

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

CHILD CUSTODY AND ACCESS

Executive Summary

(This Executive Summary is an outline of the report. Copies of the report can be obtained either from the Secretary, Law Reform Commission, 20/F Harcourt House, 39 Gloucester Road, Wanchai, Hong Kong, or on the Internet at <<http://www.hkreform.gov.hk>>.)

Background

1. The Law Reform Commission's report on *Child Custody and Access* is the final in a series of four reports published by the Commission under its reference on guardianship and custody of children. The first report in this series, on *Guardianship of Children*, was published in January 2002 and concerned the law governing the appointment of guardians for children in the event of the death of one or both parents. The Commission's second report, on *International Parental Child Abduction*, was published in April 2002. This examined the law relating to the abduction of children across international borders by parents in contested custody disputes. In March 2003, the Commission published its third report in the series, on *The Family Dispute Resolution Process*. This report considered the various approaches that may be adopted in resolving family disputes and highlighted the use of mediation.

2. The Commission's four reports follow extensive research in this area by the Law Reform Commission's Sub-committee on Guardianship and Custody, which issued a consultation paper on guardianship and custody in December 1998.

Introduction to the *Child Custody and Access* report

3. Under Hong Kong's existing law on child custody and access, the parent-child relationship is defined in terms of the "*rights and authority*" that parents have over their children. When parents divorce, the court is perceived to have the role of dividing up this bundle of rights and authority between the parents. The report observes that in the past, the courts would often award one parent *sole custody* of the child - with all the decision-making power that that implied - while the other parent's involvement with the child

was limited to the right of access only. Over time, this often resulted in dwindling contact between the child and the non-custodial parent.

4. In recent years, the courts have recognised the importance of maintaining the direct involvement of both parents in the child's life as far as possible, and so more orders for *joint custody* are now being made. Under these orders, although one parent may have daily care and control of the child, both parents continue to be actively involved in the child's life and in making major decisions affecting the child.

5. This more modern approach has been incorporated into legislation in a number of overseas jurisdictions. In England, Scotland, Australia and (soon) New Zealand, former child custody laws similar to our own have been replaced with laws reflecting a new *joint parental responsibility model*. This new approach emphasises the continuing responsibilities of both parents towards their children rather than their individual parental rights. It also emphasises the child's right to enjoy a continuing relationship with both parents if this is in the child's best interests. Allied to this change in concept, a range of new court orders was introduced in England, Scotland and Australia to sweep away the old "*custody*" and "*access*" terminology in family proceedings.

6. The main thrust of the Law Reform Commission's 72 recommendations in the *Child Custody and Access* report relate to the introduction of this new joint parental responsibility model into Hong Kong's family law. As part of this approach, the Commission recommends the introduction of new court orders to govern the arrangements for children when their parents divorce.

7. The Law Reform Commission further recommends the removal of the current limitation on the right of interested third parties, such as close relatives, to apply for court orders affecting children.

8. Other important recommendations in the report relate to: how the views of the child may be better expressed in family proceedings which affect them; how the current care and protection provisions may be improved to better protect children's rights; and how the rare but serious custody and access cases involving domestic violence may be better dealt with under the law.

9. The Law Reform Commission also recommends that the minimum age for marriage without parental consent should be reduced from 21 to 18 years.

Public response

10. In terms of the public's response to these proposals, interim recommendations on the joint parental responsibility model were included in the consultation paper issued by the Law Reform Commission's Subcommittee on Guardianship and Custody. These proposals were generally

well supported by consultees, although a minority expressed opposition to the reforms. Their primary concern was that in situations where domestic violence was involved in the break up of the marriage, the introduction of the reforms might allow greater scope for abusive ex-spouses to continue to harass their former partners and children after the divorce. The Law Reform Commission has given careful consideration to these views, and has further developed its original proposals to take account of these and other concerns raised by consultees.

Chapter overview

Format of the report

11. The report is comprised in three broad sections. In Chapters 1 to 4, the Law Reform Commission presents an overview of Hong Kong's current law on child custody and access as well as other related areas of our family law. Chapters 5 to 8 are the comparative law chapters of the report, and include an analysis of the child custody and access regimes in England, Scotland, Australia and New Zealand. The report's 72 recommendations are set out in Chapters 9 to 13 of the report and are summarised in Chapter 14. Relevant annexes appear at the end of the report.

The current law on divorce and child custody and access in Hong Kong (Chapters 1 to 4 of the report)

12. Chapter 1 of the report examines the psychological effects of divorce on parents and children, and considers the sociological issue of how the impact of divorce may be changing family structures. This chapter also briefly introduces the joint parental responsibility model for post-divorce arrangements for children. Chapter 1 explains that this more modern approach to child custody and access, with its range of new court orders affecting children, is based on the child's right, from a human rights' perspective, to continue to maintain a post-divorce relationship with *both* parents as far as possible. The broader legal framework of children's and parents' rights under the United Nations Convention on the Rights of the Child and the Hong Kong Bill of Rights is also discussed.

13. Chapter 2 of the report provides an overview of the general legal principles and standard court procedures which apply in Hong Kong in divorce and child custody cases. The existing regime, with its emphasis on parental rights and authority, is explained in some detail, as are the current court orders available. Chapter 2 also examines how the *welfare principle* in relation to children is applied by the courts.

14. The provisions in a number of Hong Kong Ordinances are relevant in this area, including the Guardianship of Minors Ordinance (Cap 13), the Matrimonial Causes Ordinance (Cap 179), the Matrimonial Proceedings

and Property Ordinance (Cap 192) and others. Chapter 3 examines these provisions, as well as criticisms that have been levelled at the law in this area.

