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## Hong Kong's *Children Proceedings (Parental Responsibility) Bill*: Comparative Family Law Reform and Multidisciplinary Collaboration

Katherine Lynch

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**HONG KONG'S CHILDREN  
PROCEEDINGS (PARENTAL  
RESPONSIBILITY) BILL: COMPARATIVE  
FAMILY LAW REFORM AND  
MULTIDISCIPLINARY COLLABORATION**

**Katherine Lynch**\*

**INTRODUCTION: THE NEED TO MODERNIZE  
HONG KONG'S FAMILY JUSTICE SYSTEM**

Many comprehensive reviews of family justice systems have been undertaken in common law jurisdictions over the past twenty years, all seeking to make family law systems more workable for families and children.<sup>1</sup> Resulting reform

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\* Founding Director of the *LLM in Arbitration & Dispute Resolution* program and Associate Professor at the University of Hong Kong. Many thanks to Yulin Cheng for her invaluable research and editorial assistance.

<sup>1</sup> Canada released a major federal report in 2013. See Canada, Family Justice Working Group, Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words* (Ottawa: ACAJCFM, 2013) [Family Justice Working Group, *Meaningful Change for Family Justice*]. The UK Government completed a review in 2011. See UK, Ministry of Justice, Department for Education and the Welsh Government, *Family Justice Review: Final Report* (3 November 2011) [*Family Justice Review Final Report*]; UK, Ministry of Justice, Department for Education, *Policy paper: 2010 to 2015 government policy: family justice system* (9 April 2013), online: <[www.gov.uk/government/publications/2010-to-2015-government-policy-family-justice-system/2010-to-2015-government-policy-family-justice-system](http://www.gov.uk/government/publications/2010-to-2015-government-policy-family-justice-system/2010-to-2015-government-policy-family-justice-system)> [*UK Policy paper*]. Singapore conducted comprehensive review in 2013 with reforms introduced in 2014. See Singapore, Committee for Family Justice,

efforts have seen substantive law reform, with child and family justice systems shifting from adversarial litigation to more informal out-of-court processes. Judges now exercise greater case-management and settlement-facilitation powers and children are being given more direct rights of advocacy and participation in the proceedings.<sup>2</sup> This is all part of successive waves of family justice reform beginning with doctrinal reform (including adopting the best-interests-of-the-child standard), then incorporating alternative-dispute-resolution reform, and now developing various innovative measures and practices to provide more effective family justice.<sup>3</sup> Despite this extensive reform, common law jurisdictions including Canada, Scotland, England and Wales, Australia, and New Zealand are reviewing their family justice systems and seeking to enact more comprehensive family law reform that would provide meaningful affordable access to justice

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*Recommendations of the Committee for Family Justice* (Singapore: Ministry of Law, 2014) [*Singapore Report*].

- <sup>2</sup> In recognition of children's rights in the United Nations *Convention on the Rights of Children*, 1577 UNTS 3 (entered into force 2 September 1990) [*UNCRC*] and based on research investigating children's experiences in the family law system. See Rachel Carson et al, "Children and Young Persons in Separating Families: Family Law System Experiences and Needs" (Melbourne: Australia Institute of Family Studies, 2018); Helen Rhoades, Commissioner, Australian Family Law Reform, "Review of the family law systems: Issues and opportunities" (2018); Erin Shaw, "Family Justice Reform: A Review of Reports and Initiatives" (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2012).
- <sup>3</sup> See Noel Semple, "A Third Revolution in Family Dispute Resolution: Accessible Legal Professionalism" (2017) 34:1 Windsor YB Access Just 130 (discussion of three waves, or revolutions, of family law reform).

for children and families.<sup>4</sup> Hong Kong is also under pressure to enact extensive legislative reforms dealing with children's matters, and more broadly with family and matrimonial issues, which date back to 2002–05.

