



Hong Kong College of Paediatricians
香港兒科醫學院
(Incorporated in Hong Kong with Limited Liability)



By Email (custody_consultation@lwb.gov.hk) & Post

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

(Attention: Ms Wendy Leung
Principal Assistant Secretary)

Dear Sir/Madam

Hong Kong College of Paediatricians

Response to Labour and Welfare Bureau Consultation Paper on Child Custody and Access: Whether to implement the “Joint Parental Responsibility Model” by Legislative Means

The Hong Kong College of Paediatricians with a commitment to the health of children welcomes the government’s confirmation of the principle of “Joint Parental Responsibility” of divorced parents. This principle was already laid down in the Convention on the Rights of the Child¹ (CRC) extended to Hong Kong in 1994. A number of articles of the CRC state clearly the rights of the child under such circumstances:

Article 18: “State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child...”

Article 9: “...State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests...”

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Article 12: “State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body in a manner consistent with the procedural rules of national law.”

Article 3: 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...”

The Law Reform Commission of Hong Kong’s Report on Child Custody and Access in 2005² (LRC Report 2005) outlined the impact of divorce on children through the period of marital discord, prior to the divorce, the divorce itself and after the divorce. The impact on the child differs with age, gender, personality and social circumstances. The adjustment does not end with the separation of the biological parents but if parents remarry, could extend into the relationship within reconstituted families. Parents going through divorce can be so engulfed with their own problems that they may undermine their parenting roles. Professionals involved have the duty to ensure that the best interests of the child are protected.

The existing legislation on child custody implies that the child is the property of the parents. This concept and that of parents having the right of access to the child is probably out of date. Instead, according to the CRC, the emphasis should be on the life-long parental responsibility before and after divorce or separation, and the right of the child to have contact with their parents. In proposing legislative reform, the Law Reform Commission urged the Administration of the Hong Kong Special Administrative Region to exercise its moral obligation to ensure that disputes on custody and access are resolved in compliance with the CRC. Incorporation of these provisions of the CRC into domestic legislation is probably the best guarantee that the rights of the child are respected.

The focus ought not to be whether to implement the “Joint Parental Responsibility Model” by legislative means but how best this can be done. There are concerns that legislation without the provision of appropriate supportive services will create more problems than that can solve. Legislation alone may not necessarily bring any change to the predicament of children of divorcing parents. The LRC Report 2005 made 72 recommendations in support of the new model. These should be considered together with the current consultation. Our College has the following opinions.

Voice of the child

In a matter closely related to the child, it is unfortunate that there is no child friendly version of government consultation to facilitate the child’s right to participate as stipulated by the CRC. For a child to exercise the right of expression and thus have his views given due consideration, he needs to be aware of his rights (though it is for him to

decide whether he wishes or does not wish to express his views). If the child's decision is to have his views known, he needs to know to go through what channels and how. There should be no limit to the age of the child, as it depends on the issue under consideration and the maturity of the child. Hence, the assessment of the child's ability should be individualized. The most frequently used format of an interview with a social worker who then prepares a report on the family for the court's consideration may not necessarily reflect the best interests of the individual child. Although the judge could appoint an official solicitor to represent the child, the low usage of this service probably indicates that children and families are not aware of it.

There are also occasions that divorcing parents have apparently agreed on arrangements for their children between themselves. It is important that the child's views should be heard and taken into consideration so that the best interests of the child are protected.

Families with domestic violence and child abuse

These families require sensitive management and there should not be an assumption that the contact between the child and non-resident parent is not necessary in the child's best interest. On the other hand, it is essential to ensure that the child and the resident parent is safe. The situation in each family is unique and requires an appropriate assessment based on relevant information. Detailed attention should be paid to the nature, severity and frequency of the problem. There is also the need for a welfare report representing the child's interest e.g., whether contact is safe for the child and resident parent, whether contact should be supervised in contact centres, whether there is or should be an injunction order, and whether the non-resident parent should receive treatment.

Even more difficult to address are cases where domestic violence has not been taken to court or there is no prior knowledge by social workers. It is the responsibility of the welfare officer to find out whether this is a concern in the family and the impact it has or will have on the child. The welfare officer should reflect these facts in the report.

Professional Training

For all professionals involved with children, their training should include the developmental needs of children, the ability to communicate with children of different ages and be sensitive to their concerns. In divorce proceedings, it is important that professionals do not put children into the position of choosing between their parents or making it appear to be so in the deliberation of the final arrangement. There needs to be an awareness of potential domestic violence being a factor in the divorce and its impact on the child whether or not the child himself is subjected to direct violence. How to balance different views for the best interests of the child is another important issue. Arrangements for immediate best interests of the child can be different from future best

interests. Hence, training is essential and should be ongoing for professionals involved. The checklists mentioned in the consultation document are useful.

Public Education

Changing the legislation is itself educational but much more is needed to be done in helping the public to understand that having children is a life-long commitment whether the parents are married or divorced. Thus, education on parental responsibilities should start when marriage is being contemplated and should be re-emphasized throughout parenthood. In fact, education on the basic rights of children should start early in schools and this message should extend to the adult community.

Services

Mediation

The pilot scheme of divorce mediation started in 2000 only lasted 3 years despite its reported success in dispute resolution. While mediation is being widely promoted for all types of disputes, it is important that mediation service providers for divorce cases are qualified in this very specialised area.

Counselling:

Counselling is important in marital disharmony so that divorce could be avoided in the first place. If divorce is inevitable, counselling should not stop with the completion of divorce proceedings. It is because marital discord affects the child and parents before, during and after the divorce.

Contact centres

The consideration should not only be the provision of premises for parental contact, but also that the child and families who need supervised contact are being adequately supported by suitable trained professionals. These centres could also provide the post-divorce individual or group counseling for the child and parents.

Research

Although Hong Kong has data on the number of marriages and divorce decrees each year, information on the number of children involved in these divorces and their age range are not readily available. With any change in policies, we need to know the current situation, assess potential impacts of these changes and regularly review the outcome of changes to guide future modifications. This applies to the use of guidelines or checklists and court decisions. Research on the impact of divorce on the child and means to mitigate this impact is also important.

Conclusions

The number of marriages ending in divorce is high, as is the number of remarriages. A time frame should be set for adoption of the new legislation on joint parental responsibility rather than debating whether it is needed. Although overdue, this delay allows Hong Kong to learn from overseas experience to ensure that the best interests of the child is truly served in the process. Legislative changes should be accompanied by provisions in public education, professional training, services and research. Appropriate resources should be allocated. Trained professionals who do not have time to practice what they consider appropriate would defeat the purpose of their training. Hong Kong should develop a set of child ordinance according to the principles of the CRC.

References

1. United Nations Convention on the Rights of the Child (1989). <http://www2.ohchr.org/english/law/crc.htm> accessed 20 April 2012
2. The Law Reform Commission of Hong Kong Report on Child custody and Access (2005) <http://www.hkreform.gov.hk/en/publications/raccess.htm> accessed 20 April 2012

Yours faithfully



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