15. A number of significant developments that have taken place in family law in Hong Kong in recent years are discussed in Chapter 4. These include the expansion of the special procedure divorce process, the implementation of pilot schemes on family mediation and the reform of ancillary relief procedures, as well as the publication of the Law Reform Commission's three earlier reports under the current reference, on *Guardianship of Children*, *International Parental Child Abduction* and *The Family Dispute Resolution Process*.

Child custody and access laws in other jurisdictions (Chapters 5 to 8 of the report)

16. Chapter 5 examines the relevant provisions of the Children Act 1989, which introduced into English family law the principles underlying the joint parental responsibility model, as well as the new "*residence*," "*contact*," "*specific issue*" and "*prohibited steps*" orders that the court can grant in family proceedings affecting children. These are known as "*section 8 orders*" under the English system. Significant developments that have taken place since the implementation of the 1989 Act are also discussed.

17. The legislation which introduced similar reforms in Scotland, the Children (Scotland) Act 1995, is discussed in Chapter 6, including important areas where the Scottish system diverges from that in England.

18. The Family Law Reform Act 1995, which introduced into Australian law the joint parental responsibility concept and related court orders modelled on the English system, is examined in Chapter 7. A review study carried out on the implementation of the Act is also discussed, as well as the issue of parental contact where there is domestic violence, which was an issue highlighted in the review study.

19. New Zealand's current law in this area, which is discussed in Chapter 8, is found chiefly in the Guardianship Act 1968. This Act still retains the terminology of "*custody*" and "*access*" and emphasises the "*rights*" of parents over their children. New legislation, however, comprised in the Care of Children Act 2004, which is expected to come into force shortly, will emphasise the rights of the child under family law and the principle of parental responsibility rather than parental rights. It will also change the current terminology of "*custody*" and "*access*" orders to "*parenting orders*" for the day-to-day care of the child and for contact with him.

The Law Reform Commission's recommendations on parental responsibility and rights (Chapter 9 of the report)

20. In Chapter 9 of the report, the Law Reform Commission sets out its final recommendations concerning the underlying principles of the joint parental responsibility model. The chapter begins with a discussion of the welfare principle, and how this should be recast as the more modern "*best interests*" principle. Chapter 9 then explains the Commission's recommendations on how the principle of parental responsibility should be implemented.

21. Key recommendations in Chapter 9 include that:

- a detailed statutory checklist of factors should be introduced to assist the court in determining what is in the child's best interests in proceedings concerning children (Recommendation 3);
- the concept of "*guardianship*" under Hong Kong law should be replaced (except in cases involving the death of a child's parents) by that of "*parental responsibility*" (Recommendation 4);
- parental responsibilities and parental rights should appear in separate statutory lists (Recommendation 5);
- the common law right of the father to be the natural guardian of his legitimate child should be abolished (Recommendation 7);
- an unmarried father should be able to obtain parental responsibility by signing the birth register (Recommendation 10);
- while 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), those decisions affecting the child which should require the other parent to be notified, or should require the other parent's express consent, should be specified in legislation (Recommendation 13); and
- the Administration should review the existing law and procedures relating to the enforcement of maintenance orders to see how they could be made more effective (Recommendation 14).

The Law Reform Commission's recommendations on types of court orders for children (Chapter 10 of the report)

22. The Law Reform Commission's recommendations in Chapter 10 relate to the introduction of the new range of court orders to replace the existing orders for custody and access.

23. *Residence order.* The new "*residence*" order (Recommendation 21) would determine the person (a parent or third party) with whom the child is to live on a daily basis and who will 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-residential 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.

24. *Contact order.* Recommendation 24 proposes a new "*contact*" order, which will determine the arrangements for maintaining contact between the child and a person with whom the child will not be living. The recommendation also proposes that the contact parent should have the right to act independently in relation to the day-to-day care of the child while contact is being exercised.

25. *Specific issues order.* Recommendation 25 proposes a "*specific issues*" order, to enable the court to give directions on a particular question that may arise in relation to any aspect of parental responsibility for the child (for example, which school the child is to attend).

26. *Prohibited steps order.* A new "*prohibited steps*" order is proposed in Recommendation 26. This would operate like an injunction, and would prevent the taking of particular steps by a parent in the exercise of his parental responsibility (for example, removing the child from a particular school) without first obtaining the consent of the court.

27. *Third parties.* The rights of interested third parties to apply for court orders in relation to children would be greatly enhanced under Recommendation 28, which proposes the removal of current limitations in this respect appearing in the Guardianship of Minors Ordinance (Cap 13). Under the new provisions, an interested third party would not require leave of the court to apply for any of the new orders if the child had been living with the applicant for a total of one year out of the previous three, provided that this period had not ended more than three months before the application was made. Where this criteria was not met, interested third parties would still be able to apply for the new orders with leave of the court.

28. *No order.* Recommendation 30 proposes that the option should be available to the court *not* to make any order in relation to arrangements for the child where both the parties consent to this approach and it is in the best interests of the child. This would be a significant innovation in Hong Kong where the option is currently not available. The Law Reform Commission considers that in appropriate exceptional cases, where the level of co-operation between the divorcing parties is already very high, not making an order and leaving flexibility to the parties to determine their own arrangements for their children would support and enhance the parents' future, post-divorce relationship.

29. The Commission notes that, on the issue of public housing, the relevant government departments appear to *require* that court orders are

made before making public housing arrangements for divorcing couples. The Commission therefore urges the Administration to look into this issue, on the basis that it would be unfortunate if reform in this area were hampered by administrative considerations.

