

**Child Custody and Access:
Whether to Implement the
“Joint Parental Responsibility Model”
by Legislative Means**

Consultation Paper

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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 access¹

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.

¹ 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 model² 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 parents³, while some require notification to the other parent⁴. 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

² Please refer to Chapter Three of the consultation paper.

³ 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.

⁴ 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 reforms⁵

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

⁵ 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 jurisdictions⁶

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

⁶ 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 questions⁷

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)?

⁷ 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?

CHAPTER ONE

INTRODUCTION

Introduction

- 1.1 This consultation paper aims to invite feedback from members of the public on the recommendations made by the Law Reform Commission of Hong Kong (LRC) in its Report on Child Custody and Access in relation to the implementation of the “joint parental responsibility model” (the model) by legislative means.
- 1.2 The consultation paper is divided into six chapters. Chapter One gives a brief introduction of the consultation exercise, including its origin, purpose and scope. The following chapters will cover the existing law on child custody and access (Chapter Two), LRC’s recommendations on implementing the model through legislative reforms (Chapter Three), the views of major stakeholders (Chapter Four) and developments in overseas jurisdictions (Chapter Five). In the last chapter, the questions on which the views of the public are sought will be set out.

Background information

LRC

- 1.3 Established in January 1980, LRC is responsible for considering reform of the aspects of Hong Kong laws referred to it by the Secretary for Justice or the Chief Justice. LRC is chaired by the Secretary for Justice and the other official members are the Chief Justice and the Law Draftsman. Its members include academics, practising lawyers and prominent members of the community who are appointed by the Chief Executive on the advice of the Secretary for Justice.
- 1.4 LRC has published more than 50 reports making reform recommendations on a wide range of subjects including contract law, commercial law, criminal law, privacy law and family law, etc. The recommendations made by LRC have brought about

key changes to the laws affecting the family. In particular –

- (a) its Report on Illegitimacy published in 1991 brought about legislative reforms in 1993 to regularise the status of children through the Parent and Child Ordinance (Cap. 429); and
- (b) its Report on Grounds for Divorce and the Time Restriction on Petitions for Divorce within Three Years of Marriage published in 1992 brought about reforms in 1995 to the then divorce regime.

LRC's study on the subject of guardianship and custody of children

- 1.5 From the late-1980s to the mid-1990s, a number of common law jurisdictions such as England and Wales, Scotland and Australia have introduced major reforms to their family laws, including those governing the guardianship and custody of children. Noting that the law of Hong Kong on guardianship and custody of children dated back to the 1970s and had not been reviewed for a long time, the then Attorney General and Chief Justice referred the subject to LRC for study in April 1995. LRC was tasked to “*consider the law relating to guardianship and custody of children, and to recommend such changes as may be thought appropriate.*”
- 1.6 In May 1995, LRC appointed a twelve-member sub-committee chaired by the Hon Miriam LAU to study the subject. The majority (eight) of the sub-committee members were legal professionals and practitioners, including a judge, barristers, solicitors, a legal aid counsel and a legal academic. Other members included a mediator, social workers and a marriage counsellor. The membership list of the sub-committee is at **Annex**.
- 1.7 In the course of its study, the sub-committee identified a number of key topics to be reviewed, which included –
 - (a) guardianship of children on the death of a parent;
 - (b) prevention of international parental child abduction;
 - (c) use of dispute resolution procedures in family cases; and

- (d) post-divorce custody and access arrangements for children.

1.8 In December 1998, the sub-committee published a consultation paper which sought the views of the public on all the topics identified for review in the study (i.e. including but not limited to the post-divorce custody and access arrangements for children). At the end of the three-month consultation period, LRC received a total of 51 responses, comprising 40 public responses and 11 submissions from Government departments.

1.9 Taking into account the views collected during the consultation exercise as well as relevant overseas legislation and research findings, LRC published a series of four reports on the subject of guardianship and custody of children from 2002 to 2005. The four reports are –

- (a) Report on Guardianship of Children (published in January 2002);
- (b) Report on International Parental Child Abduction (published in April 2002);
- (c) Report on The Family Dispute Resolution Process (published in March 2003); and
- (d) Report on Child Custody and Access (published in March 2005).

Together, the four reports have made a total of 124 recommendations.

1.10 The Labour and Welfare Bureau (LWB) is responsible for taking forward three of the four reports, namely the Report on Guardianship of Children, Report on International Parental Child Abduction and Report on Child Custody and Access. The Report on The Family Dispute Resolution Process is being followed up by the Home Affairs Bureau.

The Report on Child Custody and Access

- 1.11 The Report on Child Custody and Access (the LRC's Report) made a total of 72 recommendations which mainly concern the custody and access arrangements for children after the divorce of their parents. The main thrust of the recommendations in the report is that the model should be introduced into Hong Kong's family law to replace the existing system for custody and access arrangements.
- 1.12 Other recommendations in the LRC's Report include: removing the limitation on the right of interested third parties, such as close relatives, to apply for court orders affecting children; amendments to the ways by which unmarried fathers could acquire parental responsibilities over their children; enhancement of the mechanism for the views of children to be taken into account in family proceedings; resolution of the anomalies between the various matrimonial Ordinances⁸; amendments to the Protection of Children and Juveniles Ordinance (Cap. 213) concerning the application of care orders and supervision orders for children to better protect children's rights; and a reduction in the minimum age for marriage without parental consent from 21 to 18 years, etc.
- 1.13 An important feature of the LRC's Report is that LRC has modified a number of its earlier recommendations and formulated nine 'new' recommendations to address concerns raised by some respondents about the implementation of the model through legislative reforms in its 1998 consultation.
- 1.14 The LRC's Report and its Executive Summary are available at LRC's website at the following links –

<http://www.hkreform.gov.hk/en/publications/raccess.htm>

<http://www.hkreform.gov.hk/tc/publications/raccess.htm>

⁸ "Matrimonial Ordinances" refer to the various Ordinances governing matrimonial and related issues, which include the Guardianship of Minors Ordinance (Cap. 13), Matrimonial Causes Ordinance (Cap. 179), Matrimonial Proceedings and Property Ordinance (Cap. 192) and Separation and Maintenance Orders Ordinance (Cap. 16). Except for Cap. 13, all the other Ordinances are under the Home Affairs Bureau's purview.

The model and LRC's recommendations to implement it by legislative means

- 1.15 The model is a new approach to dealing with the arrangements for children after the divorce of their parents. Unlike the traditional child custody arrangements, it emphasises the continuing responsibilities of both parents towards their children (rather than their individual parental rights) and the child's right to enjoy a continuing relationship with both parents if this is in the child's best interests. Under the model, both parents of a child would retain their responsibilities to participate in important decisions about the child even after divorce.
- 1.16 LRC considers that the model should be implemented in Hong Kong through legislative reforms. In this connection, the LRC's Report has recommended, among other things, that the existing custody and access orders which imply ownership over children should be abolished and replaced with a new range of court orders including a residence order, a contact order, a specific issues order and a prohibited steps order. A parent granted a residence order would have the right and responsibility to have the child reside with him, while a parent with a contact order would have the right and responsibility to maintain contact with the child. Generally, parents with either a residence order or a contact order would be able to act independently while the child is with them with regard to the day-to-day care of the child. For major decisions affecting the child which are proposed to be specified in legislation, however, one parent would have to notify the other, or in some cases obtain their prior consent before acting, unless the court makes orders or gives directions that a parent may dispense with any of the requirements to notify or seek the consent of the other parent.
- 1.17 More details about LRC's recommendations for implementing the model by legislative means will be provided in the ensuing chapters.

