



## Law Society's Submissions

### Labour and Welfare Bureau's Consultation Paper *Child Custody and Access: Whether to implement the "Joint Parental Responsibility Model" by Legislative Means*

The Law Society's Family Law Committee has thoroughly considered the Consultation Paper prepared by the Labour and Welfare Bureau on *Child Custody and Access: Whether to implement the "Joint Parental Responsibility Model" by Legislative Means* (Consultation Paper). We have the following submissions on the queries raised on the concept of the "Joint Parental Responsibility Model" as follows:

**Question 1: Do you agree that the concept of the joint parental responsibility model has the merits listed out in paragraph 3.3 of the consultation paper? If so, why? If not, why not?**

#### Law Society's response

The Law Society notes the Consultation Paper is seeking views on recommendations made in the Law Reform Commission's Report "*Child Custody and Access*" (LRC Report) published in March 2005 on the concept of "*parental responsibility*".

We note the LWB refers to "*joint parental responsibility*" model throughout its Consultation Paper, but in our submissions will refer to the concept of "*parental responsibility*"<sup>1</sup> as referred to in the LRC Report; in our opinion the description of "*joint parental responsibility*" is not the model discussed in the LRC Report as Recommendation 4 states:

*"We recommend that the concept of parental responsibility should replace that of guardianship, except that the concept of guardianship should be retained in relation to a third party's responsibilities for a child after the death of a parent".*

We agree with the merits listed in paragraph 3.3 (a) to (e) in the Consultation Paper which have been taken from the LRC Report.

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<sup>1</sup> See paragraphs 9.50 to 9.55 of the LRC Report

We agree that the change from the traditional approach of “*winner takes all in custody proceedings should reduce hostility between parents determining the future arrangements for their children*”. However, we note not all cases will benefit such as ‘high conflict’ cases and/or those involving domestic violence or child abuse as these cases will still require supervision by the court.

**The Administration is questioning whether legislation is necessary or whether Hong Kong should, in effect, maintain the status quo by retaining the concept of “custody” and follow the practice in Singapore. We disagree and discuss the Singaporean model in our response to Question 7 below.**

**Question 2: Should the concept of the joint parental responsibility model be promoted in Hong Kong? If so, why? If not, why not?**

#### **Law Society’s response**

As noted above we support the concept of “*parental responsibility*” which should be the concept to be promoted in Hong Kong. The existing legislation is failing Hong Kong families in the 21st. century as there is no comprehensive legislation in place dealing with children but provisions can be found in the following Ordinances:

- Adoption Ordinance (Cap.290)
- Domestic and Cohabitation Relationships Violence Ordinance (Cap. 189)
- Guardianship of Minors Ordinance (Cap. 13)
- Legitimacy Ordinance (Cap. 184)
- Maintenance Orders (Reciprocal Enforcement) Ordinance (Cap 188)
- Matrimonial Causes Ordinance (Cap. 179)
- Matrimonial Proceedings and Property ordinance (Cap. 192)
- Parent and Child Ordinance (Ca. 429)
- Child Abduction and Custody ordinance (Cap. 512)

The concept of custody is outdated and based on the “*ownership of chattels*” with the emphasis on parents’ rights i.e. mother has custodial right of a child if born out of wedlock and the father if the parties were married at the birth of the child. We note comparable jurisdictions now focus on children’s rights and parents’ responsibilities to their children. The concept of “custody” fails to encourage divorcing couples to act in a manner which is in the best interests of their children.

In our opinion, the concept of parental responsibility addresses such issues as:

- The importance of fathers continuing to have a role in the lives of their children which doesn’t stop because of divorce; research has shown the importance of children retaining contact and a relationship with the father
- Rapid social development since the introduction of the Matrimonial Causes Ordinance and the Matrimonial Property and Proceedings Ordinance were introduced – now more than 50% of women are in the work force

- The reality that a majority of mother are awarded custody of the children; in reality a lesser % of fathers do not have a realistic chance of obtaining care and control of their children
- the buttressing of gender equality

Hong Kong's private law provisions on children should also comply with the principles set out in the United Nations Convention on the Rights of the Child ("UNCRC") and the International Covenant on Civil and Political Rights ("ICCPR"). These international treaties put Hong Kong under an obligation to change its legislation to protect the rights of children and to introduce the principle that *both parents* have common responsibilities for the upbringing and development of their children. We therefore *do not agree the concept of 'joint parental responsibility' should be promoted in Hong Kong.*

We do support the concept of "parental responsibility" as outlined in Recommendation 4 of the LRC report.

**Appendix 1: Table showing differences between "parental rights/authority" and "parental responsibility"**

***Question 3: If your answer to Q2 above is affirmative, do you agree that we should introduce legislative amendments to support and promote the concept of the joint parental responsibility model in Hong Kong? If so, why? If not, why not?***

**Law Society's response**

The concept of parental responsibility requires a cultural mindset which can only be achieved by new legislation. The policy changes should be combined with an extensive education campaign to assist the public to adopt the new paradigm. We note as an example the experience in the United States which experienced a polarising debate on how to improve race relations and to change the mindset - this could only be achieved by introducing legislation and educating the population. Legislation underpins the policy changes and the public understands that changes will be implemented – a failure to introduce legislation will perpetuate the mindset that children are "chattels" and a parent's ongoing responsibility to his/her child, regardless of their marital status.

***Question 4: If your answer to Q2 is affirmative and that to Q3 is negative (i.e. you think that the joint parental responsibility model should be promoted in Hong Kong but it should not be done through legislative reforms), how do you think the concept of the model should be promoted in Hong Kong?***

**Law Society's response**

N/A

***Question 5: If your answer to Q3 is affirmative, what are your views on the recommendations made in the LRC's Report to implement the joint parental responsibility model which are set out in paragraphs 3.4 to 3.8 of the consultation paper, including the introduction of two statutory lists of important decisions affecting the child (paragraph 3.6(b)), abolition of the custody order and access order currently provided for under the law (paragraph 3.7), introduction of the residence order, contact order, specific issues order and prohibited steps order (paragraph 3.7), and removal of the limitation in section 10 of the Guardianship of Minors Ordinance (Cap.13) on the right of third parties to apply to the court for orders concerning children (paragraph 3.8(a))?***

### ***3.4 LRC's recommendation for implementing the model***

***(a) as noted in paragraph 2.2 above, the legal parent-child relationship is denoted by the concepts of "guardianship" and "parental rights and authority" under the existing law of Hong Kong. Since the model emphasises parental responsibility rather than parental rights and authority, legislative amendments would be required to redefine the parent-child relationship in terms of the "parental responsibilities".***

#### **Law Society's response**

We agree a change of culture is necessary. We consider such changes to policy require an extensive and extended education campaign. We note younger parents are better educated and aware of their responsibilities to their children. The concept of parental responsibility will not end litigation but should reduce the issues in contention. There should, nonetheless, be acceptance that parental responsibility does not end with divorce.

We note the changes to Hong Kong society and that the divorce rates have steadily increased over the last 40 years. See **Appendix 2** which provides data on the number of divorce petitions since 1990.

***(b) it would be necessary to introduce in the law the notion that parental responsibilities of both parents should last until the child reaches adulthood and should not end because of the divorce of parents.***

#### **Law Society's response**

Yes. We note this should also include parents who separate but do not petition for divorce.

***(c) the existing regime of custody orders which emphasises parental rights and authority should be abolished. New orders which are consistent with the concept of "joint parental responsibilities" should be introduced in the law.***

**Law Society's response**

We agree that new orders which are consistent with the concept of 'parental responsibilities' should be introduced in the law.

*(d) other amendments recommended by LRC may also be needed to supplement the operation of the new court orders and prevent/address potential problems arising from the implementation of the model.*

**Law Society's response**

Yes. The Law Society strongly endorsed this recommendation during the original consultation exercise.

We note many NGOs support the LRC's Recommendations. However, they have expressed concerns over the provision of adequate support services prior to the introduction of the reforms. In reality, Hong Kong families are in need of such support services now as well as going forward. The Administration must acknowledge that such reforms will require resources and should be addressing this issue without further delay.

Please refer to the Law Society's response to the remaining LRC Recommendations in **Appendix 3**.

**3.5 Replacement of the concept of guardianship with parental responsibility**

*(a) to replace the concept of "guardianship" with the concept of "parental responsibility" to denote the parent-child relationship in the law (Recommendation 4).*

**Law Society's response**

We agree.

