.

[Administration's response:](#)

[Agree to consider the recommendation when the legislative route is pursued. Also see recommendation 6, 32 and 68 relating to the age issue.](#)

### **LRC Recommendation 30 (No order principle)**

We recommend that the option of "*no order*" should be available for those cases where both parties consent to no order being made by the court and where the making of no order would be in the best interests of the child.

[Administration's response:](#)

[Agree to consider the recommendation when the legislative route is pursued.](#)

### **LRC Recommendation 31 (Family proceedings)**

We recommend the enactment of a provision similar to section 10(1) of the Children Act 1989 in England, which gives the court a specific power to make section 8 orders in any family proceedings.

We also recommend the introduction of a definition of "*family proceedings*."

[Administration's response:](#)

[Agree to consider the recommendation when the legislative route is pursued.](#)

### **LRC Recommendation 32 (Age at which parental responsibility ceases for the purposes of court orders)**

For the sake of consistency, we recommend that parental responsibility for children, and provisions on the lines of section 8 orders (such as orders for residence, contact or specific issues), should cease when the child reaches 18 years.

We also observe that:

- (a) section 10 of the Matrimonial Proceedings and Property Ordinance (Cap 192) ("MPPO") should continue to apply to orders for financial provision and maintenance of children 18 years and over falling within its scope; and
- (b) there may be a lacuna in the law with regard to children over 18 years of age who, though not sufficiently ill or incapacitated as to fall within the scope of the current mental health provisions, may nonetheless require some form of statutory protections beyond the financial provisions afforded by the MPPO.

[Administration's response:](#)

[Agree to consider the recommendation when the legislative route is pursued. Also see Recommendation 6, 29 and 68 relating to the age issue.](#)

## **Part C. Special Consideration for Cases Involving Family Violence**

### **LRC Recommendation 33 (The Administration to review Hong Kong's general law on domestic violence)**

We recommend that the Administration should review the law relating to domestic violence and introduce reforms to improve its scope and effectiveness.

[Administration's response:](#)

[Completed in the context of the Domestic Violence \(Amendment\) Ordinance 2008 and 2009.](#)

### **LRC Recommendation 34 (A new definition of "domestic violence")**

We recommend the introduction of a broad, all-encompassing definition of domestic violence along the lines of section 3 of the New Zealand Domestic Violence Act 1985.

[Administration's response:](#)

[Taken into account during amendment exercise of the Domestic Violence \(Amendment\) Ordinance 2008 and 2009.](#)

### **LRC Recommendation 35 (The court's powers under the Domestic Violence Ordinance (Cap 189) in relation to custody and access orders)**

We recommend that the court should be given power, when making an injunction under the Domestic Violence Ordinance (Cap 189), to, on an interim basis, suspend a prior access or contact order or vary a prior order so as to make a supervised access or contact order.

We recommend that the welfare or best interests principle should guide the court's exercise of such power.

We also recommend that the court should be given power, when making an injunction under the Domestic Violence Ordinance (Cap 189), to make interim consequential orders determining the residence of a child or any other aspect of parental responsibility that meets the best interests of the child, including the question of maintenance.

We recommend that the welfare or best interests principle should guide the court's exercise of such power.

We further recommend that there should be an onus on the parties to disclose prior relevant orders when applying for an injunction, to avoid orders being made that are inconsistent with prior custody, access, residence or contact orders.

Administration's response:

Completed with the Domestic Violence (Amendment) Ordinance 2008 and 2009. We agree to consider the recommendation on onus on the parties to disclose prior relevant orders when the legislative route is pursued.

**LRC Recommendation 36 (Judicial guidelines to supplement legislative reforms)**

We recommend that there should be guidelines for the judiciary at all levels, setting out the approach which the courts should adopt when domestic violence is put forward as a reason for denying or limiting parental contact to children.

Administration's response:

The court mainly relies on case law in this aspect. We would leave it to the Judiciary to consider if guidelines are needed.

**LRC Recommendation 37 (More information to be available to the court)**

We consider that, in making decisions based upon the best interests of the child, it is essential that the Court should be able to make a proper assessment of any risk to a child. This includes being able to investigate allegations of domestic violence at interim hearings.

We recommend that consideration should be given to allowing the courts hearing contact applications to have access to the criminal records of parents insofar as they may be relevant to issues of domestic violence, and to be kept informed of concurrent proceedings against perpetrators of domestic violence.

Administration's response:

To be considered outside the legislative regime.

**LRC Recommendation 38 (Supervised contact)**

We recommend that the Administration should review the current arrangements and facilities allowing for supervised contact in Hong Kong.

Administration's response:

To be considered outside the legislative regime.

**LRC Recommendation 39 (On-going training for those handling family cases)**

In line with the English proposals, we recommend<sup>1</sup> that there needs to be on-going training and raising of awareness levels in relation to the effect of domestic violence on children and residential parents for all the disciplines engaged in the Family Justice System, including the legal profession and the judiciary.

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<sup>1</sup> See discussion at para 11.67 of the report.

Administration's response:

Relevant training has been already put in place to equip social workers and police officer handling relevant cases; will keep in view. We would leave it to the Judiciary to consider if more training is needed for the judges and judicial officers.

**LRC Recommendation 40 (Privacy issues)**

We recommend that the Administration consider a review of data protection arrangements for victims of family abuse and the susceptibility of the family justice system.

Administration's response:

To be considered outside the legislative regime.

**LRC Recommendation 41 (Long-term Research)**

We recommend that long-term research should be undertaken on the effects on children of witnessing and/ or being the victims of domestic violence.

We also recommend that the detailed collection and evaluation of information arising from court proceedings in these cases.

Administration's response:

To be considered outside the legislative regime.

## **Part D. The Voice of the Child**

### **LRC Recommendation 42 (The views of the child)**

We recommend that each of the matrimonial Ordinances should specifically refer to the need to hear the views of the child.

We also recommend that the language of the United Nations Convention on the Rights of the Child should be adopted, so that the term "*views*" rather than "*wishes*" of the child is enacted in matrimonial legislation.

[Administration's response:](#)

[Agree to consider the recommendation when the legislative route is pursued.](#)

### **LRC Recommendation 43 (How and when child's views taken into account)**

In line with our earlier recommendation that a statutory checklist of factors should be established, we recommend<sup>2</sup> that the child's views should be one element in the checklist of factors, rather than a free-standing section. The child's views should be balanced with the other factors when the judge is making a decision in the child's best interests.

With the adoption of this provision, we recommend the repeal of section 3(1)(a)(i)(A) of the Guardianship of Minors Ordinance (Cap 13).

[Administration's response:](#)

[Agree to consider the recommendation when the legislative route is pursued. Also see recommendation 3.](#)

### **LRC Recommendation 44 (How the views of a child are expressed)**

We recommend that a child should be given the facility to express his views if he wishes, whether directly or indirectly. Once the child has indicated a desire to express views, then the court must hear those views, although the weight to be given to the child's views will be a matter for the court to determine.

We recommend that the mechanisms for ascertaining and expressing the child's views should be set out in the legislation. We therefore recommend the adoption of a provision on the lines of the Australian section 68G(2), but adapted to insert "*views*" rather than "*wishes*."

With the adoption of this provision, we recommend the repeal of section 3(1)(a)(i)(B) of the Guardianship of Minors Ordinance (Cap 13).

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<sup>2</sup> See discussion at paras 12.10 to 12.15 of the report.

We also recommend that any views that the child expresses to the judge should be treated in confidence by the judge and not revealed to the child's parents.

We further recommend that where social welfare officers are assigned to ascertain children's views, only those officers with adequate training and experience in this area should deal with these sensitive cases.

Administration's response:

Agree that a child should be given the facility to express his views if he wishes. Relevant judicial guidance has been developed which addressed LRC's concerns to a certain extent; will discuss with the Judiciary on the need to legislate and if so how.

As for the suggestion for not revealing the views of the child to the parents, having regard to the latest judicial guidance and the arrangements in some other jurisdictions, we will discuss further with the Judiciary and others to see if it would be more appropriate for such views as expressed to the judges not to be treated in confidence.