The Law Reform Commission's recommendations on the special consideration needed for cases involving family violence (Chapter 11 of the report)

30. Having established the basic groundwork for the new reforms in Chapters 9 and 10 of the report, the Law Reform Commission puts forward in Chapter 11 a series of supplementary recommendations to make special provision for the rare but often serious cases which involve family violence. These recommendations are in answer to the concerns expressed by some respondents that the new joint parental responsibility reforms might be made use of by perpetrators of domestic violence to further harass and abuse their ex-spouses and children. These additional proposals have also been prompted by overseas research studies on difficult contact cases, which have tended to confirm that special care needs to be taken by the courts in applying the joint parental responsibility model in cases where family violence is alleged.

31. In Recommendation 33, the Law Reform Commission reiterates an earlier recommendation in its *Stalking* report that the Administration should undertake a general review of the law relating to domestic violence to improve its scope and effectiveness.

32. A range of new powers and procedures is also recommended by the Law Reform Commission in Chapter 11. These include that:

- a new definition of domestic violence should be introduced, to more clearly define what types of behaviour would constitute domestic violence for the purpose of seeking orders under the Domestic Violence Ordinance (Cap 189) (Recommendation 34);
- circumstances of family violence should be included as a factor in the proposed statutory checklist of factors for the court to take into account when considering what is in the best interests of the child (Recommendation 3);
- the court should be empowered to suspend or vary existing residence or contact orders, and to impose supervised contact if necessary, in cases coming before it under the Domestic Violence Ordinance (Cap 189) (Recommendation 35);
- a set of guidelines should be issued to assist the courts at all levels in handling cases where domestic violence is put forward as a reason for limiting parental contact to children (Recommendation 36 and Annex 3);

- in hearing contact applications, more information should be available to the court regarding the relevant criminal records of parents and concurrent proceedings against them (Recommendation 37); and
- the Administration should review the current arrangements and facilities available for supervised contact (Recommendation 38).

33. The Law Reform Commission also proposes that on-going training should be stepped up for those handling domestic violence cases (Recommendation 39), that long-term research should be carried out in this area (Recommendation 41), and that the Administration should review the data protection arrangements for victims of family abuse to ensure that the family justice system could not be used against them, for tracing purposes, for example (Recommendation 40).

The Law Reform Commission's recommendations on the voice of the child in family proceedings (Chapter 12 of the report)

34. Chapter 12 focuses on the child's participation in family proceedings affecting him. Recommendations 42 to 46 comprise proposals in relation to the court obtaining, as appropriate, the views of the child. These include a recommendation that each of the matrimonial Ordinances should refer to the need to hear the views of the child (Recommendation 42), that the views of the child should be one factor in the statutory checklist of factors (Recommendation 43), and that children should not be required to express their views (Recommendation 45).

35. Recommendations 47 to 53 relate to separate representation for children. It is proposed that the current provisions relating to separate representation for children should be strengthened (Recommendations 47 to 48), with the circumstances and criteria for appointment more clearly defined (Recommendations 49 to 50). There should also be guidelines issued for the duties of separate representatives (Recommendation 51).

The Law Reform Commission's recommendations on related matters (Chapter 13 of the report)

36. Chapter 13 brings together a number of reform proposals which are collateral to the general law of child custody and access. Major recommendations concerning public law proceedings affecting children include that:

- the powers of the Director of Social Welfare in care and protection proceedings should be rationalised across the various related Ordinances (Recommendations 55 to 59);
- interested third parties should be allowed to apply for care and protection orders (Recommendation 60);

- research should be conducted into how the court environment could be improved for children appearing in care and protection proceedings (Recommendation 61);
- children subject to care and protection proceedings should receive separate representation by the Official Solicitor as of right (Recommendation 62);
- there should be guidelines for the duties of separate representatives, and only those who have received special training should handle these sensitive cases (Recommendation 64); and
- parents whose children are made the subject of care orders should be entitled to apply to have orders made to secure regular contact with their children (Recommendation 67).

37. On other matters, the Law Reform Commission recommends that the minimum age for marriage without parental consent should be reduced from 21 to 18 years (Recommendation 69), that a mechanism for mutual legal assistance should be established with the Mainland for the enforcement of family proceedings orders affecting children (Recommendation 70), that the provisions in Hong Kong's current family proceedings legislation affecting children should be consolidated as far as possible into one Ordinance (Recommendation 71), and that a single policy bureau should take over responsibility for creating and implementing policy for families and children, and responsibility for the matrimonial and children's Ordinances (Recommendation 72).

Summary of recommendations (Chapter 14 of the report) and Annexes

38. Chapter 14 contains a summary of all of the Law Reform Commission's recommendations on child custody and access. These are set out below. At Annex 1 of the report is a list of the various departments, individuals and organisations who responded during the consultation exercise. Annex 2 includes examples of relevant overseas legislative provisions, as well as some draft provisions proposed by the Law Reform Commission in relation to a number of the report's recommendations. Annex 3 sets out a set of good practice guidelines, referred to in Chapter 11 of the report, which the English courts now take into account when considering parental contact in cases where there is domestic violence.

Law Reform Commission of Hong Kong
March 2005

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Text of the of recommendations in the *Child Custody and Access* report

(Recommendations 1 to 19 below are to be found in Chapter 9 of the report, on Parental Responsibility and Rights.)

Recommendation 1 (Applicable proceedings)

For the removal of doubt, we recommend¹ that it should be made clear that the welfare or "*best interests*" principle guides all proceedings concerning children under the Guardianship of Minors Ordinance (Cap 13), the Matrimonial Causes Ordinance (Cap 179), the Matrimonial Proceedings and Property Ordinance (Cap 192) and the Separation and Maintenance Orders Ordinance (Cap 16), including questions of guardianship, maintenance or property.

