

## EXECUTIVE SUMMARY

1. The Law Reform Commission of Hong Kong (LRC) published the Report on Child Custody and Access (the LRC's Report) in March 2005. The main thrust of the recommendations in the report is that **the “joint parental responsibility model” should be implemented by legislative means** to replace the existing custody and access arrangements under the family law. This consultation paper aims to invite feedback from members of the public on such a recommendation.

### **The existing laws on child custody and access<sup>1</sup>**

2. Under the existing law, there is a general principle of equality of parental rights and authority between the mother and father. However, when parents divorce, the court would need to rearrange the parental rights between them through custody orders. It may, after considering the circumstances of each individual divorce case, make a sole custody order, a joint custody order or, in rare cases, a split order.
3. According to the LRC's Report, the meaning of sole custody order, joint custody order and split order is as follows –
  - (a) **Sole custody order** – When a sole custody order is made, the custodial parent would have both the right of daily care and control of the child as well as all the power to make important decisions about the child. The non-custodial parent would generally only retain the access right in respect of the child, and would be effectively excluded from the making of important decisions affecting the upbringing of the child.
  - (b) **Joint custody order** – When a joint custody order is granted, both parents retain the right to decide on important matters affecting the upbringing of the child, although the physical care and control is usually granted to only one of them. They should thus discuss and cooperate on the concerned matters.

---

<sup>1</sup> Please refer to Chapter Two of the consultation paper.

- (c) **Split order** – Split orders are rarely made. They vest the daily care and control of the child in one parent and give custody, in the sense of wider decision making power, to the other.
4. Although no amendment has been made to the statutory provisions on child custody and access, the views of the court on custody and access arrangements have been changing. Joint custody orders are more commonly made than before, and even in cases where a sole custody order is made, the court also thinks that the access parent should still be consulted on all important decisions affecting the child's welfare, though the custodial parent retains the rights to veto the opinion of the access parent and make the final decision.

### **The joint parental responsibility model**

5. The joint parental responsibility model is a new approach to dealing with the arrangements for children after the divorce of their parents. The main differences between this new model and the traditional child custody arrangements are that –
- (a) the joint parental responsibility model emphasises the continuing responsibilities of both parents towards their children (rather than their individual parental rights); and
  - (b) parental responsibilities of both parents should last until the child reaches adulthood and should not end because of the divorce. Under the joint parental responsibility model, both parents would retain their responsibilities to participate in important decisions about their children even after divorce.
6. LRC considers that, as compared with the prevailing concept of custody, the merits of the joint parental responsibility model include: it is more child focused; it can promote the continued involvement of both parents in the lives of their children even after divorce; it can reduce the hostility between parents since they no longer need to compete for custody of their children; and it is more consistent with the international trend in family law and the requirements of the United Nations Convention on the Rights of the Child.

7. The Administration agrees that parents should continue to be concerned about and positively participate in the upbringing of their children after divorce. In this regard, the fundamental questions that need to be considered are –

*whether the concept of the joint parental responsibility model should be promoted and implemented in Hong Kong by legislative means as proposed by LRC. If not, how should the concept be promoted in Hong Kong?*

**LRC’s recommendations for implementing the joint parental responsibility model<sup>2</sup> by legislative means**

8. Chapter Three of the consultation paper sets out the various specific recommendations made in the LRC’s Report to implement the joint parental responsibility model in Hong Kong through legislative reforms. Some of the recommendations include –
- (a) to introduce in the law statutory lists stating that some major decisions affecting the child require the express consent of both parents<sup>3</sup>, while some require notification to the other parent<sup>4</sup>. Besides, 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 (Recommendation 13);
  - (b) to abolish the custody order and access order currently provided for under the law and 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

---

<sup>2</sup> Please refer to Chapter Three of the consultation paper.

<sup>3</sup> Decisions requiring the other parent’s express consent should include consenting to the adoption process, change of the 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.

<sup>4</sup> Decisions requiring notification to the other parent should include notification of a major operation or long-term medical or dental treatment for the child, a major change in 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, a change in the child’s domicile or nationality and any other major or important decisions in the life of the child.

to live on a daily basis and who would have responsibility for the child's day-to-day care and best interests, whereas 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. Unlike the traditional custody order, 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; and

- (c) 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 joint parental responsibility 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.

- 9. Moreover, to supplement the operation of the joint parental responsibility model, LRC has also made various complementary recommendations which include: to relax the restrictions on a third party (a relevant person who is not the father or mother of the child) to apply for custody orders; to introduce in the law a statutory checklist of factors to be considered in custody and guardianship proceedings; and to provide preventive measures to address the problems faced by victims of domestic violence under the joint parental responsibility model.