*(b) to introduce in the law a statutory list of parental responsibilities and a statutory list of parental rights based on the same lists in the Children (Scotland) Act 1995 (Recommendations 5) which can serve as a guide to parents, children and the court on the parameters of the relevant parental rights and responsibilities, etc.*

**Law Society's response**

We agree there should be a list of parental responsibilities as this will provide guidelines and assist with the change of mindset in relation to "parental responsibility" and on balance we agree the Scottish definition is preferable<sup>2</sup>

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<sup>2</sup> See paras. 9.58 to 9.61 LRC Report

### **3.6 Continuation of parental responsibilities after divorce**

*(a) to specify in the law that parents exercising parental responsibility should be able to act independently in relation to the day-to-day care and best interests of the child (Recommendation 12).*

#### **Law Society's response**

We agree but recommend the word "independently" should be removed changed to "appropriately in the absence of the other parent". We note the concept of parental responsibility does not change the existing rights and responsibilities of the parents but re-emphasises their role in relation to the child.

*(b) in relation to more major decisions affecting the child, to introduce in the law a statutory list of decisions which require the express consent of both parents and a list of decisions which require notification to the other parent (Recommendation 13).*

*(i) decisions requiring other parent's express consent should include consenting to the adoption process, change of child's surname, removal of the child out of the jurisdiction for more than one month and permanent removal of the child out of the jurisdiction*

#### **Law Society's response: Recommendation 13 - Major Interim Decisions**

The Law Society notes the LRC decided after considerable debate that the consent of both parents would be necessary in the following situations:

- change to the child's surname;
- adoption process;
- removal of the child out of the jurisdiction for more than one month; and
- permanent removal of the child out the jurisdiction

We agree with Recommendation 13 as we consider, on balance, a statutory list will assist the public and provide clarity.

The introduction of parental responsibility can assist a majority of parents to make their own decisions on these important issues. However, high conflict cases will always require the court's supervision over orders in the best interests of the child.

*ii) decisions requiring notification to the other parent should include notification of major operation or long-term medical or dental treatment for the child, a major change of the child's schooling, bringing the child up in a particular religion, consenting to the child's marriage, moving house with the child, removing the child from the jurisdiction temporarily but for less than one month, and a change in the child's domicile or nationality and any other important decisions in the life of the child;*

*(iii) in order to address concerns expressed by some respondents on this issue, the court should be given the express power to vary or dispense with any of the consent or notification requirements where this is considered necessary.*

#### **Law Society's response**

In respect of (ii) and (iii) above, we note the following observations in the LRC Report:

*"9.99 Some consultees were concerned that the introduction of the new consent and notification requirements might be used by trouble-making or abusive spouses to obstruct and harass the other spouse. Particular concern was raised about the vulnerability of battered wives in relation to the requirements to notify the other party of changes of residential address and in the child's schooling.*

*9.100 We have considered these concerns related to domestic violence both here and elsewhere in this report. While we would expect that the judge in such situations would be fully informed of all the circumstances of the case and should be able to award orders accordingly (such as a specific issues or prohibited steps order to avoid the need for disclosure), we agree that the judge's power to vary or dispense with items on the parental responsibility list in any particular case should be made explicit. We therefore propose that our recommendation should include express reference to the court having the power to vary or dispense with any of the consent or notification requirements contained in the lists where the court considers this necessary.<sup>3</sup> It may also be useful if a catch-all provision were to be added to the end of the lists of matters requiring consent or notification, to the effect of "subject to what the court may otherwise order."*

We agree with Recommendation 13 in the LRC Report which states: *"We further recommend that the court should be given express power to vary or dispense with any of the consent or notification requirements where this is considered necessary."*

#### **"Parenting Plan"**

We consider this is an opportunity to *"think outside the box"* and for the Administration to consider the introduction of *"Parenting Plans"* based on the premise the family continues even after separation. Parents continue to have responsibility for their children and should take responsibility for their needs going forward; they should review important issues which may affect the child and where possible to reach consensus on the best way forward for the child. This could be achieved in a majority of cases where the parents are not in conflict or with the assistance of alternate dispute resolution processes such as mediation, collaborative practice or settlement meetings.

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<sup>3</sup> We note that the District Court does not have the same inherent jurisdiction to grant orders as the High Court, so the powers of the court would need to be stated in full in the implementing legislation.

### **“Hong Kong Model”**

We suggest the Administration consider the concept of a “*Hong Kong model*” which cherry picks the successful reforms in comparable jurisdictions.

We recommend the concept of “parental responsibility” should be changed to “*Continuing Parental Responsibility*” as this clarifies the situation that the responsibilities of parents remain intact and continue irrespective of divorce but removes the inference of “rights”.

We also note the Family Court intends to implement its *Pilot Scheme on Child Dispute Resolution* in the latter half of 2012; we anticipate these new procedures will help reduce the number of conflicted cases involving arrangements over the children of the family.

*(c) to specify in the law that the parental responsibility and rights of a person would be retained even if another person (e.g.) a step-parent or unmarried father) also acquires such rights (Recommendation 17)*

### **Law Society’s response**

We agree that any third party order would not divest the parents of their parental responsibility.

### **3.7 Abolition of Existing Regime of Custody Orders and Introduction of New Orders**

*(a) to abolish the custody order and access order currently provided for under the law introduce the “residence order” (Recommendation 21) and “contact order” (Recommendation 24). The residence order determines the person (a parent or third party) with whom the child is to live on a daily basis and who would have responsibility for the child’s day-to-day care and best interests. This would not be equivalent to the traditional custody order, as the non-resident parent would still retain parental responsibility (and rights) over the child and thus the right to be involved in important decisions affecting the child’s well-being and future. The contact order regulates the arrangements for maintaining personal relations and direct contact between the child and parent with whom the child is not living.*

### **Law Society’s response**

We note the proposal to abolish the concept of “custody” and replace it with the concept of ‘parental responsibility’ would be a significant step for Hong Kong. Several jurisdictions have introduced variations of this concept and Hong Kong can avoid the problems which occurred in other jurisdictions such as Australia with its “shared parenting responsibility” policy and linking the amount of contact with maintenance paid.<sup>4</sup>

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<sup>4</sup> We note the UK Government has recommended abolition of “residence” and “contact orders” in “The Government Response to the Family Justice Review” published on 6 February 2012.



As indicated in our response to Question 5 above we recommend the adoption of 'Parenting Plans' and for such documents to clearly require parents to decide on the practicalities of residence and contact. We should craft a 'Hong Kong' model which takes into account concerns which affect divorcing couples. Clearly, the most important issue for a vast majority of the parties is accommodation. We recognize in Hong Kong that whoever has the day to day care of the children is the party more likely to secure public housing.

We therefore support the proposal to provide for residence and contact orders in the legislation as matters which need to be resolved by the parents in the Parenting Plan for children under the age of 18.

*(b) to introduce the "specific issues order" (Recommendation 25) and "prohibited steps order" (Recommendation 26) to address the disagreements between parents on issues relating to their children, since both parents would have parental responsibilities (and "rights") to participate in all important decisions about their children under the model. The specific issues order enables the court to give directions on a particular question that may arise in relation to any aspect of parental responsibility for the child (e.g. which school the child is to attend), whereas the prohibited steps order is an injunction to prevent the taking of particular steps by a parent in the exercise of his parental responsibility (e.g. taking the child away from a particular school) without first obtaining the consent of the court, etc.;*

#### **Law Society's response**

We agree with the proposal to introduce "specific issues orders".

*(c) to expressly provide in legislation for the court to include directions or conditions in any of the court orders (Recommendation 27). The proposal would allow the court to impose, for example, directions in a contact order that supervised contact with the child should be organised where there has been a history of domestic violence or abuse in the family. (This is possible at present under the existing law though not specifically provided in legislation.)*

#### **Law Society's response**

We agree with the proposal. The introduction of "parental responsibility" will not be a panacea. There will always be high conflict, domestic violence and child abuse cases which will require the court's supervision to ensure the best interests of the child going forward.

### **3.8 Other recommendations for supplementing the operation of the model**

To supplement the operation of the model, LRC has made the following further recommendations to assist the court in making orders affecting children -

***(a) Right of a third party to apply for custody orders***

**Law Society's response**

We agree.

