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Panel on Welfare Services

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 8 May 2017**

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. The Panel on Welfare Services ("the Panel") was briefed on the consultation paper and received views from deputations at its meetings on 9 January and 25 February 2012 respectively. At its meeting on 8 July 2013, the Panel was briefed on the results of the public consultation and the proposed follow-up work of the Report. Noting that there were concerns on

how the Model was to be implemented in practice, the Administration would work out the legislative proposals and proposed support measures. Upon working out the proposals, the Labour and Welfare Bureau ("LWB") would further engage stakeholders and interested parties before embarking on legislation.

4. In consultation with the Department of Justice, the Home Affairs Bureau, the Social Welfare Department ("SWD"), the Judiciary and other relevant bureaux/departments, LWB had prepared the draft Children Proceedings (Parental Responsibility) Bill ("the draft Bill") and set out relevant support measures in a public consultation paper to collect public views from November 2015 to March 2016. The Panel was briefed on the consultation paper and received relevant views from deputations at its meetings on 14 December 2015 and 22 February 2016 respectively. The Panel noted that the Administration would refine the draft Bill as appropriate in the light of views received during the consultation period.

Members' deliberations

Whether to implement a new parental responsibility model by legislative means

5. 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.

6. Members noted the view of the Law Society of Hong Kong ("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 ("UNCRC") 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.

7. 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. Some 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.

8. The Administration explained that as noted from the custody orders which required assessment by SWD, the number of joint orders had increased notwithstanding that sole orders remained the majority. The Model emphasized the continuing responsibilities of both parents towards the children. SWD had been undertaking publicity measures and public education work relating to the Model in the past few years. For example, the broadcasting of announcements in the public interest entitled "Marriage may end but parenthood goes on" and distribution of a set of handbooks which provided more detailed information and guidance for separated/divorced parents and their children on co-parenting issues. A website had been rolled out in November 2015 to facilitate public access to information on parental responsibility. SWD had developed and was trial-running a short psycho-educational programme to instil the concept of continuing parental responsibility in separated/divorced parents. The Administration would strive to strengthen its efforts in public education to tie in with the introduction of the proposed legislation.

9. Some Members said that women's groups and welfare non-governmental organizations ("NGOs") were concerned that implementation of the Model without sufficient support services would inflict further harm on divorced parents who could no longer cooperate with each other, in particular those parents who were victims of family violence. Members were worried that child arrangements orders under the proposed legislation might cause nuisance and inconvenience to the parties concerned.

10. 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. A statutory checklist of factors was included in Part 2 of the draft Bill to assist the court in determining what would be in the best interests of the child in children proceedings. Besides, the option of "no order" was available for those cases where both parties consented to no order being made by the court and the court considered that making no order would be in the best interests of the child. The court would also have the express power to vary or dispense with any of the

consent or notification requirements where necessary.

11. 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.

12. 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 in 2011 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.

13. In response to some Members' enquiries about the legislative timetable for the Children Proceedings (Parental Responsibility) Bill ("the Bill"), the Administration advised that the inclusion of the draft Bill in the consultation paper in 2015 provided an opportunity for the legal sector and the social welfare sector to study in detail the proposed legislation. The Administration would keep close contact with the Hong Kong Bar Association, the Law Society and the Judiciary during the public consultation period. Consultation fora would also be organized to receive views from members of the public on the draft Bill. Members were encouraged to give views on the draft Bill so that the Administration could revise it in the light of their views.

14. The Panel generally agreed that the concept of the Model should adopt the best interests of children as the basis. However, as there was currently no specific services for parents after divorce and no maintenance board to assist them in recovering maintenance payments, the Panel took the view that the Model had caused great concerns and worries to divorced parents from high-risk families with history of domestic violence. The Panel considered it not advisable to legislate hastily in the absence of sufficient complementary services. The Panel passed a motion at its meeting on 22 February 2016 objecting to making legislation at this stage.

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, new measures would be implemented to address public concerns on the need to strengthen support for separated/divorced families and on the promotion of the concept of parental responsibility. The Administration intended to launch a pilot project on children contact service in September 2016, which aimed to provide a safe environment with social workers' support to facilitate the arrangement of children contact with the non-residing parent. Besides, "dedicated help service" would be provided to handle enquiries and requests for assistance from parents and the public during the initial one to two years after the Bill had come into effect. In addition to the new measures, the 65 Integrated Family Service Centres, two Integrated Services Centres and the Family and Child Protective Services Units ("FCPSUs") as well as NGOs concerned would continue providing services under their respective purviews to support separated/divorced families.

17. Some Members were of the view that the ineffective system of maintenance had defeated the purpose of enforcing maintenance orders in helping divorced parents collect maintenance payments. The Administration was urged to take effective measures to improve the system, e.g. setting up a maintenance board.

18. According to the Administration, it had carefully examined the suggestion of setting up a maintenance board before and considered that the suggestion would unlikely bring, to either the maintenance payees or taxpayers, any significant benefits over and above those which could be achieved by improving the existing system. Measures taken to improve the system of maintenance included: (i) relaxing the requirement for the court to make Attachment of Income Orders to make the issuance procedure more flexible; (ii) imposing interest or even surcharge against defaulting maintenance payers; (iii) upon request from legal professionals who could provide sufficient information, allowing designated government departments (i.e. Immigration Department, Transport Department and Housing Department) to disclose the addresses of maintenance payers against whom legal actions would be taken to sue for arrears in maintenance free-of-charge; and (iv) launching publicity and education programmes to strengthen public understanding of the responsibilities of maintenance payers, rights of maintenance payees and services available to them when they were unable to receive maintenance payments. The Administration would continue to keep in view the enforcement situation of maintenance orders, and consider strengthening support for maintenance payees through legislative and administrative means as appropriate.

19. Some Members were concerned that cross-boundary divorced families with history of domestic violence were unable to put co-parental responsibility into practice, if the divorced mothers who were to raise their children did not have the right of abode in Hong Kong. The Administration was requested to provide support services for families in need to enable the implementation of the Model.

20. The Administration advised that that FCPSUs would follow up cases involving custody disputes referred by the courts, including those involved in domestic violence and cross-boundary families. As the courts had made more orders for joint custody in the past few years, the concept of parental responsibility was not entirely new to SWD staff. SWD staff had received relevant training to make suitable arrangements for divorced parents and their children. The Administration would pay attention to divorced families with parents who did not have the right of abode in Hong Kong and would engage volunteers to provide assistance for those families.

Safeguarding the interests of children of divorced families

21. In response to Members' enquiries on whether children's views on the Model had been sought and the means to collect their views, the Administration advised that in addition to consulting children concern groups, it intended to invite children of divorced families through NGOs to give views on the Model. Those children's views would be collected by means of small group discussions led by social workers.

22. Some Members were concerned that as there was no mechanism for children to express their disagreement about the custody and visitation arrangements, their interests could not be safeguarded. The Administration should have made reference to UNCRC in preparing the draft Bill. According to the Administration, under the proposed legislation, a court might make an order for the independent representation of a child's interests. The cost involved should be borne by the divorced parents concerned who could apply for legal aid if necessary.

Relevant papers

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

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
Panel on Welfare Services	14 December 2015 (Item IV)	Agenda Minutes LC Paper No. CB(2)1931/15- 16(01)
Panel on Welfare Services	22 February 2016 (Item I)	Agenda Minutes LC Paper No. CB(2)807/16- 17(01)

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