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Submission to the Panel on Welfare Services on Child Protection
"*Looking into child protection policies and procedures in the light of recent child abuse cases*"
Meeting on 19 January 2018

I make this submission to share my experience as a lawyer who advises several child welfare charities and non-profit organizations, and who has represented social workers, children and parents in child abuse cases in criminal, civil, family and wardship proceedings. I am also the author of the only legal practitioner's textbook currently in print that specifically addresses child protection law in Hong Kong (i.e. Hong Kong Family Court Practice (2ed) (2015)).

The recent local cases of child abuse reported in the press are shocking but unsurprising to lawyers and child protection professionals working in this jurisdiction. Child abuse is endemic in Hong Kong: physical, sexual and psychological. It is rare for such cases to receive sustained press attention, even if they do reach the courts.[1] Endemic child abuse will continue so long as the fundamental problems with our child protection system go unaddressed.

Our Legal Duties

The Hong Kong Government has an obligation under international treaties[2], the Basic Law and the Hong Kong Bill of Rights to protect children.[3] Indeed, such duties are part of our common law.[4] In particular, the Government must take all appropriate measures to protect children from child abuse of all kinds (specifically mental, physical and sexual).[5] These duties include, *inter alia*, the duty to identify and investigate child abuse and neglect, initiate and pursue necessary court proceedings, ensure where necessary in their best interests, and that their status is regularly reviewed.

These are obligations we are failing to meet.

Child Protection and Residential Care Services

Before considering the problems with the legislation, I would like to share my concerns about the non-legal issues, in particular the shortage of residential care services available for children abandoned or exposed to abuse, neglect and ill-treatment:

Firstly, it is essential that children at high risk of child abuse, such as assault, ill-treatment, neglect and sexual abuse are removed and placed into safe, secure and appropriate environments pending welfare assessments. Where children have been exposed to such

[1] E.g. *HKSAR v KKK* [2013] 2 HKLRD 676, CACC 504/2011 (27 February 2013); *HKSAR v Wong Chi-Chung and Cheung Po-Shan*, unrep, HCCC 47/2010 (28 May 2010); *HKSAR v Gurung Hem Kumar*, unrep, HKCFI 1251; HCCC 432/2010 (3 March 2011); *HKSAR v CYL* [2016] 3 HKC 531, CACC 113/2015 (25 November 2015); *HKSAR v Lau On Shek* [2014] 2 HKLRD 367, HCMA 371/2013 (23 September 2013).
[2] See the provisions of the United Nations Convention on the Rights of the Child (**UNCRC**), especially Articles 3, 6, 16, 19, 20, 25, 27, 32, 33, 34, and 36.
[3] See especially Article 20 of the Hong Kong Bill of Rights and Article 4 of the Basic Law.
[4] See eg *D v East Berkshire Community Health NHS Trust* [2003] 4 All ER 796 (CA); and *ABB v Milton Keynes Council* [2011] EWHC 2745 (QB).
[5] See Articles 19 and 34 of the UNCRC.

abuse, emergency and short-term carers must be sufficiently equipped and trained to care for such children.

Secondly, wherever possible, placements should be residential 'home-based' rather than institutional. Long-term institutional care is not conducive to healthy child development. It may be necessary in the short-term, but is rarely an ideal solution. Children require the love, security, safety and support provided residential 'home-based' care. Furthermore, there should be as much stability in placement as possible, as 'cycling' through placements creates insecurity and anxiety for children that undermines their welfare and development.

Finally, time is of the essence for children (as discussed above). They develop quickly, and exposure to risks can have long-term consequences. Delay in taking action to investigate, protect and provide long-term solutions for children and their families is contrary to the best interests of children.

Regrettably, there is a shortage of short-term placement options for children exposed or at risk of abuse etc. This problem has been previously addressed before subcommittees of the Welfare Panel.