***(b) Statutory checklist of factors to be considered in custody and guardianship proceedings***

**Law Society's response**

The Law Society's Family Law Committee recommends adoption of the 6 factors highlighted in the judgment of HHJ Bruno Chan in *P v P* [FCMC 13264/2002] as follows<sup>5</sup>:

- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);*
- (b) his physical, emotional and educational needs;*
- (c) the likely effect on him of any change in his circumstances;*
- (d) his age, sex, background and any characteristics of his which the court considers relevant;*
- (e) any harm which he has suffered or is at risk of suffering;*
- (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs.*

We note Cheung JA in his Court of Appeal judgment in *SMM v TW M* CACV 209/2009, approved HHJ Bruno Chan's adoption of the 'welfare checklist' on determination of child custody in *P v P* and noted:

*"It is clear, however, that the Family Courts in Hong Kong have in line with the modern approach granted joint custodial orders which emphasised the continuation of parental responsibilities and Judges in Hong Kong have also adopted the welfare checklist in section 1(3) of the Children's Act: see, for example, H H Bruno Chan in P v P (Children: Custody) [2006] 2 HKFLR 305.*

*In my view since our matrimonial jurisdiction has followed that of England because of the historical connection, Hong Kong can and should draw from the wealth of experience of the English Family Courts to nurture and supplement the development of our own family jurisdiction on matters concerning principles which are not dependent exclusively on legislation."* (paragraphs: 27-28)

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<sup>5</sup> *P v P* paragraph 53

*(c) Recommendations for addressing the concerns about implementation of the model for victims of domestic violence*

**Law Society's response**

We agree with the recommendations.

**Q6. Do you agree with the views of those in support of reforming Hong Kong's family law to implement the joint parental responsibility model? If so, why? If not, why not?**

**Law Society's response**

We do not agree with the concept of "joint parental responsibility" as outlined in the Consultation Paper. However, the Law Society does agree with the Recommendation 4 in the LRC Report which refers to the 'parental responsibility' model.

**Q7: Do you agree with the view that the concept of the joint parental responsibility model should be promoted through the development of case law and public/parent education only? If so, why? If not, why not?**

**Law Society's response**

We do not agree that the concept of 'parental responsibility' can be promoted through the development of case law/parent education only.

We note this policy has been adopted by Singapore and is reviewed in Chapter 5, paragraphs 5.27 to 5.30 of the Consultation Paper, and hereinafter is referred to as the "Singaporean model".

In Singapore there is a comprehensive piece of legislation dealing with the family known as "*The Women's Charter*". We note there is statutory underpinning of the concept of 'joint parental responsibility' in Section 46(1) which states:

**RIGHTS AND DUTIES OF HUSBAND AND WIFE**

**Rights and duties**

46.

- (1) Upon the solemnization of marriage, the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children.
- (2) The husband and the wife shall have the right separately to engage in any trade or profession or in social activities.
- (3) The wife shall have the right to use her own surname and name separately.
- (4) The husband and the wife shall have equal rights in the running of the matrimonial household

Singapore was well aware of the international trend to remove the concept of 'custody' from legislation and replace it with the concept of "parental responsibility" as the Attorney-General's Chambers of Singapore published a Report "*Review of Child Custody Law*" (Singaporean Report) in 2005.

The Law Society's Family Law Committee reviewed the Executive Summary of the Singaporean Report which provides an overview of the traditional concept of "custody" and the recommendation that the existing system in relation to custody be retained as legislative changes were considered unnecessary.

The Singaporean Court of Appeal also advocated the promotion of '*joint parental responsibility*' through the use of joint custody or no custody orders in its judgment in *CX v CY*. However, we note the Singaporean Report did not indicate it would retain the status quo permanently but it would wait for the court to develop the jurisprudence.

The situation is different in Hong Kong where our legislative provisions can be found, for example, in the Matrimonial Proceedings and Property Ordinance (MPPO), the Separation and Maintenance Orders Ordinance (SMOO), and the Guardianship of Minors Ordinance (GMO).

We note the following comments by the Court of Appeal in *PD and KWW* [CACV 188/2009]:

*"The Hon Hartmann JA stated:*

*A shift in societal values*

44. There was a time when the parents of a child, more particularly the father, had almost absolute authority over that child. That is no longer the case. The principle that the best interests of the child – not the authority of the parents – must be the paramount consideration is today almost universally recognised. As Lord Fraser said in *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112 at 170:

“... parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child.”

45. There was a time also, not so long gone, when the roles of the mother and the father in the raising of their child were viewed with almost equal rigidity. The mother was best left to care for the child, certainly when the child was young. The father was best left to provide financial support and to exercise rights of guardianship.

As for his contact with the child, visitation was deemed sufficient. Today, such sexist views are obsolete.

46. Social imperatives change. When they are important and lasting, the common law can, and should, keep pace with that change.

47. It is widely recognised today that the long-term best interests of a child are invariably best protected if, despite the breakdown of the marital union, both parents are able to continue to play an equal role in making the important decisions that will determine the child's upbringing.

48. In the United States, for example, shared custody is common. The courts routinely grant joint custody orders unless one parent is clearly found to be unfit.

[In the United States, 'joint legal custody' is differentiated from 'joint physical custody'. Joint legal custody is the equivalent of our joint custody. Joint physical custody is, in our law, the equivalent of joint care and control.]

49. In England and Wales, the Children Act 1989 has sought to emphasise the continuing parental responsibility of both parents even if an order has been made that the child will reside with only one of them.

50. Other common law jurisdictions – for example, Australia – have made legislative changes to similar effect, that is, where appropriate, to ensure the continued active involvement of both parents in the upbringing of the child, or children, of their marriage.

51. The Hong Kong Law Reform Commission Report on Child Custody and Access of 2005 recommended changes in line with the Children Act 1989 but regrettably, to date at least, little appears to have been done to give the Commission's recommendations legislative form.

*In the same case Lam J. added:*

80. Likewise, as observed by my Lord, the recommendations of our Law Reform Commission in 2005 regarding Child Custody and Access have not been taken forward. Had such recommendations been implemented, the respective rights and responsibilities of the parents towards their children would be more clearly and specifically defined. Judging from the submissions advanced by the parties in this

case, I cannot help from observing that with the implementation of such reforms, appeals like the present one could have been avoided.

81. Speaking for myself, I would like to take this opportunity to urge the administration to make some progress in these directions.”

In *SMM and TWM* Cheung JA noted:

“29. It should be noted that the Hong Kong Law Reform Commission Report on Child Custody and Access (7<sup>th</sup> March 2005) has recommended changes to the *GMO*, by, among other things, replacing custody orders with residence and contact orders. There has been no implementation of the recommendation yet. In my view the Administration should make a serious effort in implementing the recommendations by legislation soon.”

Unlike Singapore our Family Court and Court of Appeal judges have not developed the “parental responsibility” model by case law and have clearly indicated in several judgments its support for implementation of the LRC recommendations as soon as possible.

The practice and procedures relating to family law in Singapore are different from Hong Kong:

- Social Welfare Reports are prepared for the judge only
- The Report is confidential and will not be shown to the parties
- The investigation officer will not be cross-examined.

We do not support the proposal of implementation of parental responsibility by case law and believe it is only with legislation that the concept of parental responsibility can be universally accepted.

***Q8. What lessons do you think we can learn from these overseas jurisdictions?***

**Law Society’s response**

We agree that lessons can be learnt from the overseas jurisdictions highlighted in the Consultation Paper.

***“Failure to change the mindset of parents”***

**Law Society’s response**

The proposed reforms are significant and a change in mindset will take time to take effect. Clearly if new policies are introduced then it is vitally important for the Administration to provide adequate resources for retraining of social workers, and for

a long term educational campaign drawing on the services of all stakeholders including the NGOs .

Younger parents are better educated and aware of their responsibilities. The concept of parental responsibility will not end litigation over resident and contact orders but with re-education parents will accept their responsibilities do not end with divorce.

Society has changed since the introduction of the concept of custody over 40 years ago. Divorce is now more common place as evidenced by the number of divorce petitions and decree absolutes granted by the court.

***“Increases in court disputes”***

**Law Society’s response**

We note there was an increase in England and Wales and in Australia following the law reforms. We also note that where there is uncertainty in any new law there are always challenges. However, as Hong Kong will have the benefit of where the reforms have been unsuccessful these can be avoided by careful drafting of Hong Kong’s legislation and the creation of a Hong Kong model.

***“Abuse by trouble-making parents”***

**Law Society’s response**

As stated above, introducing the concept of parental responsibility will not prevent “trouble-making parents” from making applications. High conflict cases and those involving domestic violence and child abuse will not disappear. The court will still have to deal with such cases.

However, for the vast majority of divorcing couple the changes will empower them to consider their own parenting plans in the best interests of their children – parents today are well aware that their children wish to maintain a relationship with both parents even after divorce.