Progress in following up the LRC reports on guardianship and custody of children

- 1.18 LWB has completed the examination of the Report on Guardianship of Children and Report on International Parental Child Abduction. The Administration's public responses to these two reports were issued to the Chairman of LRC in October 2009. In gist, the Administration accepts all the recommendations of the two reports, either in full or in a modified form. The legislative exercises for implementing the recommendations of the two reports are on track. The bill for implementing the recommendations of the Report of Guardianship of Children was introduced into the Legislative Council (LegCo) in June 2011 and a Bills Committee formed under LegCo has finished scrutinising it. The legislative proposals for implementing the recommendations of the Report on International Parental Child Abduction are also being prepared.
- 1.19 As for the LRC's Report on Child Custody and Access, the Administration considers that its recommendations, if adopted, would fundamentally change the existing concept of "custody" under the family law and have far-reaching implications on children and family on various fronts. They should thus be examined carefully. In the course of considering the above recommendations, LWB has sought the views of some major stakeholders including legal professionals, social workers, women's groups and children rights' groups and made reference to the developments in other common law jurisdictions such as England and Wales, Australia and Singapore.

Need for public consultation

- 1.20 While LRC conducted a comprehensive and objective consultation exercise in 1998 which provided useful reference for the consideration of the subject, we consider it advisable and prudent to launch a more focused and up-to-date consultation exercise on whether the model should be implemented by legislative means because –
- (a) the recommendations concerning the law reforms to implement the model would fundamentally change the

existing concept of “custody” under the family law and have far-reaching implications on children and family on various fronts;

- (b) LRC’s consultation in 1998 covered all the topics identified by the sub-committee and thus had a much wider scope. This consultation exercise, on the other hand, focuses on recommendations concerning the implementation of the model by legislative means only. It can thus enable concerned parties to focus their discussion and consideration on the model and relevant recommendations;
- (c) when we informally consulted some major stakeholders, it appeared that except for the legal professionals, many of the stakeholders consulted, including social workers and women’s groups representatives, did not have much knowledge about the model and LRC’s recommendations; and
- (d) public views on whether the model should be implemented by legislative means may have changed substantially since the launching of LRC’s consultation some 12 years ago. The more up-to-date experience of the overseas jurisdictions which have implemented the model may also have a bearing on the views of the public on the subject.

The next steps

- 1.21 Through this consultation exercise, we aim to seek the views of the public on the fundamental questions of –

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?

Subject to the views and comments received during the four-month consultation period, we will map out the way forward on whether and how best the recommendations of the LRC’s Report concerning the implementation of the model

should be taken forward. Other recommendations in the same report will be examined and followed up separately.

CHAPTER TWO

THE EXISTING LEGISLATIVE FRAMEWORK

Introduction

- 2.1 This chapter gives a brief introduction to the existing law on child custody and access (including recent judicial developments) as well as its shortcomings as considered by LRC.

The existing law on child custody and access

Parent-child relationship under the law

- 2.2 There is no simple definition of parent-child relationship in the existing law of Hong Kong. According to the LRC's Report, the term "parental rights and authority" is used in the Guardianship of Minors Ordinance (Cap. 13) to characterise parent-child relationship⁹. According to the LRC's Report, the term "parental rights and authority" is not defined in the statute. That said, "parental rights and authority" can be found at common law, which includes the rights –

- (a) to live with the child and control the child's day-to-day upbringing;
- (b) to choose the child's education, religion and surname;
- (c) to inflict moderate punishment on the child;
- (d) to consent to medical treatment for the child;
- (e) to act for the child in legal proceedings; and
- (f) to administer the child's property, etc.¹⁰

⁹ The LRC Report on Child Custody and Access (2005), para. 2.10.

¹⁰ Ditto, para. 2.10.

Law on child custody and access

- 2.3 As noted in the LRC’s Report, Hong Kong’s legislation on child custody and access is contained in a number of ordinances, including the Guardianship of Minors Ordinance (Cap. 13), Matrimonial Causes Ordinance (Cap. 179), Matrimonial Proceedings and Property Ordinance (Cap. 192) and Separation and Maintenance Orders Ordinance (Cap. 16), etc.¹¹ The current legislative framework was developed largely on the basis of the framework formerly adopted in England and Wales.
- 2.4 There is no general definition of the terms “custody” and “access” in our statute books. According to the LRC’s Report, under the common law, “custody” comprises “the bundle of rights that parents have over their children”, including “the right to ‘care and control’ and the right to make all important decisions affecting the child, such as decisions regarding his education, religion and medical treatment.”¹² As for the term “access”, it means the right to have contact with the child, visiting him, taking him out or having him to stay from time to time, etc.¹³ The LRC’s Report notes that access is regarded as the right and privilege of the child, but not the parent¹⁴.
- 2.5 Both the mother and father have parental rights over their children. There is a general principle of equality of parental rights and authority between the mother and father¹⁵. However, when parents divorce, the court would need to rearrange the parental rights between them through custody orders.
- 2.6 Under the existing law, three different ordinances, namely the Matrimonial Proceedings and Property Ordinance (Cap. 192), Separation and Maintenance Orders Ordinance (Cap. 16) and Guardianship of Minors Ordinance (Cap. 13), provide for the making of custody orders by the court –
- (a) under section 19(1) of the Matrimonial Proceedings and Property Ordinance (Cap. 192), the court has the power to make such orders as it thinks fit for the custody and

¹¹ Ditto, para. 2.2.

¹² Ditto, para. 2.16.

¹³ Ditto, para. 2.21.

¹⁴ Ditto, para. 2.25.

¹⁵ Ditto, para. 2.11.

education of any child of the family in divorce proceedings;

- (b) under section 5(1) of the Separation and Maintenance Orders Ordinance (Cap. 16), the court may award custody to either husband or wife on proof of a matrimonial offence under section 3 of the Ordinance; and
- (c) orders for “custody” may also be made by the court on the application of either parent of a minor or the Director of Social Welfare under section 10 of the Guardianship of Minors Ordinance (Cap. 13) where no divorce proceedings are involved.

2.7 It should be noted that, in any court proceedings relating to the custody and upbringing of children (regardless of which of the above ordinances is invoked for making the custody order), the welfare principle provided in section 3(1) of the Guardianship of Minors Ordinance (Cap. 13) applies. Under this principle, the welfare of the child is to be the first and paramount consideration of the court in determining custody issues and other matters relating to the upbringing of a child. The court needs to take into account what is in the best interests of the child over and above what is the best for any adults involved in the litigation. The relevant part of section 3(1) of the Guardianship of Minors Ordinance (Cap. 13) which provides for the principle is extracted as follows –

“In relation to the custody or upbringing of a minor, and in relation to the administration of any property belonging to or held in trust for a minor or the application of the income of any such property –

- (a) *in any proceedings before any court (whether or not a court as defined in section 2) the court –*
 - (i) *shall regard the welfare of the minor as the first and paramount consideration and in having such regard shall give due consideration to –*

(A) *the wishes of the minor if, having regard to the age and understanding of the minor and to the circumstances of the case, it is practicable to do so; and*

(B) *any material information including any report of the Director of Social Welfare available to the court at the hearing; ”.*

2.8 In addition to the relevant legislation, Hong Kong’s law on child custody and access also includes the common law decisions of the court. The case law has been evolving and the views of the court on child custody and access arrangements have been changing. As noted earlier and further below, although the statutory provisions on child custody and access have not been amended, there has been an increasing shift by the court in recent years towards applying the principles of joint parental responsibility in child custody and access cases, and orders for joint custody are now commonly made in Hong Kong.