Problems in Practice

In my work, I have seen how shortages of residential placements have direct consequences on the welfare of children:

- Child protection and law enforcement professionals are less likely to remove children from a dangerous environment if there are no placement facilities for those children;
- Professionals are deterred from making official reports or investigating cases when they know that there are no placement facilities for those children;
- Children are more likely to spend time in hospitals and other forms of institutional care, where they lack appropriate care and may become institutionalized;
- Children with special needs are more likely to be placed in unsuitable care facilities or go without require professional support due to the shortage of capacity; and
- Placement shortages sometimes may also lead to "placement cycling", where children spend repeated short-stays in different 'emergency' and short-term placements, pending release of longer-term placements.

I have also seen how placement shortages are exacerbated by failures to review and delays in implementing permanency plans. In my experience, failures to review or take prompt and suitable actions to implement permanency plans mean that children spend more time in institutional or short-term placements. These delays have exponential effects: since the places of children 'stuck' in the system are 'held up', there are more children waiting in line behind them without access to those services.

Need for Data Collection and Analysis

There is a paucity of reliable data collected or analyzed with regards to children in family breakdown or in institutional care. This is of great concern because trends and cases of child abuse, neglect, ill treatment, exposure to domestic violence and other serious matters affecting the fundamental rights of children are not monitored sufficiently. Where such data is collected, it does not appear to be regularly published for consideration by NGOs and

academia. This prevents civil society from engaging with these problems and filling in the gaps left by institutions.

Improving performance of the law and the various institutions concerned with the rights of children relies upon the effective and reliable collection and analysis of such data by civil society and the departments of the Government. Accordingly, I strongly encourage the Government to engage with civil society to review and consider how data regarding outcomes for children is collected, disseminated and analyzed. In the absence of an independent Children's Commission, I encourage the Government to fund research into these matters by independent and expert academics.

Outdated Legal System

Our current laws and legal mechanisms for dealing with child abuse are woefully outdated. Although the Law Reform Commission of Hong Kong (**HKLRC**) has repeatedly been asked to look into the laws relating to children[6], it has not been asked to look at the system of child protection. As a result, Hong Kong has not benefited from more recent law reforms (e.g. the Children Act 1989 Part V 'Protection of Children', "**1989 Act**").

Protection of Children and Juveniles Ordinance

The primary Ordinance that deals with cases of child abuse (the Protection of Children and Juveniles Ordinance (Cap 213) or "**PCJO**") has not been substantially amended since 1993. However, those amendments were limited in scope and did not address key problems within the child protection system.

One fundamental problem with the current system under the PCJO is that it places child protection within the jurisdiction of the Juvenile Courts. The most junior judicial officers preside upon these courts, i.e. magistrates. They do not receive comprehensive training and are not required to have previously practiced as child protection lawyers.

Juvenile magistrates are trained and experienced primarily in criminal law. Their primary role in the Juvenile Courts is to exercise criminal jurisdiction over children charged with criminal offences. Indeed, juvenile magistrates often refer to children in hearings under the PCJO as "Defendants", i.e. as criminals. This is improper and it betrays a problem with the training, perspective and procedures adopted in the juvenile court.

Juvenile magistrates are also fundamentally restricted in their powers (in terms of both time and kind of powers). Juvenile magistrates do not have the broad wardship and inherent powers of the High Court to give orders beyond the scope of the PCJO. This is a concern because the PCJO does not provide any power (or requirement) for juvenile magistrates to transfer cases to the High Court if necessary to protect the child's best interests. Because their investigatory powers are limited and because orders are time limited, magistrates also fail to follow or follow up on cases.

Children in PCJO hearings are rarely represented independently from their parents. Where they are represented, they often receive Duty Lawyer assistance – i.e. from lawyers

[6] See Child Custody and Access Report (March 2005), Guardianship of Children Report (January 2002), and International Parental Child Abduction Report (April 2002).

experienced in criminal law (rather than child protection law). As a result, unfortunately, children rarely feel they have been heard properly before the court.