***Q9. Which jurisdiction(s) do you think can serve as the best reference for Hong Kong in considering our way forward, and why?***

**Law Society’s response**

We note the LRC Report reviewed the developments in England and Wales, Australia, and New Zealand and cherry-picked successful reforms from all 3 in its 72 recommendations.

We note the problems Australia has experienced especially those arising from the *Family Law Amendment (Shared parental Responsibility) Act 2006*. This Act introduced the concept of “*shared parental responsibility*” and the statutory requirement that “*children have a right to a meaningful relationship with both parents after separation*”. As noted in an evaluation of the 2006 Family Law Reforms in

Australia,<sup>6</sup> the Australian legislation was very complex and difficult to apply. The Law Society notes the Administration can avoid the pitfalls of the Australian legislation in relation to the concept of “*shared parental responsibility*” which is not the concept proposed by the LRC.

***Q10. Do you have any other views on the concept of the parental responsibility model and whether it should be implemented in Hong Kong by legislative means?***

**Law Society’s response**

The Law Society does not support the Singaporean model as outlined in the Consultation Paper. We consider Hong Kong’s existing legislation does not permit development of the ‘*parental responsibility*’ model. The Administration should implement the recommendations in the LRC Report and in particular adopt Recommendation 4 on “*parental responsibility*” and extend this by considering the description of “*continuing parental responsibility*” (CPR) as a concept which describes the roles of the parents even after divorce.

However, we do note that Singapore has established a “Child Focused Resolution Centre” which provides, inter alia, the following services to divorcing couples:

- mandatory counselling and mediation where the parties have children below the age of 8
- assistance to the parents to resolve any parenting issues in a non-adversarial setting
- Children may be invited to attend family conferences

We note the Centre is staffed by Judges who specialise in family mediation and Family counsellors who are specially trained social workers.

In order to change the cultural mindset there must be adequate support provided to divorcing couple to reach consensus on the best possible parenting plan in the best interests of their children, therefore adequate resources should be made available to provide professional support and advice to the family.

**The Law Society of Hong Kong**  
**Family Law Committee**  
**24 April 2012**

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<sup>6</sup> The Application of the SPR Act 2006 amendments to the Family Law Act 1975 see <http://www.aifs.gov.au/institute/pubs/fle/chapter15.pdf>





### Parental Rights and Authority / Parental Responsibility

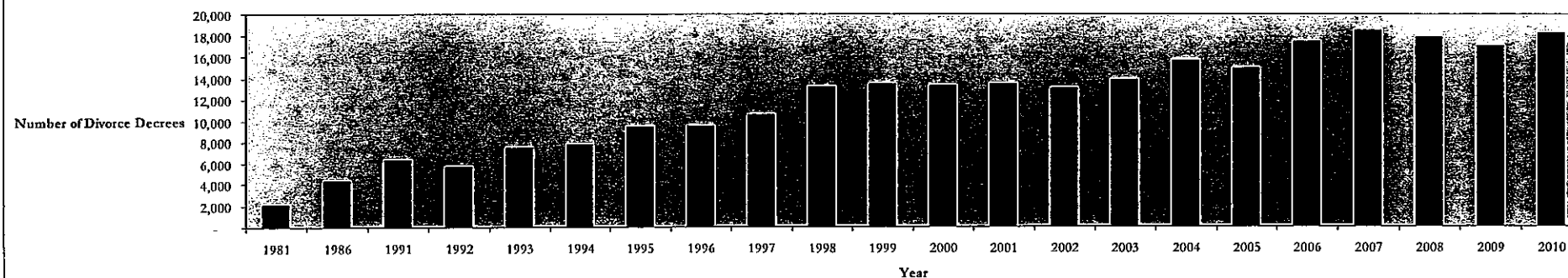
	Hong Kong	England	Scotland
Definition	<p><i>Hong Kong: Parental Rights &amp; Authority: Athena Liu (1999)</i></p> <p>On p. 276, parental rights and authority vest with the parent(s) with custody.</p>	<p>Parental responsibility is defined in the Children Act 1989 as all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.</p>	<p>The Children (Scotland) Act 1995 provides that a parent has in relation to his child a range of responsibilities (see examples) but only so far as compliance with this section is practicable and in the interests of the child.</p>
Examples	<ul style="list-style-type: none"> <li>To live with child and to control the child's day to day upbringing; (determines the child's needs for shelter, food and clothing)</li> </ul>	<ul style="list-style-type: none"> <li>To decide where a child should live and who a child should spend time with; looking after the child generally</li> </ul>	<ul style="list-style-type: none"> <li>To have the child living with him or otherwise to regulate the child's residence; to safeguard and promote the child's health, development and welfare; to provide direction and guidance, to the child in a manner appropriate to the stage of development of the child</li> </ul>

		<ul style="list-style-type: none"> <li>To have contact with the child</li> </ul>	<ul style="list-style-type: none"> <li>If the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis</li> </ul>
	<ul style="list-style-type: none"> <li>To decide on the child's education</li> </ul>	<ul style="list-style-type: none"> <li>To make choices about a child's education</li> </ul>	
	<ul style="list-style-type: none"> <li>To decide on the child's religion</li> </ul>	<ul style="list-style-type: none"> <li>To make choices about a child's religion</li> </ul>	
	<ul style="list-style-type: none"> <li>To inflict moderate punishment</li> </ul>	<ul style="list-style-type: none"> <li>To discipline the child</li> </ul>	
	<ul style="list-style-type: none"> <li>To administer the child's property</li> </ul>	<ul style="list-style-type: none"> <li>To make decisions about what should happen to any property belonging to the child</li> </ul>	
	<ul style="list-style-type: none"> <li>To act for the child in legal proceedings</li> </ul>	<ul style="list-style-type: none"> <li>To represent the child in legal proceedings; To make certain applications to the court (for example for contact or residence) to be a respondent to care proceedings</li> </ul>	<ul style="list-style-type: none"> <li>To act as the child's legal representative</li> </ul>
	<ul style="list-style-type: none"> <li>To consent to medical treatment</li> </ul>	<ul style="list-style-type: none"> <li>To make choices about a child's medical treatment (including blood tests)</li> </ul>	
		<ul style="list-style-type: none"> <li>To appoint a guardian for the child, if necessary; deciding whether someone else should look after a child or make decisions about them</li> </ul>	
		<ul style="list-style-type: none"> <li>To decide what name a child should be known by</li> </ul>	

		<ul style="list-style-type: none"> <li>To decide whether any information about the child be made public; allowing confidential information about the child to be disclosed</li> </ul>	
		<ul style="list-style-type: none"> <li>To accompany the child outside the UK and agreeing to the child's emigration</li> </ul>	
		<ul style="list-style-type: none"> <li>To ask for copies of records about the child's medical treatment and education</li> </ul>	
		<ul style="list-style-type: none"> <li>To decide whether a child should be able to go out of the country, perhaps for a holiday</li> </ul>	
		<ul style="list-style-type: none"> <li>To make other slightly less usual decisions about a child such as whether a sixteen year old should be allowed to get married, making arrangements for a child's funeral, deciding whether a child should be adopted</li> </ul>	

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Number of Divorce Decrees Granted between 1981 and 2010



Year	1981	1986	1991	1992	1993	1994	1995	1996	1997	1998	1999
Number of Divorce Decrees Granted	2,062	4,257	6,295	5,650	7,454	7,735	9,404	9,473	10,492	13,129	13,408

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Number of Divorce Decrees Granted	13,247	13,425	12,943	13,829	15,604	14,873	17,424	18,412 <sup>1</sup>	17,771	17,002	18,167

Source: Marriage and Divorce Trends in Hong Kong 1981 – 2006 by Census and Statistics Department

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<sup>1</sup> The figure is calculated from crude divorce rate in 2007.