Types of custody orders which can be made

2.9 Under the existing legislative framework, the court may, after considering the circumstances of each individual case, make a sole custody order, a joint custody order or, in rare cases, a split order. The court is also empowered to make orders for access.

2.10 The meaning of the three types of custody orders, as noted in the LRC’s Report, is as follows –

- (a) **Sole custody order** – During the time when LRC studied the subject (i.e. from 1996 when LRC appointed the sub-committee to study the subject up till the publication of the LRC’s Report in March 2005), sole custody orders were commonly made in divorce cases in Hong Kong. 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. Under the traditional approach, the non-custodial parent would be effectively excluded from the making of important decisions affecting the upbringing of the child, which may lead to their drifting

out of their children's lives altogether¹⁶. This position has, however, been changing in recent years with the evolving of case law, as discussed in paragraphs 2.12 to 2.13 below.

- (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 them¹⁷. While joint custody orders were not common at the time of LRC's study of the subject, they are now commonly made with the evolving of the court's views on the post-divorce custody arrangements for children as discussed in paragraph 2.14 below
- (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 other¹⁸.

2.11 Although no amendment has been made to the statutory provisions on child custody and access, the case law has evolved over the years and the views of the court on custody and access arrangements have been changing towards joint custody as reflected in its judgments relating to custody proceedings. Some of these recent developments are highlighted in the ensuing paragraphs.

Changes in the meaning of sole custody order

2.12 In recent years, the views of the court on sole custody order has been that even where it is granted, 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 opinions of the access parent and make the final decision. If the non-custodial parent disagrees, he can take the matter to court for final determination.

¹⁶ Ditto, paras. 2.26 to 2.28.

¹⁷ Ditto, paras. 2.32 to 2.34.

¹⁸ Ditto, paras. 2.29 to 2.31.

2.13 The following extracts from court judgments in child custody proceedings in recent years illustrate the above change in the court's views on sole custody orders –

(a) In the case *S v Z (FCMC14535/2005) [2007] HKEC 2281*, HHJ Melloy stated that –

“..... the term custody means making the important decisions about a child's life. If a parent has sole custody the implication is that ultimately the decision-making power vests in that parent the non-custodial parent still has the right to be consulted on all matters affecting the children. If the non-custodial parent feels strongly about a particular issue then the appropriate application may be made to the court in order to clarify matters. Ultimately it is for the court to decide”

(b) In the case *PD v KWW (CACV188/2009) [2010] 4 HKLRD 191*, Hon Hartmann JA stated that –

“..... if one parent only is given custody, that parent is not thereby given an absolute and independent authority to act without further reference to the non-custodial parent A non-custodial parent has the right to be consulted in respect of all matters of consequence that relate to the child's upbringing. While the right to be consulted does not include a power of veto, it is nevertheless a substantial right. It is not merely a right to be informed, it is a right to be able to confer on the matter in issue, to give advice and to have that advice considered The custodial parent who is given sole custody is given the authority to make the final decision after due consultation with the non-custodial parent.....”

Joint custody order becomes more commonly granted

2.14 While the court has not kept statistics about the number of joint custody orders granted, recent court judgments in custody proceedings suggest that it is no longer uncommon in Hong Kong. In fact, it appears from the following statement made by Hon Hartmann JA extracted from the judgment of the case of *PD v KWW (CACV188/2009) [2010] 4 HKLRD 191*, at

paragraphs 52 to 57, that joint custody order is now the court's preferred type of order when parents are able to agree on the questions of importance that would determine the upbringing of their child –

“Joint custody: the proper approach

Today, although there has been no change in our law similar to many other common law jurisdictions, orders of joint custody are in no way exceptional. This is because it is accepted that, in principle, such orders are in the interests of the children.

In all but the most exceptional circumstances, the effect of divorce on the children of the marriage, especially children of tender years, is deeply felt. In all but the most exceptional circumstances, such children desire that they should continue to be protected and guided by both parents. The case before us is an example.

In the result, in the best interests of the child, the fact that, as a result of the breakdown of the marriage, relations between the parents are strained is not of itself a reason to refuse to make a joint order of custody. Nor is the fact that the parent to be given care and control does not agree. Such orders look to the future. They will govern a limited area of exchange between the parents, albeit of the greatest importance.

Accordingly, the issue for the judge is whether, with the court proceedings concluded, it is reasonably anticipated that the parents will be able to agree on the questions of importance that will determine the upbringing of their child, both recognising that, as difficult as it may be for them, this process of cooperation is in the best interests of the child.

In determining this issue, the judge is entitled to proceed on the presumption that competent, loving parents possessed of sufficient objectivity to be able to make rational decisions in the interests of the child will be able to cooperate with each other concerning matters of importance in the upbringing of the child.

At all times, of course, the welfare of the child remains the first and paramount consideration. As this court has recognised (see, for example Y v P [2009] HKFLR 308), there may be occasions when the ability of the parents to reach any rational accord in respect of important matters concerning the upbringing of their child is so deeply undermined that to compel attempts at cooperation will not protect the interests of the child but leave the child more vulnerable.”

Shortcomings of the existing legislation as considered by LRC

2.15 Having studied the existing law on child custody and access, LRC considers that it has the following shortcomings –

- (a) “custody” is an outmoded concept which focuses on parental rights. The international trend in family law is, however, that the focus of the law should shift towards parental responsibilities;
- (b) since “custody” implies ownership and many parents think that the custodial parent is the winner and the access parent is the loser in custody proceedings, the battle for custody of children under the existing legislation is highly emotional and hotly contested in some cases;
- (c) sole custody orders, which were commonly made by the court at the time of LRC’s study, may lead to non-custodial parents drifting out of their children’s lives altogether. It should be noted, however, that since the publication of the LRC’s Report in 2005, joint custody orders have been more commonly granted under the existing legislative framework. Sole custody order may no longer be the dominating type of custody order made by the court; and
- (d) it is doubtful whether the existing legislation can fulfil the requirement of the United Nations Convention on the Rights of the Child that state parties should uphold the principle that both parents have common responsibilities for the upbringing and development of the child.

LRC's recommendations to implement the model by legislative means

2.16 Having considered the shortcomings of the existing law, the law reforms in other common law jurisdictions to implement the model (including the then latest developments), as well as the views collected during its public consultation in 1998, LRC concluded that the model should be implemented in Hong Kong through legislative reforms. The major recommendations of the LRC's Report for implementing the model through legislative reforms are highlighted in the next chapter.

CHAPTER THREE

LRC'S RECOMMENDATIONS ON THE IMPLEMENTATION OF THE MODEL THROUGH LEGISLATIVE REFORMS

Introduction

- 3.1 This chapter highlights specific recommendations made in the LRC's Report to implement the model in Hong Kong through legislative reforms.