Recommendation 2 (Best interests)

To reflect our view that the term "*best interests*" is more appropriate for modern conditions in Hong Kong than the term "*welfare*," and is more in compliance with our international obligations under the United Nations Convention on the Rights of the Child, we recommend² that section 3(1)(a)(i) of the Guardianship of Minors Ordinance (Cap 13) should be amended to read, "*shall regard the best interests of the minor as the paramount consideration ...*."

We also recommend that consequential amendments should be made to the other matrimonial Ordinances.

Recommendation 3 (Statutory checklist of factors)

We recommend³ the introduction of a statutory checklist of factors to assist the judge in exercising his discretion in determining the proceedings that will replace custody or guardianship proceedings under these reforms. This checklist should be broadly based on that set out in section 1(3) of the Children Act 1989 in England.

We also recommend the inclusion in the checklist of the following additional factors based on section 68F(2) of the Family Law Act 1975 in Australia:

- (i) section 68F(2)(b) (in part) in relation to the child's relationship with each of his parents and other persons;

1 See discussion at paras 9.6 to 9.16 of the report.

2 See discussion at paras 9.17 to 9.22 of the report.

3 See discussion at paras 9.23 to 9.49 of the report.

- (ii) a broader formulation of section 68F(2)(d) of the Australian Act, in relation to the practical difficulty of maintaining contact with either parent;
- (iii) section 68F(2)(f) (in part), in relation to any characteristics of the child that the court considers relevant;
- (iv) section 68F(2)(h) in relation to the attitudes of each of the parents towards the child and towards the responsibilities of parenthood;
- (v) section 68F(2)(i) in relation to any family violence involving the child or a member of the child's family; and
- (vi) a catch-all factor along the lines of Section 68F(2)(l).

Recommendation 4 (Concept of parental responsibility)

We recommend⁴ that the concept of parental responsibility should replace that of guardianship, except that the concept of guardianship should be retained in relation to a third party's responsibilities for a child after the death of a parent.

Recommendation 5 (Parental rights)

We recommend⁵ the adoption of a provision based on sections 1 and 2 of the Children (Scotland) Act 1995, which specifies separately a list of parental responsibilities and a list of parental rights.

Recommendation 6 (Age at which parental responsibility ceases)

We recommend⁶ that all the parental rights and responsibilities referred to in sections 1 and 2 of the Children (Scotland) Act 1995 should apply in respect of a child until the child reaches the age of eighteen.

Recommendation 7 (Father as natural guardian)

We recommend⁷ that the common law right of the father to be natural guardian of his legitimate child should be abolished

We also recommend the repeal of section 3(1)(b) of the Guardianship of Minors Ordinance (Cap 13).

4 See discussion at paras 9.50 to 9.55 of the report.

5 See discussion at paras 9.56 to 9.62 of the report.

6 See discussion at paras 9.63 to 9.65 of the report.

7 See discussion at paras 9.66 to 9.68 of the report.

Recommendation 8 (Married parents)

We recommend⁸ the adoption of a provision on the lines of section 2(1) of the Children Act 1989 in England, but amended, for the removal of doubt, to include reference to parents married subsequent to the birth of the child.

Recommendation 9 (Acquisition of parental responsibility by unmarried fathers – language of the current law)

We recommend⁹ that the language of section 3(1)(c)(ii) and (d) of the Guardianship of Minors Ordinance (Cap 13), which relates to the "*rights and authority*" of an unmarried father, should be changed to reflect the new language of responsibilities rather than rights.

Recommendation 10 (Acquisition of parental responsibility by signing the birth register)

We recommend¹⁰ that an unmarried father should be capable of acquiring parental responsibilities and rights by signing the birth register. The proposed legislation should include this in a list of the ways in which parental responsibility can be acquired. We do not recommend the automatic acquisition of parental responsibility or rights by unmarried fathers.

Recommendation 11 (Parental responsibility agreements)

We recommend¹¹ that unmarried parents should be encouraged to sign parental responsibility agreements to ensure the best interests of their child.

We also recommend that unmarried mothers should be encouraged to appoint a testamentary guardian for their children.

Recommendation 12 (Parents acting independently)

We recommend¹² the adoption of a provision on the lines of section 2(7) of the Children Act 1989 enabling persons with parental responsibility to act independently, but restricted to the day-to-day care and best interests of the child.

8 See discussion at paras 9.69 to 9.70 of the report.

9 See discussion at paras 9.71 to 9.73 of the report.

10 See discussion at paras 9.74 to 9.80 of the report.

11 See discussion at paras 9.81 to 9.85 of the report.

12 See discussion at paras 9.87 to 9.90 of the report.

Recommendation 13 (Scope of parental responsibility – when consent or notification is required)

We recommend¹³ that the proposed legislation should specify those decisions relating to the child where the other parent's express consent is required, and those decisions where only notification to the other parent is required.

We further recommend that the court should be given express power to vary or dispense with any of the consent or notification requirements where this is considered necessary.

Recommendation 14 (Enforcement of maintenance orders)

We recommend¹⁴ that the Administration should review the existing law and procedures relating to the enforcement of maintenance orders to see how they could be made more effective.

Recommendation 15 (Acting incompatibly)

We recommend¹⁵ that a provision on the lines of section 2(8) of the Children Act 1989 should be adopted.

Recommendation 16 (Delegation of parental responsibility)

We recommend¹⁶ the enactment of a provision based on section 2(9) to (11) of the Children Act 1989 in England, with the addition of words to the effect that no arrangement of a type referred to in that provision shall be enforced by the court if the court is of the opinion that it would not be for the benefit of the child to give effect to that arrangement.