These family law regime reviews and empirical research undertakings come to similar conclusions about

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<sup>4</sup> The Canadian Government recently introduced new federal family law legislation. See Bill C-78, *An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, 1st Sess, 42nd Parl, 2018 (assented to 21 June 2019), SC 2019, c 16, proclaimed in force 1 July 2020, SI/2019-82, (2019) C Gaz II. Manitoba introduced modernizing reforms set to come into effect in Fall 2019. See Manitoba Family Law Reform Committee, *Modernizing Our Family Law System* (Winnipeg: MFLRC, June 2018) [Manitoba FLRC, *Modernizing Our Family Law System*]. In July 2018, the Scottish Government also announced a comprehensive review of its family justice system, including review of the *Children (Scotland) Act 1995* (UK) and the *Family Law Act 2006* (UK). See Scottish Government, *Review of Part 1 of the Children (Scotland) Act 1995 and Creation of a Family Justice Modernisation Strategy* (consultation) (May 2018), online: <consult.gov.scot/family-law/children-scotland-act/> [*Scottish Review*]. In 2017, Australia launched a comprehensive review with a final report released in March 2019. See Austl, Commonwealth, Australian Law Reform Commission, *Review of the Family Law System Discussion Paper* (Discussion Paper No 86) (Brisbane: ALRC, 2018) [*ALRC Discussion Paper*]; Austl, Commonwealth, Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System Final Report* (ALRC Report No 135) (Brisbane: ALRC, March 2019) [*ALRC Final Report*]. In July 2018 the New Zealand Government appointed an Independent Panel to review contentious 2014 Family Court reforms. See NZ, Independent Panel (on family justice reform), *Strengthening the family justice system: A consultation document released by the Independent Panel examining the 2014 family justice reforms* (Wellington: Ministry of Justice, January 2019) [*New Zealand Consultation*].

the causes of the deficiencies in family justice systems and what measures would effectively address them.<sup>5</sup> Firstly, parental conflict has a negative impact on children. Children's early cognitive, emotional, and neurobiological development, as well as their wider family relationships are undermined by inter-parental conflict which are in turn associated with multiple poor outcomes for youth.<sup>6</sup> The traditional adversarial litigation system, emphasizing a rights-based approach to dispute resolution, promotes further conflicts and needs changing.<sup>7</sup> The system should strive to minimize conflict and promote cooperation between parties, and families should be supported and empowered to resolve their own disputes.<sup>8</sup> While the

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<sup>5</sup> There is a degree of global convergence on these issues. See generally Rhoades, *supra* note 2; Shaw, *supra* note 2. See also the Canada, UK, Scotland, Australia, and New Zealand Reports, *supra* notes 1, 4.

<sup>6</sup> There is compelling research indicating the negative impact of parental conflict on well-being outcomes for children. See Rachel Birnbaum & Nicholas Bala, "Toward the Differentiation of High-Conflict Families: An Analysis of Social Science Research and Canadian Case Law" (2010) 48:3 *Fam Ct Rev* 403; Gordon T Harold & Ruth Sellers, "Annual Research Review: Interparental Conflict and Youth Psychopathology: An Evidence Review and Practice Focused Update" (2018) 59:4 *J Child Psychology & Psychiatry* 374.

<sup>7</sup> Even though the majority of family law cases in which court files are opened settle without trial, often by lawyers' negotiation. See Michael Saini et al, "Understanding Pathways to Family Dispute Resolution and Justice Reforms: Ontario Court File Analysis & Survey of Professionals" (2016) 54:3 *Fam Ct Rev* 382 at 393. See also Shaw, *supra* note 2 at 5–6; Yuk King Lau, "The Debate on the Joint Parental Responsibility Model in Hong Kong" (2014) 7:2 *China J Soc Work* 145 at 147.

<sup>8</sup> See Lau, *supra* note 7 at 152; The Law Reform Commission of Hong Kong, *The Family Dispute Resolution Process* (Hong Kong: HKLRC, March 2003).

shortcomings of the adversarial system and the merits of more consensual processes for families in conflict are acknowledged, the view of mediation as “alternative” still persists despite it being more widely available and often incorporated within court systems.<sup>9</sup> Secondly, family justice systems are complex, expensive, lengthy, and frequently unpredictable in outcome. They have been deprived of resources so that they cannot deliver the expected quality of justice.<sup>10</sup> Thirdly, families going through separation and divorce have difficulty obtaining the necessary information and support services they require, including legal information advice and support, and services assisting with dispute resolution, financial and accounting matters, housing, employment, and parenting concerns.<sup>11</sup> Fourthly, family justice systems often fail to provide an integrated multidisciplinary response to