Concepts and merits of the model

- 3.2 As noted in paragraph 1.15 above, the model is a new approach to dealing with the arrangements for children after the divorce of their parents. The model is underpinned by the following concepts –

- (a) the parent-child relationship should be defined in terms of “parental responsibilities” rather than “parental rights and authority”; and
- (b) parental responsibilities of both parents should last until the child reaches adulthood and should not end because of the divorce of parents.

- 3.3 LRC considers that the model has the following merits –

- (a) the concept of the model is more child-focused than the prevailing concept of custody;
- (b) the model promotes and encourages the continued involvement of both parents in the lives of their children even after divorce. Children of divorced parents can continue to enjoy the involvement of both parents in their lives;
- (c) under the model, the fight for custody which is regarded as the source of contention between divorced parents would no longer exist. The change from the traditional approach of ‘winner takes all’ in custody proceedings

should reduce the hostility between parents in proceedings determining the future arrangements for their children;

- (d) the model is in line with the international trend in family law which has shifted towards focusing on the child; and
- (e) it is also consistent with the requirements of the United Nations Convention on the Rights of the Child.

LRC's recommendations for implementing the model

3.4 LRC considers that the model should be implemented in Hong Kong through legislative reforms. In this connection, amendments to the laws in the following areas would be necessary –

- (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”;
- (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;
- (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; and
- (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.

Replacement of the concept of “guardianship” with “parental responsibility”

3.5 Recommendations of the LRC’s Report in this area include –

- (a) to replace the concept of “guardianship” with the concept of “parental responsibility” to denote the parent-child relationship in the law (Recommendation 4)¹⁹; and
- (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 (Recommendation 5) which can serve as a guide to parents, children and the court on the parameters of the relevant parental rights and responsibilities, etc.²⁰

Continuation of parental responsibilities after divorce

3.6 Recommendations of the LRC’s Report in this area include –

- (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)²¹;
- (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). In this connection, the LRC’s Report has recommended that –
 - (i) 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;

¹⁹ Ditto, paras. 9.50 to 9.55.

²⁰ Ditto, paras. 9.56 to 9.62.

²¹ Ditto, paras. 9.86 to 9.90.

- (ii) 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; and
- (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;

and

- (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 an unmarried father) also acquires such rights (Recommendation 17)²².

Abolition of existing regime of custody orders and introduction of new orders

3.7 The LRC’s Report has recommended that the provisions in the relevant matrimonial Ordinances (including the Guardianship of Minors Ordinance (Cap. 13), the Matrimonial Causes Ordinance (Cap. 179), Matrimonial Proceedings and Property Ordinance (Cap. 192) and Separation and Maintenance Orders Ordinance (Cap. 16), etc.) which deal with custody orders should be repealed, and that a new range of orders should be introduced. Specific recommendations include –

- (a) to abolish the custody order and access order currently provided for under the law and introduce the “residence order” (Recommendation 21)²³ and “contact order” (Recommendation 24)²⁴. The residence order

²² Ditto, paras. 9.115 to 9.118.

²³ Ditto, paras. 10.10 to 10.16.

²⁴ Ditto, paras. 10.20 to 10.25.

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;

- (b) to introduce the “specific issues order” (Recommendation 25)²⁵ and “prohibited steps order” (Recommendation 26)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.; and
- (c) to expressly provide in legislation for the court to include directions or conditions in any of the court orders (Recommendation 27)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 violence or abuse in the family. (This is also possible at present under the existing law though not specifically provided in legislation.)

²⁵ Ditto, paras. 10.26 to 10.30.

²⁶ Ditto, paras. 10.31 to 10.34.

²⁷ Ditto, paras. 10.35 to 10.36.

Other recommendations for supplementing the operation of the model

3.8 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** – As noted in paragraph 2.6 above, under section 10 of the Guardianship of Minors Ordinance (Cap. 13), a custody order may be made by the court on the application of either parent of a minor or the Director of Social Welfare where no divorce proceeding is involved. The LRC’s Report notes that third parties (such as grandparents or other carers) have no legal standing to apply for a custody or access order under this section. They need to rely on either a parent or the Director of Social Welfare to apply for the order on their behalf. LRC considers that there is no justification for obstacles preventing interested third parties from applying for orders concerning children. It has therefore recommended that 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 should be removed (Recommendation 28). Under LRC’s recommendation, leave of the court would not be required for a third party to apply for a custody order in respect of a child if the child had lived with the applicant for a total of one year out of the previous three years (and that the one year period need not necessarily be a continuous period, but must not have ended more than three months before the application)²⁸.
- (b) **Statutory checklist of factors to be considered in custody and guardianship proceedings** – LRC has recommended that a statutory checklist of factors should be introduced in the law to guide the court in determining what is in the child’s best interests in proceedings concerning children (Recommendation 3). The purpose of this checklist is to guide the court to consider all the important matters relevant to the child’s welfare when making court orders affecting a child.

²⁸ Ditto, paras. 10.37 to 10.43.

- (c) **Recommendations for addressing the concerns about the implementation of the model for victims of domestic violence** – In the consultation conducted by LRC in 1998, there were concerns about the implementation of the model for victims of domestic violence. Some respondents were concerned that in situations where domestic violence was involved, the introduction of the proposed reforms might allow greater scope for abusive parents to continue harassing their former spouses and children after the divorce. To address these concerns, LRC has made a number of recommendations in the LRC’s Report to deal with cases involving domestic violence. These recommendations are set out in Chapter 11 “The special recommendations for cases involving family violence” of the LRC’s Report^{29 30}. The Administration believes that cases of domestic violence should be dealt with in a separate context and are not the focus of the current public consultation exercise.

²⁹ Ditto, pages 243 to 267.

³⁰ The Administration has taken on board some of LRC’s recommendations through the Domestic Violence (Amendment) Ordinance 2008 and Domestic Violence (Amendment) Ordinance 2009, including that the laws on domestic violence should be reviewed (Recommendation 33) and that the scope of the court’s powers under the Domestic and Cohabitation Relationships Violence Ordinance (i.e. the former Domestic Violence Ordinance) should be increased to empower the court, when making an injunction under the legislation, to make, vary or suspend custody or access orders, and to make other orders in the best interests of the child (Recommendation 35). There are other recommendations which do not require amendments to law, including that judicial guidelines should be introduced on handling contact cases where there are allegations of domestic violence to supplement the legislative reforms (Recommendation 36), and that more information (such as relevant criminal records of parents) should be made available to the court to enable it to make a proper assessment of risk to a child (Recommendation 37), etc. For details, please refer to Chapter 11 of the LRC’s Report.

CHAPTER FOUR

VIEWS ON IMPLEMENTING THE MODEL THROUGH LEGISLATIVE REFORMS

Introduction

- 4.1 This chapter sets out the views expressed on the implementation of the model by legislative means, including views supporting the legislative reforms and concerns raised about the reforms.

Views expressed by stakeholders in meetings with LWB

- 4.2 In the consultation conducted by LRC in 1998, there were concerns about the implementation of the model for victims of domestic violence. Some respondents were concerned that the proposed legislative reforms to implement the model might allow greater scope for abusive parents to continue harassing their former spouses and children after divorce. In making its final recommendations, LRC had considered views collected during its consultation and made reference to the relevant overseas researches on domestic violence and other matters which had subsequently come to light. A number of recommendations were made with a view to addressing the concerns raised by respondents during LRC's consultation to provide special consideration for such cases. Apart from covering "special consideration for cases involving family violence", LRC considers that the revised and new recommendations in the LRC's Report in 2005 would allow the model great flexibility to cater for situations where the parents cannot cooperate³¹.