The Law Society of Hong Kong's Family Law Committee's comments on the Law Reform Commission's Recommendations in its Report on *Child Custody and Access*

LRC Recommendation	Family Law Committee's Comments (FLC) September 2008	FLC's Comments March 2012
<p>1. <b>Applicable proceedings</b> For the removal of doubt, we recommend that it should be made clear that the welfare or "<i>best interests</i>" principle guides all proceedings concerning children under the Guardianship of Minors Ordinance (Cap 13), the Matrimonial Causes Ordinance (Cap 179), the Matrimonial Proceedings and Property Ordinance (Cap 192) and the Separation and Maintenance Orders Ordinance (Cap 16), including questions of guardianship, maintenance or property.</p>	Agreed.	Agreed
<p>2. <b>Best interests</b> To reflect our view that the term "<i>best interests</i>" is more appropriate for modern conditions in Hong Kong than the term</p>	Agreed.	Agreed

<p><i>"welfare," and is more in compliance with our international obligations under the United Nations Convention on the Rights of the Child, we recommend that section 3(1)(a)(i) of the Guardianship of Minors Ordinance (Cap 13) should be amended to read, "shall regard the best interests of the minor as the paramount consideration ... ."</i></p> <p>We also recommend that consequential amendments should be made to the other matrimonial Ordinances.</p>		
<p>3. <b>Statutory checklist of factors</b>          We recommend the introduction of a statutory checklist of factors to assist the judge in exercising his discretion in determining the proceedings that will replace custody or guardianship proceedings under these reforms. This checklist should be broadly based on that set out in section 1(3) of the Children Act 1989 in England.</p> <p>We also recommend the inclusion in the checklist of the following additional factors based on section 68F(2) of the Family Law Act 1975 in Australia:</p> <p>(i) section 68F(2)(b) (in part) in relation to the child's relationship with each of his</p>	<p>The Law Society agrees with the recommendations above. In addition, the following sections should also be adopted:</p> <p>(a) Section 68 F (c) "the likely effect of any changes in the child's circumstances including the likely effect on the child of any separation from:</p> <p>(i) either of his or her parents; or          (ii) any other child, or other person, with whom he or she has been living;"</p> <p>(b) Section 68F (e) "the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;"</p>	

<p>parents and other persons;</p> <p>(ii) a broader formulation of section 68F(2)(d) of the Australian Act, in relation to the practical difficulty of maintaining contact with either parent;</p> <p>(iii) section 68F(2)(f) (in part), in relation to any characteristics of the child that the court considers relevant;</p> <p>(iv) section 68F(2)(h) in relation to the attitudes of each of the parents towards the child and towards the responsibilities of parenthood;</p> <p>(v) section 68F(2)(i) in relation to any family violence involving the child or a member of the child's family; and</p> <p>a catch-all factor along the lines of Section 68F(2)(l).</p>	<p>Use of gender sensitive language</p> <p>The relevant provisions in the Australian checklist are gender sensitive and we recommend the standard use of "he/she" rather than the standard use of "he/his". By adopting this usage, the statutory provisions would be complying with the provisions in the Convention on the Rights of the Child ("CRC").</p>	
<p>4. <b>Concept of parental responsibility</b></p> <p>We recommend that the concept of parental responsibility should replace that of guardianship, except that the concept of guardianship should be retained in relation to a third party's responsibilities for a child after the death of a parent.</p>	<p>Agreed.</p>	<p>Agreed. However, we note the concept of "parental responsibility" has changed since the publication of the LRC Report in 2005. There are different models such as:</p> <ul style="list-style-type: none"> <li>• "joint parental responsibility"</li> <li>• "shared joint parental responsibility"</li> <li>• "shared parental responsibility"</li> </ul>

		<ul style="list-style-type: none"> <li>• “equal share parental responsibility”. Studies in UK and Australia (apart from Singapore which advocates retention of “custody”) reveals the shortfalls of the latest development which may not be in the best interest of the child. Hong Kong should be cautious in the choice of words for the new concept to replace the concept of “custody” as this may lead to a misguided interpretation; words such as “joint”, “shared” and “equal” suggest, to some extent, the right of a parent to have shared time or equal rights to the child. Parental Responsibility shifts the emphasis of parental rights to children’s rights. Hong Kong should therefore clarify the new concept of “parental responsibility” concerns their continuing duties to their children on separation or divorce. We recommend the description of “Continuing Parental Responsibility” as this emphasizes the continuing responsibilities of the parents to focus on the needs of their children. An appropriate definition, based on Section 3 of the Children’s Act 1989 can be introduced into our legislation.</li> </ul>
<p>5. <b>Parental rights</b> We recommend the adoption of a provision based on sections 1 and 2 of the Children</p>	<p>Agreed.</p>	<p>Agreed</p>



<p>(Scotland) Act 1995, which specifies separately a list of parental responsibilities and a list of parental rights.</p>		
<p>6. <b>Age at which parental responsibility ceases</b> We recommend that all the parental rights and responsibilities referred to in sections 1 and 2 of the Children (Scotland) Act 1995 should apply in respect of a child until the child reaches the age of eighteen.</p>	Adopt.	Agreed
<p>7. <b>Father as natural guardian</b> We recommend that the common law right of the father to be natural guardian of his legitimate child should be abolished.</p> <p>We also recommend the repeal of section 3(1)(b) of the Guardianship of Minors Ordinance (Cap 13).</p>	Agreed.	Agreed
<p>8. <b>Married parents</b> We recommend the adoption of a provision on the lines of section 2(1) of the Children Act 1989 in England, but amended, for the removal of doubt, to include reference to parents married subsequent to the birth of the child.</p>	Agreed.	Agreed
<p>9. <b>Acquisition of parental responsibility by unmarried fathers – language of the current law</b></p>		

<p>We recommend that the language of section 3(1)(c)(ii) and (d) of the Guardianship of Minors Ordinance (Cap 13), which relates to the "<i>rights and authority</i>" of an unmarried father, should be changed to reflect the new language of responsibilities rather than rights.</p>	Agreed.	Agreed
<p>10. <b>Acquisition of parental responsibility by signing the birth register</b>  We recommend that an unmarried father should be capable of acquiring parental responsibilities and rights by signing the birth register. The proposed legislation should include this in a list of the ways in which parental responsibility can be acquired. We do not recommend the automatic acquisition of parental responsibility or rights by unmarried fathers.</p>	Agreed.	Agreed
<p>11. <b>Parental responsibility agreements</b>  We recommend that unmarried parents should be encouraged to sign parental responsibility agreements to ensure the best interests of their child.</p> <p>We also recommend that unmarried mothers should be encouraged to appoint a testamentary guardian for their children.</p>	Agreed.	Agreed
<p>12. <b>Parents acting independently</b></p>		

<p>We recommend the adoption of a provision on the lines of section 2(7) of the Children Act 1989 enabling persons with parental responsibility to act independently, but restricted to the day-to-day care and best interests of the child.</p>	<p>Agreed.</p>	<p>Agreed but we now recommend the word “independently” should be changed to “<i>appropriately in the absence of the other parent</i>”.</p>
<p><b>13. Scope of parental responsibility – when consent or notification is required</b>  We recommend that the proposed legislation should specify those decisions relating to the child where the other parent’s express consent is required, and those decisions where only notification to the other parent is required.</p> <p>We further recommend that the court should be given express power to vary or dispense with any of the consent or notification requirements where this is considered necessary.</p>	<p>The Recommendation is agreed save for the following:</p> <p>(a) Paragraph 3 in 9.95 should be amended to read as follows: “<i>consent to removal of the child out of the jurisdiction</i>” with the time limit “<i>for more than one month</i>” to be deleted.</p> <p>Sub paragraph 6 in 9.96: “<i>Notification removing the child from the jurisdiction temporarily but for less than one month</i>”, should be deleted entirely.</p>	<p>We also note “high conflict” cases should be dealt with differently. The court may consider making specific orders to deal with certain issues to address the concerns of the parents.</p>
<p><b>14. Enforcement of maintenance orders</b>  We recommend that the Administration should review the existing law and procedures relating to the enforcement of maintenance orders to see how they could be made more effective.</p>	<p>The Recommendation is agreed. However, we note the lack of progress by the Department of Justice in relation to enforcement of cross-border judgments in family related cases and the ineffectual piece of legislation sponsored by the Home Affairs</p>	<p>The Administration should review its policy on enforcement of maintenance orders especially in light of the extremely low interest rates which have made the “<i>Interest and Surcharge on Arrears of Maintenance Ordinance</i>” in effectual.</p>

	Bureau " <i>Interest and Surcharge on Arrears of Maintenance Ordinance 2003</i> " which fails to address the problems of enforcement of maintenance orders.	
15. <b>Acting incompatibly</b> We recommend that a provision on the lines of section 2(8) of the Children Act 1989 should be adopted.	Agreed.	Agreed.
16. <b>Delegation of parental responsibility</b> We recommend the enactment of a provision based on section 2(9) to (11) of the Children Act 1989 in England, with the addition of words to the effect that no arrangement of a type referred to in that provision shall be enforced by the court if the court is of the opinion that it would not be for the benefit of the child to give effect to that arrangement.  We further recommend that section 4 of the Guardianship of Minors Ordinance (Cap 13) be repealed.	Agreed.	Agreed.
17. <b>Continuing parental responsibility</b> We recommend a provision on the lines of section 11(11) of the Children (Scotland) Act 1995, in relation to the effect on the retention of parental responsibility and rights by one person when another person also acquires such rights.	Agreed.	Agreed.