#### **LRC Recommendation 45 (Children not required to express views)**

We recommend that children should not be required to express their views.

To make the position clear, we recommend the introduction of a statutory provision to that effect on the lines of section 68H of the Australian Family Law Act 1975.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

#### **LRC Recommendation 46 (Age of maturity for the purpose of obtaining views)**

We recommend that there should be no age limit and the court should be empowered to consider a child's views irrespective of his age.

Administration's response:

Completed in the context of the Guardianship of Minors (Amendment) Ordinance 2012.

#### **LRC Recommendation 47 (Anomalies in relation to separate representation under the Matrimonial Causes Rules (Cap 179))**

We recommend that the anomalies in rule 72 and rule 108 of the Matrimonial Causes Rules (Cap 179) as to the appointment of a separate representative or guardian *ad litem* should be addressed.

Administration's response:



Agree to consider the recommendation when the legislative route is pursued.

**LRC Recommendation 48 (Types of proceedings where a separate representative may be appointed)**

For the removal of doubt it should be made clear that a separate representative can be appointed in any dispute relating to the parental responsibility for, or guardianship of, a child.

Administration's response:

Relevant judicial guidance has addressed LRC's concerns to a certain extent; will discuss with the Judiciary on the need to legislate and if so how.

**LRC Recommendation 49 (Who can apply for a separate representative to be appointed)**

We recommend that rule 108 of the Matrimonial Causes Rules (Cap 179) be repealed and that a provision on the lines of section 68L(3) of the Australian Family Law Act 1975 be enacted.

We also recommend that the restrictions on who can make application for an order, contained in section 10 of the English Children Act 1989, should also apply to this provision.

Administration's response:

Relevant judicial guidance has addressed LRC's concerns to a certain extent; will discuss with the Judiciary on the need to legislate and if so how.

**LRC Recommendation 50 (Criteria for appointment of separate representative)**

Except in the case of a child who may be subject to care or supervision orders, we recommend the adoption of a list of criteria based on those adopted in Australia to determine when it is appropriate to appoint a separate representative.

We recommend that this list of criteria be incorporated in legislation.

Administration's response:

Relevant judicial guidance has addressed LRC's concerns to a certain extent; will discuss with the Judiciary on the need to legislate and if so how.

**LRC Recommendation 51 (Guidelines for duties of separate representative)**

We recommend the adoption of the Australian guidelines for setting out the duties of the Official Solicitor or separate representative or other person acting as guardian *ad litem* in Hong Kong.

We recommend that this appear not in statute, but in booklet form.

Administration's response:

Relevant judicial guidance has addressed LRC's concerns to a certain extent. Will discuss with the Judiciary on the need to legislate and if so how. Also see recommendation 64.

## **LRC Recommendation 52 (Child as a party)**

We recommend that, in principle, provided the leave of the court has been sought, the child should be allowed to become a party to proceedings which concern him and where he has sufficient understanding to instruct a solicitor and counsel to represent him.

We recommend the introduction of a provision on the lines of section 10(8) of the English Children Act 1989 and rule 9(2A) of the English Family Proceedings Rules 1991.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

## **LRC Recommendation 53 (Costs)**

For those cases where the person representing the child is not the Official Solicitor, we recommend that the court be given power to order the parties to bear the costs of the separate representative or guardian *ad litem*.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

## **Part E. Related Matters**

### **LRC Recommendation 54 (Separation and Maintenance Orders Ordinance (Cap 16))**

We recommend the retention of the provisions of the Separation and Maintenance Orders Ordinance (Cap 16) to cover exceptional cases, such as those involving customary marriages or concubinage, which are not covered by other matrimonial proceedings legislation.

Administration's response:

Agree to retain the provision as recommended.

### **LRC Recommendation 55 (Power to order care and supervision orders)**

We recommend the retention of the power to order care and supervision orders in guardianship disputes and any disputes concerning the best interests of a child.

We also recommend that the anomalies between the Director of Social Welfare's powers in relation to care and supervision orders under the Guardianship of Minors Ordinance (Cap 13) and the Matrimonial Causes Ordinance (Cap 179), and his powers under the Protection of Children and Juveniles Ordinance (Cap 213), should be resolved.

Administration's response:

Agree to retain the power as recommended.

### **LRC Recommendation 56 (Definitions of care and supervision orders)**

We recommend that there should be a definition of a care order and a supervision order in each of the matrimonial Ordinances.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

### **Recommendation 57 (Grounds)**

We recommend that the Director of Social Welfare should only be entitled to apply for a care order or supervision order in private law proceedings on the same grounds as those in section 34(2) of the Protection of Children and Juveniles Ordinance (Cap 213).

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

### **LRC Recommendation 58 (Application of the welfare or best interests principle)**

We recommend that the welfare or best interests principle should guide all proceedings under the Protection of Children and Juveniles Ordinance (Cap 213).

Administration's response:

Agree to consider the recommendation when the legislative route is pursued. Also see recommendation 1.

### **LRC Recommendation 59 (Ex parte applications by the Director of Social Welfare)**

We recommend that rule 93 of the Matrimonial Causes Rules (Cap 179) and order 90, rule 4 of the Rules of the District Court (Cap 336) should be amended to allow for an *ex parte* application in case of emergency, but that an *inter partes* hearing should proceed if the Director's application was opposed.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

### **LRC Recommendation 60 (Third parties)**

We recommend that section 34 of the Protection of Children and Juveniles Ordinance (Cap 213) should be amended to allow an application for a care order or supervision order to be made by third parties.

We also recommend that the same criteria for applications by third parties, already adopted for private law proceedings, should be adopted for such public law proceedings.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued. Also see recommendation 28.

### **LRC Recommendation 61 (The court environment for the hearing of care and protection proceedings)**

We recommend that research should be conducted into how the court environment could be improved for children appearing in care and protection proceedings.

Administration's response:

A matter for the Judiciary to consider.

## **LRC Recommendation 62 (Separate representation for public law proceedings – criteria for appointment)**

We recommend that separate representation by the Official Solicitor should be available for children as of right in care or supervision proceedings, whether brought under Protection of Children and Juveniles Ordinance (Cap 213) or the matrimonial Ordinances.

### **Administration's response:**

Legal aid is already available for eligible parents in the unlikely event they would like to be represented. In light of the extension of service by Duty Lawyer Services since 2007, LRC Secretariat is of the view that its concerns have largely been addressed.

## **LRC Recommendation 63 (Representation and legal aid for parents)**

We recommend that, where care or supervision orders are applied for, whether under the matrimonial Ordinances or the Protection of Children and Juveniles Ordinance (Cap 213), parents should be granted legal representation (by The Duty Lawyer Service if in the juvenile court, or by the Legal Aid Department if in the Family Court or the Court of First Instance) if they fulfil the eligibility requirements. We also recommend that there should be legal representation provided by the Legal Aid Department for children and parents in wardship proceedings where the applicant is the Director of Social Welfare or other public agency, as the effect of the order is to take away the responsibility of the parents.

### **Administration's response:**

The Legal Aid Department has already covered legal aid for parents in the unlikely event they would like to be represented.

For wardship proceedings, at present legal aid is available to the parents of a child who is the subject of wardship proceedings upon satisfying the means and merits tests. The judge in charge of a wardship case may ask the Official Solicitor to represent the child who is the subject of the wardship proceedings if necessary.

## **LRC Recommendation 64 (Guidelines for duties of separate representatives)**

We recommend the adoption of the Australian guidelines for setting out the duties of lawyers representing children and parents in the juvenile court for care and protection and supervision orders.

We also recommend that special training on how to interview and represent children and parents should be provided to lawyers for these sensitive and complex cases, and only lawyers with this special training should handle these cases.

We further recommend that these arrangements should apply to cases involving care and supervision orders being made under the matrimonial Ordinances in the Family Court.

Administration's response:

Relevant judicial guidance has addressed LRC's concerns. Will discuss with the Judiciary on the need to legislate and if so how, Also see recommendation 51.

