Hong Kong Bar Association

Re: Children's (Parental Responsibility) Bill

1. The Hong Kong Bar Association welcomes the interest from the Panel on Welfare Services in the Children's (Parental Responsibility) Bill (the "**Bill**") and strongly urges the Panel to re-introduce the Bill for legislation.

2. It has long been recognised that the law relating to children should be changed in order to meet the needs of our society. In 1995 the then Chief Justice referred the topic of guardianship and custody of children to the Law Reform Commission ('**LRC**") with a mandate that the LRC consider and recommend such changes to the law as it thought appropriate (LRC Report on Child Custody and Access, March 2005). After a lengthy period of consideration and consultation with the public and all stakeholders the Bill was introduced in 2005 but has yet to be passed. As a result Hong Kong has fallen seriously behind its international counterparts, including England, Scotland, Australia, New Zealand and Singapore, which have long moved away from the parental "rights" model to parental "responsibility" model. This is most undesirable for a number of reasons, some of which are addressed in detail in this short submission.

3. Hong Kong is an international city and the home to over 2 million families. A considerable proportion of children-related disputes involve an international element, further emphasising the desirability of bringing Hong Kong's legislation to be more consonant with the approach in other countries. Our children are our future and the future of Hong Kong, yet they are being failed by the inexplicable delay in passing this longstanding Bill into law.

4. The current legislation governing children proceedings is rooted in archaic concepts and is restrictive in conferring sufficient powers to the Court to make suitable orders for the benefit of a child. By way of example, the word "illegitimate" is still used to describe children born out of wedlock in our statutes, even though it is considered to be demeaning to the child being referred to and that it offends and violates that child's dignity: see the comments of B. Chu J in ***C v. S*** (HCMP 929/2017, 12 October 2017) at §6 (appeal dismissed [2020] HKCA 35).

5. At present, children proceedings are governed in a piecemeal manner across various different ordinances, including the Guardianship of Minors Ordinance (Cap.13) ("**GMO**"), Matrimonial Causes Ordinance (Cap.179), the Matrimonial Proceedings and Property Ordinance (Cap.192).

6. The Bill would consolidate and update the existing legislation in dealing with children disputes, benefitting children, parents, guardians and the courts.

From "Parents' Rights" to "Responsibilities"

7. Since 1994, Hong Kong has been a member of the United Nations Convention on the Rights of the Child ("**UNCRC**"). Article 3(1) of the UNCRC expressly states that "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*."

8. Keeping up with its international obligations and contemporary understandings of the parent-child relationship, the Bill would introduce a paradigm shift away from the emphasis on parents' rights towards an emphasis on the child. The language and concepts move away from the archaic language of a parent's "custody", "rights and authority", "parental rights" and "guardianship" (see for example, ss.3 and 4 of the GMO) to "parental responsibility" and "children's interests".

9. The Bill puts the child's welfare at central focus, specifically stating that in children proceedings, the Court "must regard the best interests of a child as the paramount consideration" and codifies the "checklist of factors" in determining what is in the best interests of the child (ss.2(1)-(2) of the GMO).

10. Furthermore, orders governing the person with whom the child is to live, spend time or otherwise have contact with; where the child is to live, spend time or otherwise have contact with any person, will singularly be referred to as a "Child Arrangement Order" under s.28 of the Bill, rather than the current hierarchical terms of "custody", "care and control" and "access".

11. This creates tangible benefits. It reminds parents that in such times of conflict, rather than fighting over their individual right to have control over their child they have a shared goal of putting the child's welfare and interests first.

12. The current language (viz., its emphasis on "parental rights and authorities") effectively makes a custody ruling an allocation of rights over the child. This creates an impression that there is a winning party with decision-making "power" over a child's welfare, whilst the other parent "only" has access or contact. Under circumstances which are invariably already hotly contentious and emotional, rather than promoting cooperation between parents and encouraging them to set aside or resolve their conflicts (the most beneficial outcome for the child) it serves to polarize the divorcing parties and only further escalates conflicts between them over their children. This is obviously not in the interests of a child, conflict between parents is recognised as being extremely damaging to the child's wellbeing. It is further adding to the workload of an already overburdened Family Court.