<p><b>18. Removal of surviving parent as guardian</b>          We recommend that the right to remove the surviving parent as guardian under section 6(3) of the Guardianship of Minors Ordinance (Cap 13) should be repealed.</p>	<p>It is noted the Guardianship of Minors Ordinance currently restricts parental responsibility of parents therefore we agree with Recommendation 18 as the concept of parental responsibility is an enduring one.</p> <p>This Recommendation must be considered together with Recommendations 4 and 17. The Law Society does not consider Recommendation 18 to be controversial as it will be the Court's responsibility to resolve disputes between the surviving parent and the testamentary guardian.</p>	<p>We note the recent amendments to the Guardianship of Minors Ordinance (GMO)</p>
<p><b>19. Unmarried father as surviving parent</b>          We recommend that a provision be inserted in the Guardianship of Minors Ordinance (Cap 13) to the effect that once an unmarried father is granted parental rights or responsibilities, he can be treated on the death of the mother as the surviving parent for the purposes of that Ordinance.</p>	<p>Agreed.</p>	<p>We note this remains outstanding and agree with the proposal.</p>
<p><b>20. Custody orders</b>          We recommend the repeal of the provisions in the matrimonial Ordinances (including the Guardianship of Minors Ordinance (Cap 13) and the Matrimonial Proceedings and Property Ordinance (Cap 192)) dealing with</p>	<p>Agreed.</p>	<p>Agreed</p>

<p>custody orders and their replacement with provisions introducing the new range of orders outlined later in this Chapter.</p>		
<p>21. <b>Definition of a residence order</b>          We recommend that there should be statutory provision for a <i>"residence order."</i></p> <p>We recommend that the definition of a residence order should incorporate a reference to the parent in whose favour the order is made having responsibility for <i>"the day-to-day care and best interests of the child."</i></p> <p>We recommend that the definition should be: <i>"a residence order is an order settling the arrangements as to the person with whom a child is to live and who has responsibility for the day-to-day care and best interests of the child."</i></p>	<p>Agreed.</p>	<p>Agreed. We recommend the adoption of parenting plans which will contain provision for a residence order for the children of the family.</p>
<p>22. <b>Change of surname</b>          We recommend the enactment of a provision similar to section 13(1)(a) of the Children Act 1989 in England, governing the changing of a child's surname.</p>	<p>Agreed.</p>	<p>Agreed</p>
<p>23. <b>Non-parents</b>          We recommend the enactment of a provision on the lines of section 12(2) of the Children Act 1989 in England regarding</p>	<p>Agreed.</p>	<p>Agreed</p>

<p>the granting of parental responsibility to non-parents who are awarded residence orders.</p>		
<p>24. <b>Contact order</b> We recommend that there should be statutory provision for a "<i>contact order</i>," on the lines of section 11(2)(d) of the Children (Scotland) Act 1995.</p> <p>We also recommend that this section should provide that the contact parent would have the right to act independently in respect of the day-to-day care of the child while contact with the child is being exercised.</p>	<p>Agreed.</p>	<p>See our comments to Recommendation 21 above. The Parenting plan should also contain specific provisions for contact orders for the children of the family.</p>
<p>25. <b>Specific issues order</b> We recommend that there should be statutory provision for a "<i>specific issues order</i>," similar to section 8(1) of the Children Act 1989 in England.</p>	<p>Agreed.</p>	<p>Agreed</p>
<p>26. <b>Prohibited steps order</b> We recommend that there should be statutory provision for a "<i>prohibited steps order</i>," similar to section 8(1) of the Children Act 1989 in England.</p>	<p>Agreed.</p>	<p>Agreed. This order can assist in high conflict cases.</p>
<p>27. <b>Supplementary requirements</b> We recommend the adoption of a provision similar to section 11(7) of the Children Act 1989 in England which gives the court the power to include directions or conditions in</p>	<p>Agreed.</p>	<p>Agreed – this is particularly the case where supervised contact with the child is considered an appropriate order by the court.</p>

a court order.		
<p>28. <b>Right of a third party to apply</b>  We recommend the removal of the limitation in section 10 of the Guardianship of Minors Ordinance (Cap 13) on the right of third parties to apply to court for orders concerning children.</p> <p>We recommend the introduction of a provision on the lines of section 10 of the Children Act 1989 in England, with the amendment of subsections (5)(b) and (10) to provide that leave of the court would not be required if the child has lived with the applicant for a total of one year out of the previous three years.</p> <p>We further recommend that the one year period need not necessarily be a continuous period, but must not have ended more than three months before the application.</p>	<p>Agreed.</p>	<p>Agreed</p>
<p>29. <b>Arrangements for the children</b>  We recommend that section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192) should be amended to provide that the court should have regard to the views of the child and the desirability of a child's retaining contact with both parents,</p>	<p>Agreed.</p> <p>We also recommend:</p> <p>(a) The court should have regard to the "views of the child and desirability for a</p>	<p>Agree and re-iterate additional recommendations (a) and (b)</p>



<p>as is set out in section 11(4) of the English Family Law Act 1996.</p> <p>We also recommend that parents should have to satisfy the court that arrangements for the children are the best that can be arranged. The court should examine the future plans as to the child's place and country of residence and the proposed contact with both parents, especially if one parent proposes to emigrate from Hong Kong.</p> <p>We further recommend that, for consistency with the other provisions in matrimonial legislation, section 18(5)(a)(i) should be amended to refer to the age of eighteen.</p>	<p>child's retaining contact with both parents";</p> <p>(b) All matrimonial legislation should be amended to refer to the age of 18 in order to unify the provisions.</p>	
<p>30. <b>No order principle</b> We recommend that the option of "<i>no order</i>" should be available for those cases where both parties consent to no order being made by the court and where the making of no order would be in the best interests of the child.</p>	<p>Agreed.</p>	<p>Agreed</p>
<p>31. <b>Family proceedings</b> We recommend the enactment of a provision similar to section 10(1) of the Children Act 1989 in England, which gives the court a specific power to make section 8</p>	<p>Agree with both recommendations.</p>	<p>Agreed</p>

<p>orders in any family proceedings.</p> <p>We also recommend the introduction of a definition of "<i>family proceedings</i>."</p>		
<p>32. <b>Age at which parental responsibility ceases for the purposes of court orders</b>          For the sake of consistency, we recommend that parental responsibility for children, and provisions on the lines of section 8 orders (such as orders for residence, contact or specific issues), should cease when the child reaches 18 years.</p> <p>We also observe that:</p> <p>(a) section 10 of the Matrimonial Proceedings and Property Ordinance (Cap 192) ("MPPO") should continue to apply to orders for financial provision and maintenance of children 18 years and over falling within its scope; and</p> <p>there may be a lacuna in the law with regard to children over 18 years of age who, though not sufficiently ill or incapacitated as to fall within the scope of the current mental health provisions, may nonetheless require some form of statutory protections beyond the financial provisions afforded by the MPPO.</p>	<p>Agreed.</p>	<p>Agreed</p>

<p><b>33 to 41 inclusive deal with the law on domestic violence. The Domestic Violence Ordinance was amended by the Domestic Violence (Amendment) Ordinance in June 2008.</b></p>		<p>The Domestic and Cohabitation Relationship Violence ordinance (Cap. 189 came into operation on 1 January 2010.</p>
<p><b>42. The views of the child</b>  We recommend that each of the matrimonial Ordinances should specifically refer to the need to hear the views of the child.</p> <p>We also recommend that the language of the United Nations Convention on the Rights of the Child should be adopted, so that the term "views" rather than "wishes" of the child is enacted in matrimonial legislation.</p>	<p>Agreed.</p>	<p>Agreed</p>
<p><b>43. How and when child's views taken into account</b>  In line with our earlier recommendation that a statutory checklist of factors should be established, we recommend that the child's views should be one element in the checklist of factors, rather than a free-standing section. The child's views should be balanced with the other factors</p>	<p>Agreed.</p>	<p>Agreed except that any view the child expresses to the judge should not be confidential because:-</p> <p>(1) any view expressed by the child which may or may not influence the decision of the judge may lead the parties to think</p>