We further recommend that section 4 of the Guardianship of Minors Ordinance (Cap 13) be repealed.

Recommendation 17 (Continuing parental responsibility)

We recommend¹⁷ a provision on the lines of section 11(11) of the Children (Scotland) Act 1995, in relation to the effect on the retention of parental responsibility and rights by one person when another person also acquires such rights.

13 See discussion at paras 9.91 to 9.106 of the report.

14 See discussion at paras 9.103 to 9.105 of the report.

15 See discussion at paras 9.107 to 9.110 of the report.

16 See discussion at paras 9.111 to 9.114 of the report.

17 See discussion at paras 9.115 to 9.118 of the report.

Recommendation 18 (Removal of surviving parent as guardian)

We recommend¹⁸ that the right to remove the surviving parent as guardian under section 6(3) of the Guardianship of Minors Ordinance (Cap 13) should be repealed.

Recommendation 19 (Unmarried father as surviving parent)

We recommend¹⁹ that a provision be inserted in the Guardianship of Minors Ordinance (Cap 13) to the effect that once an unmarried father is granted parental rights or responsibilities, he can be treated on the death of the mother as the surviving parent for the purposes of that Ordinance.

(Recommendations 20 to 32 below are to be found in Chapter 10 of the report, on Types of Court Orders for Children.)

Recommendation 20 (Custody orders)

We recommend²⁰ the repeal of the provisions in the matrimonial Ordinances (including the Guardianship of Minors Ordinance (Cap 13) and the Matrimonial Proceedings and Property Ordinance (Cap 192)) dealing with custody orders and their replacement with provisions introducing the new range of orders outlined later in this Chapter.

Recommendation 21 (Definition of a residence order)

We recommend²¹ that there should be statutory provision for a "*residence order*."

We recommend that the definition of a residence order should incorporate a reference to the parent in whose favour the order is made having responsibility for "*the day-to-day care and best interests of the child*."

We recommend that the definition should be: "*a residence order is an order settling the arrangements as to the person with whom a child is to live and who has responsibility for the day-to-day care and best interests of the child*."

18 See discussion at paras 9.119 to 9.123 of the report.

19 See discussion at paras 9.124 to 9.125 of the report.

20 See discussion at paras 10.4 to 10.9 of the report.

21 See discussion at paras 10.10 to 10.16 of the report.

Recommendation 22 (Change of surname)

We recommend²² the enactment of a provision similar to section 13(1)(a) of the Children Act 1989 in England, governing the changing of a child's surname.

Recommendation 23 (Non-parents)

We recommend²³ the enactment of a provision on the lines of section 12(2) of the Children Act 1989 in England regarding the granting of parental responsibility to non-parents who are awarded residence orders.

Recommendation 24 (Contact order)

We recommend²⁴ that there should be statutory provision for a "*contact order*," on the lines of section 11(2)(d) of the Children (Scotland) Act 1995.

We also recommend that this section should provide that the contact parent would have the right to act independently in respect of the day-to-day care of the child while contact with the child is being exercised.

Recommendation 25 (Specific issues order)

We recommend²⁵ that there should be statutory provision for a "*specific issues order*," similar to section 8(1) of the Children Act 1989 in England.

Recommendation 26 (Prohibited steps order)

We recommend²⁶ that there should be statutory provision for a "*prohibited steps order*," similar to section 8(1) of the Children Act 1989 in England.

Recommendation 27 (Supplementary requirements)

We recommend²⁷ the adoption of a provision similar to section 11(7) of the Children Act 1989 in England which gives the court the power to include directions or conditions in a court order.

22 See discussion at paras 10.17 to 10.18 of the report.

23 See discussion at para 10.19 of the report.

24 See discussion at paras 10.20 to 10.25 of the report.

25 See discussion at paras 10.26 to 10.30 of the report.

26 See discussion at paras 10.31 to 10.34 of the report.

27 See discussion at paras 10.35 to 10.36 of the report.

Recommendation 28 (Right of a third party to apply)

We recommend²⁸ the removal of the limitation in section 10 of the Guardianship of Minors Ordinance (Cap 13) on the right of third parties to apply to court for orders concerning children.

We recommend the introduction of a provision on the lines of section 10 of the Children Act 1989 in England, with the amendment of subsections (5)(b) and (10) to provide that leave of the court would not be required if the child has lived with the applicant for a total of one year out of the previous three years.

We further recommend that the one year period need not necessarily be a continuous period, but must not have ended more than three months before the application.

Recommendation 29 (Arrangements for the children)

We recommend²⁹ that section 18 of the Matrimonial Proceedings and Property Ordinance (Cap 192) should be amended to provide that the court should have regard to the views of the child and the desirability of a child's retaining contact with both parents, as is set out in section 11(4) of the English Family Law Act 1996.

We also recommend that parents should have to satisfy the court that arrangements for the children are the best that can be arranged. The court should examine the future plans as to the child's place and country of residence and the proposed contact with both parents, especially if one parent proposes to emigrate from Hong Kong.

We further recommend that, for consistency with the other provisions in matrimonial legislation, section 18(5)(a)(i) should be amended to refer to the age of eighteen.

Recommendation 30 (No order principle)

We recommend³⁰ that the option of "*no order*" should be available for those cases where both parties consent to no order being made by the court and where the making of no order would be in the best interests of the child.

28 See discussion at paras 10.37 to 10.43 of the report.

29 See discussion at paras 10.44 to 10.49 of the report.

30 See discussion at paras 10.50 to 10.58 of the report.

Recommendation 31 (Family proceedings)

We recommend³¹ the enactment of a provision similar to section 10(1) of the Children Act 1989 in England, which gives the court a specific power to make section 8 orders in any family proceedings.