#### **LRC Recommendation 65 (Assessment)**

We recommend that, before making a care order, a District Judge should have the power under the matrimonial Ordinances to order that a child be assessed by a medical practitioner, clinical psychologist or an approved social worker, as is provided in section 45A of the Protection of Children and Juveniles Ordinance (Cap 213).

We also recommend that the Director of Social Welfare should have the power to order assessment in these proceedings in line with section 45A.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

#### **LRC Recommendation 66 (Child's views)**

We recommend that the views of a child should be taken into account in proceedings under the Protection of Children and Juveniles Ordinance (Cap 213).

Administration's response:

Agree to consider the recommendation when the legislative route is pursued. Also see recommendation 3 above.

#### **LRC Recommendation 67 (Contact in respect of a child in care)**

We recommend that parents whose children are made the subject of care orders under the matrimonial Ordinances should be entitled to apply to have orders made to secure regular contact between them and their children.

We also recommend that section 34C(6) of the Protection of Children and Juveniles Ordinance (Cap 213) should be amended to allow the court to make an order for contact when a care order is being made.

Administration's response:

Agree to consider the recommendation when the legislative route is pursued.

### **LRC Recommendation 68 (Age at which wardship orders cease)**

We recommend that a provision be enacted clearly specifying that the duration of wardship orders ceases at 18 years.

We also recommend that it be made clear that the jurisdiction of the Official Solicitor ceases at the age of 18 years, except for persons suffering a disability beyond that age.

[Administration's response:](#)

[Agree to consider the recommendation when the legislative route is pursued. Also see recommendation 6, 29, 32 relating to the age issue.](#)

### **LRC Recommendation 69 (Minimum age for marriage without parental consent)**

We recommend the retention of 16 as the minimum age of marriage with parental consent.

We also recommend the reduction of the minimum age of marriage without parental consent from 21 to 18 years.

[Administration's response:](#)

[To be considered outside the legislative regime.](#)

### **LRC Recommendation 70 (Enforcement of orders)**

We recommend that a mechanism for mutual legal assistance for the enforcement of orders for custody, access, residence and contact, and orders for the return of a child removed unlawfully from Hong Kong, and vice versa, be arranged with the Mainland.

[Administration's response:](#)

[To consult the Judiciary, DoJ or other concerned bureaux outside the legislative regime.](#)

### **LRC Recommendation 71 (Consolidation of legislation)**

We recommend that, as far as possible, the provisions dealing with disputes relating to children, arrangements on divorce, guardianship, disputes with third parties, or disputes between parents without accompanying divorce proceedings, should be consolidated into one existing Ordinance.

Accordingly, we recommend that any legislative provisions resulting from our recommendations in this area, as well as the existing substantive provisions on guardianship and custody, should be incorporated into one consolidated Ordinance.

We also recommend that there should be one definition of "*child*" and of "*child of the family*" applying to all Ordinances.

Administration's response:

To be considered; it would involve a very time-consuming exercise. The question is whether we should implement the changes by phases first.

#### **LRC Recommendation 72 (Policy co-ordination)**

We recommend that 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.

Administration's response:

To be considered outside the legislative regime.





# HONG KONG BAR ASSOCIATION

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8<sup>th</sup> May 2012

Labour and Welfare Bureau  
 Government Secretariat  
 Central Government Offices  
 Tim Mei Avenue  
 Admiralty  
 Hong Kong

Attn: Ms. Wendy Leung  
 for the Secretary for Labour and Welfare

Dear Ms. Leung,

## Public Consultation on Child Custody and Access: Whether to Implement the "Joint Parental Responsibility Model" By Legislative Means

I refer to your letter of 29<sup>th</sup> December 2011.

The Bar Council has considered the captioned Consultation paper during its Bar Council Meeting held on 3<sup>rd</sup> May 2012 and formed its views on the Consultation.

A copy of the views of the Hong Kong Bar Association is enclosed for your consideration.

Yours sincerely,

*Kumar Ramanathan*  
 Kumar Ramanathan SC  
 Chairman

### 香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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陳志剛

劉恩沛

**CHILD CUSTODY & ACCESS – December 2011 Consultation Paper**  
**THE RESPONSE OF THE HONG KONG BAR ASSOCIATION**

1. The response of the Hong Kong Bar Association (“HKBA”) to the December 2011 Consultation Paper on Child Custody & Access (“the Consultation Paper”) are as follows:-

**CHAPTER TWO**

**The Existing Legislative Framework & The Existing Laws on Child Custody & Access**

2. Paragraphs 2 to 4 of the Consultation Paper are entitled under the heading “The Existing Laws on Child Custody & Access”. Chapter Two is entitled “The Existing Legislative Framework”.
3. HKBA believes that the “existing law” could be better and more accurately expressed as follows:-
4. The existing law (consisting of legislation and case law) recognises concepts of “custody” (sole and joint), “care and control” and “access” (including staying access).
5. “Custody” was described thus by the Court of Appeal in *PD v. KWW* [2010] HKFLR184 at §31 – *“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”*.

6. *"Care and control" was described thus - "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 consequence 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 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"* [§32 PD v. KWW [2010] HKFLR184]
7. There is a *"thin line between sole custody and joint custody"* [§41 PD v. KWW [2010] HKFLR184].
8. The correct position of the existing law is however commonly misunderstood. This was also noted by the Court of Appeal - *"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 people"* [§29 PD v. KWW [2010] HKFLR184].
9. The Court of Appeal has taken the opportunity to clarify what the law as it stands is:-

*"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 'win' 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 .....*

*It is to be emphasised in the strongest terms that if one parent only is given custody, that parent is not thereby given an absolute and independent authority to act without further reference to the non-custodian parent. Any*

such potential misunderstanding was quashed in *Dipper v. Dipper* [1980] 3 WLR 626 in which Ormrod LJ said :

*"It used to be considered that the parent having custody had the right to control their children's education, and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other matter in their lives, that disagreement has to be decided by the court."*

In the same case, Cumming-Bruce LJ, another experienced family judge, said :

*"...it (is) a fallacy which continues to raise its ugly head that, on making a custody order, the custodian parent has a right to take all the decisions about the education of the children in spite of the disagreements of the other parent. This is quite wrong. The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent he has the right to come to the court in order that the difference may be determined by the court."*

*A non-custodial parent therefore has the right to be consulted in respect of all matters of consequence that relate to the child's upbringing. While the right to be consulted does not include a power of veto, it is nevertheless a substantial right. It is not merely a right to be informed, it is a right to be able to confer on the matter in issue, to give advice and to have that advice considered.*

*While therefore a parent who is given sole custody is given the authority, in the event of disagreement with the non-custodial parent, to make the final decision, it should only be made after due consultation and, if the final decision that is made is considered by the non-custodial parent to be inimical to the child's best interests, the court may be called upon to determine the matter."* [§33 et seq *PD v. KWW* [2010] HKFLR184]

10. Not only are the concepts of sole custody and joint custody commonly misunderstood – so are the concepts of care and control and access.

11. For example, it is often not appreciated that *"an order awarding care and control to one parent with rights of access to the other is in fact a form of shared care and control .....This is because, when a parent exercises rights of access, especially staying access, that parent assumes care and control of the child for the time that the child is in that parent's physical custody. Rights of access, it is to be remembered, are given - in the interests of the child - to ensure continued bonding between parent and child"*. [§43 et seq *PD v. KWW* [2010] HKFLR184]
12. These confusions and misunderstandings are deeply ingrained within society, and to some degree and extent even pervades throughout the professionals and associated service providers involved in children matters.
13. HKBA believes that legislative reform is necessary and the only effective means by which to clarify the confusion and get rid of the misunderstandings. Amongst other reasons, the terms that exist in the present Ordinances are of antiquated origin and their archaic nature renders it difficult and sometimes impossible for professionals and associated service providers to explain to lay-parents or their children.
14. Indeed, the case of *PD v. KWW* [2010] HKFLR184 in the Court of Appeal very much illustrates an oft seen phenomenon, of parents wasting time, costs and judicial resources in litigating for sole or joint custody and/or care and control / access, because of these confused misunderstandings.
15. In paragraph 2.12 of the Consultation Paper, it is said that *"the custodial parent retains the rights to veto the opinions of the access parent and make the final decision"*. This is similarly expressed in paragraph 4 of the Consultation Paper.
16. Whilst the Court of Appeal in *PD v. KWW* did describe the rights of the non-custodial parent as *"not includ[ing] a power of veto"*; the reverse however is not necessarily so, and does not follow. The non-custodial parent has *"a substantial*