<p>when the judge is making a decision in the child's best interests.</p> <p>With the adoption of this provision, we recommend the repeal of section 3(1)(a)(i)(A) of the Guardianship of Minors Ordinance (Cap 13).</p>		<p>they have been deprived of the right to produce evidence to deal with any allegation.</p> <p>(2) Judges are not trained to deal with the psychological needs or problems of a child.</p> <p>Judges should not keep the child's secrets.</p>
<p>44. <b>How the views of a child are expressed</b></p> <p>We recommend that a child should be given the facility to express his views if he wishes, whether directly or indirectly. Once the child has indicated a desire to express views, then the court must hear those views, although the weight to be given to the child's views will be a matter for the court to determine.</p> <p>We recommend that the mechanisms for ascertaining and expressing the child's views should be set out in the legislation. We therefore recommend the adoption of a provision on the lines of the Australian section 68G (2), but adapted to insert "<i>views</i>" rather than "<i>wishes</i>."</p> <p>With the adoption of this provision, we recommend the repeal of section 3(1)(a)(i)(B) of the Guardianship of Minors Ordinance (Cap 13).</p>	<p>Agreed.</p>	<p>All relevant legislation should be amended to refer to a child's "views" rather than "wishes"</p>

<p>We also recommend that any views that the child expresses to the judge should be treated in confidence by the judge and not revealed to the child's parents.</p> <p>We further recommend that where social welfare officers are assigned to ascertain children's views, only those officers with adequate training and experience in this area should deal with these sensitive cases.</p>		
<p>45. <b>Children not required to express views</b> We recommend that children should not be required to express their views.</p> <p>To make the position clear, we recommend the introduction of a statutory provision to that effect on the lines of section 68H of the Australian Family Law Act 1975.</p>	Agreed.	Agreed.
<p>46. <b>Age of maturity for the purpose of obtaining views</b> We recommend that there should be no age limit and the court should be empowered to consider a child's views irrespective of his age.</p>	Agreed.	Agreed.
<p>47. <b>Anomalies in relation to separate representation under the Matrimonial Causes Rules (Cap 179)</b> We recommend that the anomalies in rule 72 and rule 108 of the Matrimonial Causes</p>	Agreed.	Agreed. Detailed provisions for legal representation for children should be

<p>Rules (Cap 179) as to the appointment of a separate representative or guardian <i>ad litem</i> should be addressed.</p>		<p>formulated.</p>
<p>48. <b>Types of proceedings where a separate representative may be appointed</b>  For the removal of doubt it should be made clear that a separate representative can be appointed in any dispute relating to the parental responsibility for, or guardianship of, a child.</p>	<p>Agreed.</p>	<p>Agreed.</p>
<p>49. <b>Who can apply for a separate representative to be appointed</b>  We recommend that rule 108 of the Matrimonial Causes Rules (Cap 179) be repealed and that a provision on the lines of section 68L(3) of the Australian Family Law Act 1975 be enacted.</p> <p>We also recommend that the restrictions on who can make application for an order, contained in section 10 of the English Children Act 1989, should also apply to this provision.</p>	<p>Agreed.</p>	<p>We no longer agree with the conclusion of the LRC report in paragraph 12.41 which says, "<i>Having carefully reviewed our original proposal, we now consider that it would be preferable for the current law to be retained. We can envisage that cases might arise where an otherwise suitable person should be eligible to be appointed as a guardian ad litem for the child, even though that person may not be "a professional person with experience in children's issues."</i>"</p> <p>We now recommend adoption of the recommendation in the HKLRC Sub-committee's consultation paper on Guardianship and Custody (1998), at paras</p>

		<p>6.128 and 15.55 which said it would be more appropriate if a person conferred with the role of guardian <i>ad litem</i> was a professional person with experience in children's issues, rather than any individual who is a "proper" or "fit" person.</p> <p>It is appropriate for a legally trained person to be appointed because of the following:-</p> <p>(1) the difficulties in finding a 'proper person' as there may be a conflict of interest for a relative to be appointed as such.</p> <p>(2) if a lay person is appointed as a representative, he or she may not have the experience or expertise to represent the interest of the child without the assistance of a solicitor. In such circumstances a lay person will have to engage a solicitor to act for him. This situation will be undesirable for the child as he or she will have to deal a number of persons in such representation.</p> <p>(3) Separate representative usually means separate legal representative; We note Rule 108 can be interpreted as requiring a legally trained person to be appointed.</p> <p>(4) A separate representative should be able</p>
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		<p>to cross-examine relevant witnesses to ensure that all the information relevant to the best interests of the child is brought out, so preferably this person should be legally qualified. The separate representative should act as amicus curiae to ensure that all the relevant evidence on the welfare of the child would be placed before the court.</p> <p>(5) This representative should be regarded as an officer of the court who will act neutrally and be independent.</p>
<p><b>50. Criteria for appointment of separate representative</b>          Except in the case of a child who may be subject to care or supervision orders, we recommend the adoption of a list of criteria based on those adopted in Australia to determine when it is appropriate to appoint a separate representative.</p> <p>We recommend that this list of criteria be incorporated in legislation.</p>	Agreed.	Agreed.
<p><b>51. Guidelines for duties of separate representative</b>          We recommend the adoption of the Australian guidelines for setting out the duties of the Official Solicitor or separate representative or other person acting as</p>	Agreed.	Agreed.



<p>guardian <i>ad litem</i> in Hong Kong. We recommend that this appear not in statute, but in booklet form.</p>		
<p>52. <b>Child as a party</b> We recommend that, in principle, provided the leave of the court has been sought, the child should be allowed to become a party to proceedings which concern him and where he has sufficient understanding to instruct a solicitor and counsel to represent him.</p> <p>We recommend the introduction of a provision on the lines of section 10(8) of the English Children Act 1989 and rule 9(2A) of the English Family Proceedings Rules 1991.</p>	Agreed.	Agreed.
<p>53. <b>Costs</b> For those cases where the person representing the child is not the Official Solicitor, we recommend that the court be given power to order the parties to bear the costs of the separate representative or guardian <i>ad litem</i>.</p>	Agreed.	Agreed.
<p>54. <b>Separation and Maintenance Orders Ordinance (Cap 16)</b> We recommend the retention of the provisions of the Separation and Maintenance Orders Ordinance (Cap 16) to</p>	Agreed.	Agreed.

<p>cover exceptional cases, such as those involving customary marriages or concubinage, which are not covered by other matrimonial proceedings legislation.</p>		
<p><b>55. Power to order care and supervision orders</b>          We recommend the retention of the power to order care and supervision orders in guardianship disputes and any disputes concerning the best interests of a child.</p> <p>We also recommend that the anomalies between the Director of Social Welfare's powers in relation to care and supervision orders under the Guardianship of Minors Ordinance (Cap 13) and the Matrimonial Causes Ordinance (Cap 179), and his powers under the Protection of Children and Juveniles Ordinance (Cap 213), should be resolved.</p>	<p>The Protection of Children and Juveniles Ordinance should be reviewed and provisions protecting children should be separated from those in relation to juvenile offenders. We have noted in past submissions that <i>vulnerable children are punished twice as they are not only subject to abuse but also institutional indifference</i>. Magistrates, in a majority of cases, deal with juvenile offenders and have a different mindset in relation to how they should deal with vulnerable children who require the protection of the court. We repeat the observations made in the Law Society's report on the Domestic Violence Ordinance dated December 2005:</p> <p>"The recommendation to transfer the Juvenile Court to a Family Court has merit as the physical environment for these hearings should be considered. The Magistracy is not an appropriate place to deal with children in the 21<sup>st</sup>. Century. The administration of Care and Protection Orders is a hangover from</p>	<p>We re-iterate our comments that Care and Protection orders should be handled by the Family Court.</p>