13. Because of this lack of legislation, the Courts have had to take it into their own hands to "implement" certain provisions of the Bill. The "Welfare Checklist" is routinely referred to and applied by the Hong Kong courts in determining what is in the best interests of the child (see for example, ***Lai v Ling*** **[2017] 5 HKLRD 629** at §59; ***ZN v XWN*** **[2018] 3 HKLRD 644** at §28). However, this is not the role of Courts but should be the role of legislation.

14. Moreover, there are clear limits to this type of "judicial intervention", and the existing powers under the current legislation are simply insufficient. The Hong Kong Courts at all levels have expressed concern with the delay in the passage of this important legislative reform. The continued presence of the archaic and inappropriate concepts of "custody" and "access" perpetuates the kind of misunderstandings in laypersons (the Family Court has a particularly high level of self-representation) as to their responsibilities towards the upbringing of children (see ***PD v KWW*** **[2010] 4 HKLRD 191**).

Expanding the Court's Powers to make Orders

15. The current legislation, under s.10(1) of the GMO, only entitles either parent of a child or the Director of Social Welfare to apply to court for orders of custody or access to the child.

16. This has failed children, the most notable example being in ***CLP v CSN*** [2016] 5 HKLRD 530. The child's unmarried mother gave birth to the child at the age of 19, had left home after giving birth to the child and never contacted the child. The father had not been present in the child's life. The child's care fell on her grandmother but she was unable to register the child for a school place or travel documents. The grandmother sought to have her relationship with the child formally legalised so that she could do this. She made an application seeking to be appointed as a Guardian and for custody, care and control of the child. The Family Court, despite wanting to help the grandmother and the child could not do so because of the constraints of the current legislation. There was no jurisdiction under the existing outdated legislation to make this order.

17. Out of desperation the grandmother appealed to the Court of Appeal but they had no choice but to agree that under the current legislation, the Court simply was not equipped to make the orders as requested.

18. As a result, the remainder of the child's life would continue to be affected. The grandmother, despite being the effective guardian of the Child, continued to be faced with great daily difficulties:

> "*the [grandmother] is not the guardian of the child she experienced great daily difficulties in arranging for the education and obtaining travel documents for the child.*"

19. The Court of Appeal made its views on pushing for the enactment of the Bill very clear:

> "*8.1. The problem now facing the applicant may hopefully be changed in the future, if and when the draft Children Proceedings (Parental Responsibilities) Bill is eventually enacted by our Legislative Council. The bill contains, among other things, the following provisions:*

> *1) the concept of 'guardianship' will be replaced by the concept of 'parental responsibility' to redefine the parent-child relationship in law.*
>
> *2) the existing custody and access orders will be replaced by a child arrangements order so as to move away from terminology that would imply a winner or a loser in disputes concerning a child.*
>
> *8.2. More importantly for the purpose of this appeal the limitation on the rights of third parties (such as grandparents) to apply for court orders in relation to the child will be removed. The bill provides that a person with whom the child has lived for a period of at least 365 days may apply for a child arrangements order. Even if a person does not fall within the category of persons who are entitled to apply for a child arrangements order, that person may still apply with the leave of the Court to do so.*"

20. The Bill would expand the range of persons that can apply for such orders, keeping up with contemporary trends on "families" and the persons involved in a child's life. The Bill allows specified third parties to apply for court orders in relation to the child, including a step-parent and a person with whom the child has lived for a period of at least 365 days etc. This would simply reflect the contemporary realities of a lot of children, on who their "family" is.

21. The example provided in this case relates to just one child, but this is one too many when there is draft legislation that has been waiting for many years to be passed that would have cured all of this and made a profound difference to the life of this child, and no doubt many more.

Objections from Single Parents?

22. It is understood that a primary objection comes from single mothers, who have concerns about the child's father intervening and interfering on issues relating to the child. However, this likely stems from a misconception and lack of awareness of the Bill and how the Courts apply the existing law.