*right. It is not merely a right to be informed, it is a right to be able to confer on the matter in issue, to give advice and to have that advice considered”.*

17. Further, whilst the Court of Appeal did say that *“the custodial parent who is given sole custody is given the authority to make the final decision”* this is immediately qualified by the necessary precondition that this be *“after due consultation with the non-custodial parent”*.
18. HKBA believes that it is not apt to describe this as amounting to the ‘retention’ of a ‘right to veto’ as such.
19. HKBA agrees with and strongly support the sentiments of LRC as set out in paragraphs 2.15(a), (b) and (d) of the Consultation Paper.
20. In particular in relation to paragraph 2.15(a) and (b), it is the experience of HKBA Members that most parent-clients have great difficulty with properly understanding the legal concepts of ‘sole custody’, ‘joint custody’, ‘care and control’ and ‘access’. Much time and effort is wasted in almost every case in having to in effect “undo” the widely held misconceptions and misunderstandings that have been deeply ingrained.
21. This is exacerbated by the use of not only outmoded concepts, but also antiquated and archaic terms of art – whose meanings may have changed over time and developed extensively; compounding the confusion and misunderstanding.
22. Whilst case-law have developed to a stage where there is said to be no more than a “thin line” between sole and joint custody orders, the idea that ‘sole custody’ creates a ‘winner / loser’ situation still remains overwhelmingly prevalent amongst parent-clients. Much time and costs are wasted because parent-clients refuse to accept “joint custody” arrangements, insist upon obtaining “sole custody” orders, or refuse to “lose” custody to the other parent.

23. As a matter of law, "all matters of consequence" necessarily involve a process of consultation, conferral, advice and consideration, whether custody is sole or joint. In joint custody cases, disagreement results in the necessity of a court application to resolve and determine the issue; whereas in sole custody cases, the custodial parent is given authority to make the final decision after due consultation and consideration, but the other parent remains at liberty to take out a court application nevertheless.
24. The practical difference in reality therefore, amounts to little more than a question of how strongly the client-parent feels about the issue or question at stake. If there is strong disagreement, a court application is available whatever the custody order, and in reality becomes inevitable whether the order is for joint or sole custody.
25. The terminologies "sole custody" and "joint custody" however, engender concepts that are very far removed from this legal position, not least in the minds of lay-parents, who are after all the final and ultimate parties directly engaged in litigation before the Courts.
26. HKBA believes that as a most basic starting point, the terminologies involved have to be overhauled. Apart from difficult terms of art such as 'custody', 'care and control' and 'access' (which are in themselves difficult to understand and explain), there is no doubt whatsoever that venturing away from the labels "sole" and "joint" would be of great improvement and will effect a paradigm shift in the whole way of thinking.
27. Curing this mischief necessarily involves statutory reform – and is one amongst other reasons that HKBA believes that legislative reform is necessary and unavoidable.
28. HKBA supports abolition of "custody" orders and removal of the terminology and concept from the statutes. It is only through legislative reforms that the Courts will no longer be mandated to make orders for "custody".

29. In this regard, HKBA agrees with and supports the recommendations of LRC set out in paragraphs 3.4 (especially 3.4(c)) and 3.7 of the Consultation Paper.
30. As an aside, in paragraph 2.10(b) of the Consultation Paper, HKBA notes it is said that joint custody orders "*are now commonly made*". HKBA have made enquiries with practising barristers who are well-experienced and familiar with this area of practice. After consulting their views, whilst HKBA agrees that joint custody orders are now *more often* and *more readily* made than, say, in times past [and HKBA notes the quotation from *PD v. KWW* at paragraph 2.14 of the Consultation Paper that "*orders of joint custody are [now] in no way exceptional*"] - the experience of HKBA Members is that sole custody orders remain the norm, and that in contested custody cases a joint order is not usually nor 'commonly' the result.

### CHAPTER THREE

31. HKBA has read and considered Chapter Three of the Consultation Paper. HKBA agrees with and supports the recommendations therein, subject to the following comments.
32. In the list of decisions requiring both parents' express consent at paragraph 3.6(b)(i) of the Consultation Paper, HKBA suggests that change of the child's name (i.e. first, middle or *any* name, whether English, Chinese or otherwise; and not merely the surname only) ought to be included.
33. In relation to paragraph 3.8(a) of the Consultation Paper concerning the proposed rights of third-parties to apply for orders - HKBA notes that the Reports of Social Welfare Officers often include interviews with and considerations regarding non-parent care-givers or other persons with regular or frequent contact with the child; such as grandparents (especially those that reside with one or other of the parents), other relatives of the parents and partners (married or unmarried) of the parents. These are often taken into



account by Social Welfare Officers in their reports and recommendations and also by the Family Court in making its determinations and decisions.

34. As matters present stand, non-parent care-givers only really become involved indirectly by way of being interviewed or as 'witnesses' in giving relevant (and often highly relevant) evidence; this is so even where the non-parent care-giver is in reality the primary care-giver and is intended to so continue in the future. Many parents themselves lead busy lives with hectic schedules, and the bedrock of consistency and daily-care is provided by primary care-givers who are not the parents themselves. The Family Court often finds these factors to be highly relevant.
35. It is far more desirable to furnish such non-parent care-givers with legal standing, as opposed to only hearing from them indirectly by way of interview or as witnesses providing evidence. HKBA support the removal of the limitations on the rights of third-parties.
36. Under the existing law which involves custody, care and control and access - HKBA anticipates that even if third-parties be given legal standing, it will only be in rare cases that custody or care and control orders would be made in favour of non-parent care-givers directly. However, HKBA believes that there will be many cases in which access orders or orders for maintenance could be more appropriately made to third-parties directly (e.g. access by grandparents or other close family members, or maintenance payment to primary care-givers directly).
37. Under the proposed new laws - whilst HKBA anticipates that it might be unusual for residence orders to be made to non-parent care-givers directly (as opposed to being made to the parent directly, with whom such third-party resides together), there are many cases in which contact orders or maintenance orders can and ought appropriately to be made to third-parties directly (e.g. contact by grandparents or other close family members, or maintenance payment to primary care-givers directly).

38. HKBA believes that whilst the threshold test of “living together for one year out of the previous three years” (paragraph 3.8(a) of the Consultation Paper) represents an appropriate benchmark for applying for residence orders and perhaps even maintenance orders; this is not appropriate for contact orders. The threshold test for legal standing without leave to apply for contact orders might more appropriately be defined by reference to ‘regularity of contact’ in times past and/or ‘closeness of familial relationship’ in terms of degree.
39. HKBA believes that the precise threshold test for each type of order is a matter that requires further consideration.
40. Insofar as domestic violence is concerned (paragraph 3.8(c) of the Consultation Paper) – quite apart from the other legislations and laws that provide protection and relief, domestic violence and abuse are matters that can also be addressed by way of “specific issues orders” and “prohibited steps orders” and/or the variation or suspension of “residence” and “contact” orders.

#### CHAPTER FOUR

41. In light of the existing law as it now stands (for which see above) and the methods and modes available and which will be available under the proposed laws (“specific issues orders” and “prohibited steps orders” and/or the variation or suspension of “residence” and “contact” orders, as well as other legislations and laws that provide protection and relief), HKBA does not believe and does not support the view that the proposed new legislations allow for any greater scope or ambit for harassment by abusive parents nor for worsening of domestic violence.
42. Under the existing laws, so-called ‘abusive parents’ are able to ‘harass’ by way of taking out Court applications, even where sole custody orders are in place. Under the proposed new laws, these matters can be addressed by way of “specific issues orders” and “prohibited steps orders” and/or the variation or

suspension of “residence” and “contact” orders. Moreover, there exist and will exist other legislations and laws that provide additional protection and relief.