³¹ The LRC's Report in 2005 has addressed the concerns raised by respondents in LRC's consultation in 1998. The LRC's recommendations include the introduction of a new range of orders (residence order, contact order, specific issues order and prohibited steps order) (Chapter 10 of the LRC's Report) and express power of the court to vary or dispense with any of the consent or notification requirements where it is necessary (Recommendation 13, Chapter 9 of the LRC's Report), etc. Besides, as mentioned in paragraph 3.8(c) of this paper, LRC has also made a number of additional recommendations subsequent to its consultation (Chapter 11 of the LRC's Report) to deal with the concerns about cases involving domestic violence.

4.3 Notwithstanding the above, LWB considers that LRC's recommendations of replacing the existing custody and access arrangements under the family law with new legislation to implement the model would have far-reaching impact on children and families, even in cases which do not involve domestic violence. LWB hence convened informal meetings with some stakeholders in 2009 and 2010 to gauge their views. 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. Some stakeholders, in particular those from the legal sector, supported the implementation of the model by legislative means. Some, on the other hand, registered their concerns or reservations about the introduction of the model into the family law of Hong Kong.

Support for implementing the model by legislative means

4.4 Stakeholders who have expressed support for the introduction of the model by legislative means include those from the legal sector. They agreed that the existing law on child custody and access had the shortcomings considered by LRC as indicated in paragraph 2.15 above. They also agreed that the model had the merits set out in paragraph 3.3 above, including that it would be more child-focused, in line with the international trend in family law and consistent with the requirements of the United Nations Convention on the Rights of the Child. Under the model, children of divorced parents could continue to enjoy the involvement of both parents in their lives. Parental hostility during divorce proceedings would also be reduced, etc.

4.5 The stakeholders who supported the proposed law reforms thought 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. They did not consider that the concept of the model could be adequately promoted and developed only through evolving case law under the existing legislative framework and public/ parent education. Legislative changes would be necessary. Besides, they were content that LRC had given consideration to concerns over domestic violence and hostility between divorced parents in

their revised recommendations published in the LRC's Report in 2005.

- 4.6 Those who supported the law reforms for implementing the model also believed that, under the recommended model, the court would have clearly defined powers enabling it to make the appropriate orders (residence, contact, special issues and prohibited steps orders), impose special conditions and directions within those orders and vary or dispense with any of the consent or notification requirements where necessary. This could help avoid and address the on-going hostility between parents on issues relating to the upbringing of their children. During divorce proceedings, the court could make use of the above powers to settle arrangements between parents for avoiding hostility in their future cooperation. Even if such hostility did not subside, the case could be brought to the court again which could make subsequent orders for dealing with any disagreements and settling the arrangements for the child.
- 4.7 For cases involving domestic violence, the recommendations made in the LRC's Report should be able to cater for the parties' specific needs.

Concerns about implementing the model by legislative means

- 4.8 Some stakeholders expressed reservations about the introduction of the model in Hong Kong through legislative reforms to achieve joint parenting. Their major comments included –
- (a) 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 the child. In fact, as indicated in paragraph 2.14 above, recent court judgments show that the court has, in recent years, considered that joint custody is in the best interest of children. Joint custody orders are now more commonly made than before. Some stakeholders believed that it would take time to change the mindset of parents and an overnight law reform might not be the most effective way to implement and promote the concept of joint parenting. It might be more useful to promote joint parenting

through family education and law reforms were not necessary/ imminent;

- (b) from a practical perspective, under the existing law, the court had the flexibility to make the appropriate type of custody order according to the circumstances of each case and the needs of each individual family (e.g. joint custody for parents who can cooperate, and sole custody for parents who cannot cooperate). On the contrary, under the proposed legislative framework to implement the model, joint parenting would be the default arrangement for all divorced families (except for cases involving domestic violence). This might not cater for the needs of families whose divorced parents can no longer cooperate with each other (not necessarily involving domestic violence);
- (c) the new consent and notification requirements might be used by trouble-making or hostile parents to obstruct and harass the other spouse. Some parents might purposely delay the decision-making process or raise objection to whatever the other proposes. This would cause distress to some parents and unnecessary disruption to their children;
- (d) the number of on-going litigated cases (and thus the litigation costs to be borne by parents) might increase, since the hostility between divorced parents might lead to prolonged legal disputes after the “up-front” battle for residence order. In fact, as indicated in some researches³², the number of litigation in some overseas jurisdictions had increased at least in the first few years following the implementation of the model by legislative means;
- (e) from a practical perspective of some parents, participation in important decisions about the upbringing of children was regarded as a “right” or “power” of the non-custodial/ non-resident parents rather than an additional “parental responsibility”. On the other hand,

³² Including the research entitled “An Analysis of Options for Changes in the Legal Regulation of Child Custody and Access” commissioned by the Department of Justice of Canada in 2001.

the “parental responsibility” of the access parent should be to pay maintenance towards their child’s upbringing;

- (f) despite the change from the traditional approach of “winner takes all” in custody proceedings, some parents might still fight fiercely for the “residence rights” over their children as they fight for custody at present. It might cast doubt on whether the attitude of parents towards parental rights and responsibilities would be changed by the changes in law; and
- (g) there were also questions about the impact of legislative changes on divorced families whose custody arrangements had already been settled. Whilst noting that the court already had powers to discharge or vary existing custody or access orders and make new orders at present (it is thus already possible for a non-custodial parent to seek a joint custody order), some stakeholders were still worried that the reforms would encourage non-custodial parents to apply to the court for their cases to be reconsidered under the new legislative framework. Since the new model emphasises “joint parental responsibility”, there were concerns that the existing, settled and stable sole custody arrangement of the families would be disrupted.

4.9 Some of the stakeholders believed that, from a practical point of view, the concept of “joint parental responsibility” could be further developed and promoted by the courts under the existing legislative framework without legislative changes. Joint custody orders could be more frequently granted unless it was likely that the divorced parents could not cooperate in good faith on issues relating to the upbringing of their children. The Administration should, at the same time, promote the concept of “joint parental responsibility” through public and parent education.

4.10 Concerning the recommendation to remove the restrictions on a third party applying for orders concerning children in particular, there were questions as to whether it would encourage parents to entrust their parental responsibilities towards their children to a third party through the application for orders by the third party. This might contradict the basic value of the society that it

should be the primary responsibility of parents to take care of their own children.

CHAPTER FIVE

LATEST DEVELOPMENTS IN OTHER COMMON LAW JURISDICTIONS

Introduction

- 5.1 This chapter discusses how major common law jurisdictions promote the concept of the model. It provides a brief recap of LRC's study of the legislative reforms undertaken by England and Wales, Scotland, Australia and New Zealand in the LRC's Report, a discussion about the evaluation of the law reforms in England and Wales and Australia, their further legislative amendments after publication of the LRC's Report and Singapore's promotion of the model by non-legislative means.

Law reforms in other common law jurisdictions to implement the model as studied in the LRC's Report

- 5.2 As discussed in Chapters Five to Eight of 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. The ensuing sections provide a brief recap of LRC's study.