The PCJO does not set out the Welfare Principle[7], the Welfare Checklist[8] or the Delay Principle[9] as required considerations for the juvenile courts. The absence of clear guidelines has led to many cases where the courts simply fail to consider all the relevant circumstances and the best interests of the child in giving orders under the PCJO. In particular, regrettably and inexplicably, the Delay Principle was not included in the s.3 of the GMO. This has led to many cases where actions necessary to protect children at risk of abuse, neglect, ill-treatment or abandonment have not been taken. Such a checklist should explicitly require decision makers (including the Director of Social Welfare, "**DSW**") to consider whether other children are at risk, and possible placement with siblings.[10]

Another key problem with the current PCJO scheme is that there is no provision for most frontline child welfare professionals to initiate proceedings. Whereas the Ordinance allows for the DSW or police officers to bring a case before the juvenile courts, others such as registered social workers, registered teachers, and medical professionals have no standing to apply for protection for the child. Neither are guardians, childcare workers and parents empowered to apply for PCJO protection for children in their care.

Empowering non-government professionals to initiate proceedings is essential because there are not enough government social workers. The Social Welfare Department officers ("**referral workers**") are frequently responsible for more than 100 children at any one time. It is physically impossible for them to give sufficient time and effort to any child without distracting from their duties to the other children in their care. Referral workers should be limited to 15 children, and they should be adequately trained to deal with child abuse and child protection cases before the courts.

This is of special concern because of the lack of available specialist counsel for the DSW or police to present and prepare cases before the High Court or the juvenile courts. There is no specialist division within the Department of Justice (**DOJ**) dedicated and responsible to child protection and welfare. As a result, DSW is often unassisted by counsel – and as a result often acting without advice. Child protection law is archaic, difficult and it requires substantial effort to properly prepare for argument at court. The problems of presenting such cases are exacerbated by the inadequate resources and training for DSW employees and police officers to prepare and present such cases.

In particular, in one recent wardship case where I appeared for a child, the DSW was unrepresented or assisted by DOJ counsel. As a result, the government social workers asserted that there was no law in Hong Kong prohibiting the psychological abuse of children

[7] Guardianship of Minors Ordinance (Cap 13) (**GMO**) at section 3(1)(a).
[8] See HKLRC Report on Child Custody and Access dated 7 March 2005, itself borrow from s 1(3) of the 1989 Act, adopted as the law of Hong Kong by the courts in *SMM v TWM (Relocation of Child)* [2010] HKFLR 308, [2010] 4 HKLRD 37 and *P v P (Children: Custody)* [2006] HKFLR 305.
[9] Section 1(2) of the 1989 Act. This principle is part of the common law welfare principle, see *R v Inner London Juvenile Court, ex p G* [1988] FCR 316, [1988] 2 FLR 58 (QBD).
[10] The United Nations Committee on the Rights of the Child has expressed in clear terms that "the decision-makers shall ensure that the child maintains the linkages and relations with his or her parents and family (siblings, relatives and persons with whom the child has had strong personal relationships) unless this is contrary to the child's best interests." See paragraph 65 of General Comment 14, CRC/C/GC/14, 29 May 2013. These relationships are protected by the rights of children to family life.

and that because of this they would not take certain steps against the abusers. This position is incorrect in law (see section 127 of the Offences Against the Person Ordinance (Cap 212)).[11]

These problems are not lessened by the private sector response. Child protection needs quick, specialist legal assistance to provide meaningful legal remedies. Unfortunately, the legal professions have little contact with this area. There are almost no lawyers employed specifically to practice child protection or child welfare law by the private sector (or government). There are almost no books dealing with this subject and little is taught in the universities. I advise and act in this area almost exclusively on a *pro bono* basis. This is not sustainable and the Government should consider dedicating resources to allow subvented child welfare services to employ or instruct lawyers to ensure proper implementation of the law.

