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Panel on Welfare Services

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 14 December 2015**

Child custody and access in Hong Kong

Purpose

This paper 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. One of the reports, viz, the Report on Child Custody and Access ("the Report"), made 72 recommendations on arrangements relating to child custody and access. These recommendations suggested, among other things, that Hong Kong should follow other jurisdictions such as England and Wales, and Australia in adopting a new parental responsibility model ("the Model") to replace the existing custody and access arrangements in family law. LRC considered that the Model would enable both parents to continue to play an active part in the life of their children after divorce.

3. The Administration launched a public consultation exercise in December 2011 to gauge public views on whether to implement the Model by legislative means as recommended by LRC. 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 LRC's recommendations

4. Members expressed concern about whether and how the Administration would take forward the LRC's recommendations in the Report, the reasons for the slow progress and the timetable for implementing the recommendations.

5. The Administration advised that the 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 would need to examine the recommendations carefully and continue to consult relevant stakeholders. It would take a cautious approach on the implementation of LRC's recommendations and carefully consider the views of relevant stakeholders before deciding whether and how to adopt the recommendations.

6. In reply to Members' request for further information on the stakeholders that had been consulted 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. 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. Among the stakeholders in the social welfare sector and women's groups that the Administration 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. 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 the Model by legislative means

7. The Panel on Welfare Services ("the Panel") was briefed on the consultation paper on Child Custody and Access ("the consultation paper") and received views from depositions on the consultation paper at its meetings on 9 January and 25 February 2012. At its meeting on 8 July 2013, the Administration briefed the Panel on the results of the public consultation and the proposed follow-up work of the Report. 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.

8. Members 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.

9. Some other Members expressed support for the implementation of the Model as it helped foster the continuing responsibilities of both parents toward their children which was conducive to the healthy upbringing and development of the children. They took the view that the Administration should take actions to address the concerns about the need for providing concrete support services for 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 parental responsibility and parental rights should also be strengthened.

10. 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 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.

11. Some Members said that women's groups and welfare non-governmental organizations ("NGOs"), including the Hong Kong Council of Social Service, were concerned that implementation of the Model without sufficient support services would inflict further harm on divorced parents who could no longer co-operate with each other, in particular those parents who were victims of family violence.

12. According to the Administration, LRC had put forward in Part C of the recommendations of the Report a set of supplementary recommendations in response to the concerns expressed by some respondents to the 1998 public consultation that the Model could be used by perpetrators of domestic violence to further harass and abuse the ex-spouse and children. For example, LRC had recommended that the court would have express power to make the most appropriate orders/directions upon considering factors affecting the children and taking into account the circumstances of individual cases. The court would also have the express power to vary or dispense with any of the consent or notification requirements where necessary.

13. 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.

14. 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 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.

Support services for families in need

15. Some 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.

16. According to the Administration, it was committed to improving the existing support services and continuing the efforts on the publicity and education front to promote the concept of parental responsibility. 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. The Family Council had launched the Pilot Scheme on Family Mediation Service ("Pilot Scheme") in May 2012 to provide direct sponsorship to the interested NGOs for provision of family mediation services. Three NGOs were receiving sponsorship under the Pilot Scheme.

17. Some Members were of the view that specific support services should be provided for single fathers to help them overcome problems such as collection of maintenance payments, visitation and access arrangements, etc. The Administration should also render protection to needy mothers and children of broken families and improve the enforcement of maintenance orders and child visitation service.

18. The Administration advised that in view of the difficulties encountered by some separated/divorced parents with history of family violence in meeting with their children, child visitation service for admission to refuge centres/multi-purpose crisis intervention and support centre had been provided since August 2012 under the Victim Support Programme for Victims of Family Violence. With effect from 1 July 2013, the child visitation service had been extended to families with domestic violence living outside the aforesaid centres.

19. Members called on the Administration to formulate concrete work plans to promote the concept of co-parenting, regardless of whether the Model would be implemented through legislative means.

Latest developments

20. The Labour and Welfare Bureau has launched a four-month public consultation exercise on the proposed legislation to implement the recommendations of the Report since 25 November 2015. The Administration will brief the Panel on the proposed legislation and the support measures to promote the concept of parental responsibilities at its meeting on 14 December 2015.

Relevant papers

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

Council Business Division 2
Legislative Council Secretariat
10 December 2015

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
Legislative Council	26 June 2013	Official Record of Proceedings Page 50
Panel on Welfare Services	8 July 2013 (Item III)	Agenda Minutes
Panel on Administration of Justice and Legal Services	27 May 2014 (Item III)	Agenda Minutes

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