England and Wales

- 5.3 Amongst the major common law jurisdictions, England and Wales was the first to implement the model through legislative reforms. The Children Act 1989 (the English Act) which came into effect in October 1991 replaced the concept of "parental rights" with "parental responsibility"³³. Before the legislative reforms, the phrase "parental rights and duties" was used in the law to describe all the rights and duties that a mother and father had in relation to a legitimate child and his property. The English Act replaced such a terminology with "parental responsibility", which is defined 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."

³³ The LRC Report on Child Custody and Access (2005), para. 5.7.

- 5.4 According to the LRC’s Report, the English Act had not provided for a statutory list of parental responsibilities or parental rights and authority. The English Law Commission considered it practically impossible to do so since such a list would necessarily change from time to time to meet differing needs and circumstances³⁴.
- 5.5 To put in practice the notions that “once a parent, always a parent” and that the primary responsibility for deciding on the upbringing of the child should remain with the parents even following their separation, section 2(6) of the English Act provides that a person who has parental responsibility for a child does not cease to have that responsibility solely because some other person, such as a step-parent, grandparent or foster parent, subsequently acquires parental responsibility. Section 2(7) provides that where more than one person has parental responsibility, each of them may act independently in meeting that responsibility without the need to consult the other except where statute expressly requires the consent of more than one person. In practice, however, the court expects that parents having parental responsibility would be consulted on the important steps in their children’s life.
- 5.6 To implement the model, the English Act abolished the custody order and access order previously provided under the law. As replacement, a range of new orders concerning the upbringing of children were introduced in section 8, namely –
- (a) “residence order”³⁵ – an order settling the arrangements to be made as to the person with whom a child is to live;
 - (b) “contact order”³⁶ – an order requiring the person with whom a child lives, or is to live, to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other;

³⁴ Ditto, para. 5.14.

³⁵ Section 8(1) of the English Act.

³⁶ Ditto.

- (c) “specific issue order”³⁷ – an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child; and
- (d) “prohibited steps order”³⁸ – an order specifying that certain step(s) which normally can be taken by a parent in meeting his parental responsibility for the child shall not be taken by any person without the consent of the court.

5.7 The English Act retained the principle that “the child’s welfare shall be the court’s paramount consideration.” To assist the court in implementing the welfare principle, the English Act introduced a statutory checklist of factors to which the court should have regard in considering whether to make, vary or discharge the orders.

5.8 In 2006, amendments were made to the English Act by the Children and Adoption Act 2006. The reforms mainly related to improving the court’s powers to promote contact and to enforce contact orders in difficult cases. These reform measures and the background to their formulation are discussed in more detail in paragraphs 5.19 to 5.23 below.

Scotland

5.9 Scotland introduced law reforms to implement the model in the Children (Scotland) Act 1995 (The Scottish Act) which came into effect on 1 November 1996. The Scottish Act made reference to the English Act but diverged from it in a number of aspects. Unlike the English Act which only defines the concept of “parental responsibility” and deems “parental rights” as comprised within that concept, the Scottish Act introduced statutory definitions of both “parental responsibilities” and “parental rights”. The parental rights are defined in order to enable a parent to fulfil their parental responsibilities in relation to their child. A list of parental responsibilities and a list of parental rights are provided under section 1 and section 2 of the Scottish Act respectively.

³⁷ Ditto.

³⁸ Ditto.

5.10 The Scottish Act also abolished the custody order and access order and introduced a new set of orders as the English Act had done. The new set of orders included the residence order, contact order, specific issue order and the order for interdict (similar to the “prohibited steps order” of the English Act). While their definitions are slightly different to the orders provided under the English Act, the functions they serve are largely the same. As opposed to the English Act, however, the Scottish Act does not provide for the statutory welfare checklist which guides the court in making, varying or discharging the orders. It is because there were concerns that the checklist “*could lengthen proceedings and cause judges to adopt a mechanical approach to going through the list even in, say, an application for a minor variation in an order.*”³⁹

Australia

5.11 In Australia, the model was introduced in the family law through the Family Reform Act 1995 (the Australian Act) which came into force in 1996. The Act abolished the concept of custody and introduced the concept of parental responsibility which is defined in section 61B as “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.” Section 61C specifically provides that each parent of a child under 18 has parental responsibility, and this would not be affected by any change in the parents’ relationship, such as divorce or separation.

5.12 The custody order and access order were abolished and replaced with “parenting orders” under section 64B, which might be one or more of the following –

- (a) “residence order” specifying the person or persons with whom a child is to live;
- (b) “contact order” specifying the contact between a child and another person or other persons;
- (c) “child maintenance order” providing for the maintenance of a child; and

³⁹ The LRC Report on Child Custody and Access (2005), para. 6.36.

(d) “specific issues order” dealing with any other aspect of parental responsibility for a child.

5.13 The Australian Act provides a very detailed checklist of factors to assist the court in determining the child’s best interests. It also clarifies that in considering whether to make an order, the court may consider the factors in the checklist, but is not bound to do so.

5.14 In 2006, significant amendments were made to the Australian Act by the Family Law (Shared Responsibility) Act 2006. The reforms mainly aimed at further refining the laws for implementing the model and addressing the problems identified in the law reforms, including the introduction of a new presumption of **equally** shared parental responsibility and the reframing of residence and contact orders into an all-in-one “parenting order”. These reform measures and the background to their formulation are discussed in more detail in paragraphs 5.24 to 5.26 below.

New Zealand

5.15 New Zealand implemented the model through the Care of Children Act 2004 (the New Zealand Act) which came into operation in 2005. Unlike the English Act which draws a clear distinction between parenthood and guardianship, parents continue to be guardians of their children under the New Zealand Act, as they had been before the legislative reforms. The definition of “guardianship” was, however, amended to emphasise parental responsibilities rather than parental rights. The term is defined in section 15 of the Act as “all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child”. To put in practice the principle of joint parental responsibility, section 16(3) of the New Zealand Act provides that a guardian of a child may exercise the duties, powers, rights, and responsibilities of a guardian in relation to the child, whether or not the child lives with the guardian, unless a court order provides otherwise. Section 16(5) provides that in exercising these duties, powers, rights, and responsibilities, a guardian of the child must act jointly (in particular, by consulting wherever practicable with the aim of securing agreement) with any other guardians of the child.

- 5.16 Similar to the legislation in other jurisdictions, the New Zealand Act abolished the custody order and access order which implied parental rights and authority. Section 48 of the Act introduced the new parenting orders which determine who would have the role of providing day-to-day care for a child and who would have contact with the child.

Evaluation of the law reforms in England and Wales and Australia

- 5.17 A few years after the law reforms were introduced in England and Wales (in 1989) and Australia (in 1995), studies were conducted to evaluate their effectiveness in promoting the model. While none of the studies to which we have referred questioned the fundamental merits of the reforms (i.e. implementing the principles of joint parental responsibility by legislative means), they have identified some problems in meeting the objectives of the model, including –

- (a) **Failure in changing the mindset of parents** – In 2000, a study titled “The Family Law Reform Act 1995: The First Three Years” published by the University of Sydney and the Family Court of Australia concluded that “there was no evidence to suggest that shared caregiving has become a lived reality for the children of separated parents who have engaged with the family law system” since the family law reforms in 1996⁴⁰. “Interviews with, and survey of, lawyers and counselors suggested that there have been no real changes in practice as a result of the reforms”⁴¹. Another study titled “Every Picture Tells a Story” published in 2003 by the Standing Committee on Family and Community Affairs of the Australian House of Representatives concluded that the presumption of shared parenting under the law which applied in Australia at that time “is not reflected in what is happening either in the courts or in the community”⁴² and “behaviour has not changed and there is still a common winner/ loser scenario.”;

⁴⁰ The Family Law Reform Act 1995: The First Three Years” published by the University of Sydney and the Family Court of Australia (2000), para. 1.2.