	<p>colonial times and changes could and should be introduced as soon as possible. Despite past complaints, there is evidence of a lack of empathy for the trauma these children are enduring and there is considerable room for improvement.</p> <p>There is evidence of an inconsistent approach by the different Magistracies when dealing with CPOs. On the whole, the Fanling and Kowloon Magistracies have improved their procedures. The children have been separated from the juvenile delinquents and adults facing criminal charges, and hearings are conducted in a room other than the courtroom. However, some of these children can still wait up to 2 hours before a Magistrate hears the application.</p> <p>It is clear that some Magistrates lack awareness and the ability to distinguish the different needs of children involved in CPO applications with those required for juvenile offenders. The following is a description of an advocate's recent experience when conducting a CPO hearing in Eastern Magistracy:</p> <p><i>"1. The hearings were conducted in the Juvenile Court which is otherwise used as</i></p>	
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	<p><i>an adult court.</i></p> <ol style="list-style-type: none"><li><i>2. The solicitor appearing was required to stand when addressing the Bench which is a reversal of the practice introduced to make the hearings more informal and representatives were permitted to remain seated in order to maintain an air of informality.</i></li><li><i>3. The child was required to stand. Even though this is "normal" it adds the formality and can be intimidating for the child concerned.</i></li><li><i>4. New instructions were also posted on the advocate's desk for legal representatives not to say "good morning" to the magistrate. It is noted the directive does not engender an atmosphere in which juveniles, let alone vulnerable children, should be dealt with.</i></li><li><i>5. Prior to the hearing the child was kept in a witness waiting room on the same floor as the juvenile court and escorted past adult and juvenile defendants waiting to go into the court for the hearing."</i></li></ol> <p><i>It should be recognised that many of these</i></p>	
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	children require protection <i>because</i> of incidents of domestic violence and have suffered unnecessary anxiety as a result of institutional indifference. CPO cases should be dealt with by the Family Court and the Administration should take urgent steps to remedy this unsatisfactory situation.”	
<p><b>56. Definitions of care and supervision orders</b>                  We recommend that there should be a definition of a care order and a supervision order in each of the matrimonial Ordinances.</p>	Agreed.	Agreed.
<p><b>57. Grounds</b>                  We recommend that the Director of Social Welfare should only be entitled to apply for a care order or supervision order in private law proceedings on the same grounds as those in section 34(2) of the Protection of Children and Juveniles Ordinance (Cap 213).</p>	Agreed.	Agreed.
<p><b>58. Application of the welfare or best interests principle</b>                  We recommend that the welfare or best interests principle should guide all proceedings under the Protection of Children and Juveniles Ordinance (Cap 213).</p>	Agreed.	Agreed.

<p>59. <b>Ex parte applications by the Director of Social Welfare</b>          We recommend that rule 93 of the Matrimonial Causes Rules (Cap 179) and order 90, rule 4 of the Rules of the District Court (Cap 336) should be amended to allow for an <i>ex parte</i> application in case of emergency, but that an <i>inter partes</i> hearing should proceed if the Director's application was opposed.</p>	Agreed.	Agreed.
<p>60. <b>Third parties</b>          We recommend that section 34 of the Protection of Children and Juveniles Ordinance (Cap 213) should be amended to allow an application for a care order or supervision order to be made by third parties.</p> <p>We also recommend that the same criteria for applications by third parties, already adopted for private law proceedings, should be adopted for such public law proceedings.</p>	Agreed.	Agreed.
<p>61. <b>The court environment for the hearing of care and protection proceedings</b>          We recommend that research should be conducted into how the court environment could be improved for children appearing in care and protection proceedings.</p>	Agreed.	Agreed.
<p>62. <b>Separate representation for public law</b></p>		

<p><b>proceedings – criteria for appointment</b>          We recommend that separate representation by the Official Solicitor should be available for children as of right in care or supervision proceedings, whether brought under Protection of Children and Juveniles Ordinance (Cap 213) or the matrimonial Ordinances.</p>	<p>We repeat our recommendation in Recommendation 55 above that proceedings brought under the Protection of Children and Juveniles Ordinance in relation to CPOs should be transferred to the Family Court.</p> <p>Legal Representation as a Right by the Official Solicitor or by the Duty Lawyer Scheme:</p> <p>There is currently an anomaly in the legislation which requires parents to consent to representation by the Official Solicitor or the DLS in proceedings involving their child. In appropriate cases, the court should have the power to dispense with such consent.</p>	<p>We repeat our comments on CPOs.</p>
<p>63. <b>Representation and legal aid for parents</b>          We recommend that, where care or supervision orders are applied for, whether under the matrimonial Ordinances or the Protection of Children and Juveniles Ordinance (Cap 213), parents should be granted legal representation (by The Duty Lawyer Service if in the juvenile court, or by the Legal Aid Department if in the Family Court or the Court of First Instance) if they fulfil the eligibility requirements.</p> <p>We also recommend that there should be</p>	<p>Agreed. Legal Aid should be provided to both children and parents in wardship cases.</p>	<p>Agreed and we repeat our comments in relation to wardship cases.</p>

<p>legal representation provided by the Legal Aid Department for children and parents in wardship proceedings where the applicant is the Director of Social Welfare or other public agency, as the effect of the order is to take away the responsibility of the parents.</p>		
<p>64. <b>Guidelines for duties of separate representatives</b>          We recommend the adoption of the Australian guidelines for setting out the duties of lawyers representing children and parents in the juvenile court for care and protection and supervision orders.</p> <p>We also recommend that special training on how to interview and represent children and parents should be provided to lawyers for these sensitive and complex cases, and only lawyers with this special training should handle these cases.</p> <p>We further recommend that these arrangements should apply to cases involving care and supervision orders being made under the matrimonial Ordinances in the Family Court.</p>	<p>Agreed.</p>	<p>Agreed.</p>
<p>65. <b>Assessment</b>          We recommend that, before making a care order, a District Judge should have the</p>	<p>Agreed.</p>	<p>Agreed.</p>



<p>power under the matrimonial Ordinances to order that a child be assessed by a medical practitioner, clinical psychologist or an approved social worker, as is provided in section 45A of the Protection of Children and Juveniles Ordinance (Cap 213).</p> <p>We also recommend that the Director of Social Welfare should have the power to order assessment in these proceedings in line with section 45A.</p>		
<p>66. <b>Child's views</b> We recommend that the views of a child should be taken into account in proceedings under the Protection of Children and Juveniles Ordinance (Cap 213).</p>	<p>Agreed.</p>	<p>Agreed.</p>
<p>67. <b>Contact in respect of a child in care</b> We recommend that parents whose children are made the subject of care orders under the matrimonial Ordinances should be entitled to apply to have orders made to secure regular contact between them and their children.</p> <p>We also recommend that section 34C(6) of the Protection of Children and Juveniles Ordinance (Cap 213) should be amended to allow the court to make an order for contact when a care order is being made.</p>	<p>Agreed.</p>	<p>Agreed.</p>

<p>68. <b>Age at which wardship orders cease</b> We recommend that a provision be enacted clearly specifying that the duration of wardship orders ceases at 18 years.</p> <p>We also recommend that it be made clear that the jurisdiction of the Official Solicitor ceases at the age of 18 years, except for persons suffering a disability beyond that age.</p>	Agreed.	Agreed.
<p>69. <b>Minimum age for marriage without parental consent</b> We recommend the retention of 16 as the minimum age of marriage with parental consent.</p> <p>We also recommend the reduction of the minimum age of marriage without parental consent from 21 to 18 years.</p>	Agreed.	Agreed.
<p>70. <b>Enforcement of orders</b> We recommend that a mechanism for mutual legal assistance for the enforcement of orders for custody, access, residence and contact, and orders for the return of a child removed unlawfully from Hong Kong, and vice versa, be arranged with the Mainland.</p>	Agreed.	Agreed.
<p>71. <b>Consolidation of legislation</b> We recommend that, as far as possible, the provisions dealing with disputes relating to</p>	The Law Society strongly endorses this recommendation.	Agreed.

<p>children, arrangements on divorce, guardianship, disputes with third parties, or disputes between parents without accompanying divorce proceedings, should be consolidated into one existing Ordinance.</p>		
<p>72. <b>Policy co-ordination</b> We recommend that a single policy bureau should take over responsibility for creating and implementing policy for families and children and, in particular, all the matrimonial and children's Ordinances. It is a matter for the Administration to decide whether the Health, Welfare and Food Bureau or the Home Affairs Bureau should assume this responsibility.</p>	<p>Agreed.</p>	<p>Agreed.</p>
	<p><b>Additional Recommendations</b> There is an anomaly in Section 10(3)(b) of the Guardianship of Minors Ordinance (Cap. 13) which authorises the court to make a maintenance order for maintenance an illegitimate child for period of 3 months only. We recommend the limitation of 3 months only. This limitation of 3 months should be removed as it cannot be justified in relation to the wasted costs incurred. We note Section 9(2) of the Separation and Maintenance Orders Ordinance (Cap.16) contains a similar</p>	<p>This has not been addressed in the Guardianship of Minors (Amendment) Ordinance 2012.</p>

	provision and likewise this limitation should be removed.	
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