13. HKBA supports the views expressed in paragraphs 4.4 to 4.7 (in particular paragraph 4.6) of the Consultation Paper.

#### CHAPTER FIVE

14. HKBA notes that with the exception of Singapore, all major common law jurisdictions have abandoned and abolished the old laws through legislative reform and have implemented new laws in replacement thereof.
15. The legislative refinements and adjustments that have occurred in major common law jurisdictions are certainly matters that ought to be taken on board in guiding the local legislation. However, whilst there is much to be learnt from the developments and experiences of the major common law jurisdictions, in particular as to how best to develop the local jurisprudence and how best to implement the new model, HKBA notes that none of the major common law jurisdictions have sought to resile from or undo the legislative reforms at any time – and in none of the major common law jurisdictions has it been suggested that the old laws were preferable or better. The fundamental merits of the reform are not in question.
16. All legislation (whether old or new) have room for improvement, not least to cater for changing societal views and concerns. That foreign legislations have developed for the better and improved over time is of itself something to take on board positively, and not to be viewed with scepticism.
17. A survey of the major common law jurisdictions does not support the view that legislative reforms are unnecessary – indeed, the developments and experiences abroad very much support the view that legislative reform is highly desirable, and that Hong Kong has fallen very far behind in the modernisation and

development of the law and the associated jurisprudence and mind-set of thinking.

48. With the legislative refinements and adjustments that have occurred in the major common law jurisdictions, Hong Kong is now well placed to learn from these experiences abroad, to develop and implement the local law upon the shoulders of foreign developments, adjusted to cater for local considerations.

#### Singapore Women's Charter

49. The Women's Charter provides for joint parental responsibility i.e. the parents would be "mutually bound to co-operate" with each other *inter alia* in caring for the children:-

#### "PART VI

#### *RIGHTS AND DUTIES OF HUSBAND AND WIFE*

##### *Rights and duties*

46.—(1) *Upon the solemnization of marriage, the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children."*

#### "Joint Parental Responsibility Model"

50. The Law Reform Commission refers to "parental responsibility" not "joint parental responsibility".
51. See *inter alia* the Executive Summary (emphasis supplied):-while parents exercising parental responsibility should be able to act independently in relation to the day-to-day care and best interests of the child (Recommendation 12), those decisions affecting the child which should require the other parent to be notified, or should require the other parent's express consent, should be specified in legislation (Recommendation 13).

52. HKBA is therefore of the view that the Consultation Paper is in error in its repeated references to the “joint parental responsibility model” purportedly recommended by the Law Reform Commission: this is Singaporean terminology.

“Fundamental Philosophical Differences”

53. As to shared parenting and residence, the Singapore Consultation and the Singapore Judiciary would have been bound by their Court of Appeal decision (*CV v. CY*) requiring the promotion of joint parental responsibility through the use of joint custody or no custody orders. This explains the Singapore Law Reform Division’s conclusion that legislation was not necessary for the development of the law towards a “Joint Parental Responsibility Model”.
54. The Hong Kong position is very different: we are bound by our Court of Appeal decisions including *SMM v. TWM* (HKCA; CACV No. 209/2009 09 June 2010), at para. 68, requiring legislation. As there are “*fundamental philosophical differences*” between the concepts, the law cannot be developed judicially in Hong Kong.
55. In *SMM v. TWM*, the then Chairman of the Bar, Russell Coleman S.C. submitted that the Court below could, in addition to joint custody, have imposed a shared care and control order, which, he argued, was akin to shared parenting and a shared residence order. However, Mr. Justice Cheung JA refused to do so, recognising that there are “*fundamental philosophical differences*” between the concepts, and that until legislation was introduced, declined to engage in discussion as to the extent to which shared residence was the same as a joint custody, care and control order.
56. The relevant passages in *SMM v. TWM* are cited in full, emphasis provided:-

“Difference between residence order and custody order

58. As to the difference between residence orders and custody orders, Hale LJ referred to the Law Commission's Report Law Com No. 172 (1988) on Guardianship and Custody :-

"Apart from the effect on the other parent, which has already been mentioned, the main difference between a residence order and a custody order is that the new order should be flexible enough to accommodate a much wider range of situations. In some cases, the child may live with both parents even though they do not share the same household. It was never our intention to suggest that children should share their time more or less equally between their parents. Such arrangements will rarely be practicable, let alone for the children's benefit. However, the evidence from the United States is that where they are practicable they can work well and we see no reason why they should be actively discouraged. None of our respondents shared the view expressed in a recent case [*Riley v. Riley*] that such an arrangement, which had been working well for some years, should never have been made. More commonly, however, the child will live with both parents but spend more time with one than the other. Examples might be where he spends term time with one and holidays with the other, or two out of three holidays from boarding school with one and the third with the other. It is a far more realistic description of the responsibilities involved in that sort of arrangement to make a residence order covering both parents rather than a residence order for one and a contact order for the other. Hence we recommend that where the child is to live with two (or more) people who do not live together, the order may specify the periods during which the child is to live in each household. The specification may be general rather than detailed and in some cases may not be necessary at all."

59. The type of order suggested by the Law Commission is *shared residence orders*. As observed by Lord Hoffmann in *Holmes-Moorhouse v. Richmond upon Thames LBC* [2009] 1 WLR at [7] that nowadays in England shared residence orders are not unusual. They do not necessarily provide for the children to spend equal time with each parent.

#### Reliance on shared residence order

60. Apart from having joint custody of the child, the father wanted shared care and control as well. He argued that an order for joint custody and shared care and control would be akin to shared parenting and a shared residence order with the child sharing his time and residence with both parents (even if it does not necessarily have to mean time shared on an exactly equal basis).

.....

#### The proper approach

68. Until Hong Kong introduces residence orders by legislation, it is not helpful for me to enter into any discussion as to what extent a shared residence order is the same as a joint custody, care and control order. From the material I have just referred to, there are fundamental philosophical differences between the two types of orders."

#### CONSULTATION QUESTIONS

57. To be read together with the above views and comments of HKBA, HKBA's response to the Consultation Questions are as follows:-

Q1. Yes. For the reasons provided by LRC and for the reasons above-mentioned herein.

Q2. Yes. For the reasons provided by LRC and for the reasons above-mentioned herein.

- Q3. Yes. For the reasons provided by LRC and for the reasons above-mentioned herein. Legislative reform is necessary and ought to be implemented as soon as practicable.
- Q4. No. Promotion alone without legislative reform does not address the concerns of LRC and HKBA for the reasons above-mentioned herein.
- Q5. See above for HKBA's views, comments and suggestions above-mentioned herein.
- Q6. Yes. HKBA's additional reasons in support are as above-mentioned herein.
- Q7. No. Promotion alone without legislative reform does not address the concerns of LRC and HKBA for the reasons above-mentioned herein. Further, case law development in the common law jurisdiction takes time and the coincidental appearance of a relevant and material fact scenario that happens to come together brings the relevant factors and matter before the attention of Appellate Courts. Moreover, this places the responsibility and burden upon private litigants to develop local jurisprudence – something that is not only unfair but is also a risk that private litigants are increasingly unwilling to undertake (especially when no necessarily tangible or substantial benefits are to be obtained – as in often the case in children matters).
- Q8. What lessons do you think we can learn from these overseas jurisdiction (i.e. England and Wales, Australia and Singapore) ? The HKBA considers that the experiences of England and Wales and Australia are more appropriate to Hong Kong than Singapore for the following reasons:-



- a. Paragraph 5.28 of the December 2011 Consultation Paper states that the Women's Charter governs Singapore's laws on custody which, it is said, is in line with the study conducted by the Attorney-General's Chambers in 2005;
- b. The situation in Singapore is clearly very different to the situation in Hong Kong where the current legislation is not governed by any gender specific charter but rather gender neutral legislation;
- c. Furthermore the detailed and broad ranging consultation process which began in Hong Kong May 1996 and resulted in the March 2005 Report made 72 recommendations which unequivocally required legislative change;
- d. The fact that Singapore's study concluded legislative change was not necessary in Singapore is no basis for ignoring Hong Kong's own consultation process which clearly recommended legislative change;
- e. HKBA is of the view that too many definitions would result in increased litigation, and that Courts should be allowed more flexibility.