⁴¹ Ditto, para. 1.2.

⁴² “Every Picture Tells a Story” published by the Standing Committee on Family and Community Affairs of the Australian House of Representatives (2003), para. 2.10.

- (b) **Increase in court disputes** – As reported in some studies, the number of parental conflicts and litigation had increased in the two jurisdictions following the law reforms. According to the study “An Analysis of Options for Changes in the Legal Regulation of Child Custody and Access” commissioned by the Department of Justice of Canada in 2001, there had been an increase in the number of specific issue orders in England and Wales. The study suggested that the availability of specific issue orders might have encouraged greater resort to the courts for trivial disputes. The same study indicated that in Australia there had been an increase in court applications in relation to child orders. According to the study, it was thought that the new model might provide a non-resident parent who wished to harass their former partners with the opportunity to seek orders relating to the minutiae about their children. Some non-resident parents expected the resident parents to do “the lion’s share of the work” but “took every opportunity” to challenge their care of the children and/or the lack of consultation about day-to-day decisions. The study “The Family Law Reform Act 1995: The First Three Years” indicated that there were uncertainty and confusion under the model as to who had the responsibility for children, which might give rise to the unrealistic expectations of a non-resident parent (mainly fathers). Some of them thought that the reforms had promised them more or even equal time with their children⁴³. The law reforms had brought about a change in parental attitudes which contributed to a growing tendency to assert the importance of their role in their children’s lives⁴⁴. These might lead to conflicts between parents and, ultimately, court litigation; and
- (c) **Abuse by trouble-making parents** – The study “The Family Law Reform Act 1995: The First Three Years” indicated that the implementation of the model in Australia had created greater scope for an abusive non-resident parent to harass or interfere with the life of the child’s primary caregiver by challenging his/ her

⁴³ “The Family Law Reform Act 1995: The First Three Years” published by the University of Sydney and the Family Court of Australia (2000), paras. 4.31 and 4.83.

⁴⁴ Ditto, para. 6.8.

decisions and choices. It might become a new tool of control for abusive non-resident parents and create constant disputes and an endless cycle of court orders.⁴⁵ The study noted a large increase in the number of contravention applications brought by non-resident parents alleging breaches of contact orders. It was, however, found that many such applications were without merit⁴⁶ and many were pursued as a way of harassing or challenging the resident parent, rather than representing a genuine grievance about missed contact⁴⁷.

Subsequent legislative reforms in England and Wales and Australia

5.18 Both England and Wales and Australia were of the view that they should not rolled back from the legislative reforms. To address the problems identified in the first years of their reforms and further promote and implement the concept of the model, both jurisdictions made further amendments to their family laws in 2006. The following sections give a brief introduction to the subsequent legislative reforms in the two jurisdictions.

England and Wales

5.19 In England and Wales, the Government published a Green Paper “Parental Separation: Children’s Needs and Parents’ Responsibilities” in 2004 to put forward and invite views on the proposals for further law reforms. The reform proposals were made under the presumption that the principle of shared parental responsibility underpinning the Children Act 1989 was correct and was not to be changed.

5.20 Having considered the views collected during the consultation, the Government published a paper entitled “Parental Separation: Children’s Needs and Parents’ Responsibilities: Next Steps” in 2005 (the 2005 paper) to set out the Government’s legislative and administrative proposals.

5.21 The proposals in the 2005 paper which required legislative amendments were implemented through the Children and

⁴⁵ Ditto, para. 4.88.

⁴⁶ Ditto, para. 5.88.

⁴⁷ Ditto, para. 5.110.

Adoption Act 2006⁴⁸ (the 2006 English Act) which was passed in June 2006. One of the important aspects of the reform proposal in the 2005 paper was to provide the courts and relevant agencies with new powers to better enforce contact orders for ensuring their compliance.

5.22 To address the increase in the number of court disputes, the 2005 paper proposed to further promote the use of alternative dispute resolution methods such as mediation and in-court conciliation, but did not make it compulsory.

5.23 The Government has also considered the presumption of equal contact but was not convinced that legislative change to introduce such a presumption would benefit children, nor would it make any significant difference in practice.

Australia

5.24 At the request of the then Prime Minister, a committee was formed under the House of Representatives to study how the implementation of the model could be enhanced. The committee published the report “Every Picture Tells a Story” in December 2003 to make recommendations for law reforms which led to the passage of the Family Law (Shared Responsibility) Act 2006 (the 2006 Australian Act)⁴⁹.

5.25 The most important change brought about by the 2006 Australian Act was that it went further to introduce a new presumption of **equally** shared parental responsibility (not just “shared”, but also “equally shared”), which emphasises that both parents have an **equal** role in important matters concerning their children. The Act also requires the court to consider whether a child spending equal time with both parents is reasonably practical and in the best interests of the child. If it is not appropriate, the court must consider substantial and significant time (including day to day routine, not just weekends or holidays).

⁴⁸ Background of the 2006 English Act can be found at the homepage of the National Archives of the United Kingdom Government.

⁴⁹ Background of the 2006 Australian Act can be found at the homepage of the Attorney-General’s Department of Australia.

- 5.26 Apart from the above, the 2006 Australian Act also –
- (a) introduced the requirement that parent must attend family dispute resolution sessions and make a genuine effort to resolve their dispute before taking a parenting matter to court (save for cases involving domestic violence);
 - (b) strengthened the then enforcement regime by giving the court a wider range of powers to deal with people who breached parenting orders; and
 - (c) abolished the residence order and contact order (which were introduced in the 1995 reform to replace the custody order and access order) and replaced them with the “parenting order”, which is an “all-in-one” order addressing the question as to “whom the child lives with, spends time with and communicates with.” The Australian Government thought that the parenting order which emphasised “parenting” was more compatible with the concept of the shared parental responsibility model, etc.

Laws relating to child custody and access in Singapore

- 5.27 In addition to the four western common law jurisdictions covered in the LRC’s Report (England and Wales, Scotland, Australia and New Zealand), we have also looked into the legislation relating to child custody and access arrangements in Singapore. The legal system of Singapore is based on the English common law and the majority of its citizens are Chinese. Unlike the four western common law jurisdictions covered above, Singapore has not introduced the model in its family law.
- 5.28 Up to now, Singapore has not yet implemented the model through legislative reforms. The Women’s Charter which governs Singapore’s laws on custody still provides for the making of custody and access orders. This is in line with the conclusion of a study conducted by the Attorney-General’s Chambers of Singapore in 2005 that legislative amendments were not required for the purpose of promoting joint parental responsibility at that juncture.

5.29 As noted in paragraphs 5.2 to 5.16 above, a number of common law jurisdictions had reformed their laws to implement the model from 1989 to 2005. In Hong Kong, LRC studied the subject and published the LRC’s Report in 2005. Against this background, and in response to the calls for reform in that area of law and for greater focus on parental responsibility within the Singaporean society, the Attorney-General’s Chambers of Singapore published a paper titled “Review of Child Custody Law” in October 2005. While acknowledging the need to place primary emphasis on joint parental responsibility rather than custody, the paper raised two fundamental questions, namely –

- (a) whether it is necessary to amend legislation in order to promote the concept of parental responsibility⁵⁰; and
- (b) whether parental responsibility can be emphasised within the existing regime of custody orders⁵¹.