We also recommend the introduction of a definition of "*family proceedings*."

Recommendation 32 (Age at which parental responsibility ceases for the purposes of court orders)

For the sake of consistency, we recommend³² that parental responsibility for children, and provisions on the lines of section 8 orders (such as orders for residence, contact or specific issues), should cease when the child reaches 18 years.

We also observe that:

- (a) section 10 of the Matrimonial Proceedings and Property Ordinance (Cap 192) ("MPPO") should continue to apply to orders for financial provision and maintenance of children 18 years and over falling within its scope; and
- (b) there may be a lacuna in the law with regard to children over 18 years of age who, though not sufficiently ill or incapacitated as to fall within the scope of the current mental health provisions, may nonetheless require some form of statutory protections beyond the financial provisions afforded by the MPPO.

(Recommendations 33 to 41 below are to be found in Chapter 11 of the report, on Special Consideration for Cases Involving Family Violence.)

Recommendation 33 (The Administration to review Hong Kong's general law on domestic violence)

We recommend³³ that the Administration should review the law relating to domestic violence and introduce reforms to improve its scope and effectiveness.

31 See discussion at paras 10.59 to 10.61 of the report.

32 See discussion at paras 10.62 to 10.67 of the report.

33 See discussion at paras 11.40 and 11.51 of the report.

Recommendation 34 (A new definition of "domestic violence")

We recommend³⁴ the introduction of a broad, all-encompassing definition of domestic violence along the lines of section 3 of the New Zealand Domestic Violence Act 1985.

Recommendation 35 (The court's powers under the Domestic Violence Ordinance (Cap 189) in relation to custody and access orders)

We recommend³⁵ that the court should be given power, when making an injunction under the Domestic Violence Ordinance (Cap 189), to, on an interim basis, suspend a prior access or contact order or vary a prior order so as to make a supervised access or contact order.

We recommend that the welfare or best interests principle should guide the court's exercise of such power.

We also recommend that the court should be given power, when making an injunction under the Domestic Violence Ordinance (Cap 189), to make interim consequential orders determining the residence of a child or any other aspect of parental responsibility that meets the best interests of the child, including the question of maintenance.

We recommend that the welfare or best interests principle should guide the court's exercise of such power.

We further recommend that there should be an onus on the parties to disclose prior relevant orders when applying for an injunction, to avoid orders being made that are inconsistent with prior custody, access, residence or contact orders.

Recommendation 36 (Judicial guidelines to supplement legislative reforms)

We recommend³⁶ that there should be guidelines for the judiciary at all levels, setting out the approach which the courts should adopt when domestic violence is put forward as a reason for denying or limiting parental contact to children.

Recommendation 37 (More information to be available to the court)

We consider that, in making decisions based upon the best interests of the child, it is essential that the Court should be able to make a proper

34 See discussion at paras 11.52 and 11.54 of the report.

35 See discussion at paras 11.55 and 11.60 of the report.

36 See discussion at para 11.63 of the report.

assessment of any risk to a child. This includes being able to investigate allegations of domestic violence at interim hearings.

We recommend³⁷ that consideration should be given to allowing the courts hearing contact applications to have access to the criminal records of parents insofar as they may be relevant to issues of domestic violence, and to be kept informed of concurrent proceedings against perpetrators of domestic violence.

Recommendation 38 (Supervised contact)

We recommend³⁸ that the Administration should review the current arrangements and facilities allowing for supervised contact in Hong Kong.

Recommendation 39 (On-going training for those handling family cases)

In line with the English proposals, we recommend³⁹ that there needs to be on-going training and raising of awareness levels in relation to the effect of domestic violence on children and residential parents for all the disciplines engaged in the Family Justice System, including the legal profession and the judiciary.

Recommendation 40 (Privacy issues)

We recommend⁴⁰ that the Administration consider a review of data protection arrangements for victims of family abuse and the susceptibility of the family justice system.

Recommendation 41 (Long-term Research)

We recommend⁴¹ that long-term research should be undertaken on the effects on children of witnessing and/ or being the victims of domestic violence.

We also recommend that the detailed collection and evaluation of information arising from court proceedings in these cases.

37 See discussion at paras 11.64 to 11.65 of the report.

38 See discussion at para 11.66 of the report.

39 See discussion at para 11.67 of the report.

40 See discussion at paras 11.68 to 11.69 of the report.

41 See discussion at para 11.70 of the report.

(Recommendations 42 to 53 below are to be found in Chapter 12 of the report, on *The Voice of the Child*.)

Recommendation 42 (The views of the child)

We recommend⁴² that each of the matrimonial Ordinances should specifically refer to the need to hear the views of the child.

We also recommend that the language of the United Nations Convention on the Rights of the Child should be adopted, so that the term "*views*" rather than "*wishes*" of the child is enacted in matrimonial legislation.

Recommendation 43 (How and when child's views taken into account)

In line with our earlier recommendation that a statutory checklist of factors should be established, we recommend⁴³ that the child's views should be one element in the checklist of factors, rather than a free-standing section. The child's views should be balanced with the other factors when the judge is making a decision in the child's best interests.

With the adoption of this provision, we recommend the repeal of section 3(1)(a)(i)(A) of the Guardianship of Minors Ordinance (Cap 13).

Recommendation 44 (How the views of a child are expressed)

We recommend⁴⁴ that a child should be given the facility to express his views if he wishes, whether directly or indirectly. Once the child has indicated a desire to express views, then the court must hear those views, although the weight to be given to the child's views will be a matter for the court to determine.

We recommend that the mechanisms for ascertaining and expressing the child's views should be set out in the legislation. We therefore recommend the adoption of a provision on the lines of the Australian section 68G(2), but adapted to insert "*views*" rather than "*wishes*."