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

- a. HKBA is firmly of the view that England and Wales and Australia serve as the best references for Hong Kong;

- b. Both jurisdictions recognize the importance of legislation and common law in the development of jurisprudence;
- c. Both jurisdictions have actively implemented legislation to clarify and focus the direction of family law to be child centric, as opposed to parent centric.

Q10. See above for HKBA's views, comments and suggestions.

58. HKBA also notes and urges attention to the Judgment of the Honourable Mr. Justice Lam in *PD v. KWW* [2010] HKFLR 184 at §78 to §81, in particular the observation that had the Recommendations of LRC in 2005 regarding Child Custody and Access been taken forward and implemented, the rights and responsibilities of parents towards their children would have been more clearly and specifically defined, and appeal such as that which the Court of Appeal was dealing with could have been avoided. The Honourable Mr. Justice Lam also took the opportunity to urge the administration to make progress in these directions.

Dated: 8 May 2012

我們是港島單親互助社，由一班單親家長組成，成立目的是為了關注有關單親政策、福利，改善單親困難的處境，大家互相關懷、扶持、幫助，一起同行。

因為在最近 2011 年 12 月，勞工及福利局出了一份諮詢文件：子女管養及探視權，應否以立法形式推行「共同父母責任模式」。我們的會員看過有關的諮詢文件，發現有很多的疑問及擔憂，亦都諮詢過律師的意見。其後，立刻聯絡我們的會員，收集他們的意見，及過往曾經發生過的故事，輯錄了他們的說話，以下是我會就諮詢文件的回應：

## 6.2

### 問 1. 反對「共同父母責任模式」的概念載列的所謂優點

反對原因：-

- (a) 所謂以兒童為本，問題是最終要決定離婚是因為夫婦間無法解決雙方矛盾，絕大多數因關係不好，溝通困難，不能夠互相體諒及無法對事情達到共識等原因，試問父母有着這些矛盾，怎能和平融合地為子女商討事情呢？如勉強用法例去執行，只會大小事情都訴諸法律，延誤決定，情況實難於想像，最終受害只會是子女；
- (b) 離婚已經對大人及子女面對很大的傷痛，經過一段頗長時間去平伏心情，如果因為不斷要和對方見面，商討子女大小事情而發生磨擦和糾纏，令到已經平靜的情緒再起波伏，和諧輕鬆的生活又會再起變化，帶來了麻煩和壓力。亦都擔心產生爭拗時，自己及子女都會再受到困擾，甚至，引起衝突，又再產生家暴事件，對子女的成長是絕對不利；
- (c) 所為爭奪管養權角力，只是在離婚同一訴訟上，最終都隨着訴訟完結而解決，甚至有些父、母未離婚前根本就不關心子女，亦不主動爭取管養權，反之，如建議成法令，則大小事情都變成彼此角力的源頭，不停的爭吵，導致訴訟不斷，未完未了，延誤了決定，令子女不斷地繼續受傷害；
- (d) 很多離婚後的夫婦，大多數都與對方失去聯絡，又或者因為逃避付贍養費而失蹤，法律規定如果無法聯絡，需經過登報程序，難道如果新政策實行時，每次都要向法院申請去登報尋人嗎？這樣不單導致延誤決定，更浪費時間和金錢！

(e) 有些曾受家庭暴力的個案，更無法處理。

所以我們完全看不到此建議有任何優點，只有缺點，實際是弊多而無一利。

問2. 不應該，如父母離婚後繼續希望參與子女的生活，現時法例已可彈性地根據雙方的實際狀況去決定。即是，如離婚父母關係良好而兩者之間又真心為子女着想的，可判以「共同管養令」。相反，如關係差、其中一方不願意照顧或不懂得照顧、或某些原因不適合照顧等，這樣必須要為着兒童為本的原則去彈性處理，繼續判予「獨有管養令」或「分權令」，或由法庭根據個別個案需要命令，如家暴等個別情況。所以現行法例已足夠，不適宜立法強迫，最終會令子女受傷害，違反原意。

#### 6.4

問6 「否」，我們應該理解責任並不表示願意承擔，因為照顧子女必須有着真心和用心，親子關係最重要不是以「權利和權能」去理解，是以是否願意真心去承擔，責任可以是金錢、照顧、教導等層面，我們是希望每位父母都能全面地負上這些責任，就父和母的能力、時間和是否適合作出分配，所以現行的三種模式已是很好的彈性處理方法，適應於每對不同的離婚父母的狀況，最重要是那種方案是最適合子女的健康成長，所以強制立法最終只會再令子女受害。

問7 「否」，教育和推廣不是在決定離婚這時刻才做，應該是子女出生前，又或者決定結婚前已應該知道自己對婚姻、對子女的責任，問題是父或母是否真心為子女而願意遵守其責任；再且，如贍養費，政府無論在教育、宣傳推廣上都做了不少功夫，甚至立法執行，可是結果仍有很多拖欠或拒絕付贍養費的個案，訴訟累累。贍養費的原則是要父母離婚後繼續承擔子女經濟上的責任，可見責任並非靠教育、宣傳及立法可以達致。

#### 6.5

問8 不可以：海外司法管轄區的都是不健全，立法後看不到任何好處（於5.17），反而，反覆走向調解和庭內和解（於5.22），這樣為何又要多此一舉不繼續採用現時的模式呢？

問9 無一個值得借鑒：因無一個地方執行得理想，亦無實際個案睇到當事人親身經歷感受的評語，只看到訴訟個案不繼增加，浪費金錢和時間，更延誤決定，最終都是子女受傷害；

問 10 我們都理解諮詢文件內容的原意，但是，現時的法例，已經有三種模式，(1)獨有管養令 (2)共同管養令 (3)分權令，如離婚時，大家關係良好，鼓勵「共同撫養模式」，而並不是立法去硬性規定，以上剛才所述種種都是切身經歷，根本立法是難於執行，只會帶來不斷訴訟，浪費時間和金錢，如需要法援幫助的個案，大家可想而知喇！所以，我們堅持保留現有的法律模式，靈活處理，不致於令到那些關係不好的離婚父、母陷於困擾，只會令子女們得不到和諧及健康的生活。反之...我們更加需要強調關顧及支持願意承擔照顧子女的一方的生活和情緒，令其能全心正面地面對單親的日子，照顧子女快樂健康成長才是最重要，而不是為着勉強與另一半不停糾纏而困擾，大家應該明白和相信負面情緒，對其本人、子女、社會都無好處

以上是我們就諮詢文件的回應，希望各位所謂的專家們，應該了解有關個案當事人的真實親身經歷，體會他們的處境和情緒，不要強行將專家們的想法套用在我們身上，令當事人受更大壓力和困擾。附件是我會會員對有關條例的意見，供各委員參考。

港島單親互助社

2012 年 4 月 27 日

聯絡人：馮小姐 9043-7967

郵寄地址：炮台山道 28A 單親家庭互助中心轉交

附件六頁：個案 45 個

個案(一)

女 離婚 41-60

我與前夫已經十二年來沒有聯絡，對方本身不在港，根本不關心子女，他對我和我的兩個兒子毫不關心，既沒有負任何責任，我又何須事事知會他。

個案(二)

女 離婚 22-40

如能和平共處並不會選擇離婚，再見亦不能成為朋友，再說如果再見面或聯絡，生活必然會起變化，而且對小朋友來說，離婚父母再次見面，或許會有不快事件發生，故此不能以共同父母責任模式去撫養小朋友。

其實現有法律已足夠，若不負責任的人，即使新法例都不會變，反而被迫見面，會令平靜的情緒再起伏。

個案(三)

女 離婚 41-60

我覺得離婚時，已經沒有商量如地，所以不需要再見面商量。

個案(四)

女 離婚 22-40

雙方溝通有困難，意見都不同，怎可以共同去執行，因為沒有共同模式，才會離婚的。

個案(五)

女 離婚 41-60

很多事情不想知會，最終只會引發更多雙方衝突及增加法律責任。另方面亦怕若接觸不到會引發訴訟問題。

個案(六)