5.30 The paper concluded that it was not necessary for Singapore to amend their law at that juncture to promote the model. It recommended that the concept of “joint parental responsibility” be further developed by the courts under the existing custody arrangements under the law⁵². The major arguments provided in the paper for not amending the law are as follows –

- (a) In July 2005, in a custody hearing in the Court of Appeal of Singapore (*CX v CY (minor: custody and access)* [2005] 3 SLR 690, [2005] SGCA 37), the Court ruled that the concept of joint parenting should be promoted, and that this should be done by making the joint custody or no custody arrangement the norm in normal cases, and making sole custody orders only in exceptional cases, such as where one parent physically, sexually or emotionally abuses the child, or where the relationship of the parties is such that cooperation is impossible even after the avenues of mediation and counselling have been explored, etc.⁵³ Considering that it was possible for the

⁵⁰ “Review of Child Custody Law” published by the Attorney-General’s Chambers of Singapore (2005), para. 59.

⁵¹ Ditto, para. 59.

⁵² Ditto, para. 76.

⁵³ Ditto, paras. 61 to 65.

courts to emphasise and promote joint parental responsibility through the joint custody or no custody arrangements under the existing legislative framework, and that such an approach had received the endorsement of the Court of Appeal in *CX v CY*, Attorney-General's Chambers saw no pressing impetus to amend the law for the purpose of promoting the model. It was considered that the laws on parental responsibility could be left to be developed by the courts under existing legislation⁵⁴;

- (b) The Attorney-General's Chambers of Singapore noted from the Australian study "The Family Law Reform Act 1995: The First Three Years" mentioned in paragraph 5.17 above that the Australian Act in 1995 may not have been entirely successful in promoting the concept of the model. The paper quoted the findings of the study that (a) the meaning of joint parental responsibility and how joint parental responsibility should be exercised after the making of court orders was not clearly stated in the legislation and was not well enough understood by the legal profession and public; and (b) the new terminology for court orders was also not well understood, with separating parents continuing to think in terms of custody and access⁵⁵;
- (c) The Attorney-General's Chambers of Singapore doubted whether a semantic change in legislative expressions might help bring about cultural and psychological change of parents. In particular, a semantic change of English expressions might have far less effect in Singapore which is a multi-cultural and multi-lingual nation than in native English-speaking states such as England and Australia⁵⁶;
- (d) The Attorney-General's Chambers of Singapore considered that, although the concept of custody might have its origins in property and parental rights over children, it was not understood in that sense in Singapore. Parents fought for custody of a child not because they sought to own the child as property, but because of their strong emotional bonds to the child. The custody battle

⁵⁴ Ditto, para. 71.

⁵⁵ Ditto, para. 72.

⁵⁶ Ditto, para. 73.

could be seen as a contest for the “right” to continue to be a parent to the child, rather than a contest for “ownership” over the child⁵⁷; and

- (e) Noting that the case law had already been evolving in the direction of “joint parental responsibility”, the Attorney-General’s Chambers of Singapore was worried that a radical legislative reforms to the existing family law, on the other hand, might create confusion and uncertainty, which might be counter-productive to the development of the law⁵⁸.

⁵⁷ Ditto, para. 74.

⁵⁸ Ditto, para. 75.

CHAPTER SIX

CONSULTATION QUESTIONS

Introduction

- 6.1 This consultation exercise aims to seek the views of the public as to whether the model should be implemented in Hong Kong by legislative means. For this purpose, we would like to invite your views on the following specific aspects –

Consultation questions

The concept of “joint parental responsibility”

- 6.2 Paragraph 3.2 introduces the concept of the model (i.e. the concept of “joint parental responsibility”). Paragraph 3.3 sets out what LRC considers its merits. In this connection –

- 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?

LRC’s recommendations to implement the model by legislative means

- 6.3 The LRC’s Report has recommended that the model should be implemented in Hong Kong by legislative means. The key aspects of LRC’s recommendations and merits of the model are discussed in Chapter Three. The views of stakeholders collected by LWB on the model and overseas experience are discussed in Chapter Four and Chapter Five respectively. Having considered the above –

- 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 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))?

Views expressed on implementing the model by legislative means

6.4 As discussed in Chapter Four, different views were expressed by stakeholders on whether the model should be implemented through legislative reforms.

- 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?

Overseas experience in implementing the model

6.5 Chapter Five gives an introduction to: (a) the implementation experience of western jurisdictions such as England and Wales and Australia which have implemented the model by legislative means; and (b) laws relating to child custody and access in Singapore. 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?

6.6 Having considered details of LRC's recommendations (Chapter Three), views expressed on implementing the model by legislative means (Chapter Four) and overseas experience in implementing the model (Chapter Five) –

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?

Submission of written comments

6.7 LWB welcomes written comments on or before 30 April 2012 through any of the following channels –

By mail : Team 1, Labour and Welfare Bureau
11/F, West Wing,
Central Government Offices,
2 Tim Mei Avenue,
Tamar, Hong Kong

By fax : (852) 2524 7635

By email : custody_consultation@lwb.gov.hk

- 6.8 LWB may, as appropriate, reproduce, quote, summarise and publish the written comments received, in whole or in part, in any form and use without seeking permission of the contributing parties.
- 6.9 Names of the contributing parties and their affiliation(s) may be referred to in other documents we publish and disseminate by different means after the consultation. If any contributing parties do not wish their names and/ or affiliations to be disclosed, please expressly state so in their written comments. Any personal data provided will only be used by LWB and/ or other government departments/ agencies for purposes which are directly related to this consultation.

– End –

**Membership List of the Sub-committee under LRC to Study the Law
relating to the Guardianship and Custody of Children**

Hon Miriam Lau, GBS, JP Chairperson	Sole Practitioner Miriam Lau & Co
Master de Souza Deputy Chairman	Master High Court
Miss Rosa Choi	Assistant Principal Legal Aid Counsel Legal Aid Department
H H Judge Chu	Judge District Court
Ms Robyn Hooworth (up to 28 August 2001)	Mediator
Mr Anthony Hung	Partner Lau, Kwong & Hung, Solicitors
Ms Jacqueline Leong, SC	Barrister
Dr Athena Liu	Associate Professor Faculty of Law University of Hong Kong
Mr Thomas Mulvey, JP	Consultant
Mrs Cecilia Tong	Regional Officer (Retired) Social Welfare Department
Ms June Wee	Barrister
Miss Wong Lai-cheung	Counsellor

GLOSSARY

LegCo	Legislative Council
LRC	Law Reform Commission of Hong Kong
LWB	Labour and Welfare Bureau
The LRC's Report	Report on Child Custody and Access
The 2005 paper	The Paper entitled "Parental Separation: Children's Needs and Parents' Responsibilities: Next Steps" published by the Government of United Kingdom in 2005
The 2006 Australian Act	The Family Law (Shared Responsibility) Act 2006
The 2006 English Act	The Children and Adoption Act 2006
The Australian Act	The Family Reform Act 1995
The English Act	The Children Act 1989
The model	The joint parental responsibility model
The New Zealand Act	The Care of Children Act 2004
The Scottish Act	The Children (Scotland) Act 1995