Finally, in the vast majority of cases, there is no judicial or independent accountability. Many cases are avoided because the child is removed from the home by consent. This leads to children wasting their key developmental years in institutions without final orders or any investigation of the abuse they have suffered. The care plans for all children in care should be reviewed by judicial officers, periodically to prevent delay and/or failure to investigate.

In light of the above, **I strongly urge the Government to immediately consider the following steps:**

1. Immediately request the HKLRC to review the system of laws pertaining to child abuse and child protection;
2. Enact new legislative provisions setting out the Welfare and Delay Principles, and the Welfare Checklist in relation to all cases (in particular PCJO cases);
3. Director of Social Welfare must take steps to assess a child in need and to protect that child's best interests, and in particular require all children in care (by consent or by order) for longer than 9 months to have their 'care plans' periodically reviewed by the courts to ensure proper investigation and prevent delay;
4. Allow for Care or Protection Order proceedings under the PCJO to be initiated by child welfare professionals (government and non-governmental) and by persons *in loco parentis* to children;
5. Require judicial officers at all levels dealing with child protection cases to undergo child abuse training;
6. Consider the creation of a separate "Child & Family" court with plenary jurisdiction and specialist judges;
7. Create a specialist and dedicated division of the DOJ to advise DSW on child abuse and child protection cases;
8. Provide budgets for subvented services to obtain legal advice on child protection; and
9. Provide training and adequate resources for child welfare professionals to prepare and present child protection cases in court.

Mandatory Reporting

Children are entitled to be heard but our society often silences them. They rely on adults who care for them to protect them by speaking up on their behalf.

[11] See also Archbold UK 2018 para 19-386 and see Archbold HK 2018 at para 20-308; and e.g. *P v Tasmania (No 2)* [2006] TASSC 35 at para 43. See also Article 19(1) of the UNCRC ("*mental violence*").

A key flaw with the current legislation covering child abuse is the absence of clear reporting obligations, even in respect of child welfare and child protection professionals. Neither is there any statutory protection to protect whistleblowers to report child abuse from victimization.

A good example of what can go wrong and what can go right is the case of *KKK*[12] referred to above. In that case, the children had told several adults with responsibility for them about what had happened. In particular, one of the children had told the grandmother about how she had been systematically raped (and impregnated) by their father (KKK). The grandmother, who had been minding them from time to time, only told the child "to avoid" the father. The rapes continued until one of the children told a school social worker about the rapes.

Mandatory reporting is effective if the Government takes steps to inform and train both the public and professionals about how to deal with suspected child abuse, and if those who are aware of such claims are empowered to invoke the protection of the law. In many cases that I have seen, the first adult aware of the abuse is a domestic worker. Such persons should be incentivized and protected when they come forward with concerns about abuse.

I strongly advise the Government to **introduce a statutory duty to report child abuse** for those responsible for the care and welfare of children, including registered medical practitioners, registered social workers, registered teachers, childminders, and the owner and operators of child care centres to their institutional superiors, the Police Force or the Social Welfare Department. I also advise the introduction of a similar duty on those with parental responsibility for children to report abuse to the Police Force or the Social Welfare Department. Where such a person is an employee (in particular of the alleged abuser or a person connected to the abuser) it should be an **offence to discriminate or victimize the employees who report child abuse** in good faith.

Concluding thoughts

The problem of child abuse demonstrates the urgent need for (i) the full implementation and incorporation of the UNCRC into the laws of Hong Kong, and (ii) a statutory, independent and properly resourced children's commission to investigate these problems and make timely recommendations for reform.

I applaud the Panel for taking up this issue and my colleagues at child welfare organizations for their courage in raising the problems with the current system. I implore the Hong Kong Government to take heed of the views expressed before the Panel.

Submitted by

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[12] See *HKSAR v KKK* [2013] 2 HKLRD 676, CACC 504/2011 (27 February 2013).