With the adoption of this provision, we recommend the repeal of section 3(1)(a)(i)(B) of the Guardianship of Minors Ordinance (Cap 13).

We also recommend that any views that the child expresses to the judge should be treated in confidence by the judge and not revealed to the child's parents.

42 See discussion at paras 12.2 to 12.9 of the report.

43 See discussion at paras 12.10 to 12.15 of the report.

44 See discussion at paras 12.16 to 12.21 of the report.

We further recommend that where social welfare officers are assigned to ascertain children's views, only those officers with adequate training and experience in this area should deal with these sensitive cases.

Recommendation 45 (Children not required to express views)

We recommend⁴⁵ that children should not be required to express their views.

To make the position clear, we recommend the introduction of a statutory provision to that effect on the lines of section 68H of the Australian Family Law Act 1975.

Recommendation 46 (Age of maturity for the purpose of obtaining views)

We recommend⁴⁶ that there should be no age limit and the court should be empowered to consider a child's views irrespective of his age.

Recommendation 47 (Anomalies in relation to separate representation under the Matrimonial Causes Rules (Cap 179))

We recommend⁴⁷ that the anomalies in rule 72 and rule 108 of the Matrimonial Causes Rules (Cap 179) as to the appointment of a separate representative or guardian *ad litem* should be addressed.

Recommendation 48 (Types of proceedings where a separate representative may be appointed)

For the removal of doubt it should be made clear that a separate representative can be appointed in any dispute relating to the parental responsibility for, or guardianship of, a child.⁴⁸

Recommendation 49 (Who can apply for a separate representative to be appointed)

We recommend⁴⁹ that rule 108 of the Matrimonial Causes Rules (Cap 179) be repealed and that a provision on the lines of section 68L(3) of the Australian Family Law Act 1975 be enacted.

45 See discussion at paras 12.22 to 12.24 of the report.

46 See discussion at paras 12.25 to 12.27 of the report.

47 See discussion at paras 12.33 to 12.35 of the report.

48 See discussion at paras 12.36 to 12.38 of the report.

49 See discussion at paras 12.42 to 12.45 of the report.

We also recommend that the restrictions on who can make application for an order, contained in section 10 of the English Children Act 1989, should also apply to this provision.

Recommendation 50 (Criteria for appointment of separate representative)

Except in the case of a child who may be subject to care or supervision orders, we recommend⁵⁰ the adoption of a list of criteria based on those adopted in Australia to determine when it is appropriate to appoint a separate representative.

We recommend that this list of criteria be incorporated in legislation.

Recommendation 51 (Guidelines for duties of separate representative)

We recommend⁵¹ the adoption of the Australian guidelines for setting out the duties of the Official Solicitor or separate representative or other person acting as guardian *ad litem* in Hong Kong.

We recommend that this appear not in statute, but in booklet form.

Recommendation 52 (Child as a party)

We recommend⁵² that, in principle, provided the leave of the court has been sought, the child should be allowed to become a party to proceedings which concern him and where he has sufficient understanding to instruct a solicitor and counsel to represent him.

We recommend the introduction of a provision on the lines of section 10(8) of the English Children Act 1989 and rule 9(2A) of the English Family Proceedings Rules 1991.

Recommendation 53 (Costs)

For those cases where the person representing the child is not the Official Solicitor, we recommend⁵³ that the court be given power to order the parties to bear the costs of the separate representative or guardian *ad litem*.

50 See discussion at paras 12.46 to 12.51 of the report.

51 See discussion at paras 12.52 to 12.56 of the report.

52 See discussion at paras 12.57 to 12.60 of the report.

53 See discussion at paras 12.61 to 12.66 of the report.

(Recommendations 54 to 72 below are to be found in Chapter 13 of the report, on Related Matters.)

Recommendation 54 (Separation and Maintenance Orders Ordinance (Cap 16))

We recommend⁵⁴ the retention of the provisions of the Separation and Maintenance Orders Ordinance (Cap 16) to cover exceptional cases, such as those involving customary marriages or concubinage, which are not covered by other matrimonial proceedings legislation.

Recommendation 55 (Power to order care and supervision orders)

We recommend⁵⁵ the retention of the power to order care and supervision orders in guardianship disputes and any disputes concerning the best interests of a child.

We also recommend that the anomalies between the Director of Social Welfare's powers in relation to care and supervision orders under the Guardianship of Minors Ordinance (Cap 13) and the Matrimonial Causes Ordinance (Cap 179), and his powers under the Protection of Children and Juveniles Ordinance (Cap 213), should be resolved.

Recommendation 56 (Definitions of care and supervision orders)

We recommend⁵⁶ that there should be a definition of a care order and a supervision order in each of the matrimonial Ordinances.

Recommendation 57 (Grounds)

We recommend⁵⁷ that the Director of Social Welfare should only be entitled to apply for a care order or supervision order in private law proceedings on the same grounds as those in section 34(2) of the Protection of Children and Juveniles Ordinance (Cap 213).

Recommendation 58 (Application of the welfare or best interests principle)

We recommend⁵⁸ that the welfare or best interests principle should guide all proceedings under the Protection of Children and Juveniles Ordinance (Cap 213).

54 See discussion at paras 13.2 to 13.7 of the report.

55 See discussion at paras 13.11 to 13.14 of the report.

56 See discussion at para 13.15 of the report.

57 See discussion at paras 13.16 to 13.18 of the report.

58 See discussion at paras 13.19 to 13.20 of the report.

Recommendation 59 (Ex parte applications by the Director of Social Welfare)

We recommend⁵⁹ that rule 93 of the Matrimonial Causes Rules (Cap 179) and order 90, rule 4 of the Rules of the District Court (Cap 336) should be amended to allow for an *ex parte* application in case of emergency, but that an *inter partes* hearing should proceed if the Director's application was opposed.