女 離婚 41-60

若果是急切的事，應當機立斷，不應浪費時間找一個極少接觸的人，延誤決定。另外不想教子女方法被干預。最主要是現時生活平靜輕鬆，已心滿意足，如接觸對方，會令自己回憶離婚前的悲慘經歷。最後，子女在宗教及婚姻的決定亦應由他們自己作主，無需知會對方。

個案(七)

女 離婚 41-60

因雙方離婚時關係破裂，無法共同負責任。

個案(八)

女 離婚 41-60

雙方已經無話可說下才離婚，見面只會增加磨擦，解決不到問題亦令我自己精神欠佳、頭痛、心跳加速。子女管教方法不同，難商量。重要時刻怕拖延誤事。

個案(九)

女 離婚 21 以下

因為家暴而離婚，所以不可被對方知地址，害怕再受傷。再見將會出現更多爭執，並會有很多的法律糾紛，而且法律責任的後果嚴重，未必有能力承擔。

個案(十)

男 離婚 41-60

難溝通，不可能再合作。

個案(十一)

女 離婚 41-60

因為離婚後一般難以溝通，好關係自然溝通到，關係不好則溝通不到。

個案(十二)

男 離婚 60 以上

因離婚已有家事法庭的證明文件，雙方都照法律而行，無需再節外生枝。

個案(十三)

女 離婚 41-60

根本前夫離婚前也沒有理會女兒，其實離婚後也不會理會，所以通知他與否也不重要，他也不會理會。另方面，管教子女方法不同，難有共識，而且對方已不是一家人，他根本不會理。

個案(十四)

女 離婚 41-60

孩子曾受父虐待，不想再見父親。自己也不願跟對方接觸，怕影響情緒。

個案(十五)

女 離婚 41-60

關係不好，對方不是真心為子女，並且欠贍養費，失蹤。對子女事情全不知情，無須他俾意見。

個案(十六)

女 離婚 41-60

兩人所想的根本不合，難以溝通。形同陌路人，已無話可說，子女很多事已可自決，最終只須尊重子女。

個案(十七)

女 離婚 22-40

法律的規管只對有責任的人試行，對毫無責任的人狗屁不如，多又餘。對方離婚後失蹤 18 年，他毫無資格及權利表達意見。對他的毫無責任感，令我再見會情緒氾濫。

個案(十八)

女 離婚 22-40

本人認為政府所做的事很無謂，不切實際。子女本身很多事不想給他知，遷居是想避開他，所以不想知會他。

個案(十九)

女 離婚 22-40

我覺得如果將共同父母責任模式放在我的個案，我覺得對我現時的生活帶來好多麻煩，對小朋友也造成好大的壓力。跟對方一直難以溝通。

個案(二十)

女 離婚 22-40

其實現行的模式都運作多年，亦有共同管養令，都是針對不同個案來判決。基本上，要弄到離婚，即大家相處不來，關係弄得不好，好的關係有共同管養令可行，關係不好，獨有管養令，會較有彈性，避免更多的爭執出現。有些決定如移民/做手術，若其中一方不同意，會好有問題。

個案(二十一)

女 離婚 21 以下

政府無事找是事來做。贍養費也不肯俾，所以不需要通知他，遷居都是想離開他，不想再接觸他。

個案(二十二)

女 離婚 21 以下

同前夫溝通不到，不可能合作，我相信他會利用法例找機會吵架。



個案(二十三)

女 離婚 22-40

因對方已有另一半，就算通知也不會理會。雙方溝通都有困難，不可能合作，爭吵會多很多，對子女有傷害。對於婚姻/宗教，根本子女自己很多時均可自己決定，應要尊重。

個案(二十四)

女 離婚 22-40

分開是因為發生了很嚴重的衝突，根本連見面都是一種壓力，無可能再有冷靜的溝通。況且，分開後根本已斷絕了來往，這是一種解脫，何必再要勉強接觸。

個案(二十五)

女 離婚 41-60

多餘，法例不可改善溝通，相反製造更多爭吵。有很多事情，時間緊迫要作決定，根本不實際。子女婚姻自己也可決定。

個案(二十六)

男 分居/離婚 41-60

相方已是仇人，再溝通不來。

個案(二十七)

女 離婚 41-60

對方有精神病，不信他會理性分析。

個案(二十八)

女 離婚 22-40

此政策對子女無好處，怕父母經常因為他們而爭執，結果為他們帶來不良影響。加上，與對方亦已失去聯絡。

個案(二十九)

女 離婚 41-60

原來已經溝通不到，即使有了法例不見得會改善。再者，對方是一個不關心子女的人，找他是沒可能，溝通不到。

個案(三十)

女 離婚 41-60

對方不會理會，根本無法通知對方。此外，關係太差，再合作好像在我傷口上灑鹽。

個案(三十一)

女 離婚 41-60

不是和平分手，離婚後，不能與對方溝通，所以沒甚麼好說

個案(三十二)

女 離婚 41-60

離婚後，不能與對方溝通

個案(三十三)

女 離婚 41-60

雙方因為不和而離婚，所以難商量，相信對方一定留難。另婚姻方面，子女自己也可做決定。怕對方騷擾，所以不想。

個案(三十四)

女 喪偶 41-60

關係已很差，難再合作或溝通，相信對方只可找麻煩。宗教或婚姻由子女自己決定便可。

個案(三十五)

女 離婚 41-60

他什麼都不理，一定會帶出好多麻煩。

個案(三十六)

女 離婚 41-60

不是和平分手，合作不到。

個案(三十七)

女 離婚 41-60

會引起很多麻煩和法律責任。

個案(三十八)

女 離婚 41-60

再合作會製造更大衝突，影響平靜生活。

個案(三十九)

女 離婚 41-60

離婚原因是對方人格有問題，根本不想與他有任何聯繫，而且深信他不會從我的角度立場，驚他為難自己。再次見面相信會有很多爭執，自己會感到很辛苦。

個案(四十)

女 離婚 22-40

根本聯絡不到女兒父親，他在女兒出世前已失蹤，而家我都不再聯絡他，不想再爭執，對女兒來說他都只是個陌生人，相信他會存心留難，對小朋友產生很大影響。

個案(四十一)

女 離婚 41-60

自己再沒有與前夫通電，前夫從來是一個不負責任及冷血的人，以前所有決定也不參與，只是每個月支付生活費，對女兒生活不聞不問，對於宗教及婚姻方面，子女意願，不應該干預。

個案(四十二)

女 離婚 41-60

丈夫賭錢又吸毒，又不負責任，絕對是一個稱職的爸爸，如果要得他同意才可做某些事情，對方一定會「玩嘢」及反對，甚至會告上法庭。

個案(四十三)

女 離婚 41-60

聯絡不到前夫，想聯絡也無辦法。多年來前夫不聞不問，代表對方已放棄權利，如果每做一個行為前也需要登報或找法援，會浪費時間及納稅人的錢。

個案(四十四)

女 離婚 41-60

無可能坐埋一齊傾，因前夫對我唔住，就算一齊傾，他亦事事玩針對。

個案(四十五)

女 離婚 41-60

與對方關係不好，不可能合作，加上自己容易有脾氣，如果有不同意見很可能有更大衝突。

**香港社會服務聯會**  
**就《子女管養及探視權：應否以立法形式推行「共同父母責任模式」》**  
**交勞工及福利局的意見**

**前言：**

法律改革委員於 2005 年提出《子女管養及探視權報告書》後，本會一直關注其進展。就勞福局於 2011 年底提出的《子女管養及探視權：應否以立法形式推行「共同父母責任模式」》諮詢文件，本會整合服務機構、前線社工及服務使用者的深入討論後，提出下列意見：

**1. 對「共同父母責任模式」的整體意見**

**1.1 「共同父母責任」模式是理想的管養模式**

父母對子女應有持續的管養責任，有意義的親子聯繫不應因為父母離異而終止。「共同父母責任模式」的理念正提醒社會各界（包括家長、司法人員及其他專業人士），回應離異家庭的需要時，要以兒童的福祉為重，不應單看父母權利。這是值得推廣的範式轉移(Paradigm Shift)。

