RESPONSE OF THE HONG KONG BAR ASSOCIATION ON THE DRAFT FAMILY PROCEDURE BILL

1. We refer to the letter dated 14 February 2022 enclosing the Consultation on Draft Family Procedure Bill and inviting views from the Hong Kong Bar Association ("**HKBA**").

2. HKBA and its Committee on Family Law welcome and support the introduction of the Family Procedure Bill (**"the Draft Bill"**). The Draft Bill is the next step in pursuit of the Report on Review of Family Procedure Rules by the (then) Chief Justice's Working Party (appointed in March 2012). HKBA has been supportive and has contributed throughout the process, and was represented on the Working Party itself. We commented on and were supportive of the Interim Report & Consultative Paper (published February 2014; consultation period ended 16 June 2014) and thereafter the Final Report (published May 2015) (**"the Report"**).

3. As a general and overall observation – it is noted that the Draft Bill seeks to first lay down a statutory framework, from which will be formed the Family Procedure Rules Committee ("**Rules Committee**") empowered to make Rules (**Family Procedure Rules; "FPR"**). Therefore, it is understood that whilst the Working Party's Reports previously made a large number of Recommendations (133 in total, all of which were accepted by the (then) Chief Justice), including specific rules and provisions, the Draft Bill is at present laying the foundations upon which the FPR will be devised to implement the Recommendations from the Working Party's Reports. It is understood that the Rules Committee for the FPR will be similar to the rules committees for the High Court and the District Court ("**DC**").

4. We note that the FPR will be the subject matter of *"further public consultation"*, and look forward to contributing towards the same.

5. It is also noted that whilst selected clauses (see Clause 1(3)) relating to the Family Master system will come into operation sooner, the remaining clauses will commence with the FPR at a later stage. In the meantime, the current procedures remain in force, including, for example, the Matrimonial Causes Rules, Cap.179A ("**MCR**"), with the present Rule 3 of the MCR reflected in Clause 21, which provides that Rules of the High Court apply to fill in where there is "no provision". It is noted that many current rules, including MCR, will be given 'repealed legislation' status in the future (see Clause 3(3)).

6. We note the emphasis on using 'plain language' to be *"carefully reviewed from the perspective of lay court users"*. This is a welcomed approach that we strongly support and will improve access to justice in the Family Court system. Clause 2(2) is an example of language simplification and an approach that we support and encourage to be adopted throughout the FPR.

7. **Clause 3**. Clause 3(1)(a) refers to the 'inherent jurisdiction' of the Court of First Instance ("CFI") – which has a qualified definition in Clause 2 (*"in relation to a child"*). For clarity, we suggest making express whether the legislative intent is that Clause 3(1)(a) only applies to *"a proceeding that falls within the CFI's inherent jurisdiction <u>in relation to a child</u>"* (in line with the qualified definition in Clause 2), or could also apply to the CFI's inherent jurisdiction more generally (*i.e.* wider than and not bound / restricted by the scope and ambit of the Clause 2 qualification). This

clarification is important because the definition 'family proceeding' is used throughout.

8. Clause 3(1)(e) – we respectfully suggest the following for clarity *"a proceeding started under any repealed legislation as set out in subsection(3)"*.

9. **Clause 4**. We suggest including section 12 of the Inheritance (Provision for Family and Dependants) Ordinance, Cap.481 in Clause 4(2)(g).

10. **Clause 8** addresses the transfer of proceedings between the CFI and Family Court. Clauses 8(2), 8(3)(b) and 8(4)(a) refer to transfers between the courts occurring where warranted "*having regard to all the circumstances"* of the case. It is suggested that it may be beneficial for the Bill to particularise, with reference to the leading cases on the issue, what factors may be considered by the Courts in a transfer application to give greater clarity for these applications. The same suggestion would apply in respect of Clauses 9(2)(a) and 9(3).

11. **Clause 9** grants the Family Court powers to deal with inherent jurisdiction proceedings where the CFI has transferred the same to it. This is a sensible expansion of the Family Court's jurisdiction and provides for a longstanding lacuna in the Family Court's jurisdiction, whilst also providing for safeguards preserving the CFI's inherent jurisdiction. It is noted that Clause 9(4) which mandates the Family Court to re-transfer back cases to the CFI under specified circumstances, including where the CFI so directs.