23. First, even under the Bill, an unmarried father does not automatically have parental responsibility under all circumstances. A father will only have parental responsibility if:

a. He was married to the mother at the time of the child's birth (s.4(1) of the Bill);
b. He acquires parental responsibility by marrying the mother of the child after the child's birth (s.6(1)(a) of the Bill);
c. He becomes registered as the father of the child (s.6(1)(b) of the Bill);
d. He makes an agreement with the mother of the child providing for him to have parental responsibility for the child (s.6(1)(c) of the Bill);
e. He assumes guardianship over the child as a guardian appointed under Part 3 of the Bill (s.6(1)(d) of the Bill);
f. He makes an application to the Court and the Court makes an order that the father has parental responsibility for the child (ss.6(1)(e) and 6(2) of the Bill).

24. In other words, a single mother's involvement is almost always required (eg. by marriage, by the mother registering the father in the birth certificate, or by agreement) before a child's father would have parental responsibility. Without the mother's involvement, the unmarried father would have to make an application to the Court.

25. The objection from those who thought abusive spouses or fathers would gain an advantage is without basis. The Court would take this important factor into consideration before making a care arrangement.

26. Second, the Bill would not bring about a marked difference from the way a father can acquire parental responsibility, when an application is made to the Court.

27. Under the existing legislation, s.10 GMO allows an unmarried father to apply to the Court for custody.

28. When such an application does come before the Court, it not only applies the principles derived from the English case of ***Re H (Illegitimate Children: Father: Parental Rights) (No 2)*** [1991] 1 FLR 214 (applying the English counterpart of the Bill), where three factors are examined (1) The degree of commitment which the father has shown towards the child; (2) The degree of attachment which exists between the father and the

child; and (3) The reasons of the father applying for the order. The Court has also stressed the "Equality principle": ***C v. S*** (HCMP 929/2017, 12 October 2017) (appeal dismissed [2020] HKCA 35).

29. In respect of the Equality Principle, B. Chu J had stated at §§42-43:
Jeremy Poon J, as he then was, in ***H v N (Children: variation of interim order)*** **[2012] 5 HKLRD 498**, had referred to the "Equality principle", namely in approaching s3 (1) of GMO, subject to the position under illegitimacy, the court will always put the competing parents on an equal footing and any role or gender discrimination is not permissible ("Equality Principle"). In this, he had quoted what was said by Hartmann JA, as he then was in *PD v KWW (Child: Joint Custody)* [2010] 4 HKLRD 191, in particular the following:

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

Poon J then went on to explain that in the case of illegitimacy, the position is a little different, and at common law, an illegitimate child was regarded as a *filius nullius*, a child of nobody. He had no legal relationship with the mother or father, and common law had developed to allow the mother to claim custody of her illegitimate child. However, Poon J recognized that it remains the case that the unmarried father has no legal parental rights over his illegitimate child, but pointed out that:

> "*although the common law disparity in parental rights in cases of illegitimacy still lingers, it can be redressed by the court under s3 (1)(d). He further said whether and how the court will do so must depend on the actual circumstances of the case, but surely the court will firmly bear in mind the Equality Principle when dealing with a father's application*." (emphasis added)

30. It is expected that the Court will treat applications under the Bill by unmarried fathers the same way.

31. For example, currently, even an unmarried mother with sole custody, care and control is not entitled to relocate unilaterally. B. Chu J has re-affirmed that "E*ven though the Mother was in law the sole custodian, she should have made a proper application to the Court for relocation instead of taking the matter into her own hands*": ***LCH v. JMC*** [2019] 4 HKLRD 242 at §43.

32. More recently, in ***BGPB v. KSW*** [2021] 2 HKLRD 458, the mother was ordered to return to Hong Kong with the child, after having relocated without the consent of the father, and the father was further granted joint custody, care and control.

33. In fact, putting this in statutory footing would increase the transparency for both mother and father, to understand the circumstances in which parental responsibility can be obtained, and their obligations to communicate with each other as parents. As observed by B Chu J in ***C v. S*** **(supra.)**: "*the ways in which an unmarried father can acquire the parental responsibilities and rights in relation to his child will be further streamlined and spelt out clearly*."

34. Hong Kong has already fallen behind on the world stage in updating its legislation to accord to modern concepts and children's rights. It is high time for the Bill to be enacted, and put our children's interests first.

Committee on Family Law
The Hong Kong Bar Association
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