

4 October 2017

**Panel on Welfare Services  
Special Meeting**

**The proposed legislation to implement the recommendations of the Law Reform Commission Report on Child Custody and Access and relevant support measures**

Whilst the Administration's consideration of the Law Reform Commission's 2005 Report on Child Custody and Access is a most welcome development, as the papers from the Administration and the Legislative Council's secretariat document, there are mixed responses from the community as to the desirability of the proposed reforms in the form that they have been tabled.

This paper seeks to focus specifically on the invariable incompatibility between the proposed model and the outcomes for families where domestic violence and abuse has featured prominently in the relationship. Although the consultation paper and the response to it anticipate this to be a realm where discretion and nuance is necessary in the application of the model compared with other types of cases, the proposed bill does little to allay the concerns raised except to suggest that domestic violence will be considered as a factor to take into account in determining the best interests of the child in such arrangements. This is most unsatisfactory. Arguably, currently, the courts and decision-makers are already required to take such factors into account. Given that there have been over the past year and a half or so, active training, education and promotion of the joint parental responsibility model, it is disappointing to learn from NGO colleagues and many working at IFSCs and FCPSUs that domestic violence rarely features as a prevalent consideration in the preparation of reports or provision of support.

Regrettably, the advice from survivors of abuse often is that they are labelled manipulative, cunning or uncooperative partners who are not interested in their child's wellbeing on the basis that there could be no other reason that a separated or divorced parent would choose to bring up family violence in sessions with social workers or other frontline personnel or even judges if not but to negatively poison the minds of these officers against the allegedly abusive partner. A mother's concern for her child's safety, physical and mental wellbeing (and necessarily her own where the risks of violence have materialised enough times in the past for her to recognise the modus operandi or pattern of abusive control, and infliction of harm) is misinterpreted or rather, reduced to a mere tactic where she manipulates the situation in order to use her child as a bargaining chip to pull a fast one on the ex-spouse in this power struggle.

The many stories of survivors who continue to battle with this mindset which unfortunately, appears to be fairly pervasive, and filters across the professional support that the women rely on, including legal professionals who advise clients not to raise arguments pertaining to domestic abuse in custody proceedings because the 'court is applying the joint parental responsibility model as a default position and such arguments are viewed unfavourably by family court judges and could cost you access to your child' and judges, who would treat suspiciously the circumstances in which such claims are raised (for example, at a custody hearing where such claims had not surfaced in earlier matrimonial proceedings). This has led to the labelling of some mothers as uncooperative, manipulative or willing to go to any extreme to wrest control from the other parent.

Furthermore, it is vital to take into substantive consideration the lessons learned from the experiences of jurisdictions such as Australia and the United Kingdom where the joint parental

responsibility model has been in place for several years now. In the case of the legislative frameworks from these two jurisdictions, the framework clearly prioritises the primary considerations in decisions of this nature – being the best interests of the child and the need to protect them from violence, harm and neglect.<sup>1</sup> In the UK, however, the relevant subcommittee conducting the reform consultation exercise pertaining to the Children’s Act saw no need to introduce legislative change to this effect but rather, considered that these matters could be properly addressed through other means such as guidelines for good practice and training. These guidelines, it was recommended, were to take the form of a Practice Direction issued by the Family Court and for these to be reviewable regularly to monitor their effectiveness.<sup>2</sup> Indeed, Australia drew on the experience of the UK and built on the findings from research which suggested gaps in practice. The research also led to further reform for example, to broadly define ‘harm’ to include the impairment suffered as a result of witnessing the ill-treatment of another and the incorporation of the good practice guidelines into the training materials for judicial training.

In Australia, family violence or risk of family violence features as an item on the welfare checklist. In New Zealand, the provisions introduce a presumption against contact where family violence has been established. Despite the inclusion of a checklist of factors in the proposed bill to enable courts and relevant personnel such as social workers and other frontline officers to take into consideration various matters before determining what is in the best interests of the child, the proposed bill does not shed any light on *how* these principles are to be operationalised in practice when confronted with cases. The focus of the Australian law reform subsequent to the introduction of the shared parental responsibility model was to ensure that in making decisions in the child’s best interests, that all relevant information should be made available to the court in order to facilitate an informed risk assessment to the child. The Family Court of Australia launched the Family Violence Strategy demonstrating its commitment to address and its recognition of the impact of family violence on children, and the need for partnership with various agencies in order to appropriately manage cases involving violence.<sup>3</sup>

The presumptive emphasis in the proposed bill appears to be that access to a family unit comprising both parents is invariably in the child’s interests. If that is the case, then the threshold for an alternative order may be considerably high. Whilst attempting to counterbalance this against the reality of domestic abuse faced by the residential parent and / or the child previously or the risk of such abuse with this default preferred arrangement, it remains questionable whether the child’s best interest is being duly considered in its entirety outside of the paradigm that regular access to an ‘in-tact’ family unit is necessarily positive for the child’s developmental and other interests.