12. **Clause 11** is a welcomed and much needed clarification as to the Family Court's jurisdiction. Where third-party related proceedings do not fall within section 17 of the Matrimonial Proceedings and Property Ordinance, Cap 192 ("**MPPO**"), including most *TL v. ML* proceedings, it will now be possible to point to express powers to make formal declarations as to beneficial ownership unrestricted by the District Court Ordinance, Cap 336. The Family Court will be able to make binding orders against the third-party, including injunctions beyond the scope of section 17 of MPPO (*e.g.* a mandatory injunction of unlimited value; or indeed, other forms of relief that would otherwise not fall within any other statutory provision).

13. **Clause 12**. As a matter of clarification, we suggest that Clause 12(2) be preceded by the words *"Save where an enactment expressly provides to the contrary, the court has power to vary ……"*. For example, section 11 of the MPPO contains primary powers as well as express powers of variation. We suggest clarifying whether Clause 12(2) is intended to grant powers to vary, suspend, rescind or discharge where there was previously no statutory power (*i.e.* powers of variation are no longer limited to only section 11 of the MPPO).

14. In this respect, under the existing law, there is no power to vary a lump sum unless it is a lump sum payable by instalments. This has an important impact in, for example, settlement negotiations where the paying party is willing to offer as part of a settlement package a lump sum, but wants to do so by instalments over a period of months or years. The receiving party may be willing to bear the risk of the paying party later applying to vary the lump sum either in respect of the quantum or scheduled payment (or both) but may seek a higher amount to compensate for the delay in receipt and the element of risk.

15. A change of this magnitude under Clause 12(2) (*i.e.* the court having an express power to vary an order made by it) should be made with awareness of the potential consequences to litigants in respect of issues of enforcement of financial orders reached by settlement or after trial. For example, theoretical variability should mean that all financial orders, including non-instalment single lump sum payments, will become not provable in bankruptcy.

16. **Clause 12(2)(a)** provides for express powers to rescind an order and relist the application. This is a welcomed expansion of power and will dispense with the future need to artificially commence 'fresh action' to set aside ancillary relief orders.

17. **Clause 12(2)(b)** provides for express powers to correct an 'invalid' order by 'replacing' the order with one the court has power to make. This is a welcomed expansion of power and will dispense with the future need to 'appeal' where the more appropriate application is in the nature of a *Barrell Enterprises* application. We note that the new power is not subject to the limitations of the 'slip rule' nor is it restricted to applications made before formal sealing of orders (*Barrell* applications cannot be made after formal sealing of order).

18. **Clause 15**. We refer to our previous submission dated 26 July 2021 in relation to Practice Direction SL10.4. In paragraph 4 of that submission, it was noted that

> 4. To the extent that the proposed system effectively foreshadows the introduction of Masters, the advantages of a docket system with the interlocking 3-way approach (Main Suit, Ancillary Relief and Children) should not be

unduly compromised: the best of both worlds can be achieved by pairing the CMJ with the AJ, so that they can work together.

19. It is respectfully suggested that as part of the proposed reforms, this "pairing" or "grouping" should be transparent *i.e.* the parties and their advisors should know which Judges will be hearing a particular matter and giving directions and ultimately the CDR/FDR/Trial.

20. **Clause 17**. The reference to "Family Proceedings and Property Ordinance" under Clause 17(f) should be "Matrimonial Proceedings and Property Ordinance".

21. **Clause 18** uses the word "private", which is not defined in Clause 2. It is suggested either to define "private" meaning "not open to the public" (*c.f.* PD 15.15) or alternatively to include a "for the avoidance of doubt" subsection to define what the word means in this context.

22. **Clause 20**. The existing time limit for applications for leave to appeal from an order of the Family Judge differs depending on whether the order is "final" or "interim". There is some ambiguity in respect of child-related orders in that, in a very real sense, such orders can never be "final" in that the Court retains jurisdiction over the child to vary orders or suspend them from time to time, upon application being made. This Bill provides an opportunity to incorporate and clarify the time limits applying to applications for leave to appeal, for example, to confirm that the time limit for *all* child-related orders is to be 28 days from the date of the order.

23. **Others**. It is beyond this Paper to address other aspects of much-needed reform, *e.g.* limitations on interim lump sums under the existing

enactments – at present there is no power to make such orders in Hong Kong, leaving the Family Court (DC or CFI) significantly out of step with other jurisdictions, including the UK. We are considering these matters and will be seeking to advance concrete proposals for further reform in the future. Similarly, whilst we understand that the Protection of Children and Juveniles Ordinance, Cap 213 is not part of the Chief Justice Working Party's considerations, the Report or Draft Bill at this stage, it is indirectly related and perhaps can be borne in mind for future reform.

Dated 8 April 2022

Committee on Family Law,
Hong Kong Bar Association