

立法會
Legislative Council

LC Paper No. CB(2)1483/12-13(03)

Ref : CB2/PL/WS

Panel on Welfare Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 8 July 2013**

Child custody and access in Hong Kong

Purpose

This paper provides background information on and gives an account of Members' past discussions on child custody and access in Hong Kong.

Background

2. In 1995, the then Attorney General and Chief Justice requested the Law Reform Commission ("LRC") to consider the law relating to guardianship and custody of children and to recommend appropriate changes to the law. In 1998, a subcommittee, which was set up under LRC to consider the matters, published a consultation paper on guardianship and custody covering its reform proposals. Following the consultation, LRC published a series of four reports between 2002 and 2005, namely: Guardianship of Children; International Parental Child Abduction; The Family Dispute Resolution Process; and Child Custody and Access. According to the Administration, it has completed the legislative amendments for implementing the recommendations in the Report on Guardianship of Children. A bill containing amendments to the relevant legislation for implementing the recommendations of the Report on International Parental Child Abduction has been included in the 2012-2013 Legislative Programme.

3. The Administration advised that the Report on Child Custody and Access ("the Report") which was released in March 2005 makes

72 recommendations on arrangements relating to child custody and access. These recommendations suggest, among other things, that Hong Kong should follow other jurisdictions such as England and Wales, and Australia in adopting the "joint parental responsibility model" (the model") to family law. LRC considers that the model will enable both parents to continue to play an active part in the life of their children after divorce.

4. The Administration launched a public consultation in December 2011 to gauge public views on the LRC's recommendation that the model should be implemented by legislative means to replace the existing custody and access arrangements under the family law. According to the Administration, it would map out, in the light of comments received, whether and how to take forward the relevant recommendations of the Report.

Members' deliberations

Taking forward Law Reform Commission's recommendations

5. Questions were raised at the Council meetings between 2007 and 2009 about how the Administration would take forward LRC's recommendations in the Report, the reasons for the slow progress and the timetable for implementing the recommendations.

6. In reply to the question raised at the Council meeting on 13 May 2009 regarding whether and when it would implement LRC's recommendations in the Report, the Administration stated that LRC's recommendations would fundamentally change the existing concept of "custody" under the family law and would have far-reaching implications on children and families on various fronts. The Administration was of the view that, in deciding whether and how to adopt the recommendations of the Report, it would need to examine carefully each of the recommendations and consider them in a holistic manner. The Administration would also consult stakeholders as and when necessary during the process.

7. The Administration also pointed out that among the stakeholders in the social welfare sector and women's groups that they had consulted, most of them agreed with the concept underlying the model. However, some stakeholders considered that it might not be advisable to adopt the model in local family law. There were others who worried that parents

whose relationships broke up after divorce might abuse the relevant legislation and obstruct the making of major decisions relating to the child, which in the end would hinder the development of the child and work against his or her interest. The Administration also stated that studies in Australia indicated that there had been an increase in the number of court disputes in Australia subsequent to the introduction of the model, suggesting that the new model might be abused by trouble-making parents.

8. The Administration further advised that it had adopted the relevant parts of the Report, including Recommendations 33 and 35 in the Report, in reviewing the then Domestic Violence Ordinance¹. The Administration had introduced provisions empowering the court to vary or suspend a custody or access order currently in force when making an injunction under the Domestic Violence Ordinance regarding the child concerned. The amendment bill was passed by the Legislative Council in June 2008 and has taken effect since August 2008.

9. At the meeting of the Panel on Welfare Services ("the Panel") on 8 February 2010, members expressed concern about the progress of implementing the recommendations in the Report. The Administration responded that given the far-reaching implications of the model on children and families, the Administration would need to examine the recommendations carefully and continue to consult relevant stakeholders. It would take a cautious approach on the matter relating to the implementation of LRC's recommendations and carefully consider the views of relevant stakeholders before deciding whether and how to adopt the recommendations.

10. In reply to members' request for further information on the stakeholders that had been consulted so far and their comments on LRC's recommendations, the Administration advised that it had consulted the Law Society of Hong Kong ("The Law Society"), some social workers and women's groups on the model. According to the Administration, the Law Society considered that the model would be beneficial to children as both parents would still have the responsibilities for their children after divorce.

¹ According to Recommendation 33, LRC recommends that the Administration should review the law relating to domestic violence and introduce reforms to improve its scope and effectiveness. Meanwhile, Recommendation 35 suggests that the court should be given power to, on an interim basis, suspend or vary a prior access or contact order when making an injunction under the Domestic Violence Ordinance.