This is precisely the challenge experienced in the UK which has recently led to the introduction of reforms to address this very challenge in view of the incompatibility and high-risk posed to resident parents and children.<sup>4</sup> In the past decade, 19 deaths have resulted from the failure of an appropriate care order being made in such high-risk cases (i.e. no contact order or indirect contact order). In Australia, 2011 saw another round of reforms to ensure that family violence issues were firmly on the table and part of consultations between court-appointed officers, and parties accessing the court for relevant orders as well as a fundamental part of lawyering. This meant that there was overall a heightened awareness of the importance of family violence as a key consideration in

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<sup>1</sup> (*Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)); and <<http://www.comlaw.gov.au/Details/C2011A00189>> (*Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth)).

<sup>2</sup> Law Reform Commission of Hong Kong, *Child Custody and Access*, March 2005, pp. 247 and 248, referencing the UK’s Children Act Sub-Committee Report (2000).

<sup>3</sup> The Family Court of Australia, *Family Violence Strategy 2004-2005* (March 2004).

<sup>4</sup> <https://www.bbc.co.uk/news/amp/uk-41440829>

determining the safety and protection of the child which, necessarily had to precede any other considerations in relation to parental contact, whatever the intended goals of equalising the balance between both parents.

In numerous countries including the [UK](#)<sup>5</sup>, [Australia](#)<sup>6</sup>, [US](#)<sup>7</sup>, [New Zealand](#)<sup>8</sup> and [Canada](#)<sup>9</sup>, the research findings are overwhelmingly clear - the model has been catastrophic where visitation rights without supervision have led to death of the children and / or the abused spouse. Such an arrangement, if not properly assessed and evaluated could have disastrous consequences in Hong Kong. Therefore, it is vital that there be clarity as to the precise considerations, the framework for their consideration, including the paramountcy of child protection against violence, physical, psychological or financial, and most importantly, capacity building and regularly monitoring and review of capacities to ensure that the legislation is effectively implemented to help Hong Kong families avoid the misfortunes witnessed in other jurisdictions as a result of such policies, though well-meaning, but ineffectively implemented.

It is recommended that a much more considered approach be taken before introducing legislative reform without fully contextualising the family circumstances experienced by different stakeholders in this process as a new model of shared parental responsibility comes into effect in the community and as applied by frontline personnel.

1. A complementary approach which is instructive in terms of the level of detail provided through legislation and accompanying guidelines is important but at the same time, a comprehensive approach which ensures that the system is ready to support and deliver on the model by providing necessary resources, training and also, reformation of related areas (such as amendments to the Domestic Violence Ordinance especially the sections pertaining to definition and applications for injunctive relief, etc.) are concurrently put into place.
2. Additionally, it is imperative that the process be evidence-based and guided by research on the impact and effects of the implementation of the joint parental responsibility model currently on families, especially those which have a history of family violence.
3. Such wide-scale changes will have a long-term impact on children and resident spouses and will likely be very difficult for many especially in cases where conflicts have resulted in the termination of the marital relationship or partnership. Therefore, immediate steps should be taken to require that all personnel handling family cases be required to undergo ongoing training and education to understand fully the effect and impact of family violence. This should extend into professional curricular programs but also, on the job training for frontline staff, and others engaged in the family court process, including judges and lawyers. Although there is reportedly such training and education currently, various sources suggest that these measures are ineffective. The burden remains on the residential spouse or the primary carer to 'behave' well in order to ensure that an adverse order is not made against her.

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<sup>5</sup> [http://rightsofwomen.org.uk/wp-content/uploads/2014/10/Picking\\_Up\\_the\\_Pieces\\_Report-2012l.pdf](http://rightsofwomen.org.uk/wp-content/uploads/2014/10/Picking_Up_the_Pieces_Report-2012l.pdf)

<sup>6</sup> <http://journals.sagepub.com/doi/abs/10.1177/1077801216659942?journalCode=vawa#articleShareContainer>

<sup>7</sup> <http://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1045&context=sjsj>

<sup>8</sup> <https://static1.squarespace.com/static/57d898ef8419c2ef50f63405/t/59386e6a15d5db8350f9157f/1496870522432/Family+Violence+Survey+report+080617+-+embargoed+until+1am+Thursday+%281%29.pdf>

<sup>9</sup> [https://ywcavan.org/sites/default/files/resources/downloads/Litigation Abuse FINAL.pdf](https://ywcavan.org/sites/default/files/resources/downloads/Litigation%20Abuse%20FINAL.pdf)

4. Most critically, it is recommended that the courts undertake a review of their family cases and identify the percentage which raise issues of family violence and commission an in-depth evaluation of the outcomes of these cases for the parties concerned. This evidence will be of invaluable assistance in helping inform the future directions of law reform and the implementation of such a model in Hong Kong.

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