Recommendation 60 (Third parties)

We recommend⁶⁰ that section 34 of the Protection of Children and Juveniles Ordinance (Cap 213) should be amended to allow an application for a care order or supervision order to be made by third parties.

We also recommend that the same criteria for applications by third parties, already adopted for private law proceedings, should be adopted for such public law proceedings.

Recommendation 61 (The court environment for the hearing of care and protection proceedings)

We recommend⁶¹ that research should be conducted into how the court environment could be improved for children appearing in care and protection proceedings.

Recommendation 62 (Separate representation for public law proceedings – criteria for appointment)

We recommend⁶² that separate representation by the Official Solicitor should be available for children as of right in care or supervision proceedings, whether brought under Protection of Children and Juveniles Ordinance (Cap 213) or the matrimonial Ordinances.

Recommendation 63 (Representation and legal aid for parents)

We recommend⁶³ that, where care or supervision orders are applied for, whether under the matrimonial Ordinances or the Protection of Children and Juveniles Ordinance (Cap 213), parents should be granted legal representation (by The Duty Lawyer Service if in the juvenile court, or by the Legal Aid Department if in the Family Court or the Court of First Instance) if they fulfil the eligibility requirements.

59 See discussion at paras 13.21 to 13.23 of the report.

60 See discussion at paras 13.24 to 13.27 of the report.

61 See discussion at paras 13.28 to 13.29 of the report.

62 See discussion at paras 13.30 to 13.34 of the report.

63 See discussion at paras 13.35 to 13.39 of the report.

We also recommend that there should be legal representation provided by the Legal Aid Department for children and parents in wardship proceedings where the applicant is the Director of Social Welfare or other public agency, as the effect of the order is to take away the responsibility of the parents.

Recommendation 64 (Guidelines for duties of separate representatives)

We recommend⁶⁴ the adoption of the Australian guidelines for setting out the duties of lawyers representing children and parents in the juvenile court for care and protection and supervision orders.

We also recommend that special training on how to interview and represent children and parents should be provided to lawyers for these sensitive and complex cases, and only lawyers with this special training should handle these cases.

We further recommend that these arrangements should apply to cases involving care and supervision orders being made under the matrimonial Ordinances in the Family Court.

Recommendation 65 (Assessment)

We recommend⁶⁵ that, before making a care order, a District Judge should have the power under the matrimonial Ordinances to order that a child be assessed by a medical practitioner, clinical psychologist or an approved social worker, as is provided in section 45A of the Protection of Children and Juveniles Ordinance (Cap 213).

We also recommend that the Director of Social Welfare should have the power to order assessment in these proceedings in line with section 45A.

Recommendation 66 (Child's views)

We recommend⁶⁶ that the views of a child should be taken into account in proceedings under the Protection of Children and Juveniles Ordinance (Cap 213).

Recommendation 67 (Contact in respect of a child in care)

We recommend⁶⁷ that parents whose children are made the subject of care orders under the matrimonial Ordinances should be entitled to apply to

64 See discussion at paras 13.40 to 13.41 of the report.

65 See discussion at paras 13.42 to 13.43 of the report.

66 See discussion at paras 13.44 to 13.45 of the report.

67 See discussion at paras 13.46 to 13.49 of the report.

have orders made to secure regular contact between them and their children.

We also recommend that section 34C(6) of the Protection of Children and Juveniles Ordinance (Cap 213) should be amended to allow the court to make an order for contact when a care order is being made.

Recommendation 68 (Age at which wardship orders cease)

We recommend⁶⁸ that a provision be enacted clearly specifying that the duration of wardship orders ceases at 18 years.

We also recommend that it be made clear that the jurisdiction of the Official Solicitor ceases at the age of 18 years, except for persons suffering a disability beyond that age.

Recommendation 69 (Minimum age for marriage without parental consent)

We recommend⁶⁹ the retention of 16 as the minimum age of marriage with parental consent.

We also recommend the reduction of the minimum age of marriage without parental consent from 21 to 18 years.

Recommendation 70 (Enforcement of orders)

We recommend⁷⁰ that a mechanism for mutual legal assistance for the enforcement of orders for custody, access, residence and contact, and orders for the return of a child removed unlawfully from Hong Kong, and vice versa, be arranged with the Mainland.

Recommendation 71 (Consolidation of legislation)

We recommend⁷¹ that, as far as possible, the provisions dealing with disputes relating to children, arrangements on divorce, guardianship, disputes with third parties, or disputes between parents without accompanying divorce proceedings, should be consolidated into one existing Ordinance.

68 See discussion at paras 13.52 to 13.55 of the report.

69 See discussion at paras 13.56 to 13.59 of the report.

70 See discussion at paras 13.63 to 13.68 of the report.

71 See discussion at paras 13.69 to 13.74 of the report.

Accordingly, we recommend that any legislative provisions resulting from our recommendations in this area, as well as the existing substantive provisions on guardianship and custody, should be incorporated into one consolidated Ordinance.

We also recommend that there should be one definition of "*child*" and of "*child of the family*" applying to all Ordinances.

Recommendation 72 (Policy co-ordination)

We recommend⁷² that a single policy bureau should take over responsibility for creating and implementing policy for families and children and, in particular, all the matrimonial and children's Ordinances. It is a matter for the Administration to decide whether the Health, Welfare and Food Bureau or the Home Affairs Bureau should assume this responsibility.

72 See discussion at paras 13.75 to 13.77 of the report.