11. The Administration also stated that the social workers and most of the women's groups that it had consulted agreed with the underlying concept of the model. However, they expressed the following concerns:

- (a) there might be an increase in the number of court cases between divorced parents on issues about their children;
- (b) some parents might abuse the right to participate in their children's lives and deliberately obstruct or delay the making of major decisions relating to their children;
- (c) the requirement for parents (including victims of domestic violence) to notify or obtain the prior consent of their ex-spouses before making major decisions for their children might cause unnecessary worries and disruptions to them; and
- (d) enhancing education to change the mindset of parents on custody issues might be more effective than law reform.

Whether to implement joint parental responsibility model by legislative means

12. The Panel was briefed on the consultation paper on Child Custody and Access ("the consultation paper") and received views from deputations on the consultation paper at its meetings on 9 January and 25 February 2012. Some members expressed reservations about the introduction of the model by legislative means as the court could grant a joint custody order where appropriate. They were concerned that the consent and notification requirements might be used by hostile parents to obstruct and harass their former spouses after divorce. This would also lead to legal disputes and cause distress to their children and eventually impede their development. Some members cast doubt on whether the introduction of the model could adequately deal with the disagreements and settle the parental arrangements for the child during divorce proceedings.

13. Member noted the view of the Law Society that granting joint custody order and promoting parental responsibility were premised on different legal basis. Having studied the existing law on child custody and access, and made reference to the requirement of the United Nations Convention on the Rights of the Child that state parties should uphold the principle that both parents had common responsibilities for the

upbringing and development of the child, the Law Society considered that the Administration should effect legislative amendments.

14. Some other members considered that joint parenting was conducive to the healthy upbringing and development of children and therefore should be introduced and promoted. The Administration should take actions to address the concerns about the need for providing concrete support services to divorced families prior to the enactment of the relevant legislative proposals and effect policy changes to housing and welfare services to tie in with the implementation of the legislative proposals. Public education on joint parental responsibility and parental rights should also be strengthened.

15. The Administration explained that as noted from the custody orders which required assessment by the Social Welfare Department, the number of joint orders had increased notwithstanding that sole orders remained the majority. The model emphasised the continuing responsibilities of both parents towards the children. The concept of joint parental responsibility would be promoted, irrespective of whether the model would be implemented by legislative means. The Administration would, having regard to the views collected during the public consultation conducted in December 2011, formulate its work plan for taking forward the relevant proposals and public education programmes.

16. Some members considered that the Administration should conduct studies on whether the implementation of the model through legislative means would be effective in bringing about healthier and happier development of the children before introducing the legislative proposals.

17. The Administration advised that LRC had studied the legislative reforms undertaken in England and Wales, Scotland, Australia and New Zealand in the Report. Evaluations of the law reforms in England and Wales and Australia showed that there was no dispute on the fundamental merits of implementing the principles of joint parental responsibility by legislative means, but some problems were identified in meeting the objectives of the model, including increasing court disputes and abuse by trouble-making parents. Both England and Wales and Australia further amended their respective family law in 2006 to address the problems identified. In addition to these four western common law jurisdictions, the consultation paper had also covered the experience of Singapore which had decided to promote the model by non-legislative means. The Administration assured members that it would take into consideration the unique circumstances of Hong Kong when deciding whether the model

should be implemented by legislative means.

18. Members had reservations about the smooth implementation of the model in the absence of complementary support services, such as mediation and counselling services, to facilitate cooperative and continued parental responsibility. They were of the view that the Administration should provide more resources in this respect and enhance publicity on the availability of support services to divorced parents, irrespective of whether the model would be implemented by legislative means.

19. According to the Administration, the Integrated Family Service Centres had been providing one-stop and integrated services to families in need. In addition, the Judiciary had been promoting and encouraging the resolution of disputes by mediation.

20. Members called on the Administration to formulate concrete work plans to promote the concept of joint parenting, irrespective of whether the model would be implemented through legislative means.

Latest developments

21. The Administration will brief the Panel on the results of the public consultation on LRC's recommendations and on the way forward at its meeting on 8 July 2013.

Relevant papers

22. A list of the relevant papers on the Legislative Council website is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
3 July 2013

Appendix

Relevant papers on child custody and access in Hong Kong

Committee	Date of meeting	Paper
Legislative Council	23 May 2007	Official Record of Proceedings Pages 41 - 49
Legislative Council	13 May 2009	Official Record of Proceedings Pages 7 - 17
Panel on Welfare Services	8 February 2010 (Item V)	Agenda Minutes
Panel on Welfare Services	9 January 2012 (Item IV)	Agenda Minutes
Panel on Welfare Services	25 February 2012 (Item I)	Agenda Minutes

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