**1.2 推行「共同父母責任模式」需要三管齊下**

要有效地實踐「共同父母責任模式」，取決於當事的家庭狀況、家庭功能、離異父母的溝通和合作能力等因素，然而，這都受到法律、公共政策和社會文化等制度影響。推動家庭關係和功能的變遷，需要由法律、政策和文化三管齊下。單以一種方法處理，只會適得其反。

**2. 對諮詢文件內容的意見**

**2.1 保障兒童**

當局表示「共同父母責任模式」是以兒童為中心，但諮詢集中討論父母權利和責任，對保障兒童的權利，支援兒童參與規劃和執行管養和探視計劃，協助兒童向父母及法庭表達意見等皆未有說明。就今次諮詢工作，應專門設立與兒童溝通的渠道，直接收集兒童意見。

**2.2 單以立法形式推行「共同父母責任模式」難以達致預期果效**

對諮詢文件 3.3(b)和(c)所述「促使和鼓勵父母離婚後繼續參與子女的生活」和「離婚父母便不再需要為爭奪管養權而角力」甚有懷疑。根據業界的經驗，即使不爭奪管養權，離異父母仍可為同住、聯繫或生活大小事務展開無窮無盡角力。事實上，單單改革法律不足以化解紛爭。以「一刀切」的辦法以「共同父母責任模式」處理絕大部份的個案，反而失去靈活性，更難滿足個案的獨特性。

### 2.3 缺乏考慮對離婚家庭的社會和心理需要

離婚對家長和子女的心理和生活帶來重大影響，社會和心理的支援都很重要。承 2.2 的意見，離異父母的角力，問題源於關係惡劣，溝通和協調欠佳，難於適應離婚等因素。追根究底，應由改善溝通和重建合作入手。

### 2.4 保護弱勢群體

除了有家暴危機的個案，有濫藥、精神問題或跨境生活的家庭，離異父母就管養和探視子女的溝通和合作普遍困難，危機因素亦有別於一般家庭。因此，實行「共同父母責任模式」時，必需詳細考慮各類弱勢群體的處境。

### 2.5 擔心濫用司法程序

服務使用者亦擔心，製造麻煩者以「共同父母責任」為由，處處介入子女管養事務，藉機製造麻煩。

### 2.6 離異父母的主要訴求

離異父母認為，當務之急，應該著力於當前三個難題：

#### (a) 父母以外的親屬無法取得兒童管養權

社會上不少兒童由祖父母或親屬擔當實質的照顧者，可是法例不容許第三者取得管養權，使得這類家庭遇到很大的麻煩。

#### (b) 無法探視子女

由於同住父母的阻撓，甚至秘密搬遷，持探視令的父母難以維繫親子關係。若無法自行解決，只能提出訴訟。可是，不少非同住的父母批評，法律程序費時失事，效果欠佳，「探視令」尤如虛設。他們表示，若無輔助措施，將「探視令」改為「聯繫令」也是無補於事。

#### (c) 拖欠贍養費

現時，被拖欠贍養費的家長對問題已束手無策，生活困苦。部份服務使用者擔心前配偶因「共同父母責任」為借口，名正言順地減少贍養費，可是，對方卻未同時負起更多責任，對照顧者造成經濟上的壓迫。

### 2.7 政府的承擔及投入是成功關鍵

參考澳洲經驗，2006 年的家事法律改革輔以司法當局統籌和資助的措施，包括開設網站，電話熱線，家庭關係中心(Family Relationship Center)。此外，改革後，同時開展為期三年的政策研究。澳洲例子說明，改革法律時，需與資

訊、服務和政策配套並行，向服務投放資源，改革公共政策，這才是改變公眾思維，實踐「共同父母責任」的關鍵要素。

## 2.8 立法以外的其他方法

諮詢文件只選取以「立法形式」的單一辦法，沒有備選方案。諮詢文件中的新加坡經驗，就以法庭案例，法律和公共政策改革，輔以專門的家庭輔導和家庭調解服務，落實「共同父母責任模式」的理念，藉得香港參考。

## 3. 具體建議

「共同父母責任模式」的理念良好，但諮詢文件缺乏周全考慮，對於篩選豁免使用「共同父母責任模式」個案的機制、政策協調、開展支援服務等皆未有交待。為此，本會現提出下列建議：

### 3.1 三管齊下實踐「共同父母責任模式」

成功實踐「共同父母責任模式」需建基於法律、公共政策和社會文化之上；因此，當局要三管齊下，具體內容包括：

#### 3.1.1 公共政策方面

- 政府當局需設立專責統籌部門，以司級官員統領，協調房屋、教育、福利、法律等公共政策和措施。
- 就各項措施的細節制訂時間表和預留足夠資源。

#### 3.1.2 社會服務及公眾教育方面

- 設立「離異家庭服務中心」，提供「一站式」的社區教育、家事調解、法律諮詢、個案及小組輔導服務。針對有家暴危機的家庭或問題家庭，提供專門的施虐者輔導、親職協調等服務。
- 設立專門的「探視服務」，由專職「親職協調員」(Parenting Coordinator) 提供服務，協調聯絡和探視的安排，教育離異父母協調管教方法。此外，協助兒童跟進親職計劃的執行情況，並向父母反映意見。
- 針對單親爸爸的處境，加強單親爸爸男士服務，協助持管養權的爸爸管養子女，另外，支持持探視權的爸爸維繫親子關係。
- 加強社區教育，包括婚前輔導、婚姻與家庭的輔導和離婚教育等。

#### 3.1.3 法律方面

- 設立「兒童顧問」(Children Consultant)的制度，由「兒童顧問」協助兒童於管養及探視的訴訟過程中表達意願，參與制訂親職計劃。
- 設定豁免採用「共同父母責任模式」的機制，訂立涵蓋範圍，辨識準則，

以免這豁免條款成為父母爭奪子女的一項策略。

- 參考外國經驗，實行「共同父母責任模式」後的訴訟數字普遍上升，因此，可參考外國經驗，支持和推廣家庭調解服務，減少雙方的敵對性，以加快司法系統的效率。
- 制訂防止濫用訴訟程序的制度，以及相關的保護措施。

### 3.2 急需改善的措施

推行「共同父母責任模式」之前，當局仍要積極改善當前的管養安排、探視安排和贍養費等問題。

#### 3.2.1 管養安排

回顧《子女管養權及探視權報告書》(2005 年)，法律改革委員會建議容許第三者(例如祖父母、親戚)申請兒童的管養權。綜合實務經驗，這是合情合理的做法，當局應積極落實這措施。

#### 3.2.2 探視安排

維繫有意義的親子關係，父母的承擔和合作是不可或缺。根本方法，應由教育和輔導著手，推動離異父母合作，提升協調管養和探視的能力。參考 2.2 部份，當局要盡快設立專門的探視中心，協調離異父母安排探視。此外，適當的阻嚇亦是必要，當局應對阻撓探視的人士設定罰則。

#### 3.2.3 贍養費

贍養費是眾多單親家庭賴以為生的命根。當局應秉持今次諮詢的理念，以兒童為中心，設立中央執行和監察機構，解決拖欠贍養費的問題。

### 3.3 培訓及人手規劃

政府當局應著力展開離婚教育，並為社工、律師、教師等人員提供各種程序的培訓，制訂長期的人手規劃。

### 3.4 本地研究

現時改革的理據和案例，大多來自海外司法系統，缺乏本地的研究基礎。建議實施法律改革之前，應先進行本地研究。另外，將來實施改革後，進行跟進政策研究，檢視改革成效。

### 總結

工作小組肯定「共同父母責任模式」的理念。可是，不贊成在現階段單以立法形式推行「共同父母責任模式」，立法與配套措施必需要協同進行。因為，處理涉及家暴個案、保障兒童最大的利益、輔助離異家庭制訂和執行親職計劃的配套措施皆未有清楚工作計劃、時間表和預留資源，亦沒有本地的實證研究資料配合下，單以立法形式進行改革，只會弄巧反拙，為離異家庭造成新的麻煩。

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2012 年 4 月 30 日