## **The views of major stakeholders on implementing the joint parental responsibility model through legislative reforms<sup>5</sup>**

10. The Labour and Welfare Bureau convened informal meetings with some stakeholders in 2009 and 2010 to gauge their views on LRC's recommendations of implementing the joint parental responsibility model by legislative means. Views on the subject were divided. While it was generally agreed that joint parenting would be in the best interests of children if divorced parents could cooperate in good faith with each other, there was no consensus as to how joint parenting could be promoted and achieved.
11. Some stakeholders, in particular those from the legal sector, supported the implementation of the joint parental responsibility model by legislative means. Their justifications included that the model was child-focused and was able to promote the continued involvement of both parents in the lives of their children even after divorce. They considered that, in order to properly implement the model in Hong Kong, legislative backing would be necessary to set out the relevant principles and court powers. Concerning the operation of the model, they considered that under the recommended model, the court would have clearly defined powers enabling it to make the appropriate arrangements to help avoid and address the on-going hostility between parents on issues relating to the upbringing of children. Even if such hostility did not subside, the case could be brought again to the court which could make subsequent orders (including the specific issues order and the prohibited steps order) to deal with the disagreements. For cases involving domestic violence, they believed that the new and revised recommendations made in the LRC's Report published in 2005 could cater for the needs of the victims.
12. Meanwhile, some stakeholders such as social workers and women's groups expressed reservations about the introduction of the joint parental responsibility model in Hong Kong through legislative reforms. Their justifications included that, under the existing law, the court could already make joint custody orders for parents who can cooperate with each other for the best interests of their children. From a practical perspective, law

---

<sup>5</sup> Please refer to Chapter Four of the consultation paper.

reforms were not necessary/ imminent. Some stakeholders were worried that the model might not be able to cater for the needs of all families. The proposed arrangements might be used by trouble-making or hostile parents to obstruct and harass the other spouse. The number of on-going litigated cases between divorced parents on major issues relating to the upbringing of children might increase (and thus the litigation costs to be borne by parents).

### **Latest developments in other common law jurisdictions<sup>6</sup>**

13. Chapter Five of the consultation paper studies how other common law jurisdictions promote the concept of the joint parental responsibility model. As stated in the LRC's Report, England and Wales, Scotland, Australia and New Zealand introduced legislative reforms in the period between 1989 and 2005 to implement the model through legislative reforms.
14. A few years after the law reforms were introduced in England and Wales and Australia, studies were conducted to evaluate their effectiveness in promoting the model. While the concerned studies did not question the fundamental merits of the joint parental responsibility model, they have identified some problems in the law reforms of the two jurisdictions in meeting the objectives of the model, including that: the law reforms had failed to change the mindset of parents; the number of court disputes had increased and the relevant arrangements had been abused by some trouble-making parents. Both England and Wales and Australia considered that the direction of their law reforms was correct. To address the problems identified and further promote and implement the concept of the joint parental responsibility model, both jurisdictions made further amendments to their family laws in 2006.
15. In addition to the four western jurisdictions mentioned above, we have also looked into the legislation relating to child custody and access arrangements in Singapore. Singapore has retained their existing custody and access arrangements and has not introduced the joint parental responsibility model in its family law. In October 2005, Singapore published a paper titled "Review of

---

<sup>6</sup> Please refer to Chapter Five of the consultation paper.

Child Custody Law” to study whether to implement the joint parental responsibility model by legislative means. The conclusion of the paper was that, while the Singaporean Government was content with the concept of the joint parental responsibility model, it considered that the concept should be further developed by the court under the existing custody arrangements under the law. It was not necessary for Singapore to amend its law to promote the joint parental responsibility model.

### Consultation questions<sup>7</sup>

16. This consultation exercise aims to seek the views of the public on the following questions –
- Q1.** 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?
  - Q2.** Should the concept of the joint parental responsibility model be promoted in Hong Kong? If so, why? If not, why not?
  - Q3.** 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?
  - Q4.** 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?
  - Q5.** 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 (set out in paragraphs 3.4 to 3.8 of the consultation paper)?

---

<sup>7</sup> Please refer to Chapter Six of the consultation paper.

17. Chapter Four of the consultation paper sets out the different views expressed by stakeholders on whether the model should be implemented through legislative reforms. In this connection –
- 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?
  - 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?
18. Chapter Five of the consultation paper sets out the relevant legislation and developments in relation to child custody issues in other jurisdictions. In this connection –
- Q8.** What lessons do you think we can learn from these overseas jurisdictions?
  - Q9.** Which jurisdiction(s) do you think can serve as the best reference for Hong Kong in considering our way forward, and why?
  - Q10.** Do you have any other views on the concept of the joint parental responsibility model and whether it should be implemented in Hong Kong by legislative means?