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- <sup>9</sup> The failure to deal adequately with family disputes has long-term costs for parents and their children, often resulting in poverty and loss of positive parent-child relationships. See Noel Semple & Nicholas Bala, “Reforming the Family Justice System: An Evidence-Based Approach” (Toronto: Association of Family and Conciliation Courts, 2 October 2013).
- <sup>10</sup> There is a chronic lack of public funding with many court services under resourced. See Shaw, *supra* note 2 at 7–8; Canada, Family Justice Working Group, Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change* (Ottawa, ACAJCFM, 2013) at 23; The Law Reform Commission of Hong Kong, *Report on Child Custody and Access* (Hong Kong: HKLRC, March 2005) [HK Law Reform Commission, *Child Custody Report*].
- <sup>11</sup> They have an unmet need for a variety of legal, social, psychological, and economic well-being services during separation and divorce. See generally Shaw, *supra* note 2.

families going through separation and divorce.<sup>12</sup> Front-line services are often fragmented within the system and lack coordination and integration with services provided by other sectors or government departments (e.g. social work, mental health, or financial management).<sup>13</sup> Fifthly, the personal safety of family members from domestic violence should be assured and protected. It is generally accepted that family justice systems must deal with issues of inequality between parties, power differentials, and acts of violence within families. This is challenging as it involves the intersection of family law, child-welfare protection, and domestic-abuse jurisdictions.<sup>14</sup> Finally, a critical challenge is the rise of self-represented litigants within the family courts system due to financial constraints and the expense of legal representation.<sup>15</sup>

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<sup>12</sup> See generally the Canada, UK, Scotland, Australia, and New Zealand reports, *supra* notes 1 and 4.

<sup>13</sup> See generally the Canada, UK, Scotland, Australia, and New Zealand reports, *supra* notes 1 and 4.

<sup>14</sup> See Shaw, *supra* note 2 at 13–15.

<sup>15</sup> Which results in longer proceedings and decreased likelihood of settlement. Increased financial costs to publicly funded services result when the litigating parents are self-represented. See Rachel Birnbaum, Michael Saini & Nicholas Bala, “Growing Concern About the Impact of Self-Representation in Family Court: Views of Ontario Judges, Children’s Lawyers and Clinicians” (2018) 37:2 *Can Fam LQ* 121. This problem is well documented in both Canada and Hong Kong. See Julie Macfarlane, “The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report” (2013), online (pdf): *National Self-Represented Litigants Project* <representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf>; HK, Chief Justice’s Working Party on Civil Justice Reform, *Civil Justice Reform Interim Report and Consultative Paper* (Hong Kong: Judiciary, 2002), online: <civiljustice.hk/ir/paperHTML/toc\_ir.html>.

Family law reform is particularly important given the shifting nature of what the social institution of family means within society: many families are made up of heterosexual couples with children but increasingly, couples live together in common-law relationships and same-sex marriages are growing rapidly. Hong Kong's first legal challenge for same-sex couples to secure marriage equality and civil-union partnerships began in the Hong Kong High Court on May 28, 2019.<sup>16</sup> The concept of parenthood is also changing given enhancements in reproductive technologies. Families tend to have fewer children and the traditional roles within families have changed over time. Divorce and separation are quite common (many countries report divorces rate above 50 percent) with the result that single-parent and blended families have expanded significantly.<sup>17</sup> The Vanier Institute of the Family adopts an inclusive approach to *family* describing it as:

any combination of two or more persons who are bound together over time by ties of mutual consent, birth and/or adoption or placement, and who together assume responsibilities for variant combinations of some of the following: physical maintenance and care of group members; addition of new members through procreation, adoption or placement; socialization of children; social control of members; production, consumption, distribution of goods and

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<sup>16</sup> See *MK v Government of HKSAR*, [2019] HKCFI 55.

<sup>17</sup> This is not unique to Hong Kong: many countries are experiencing the same changes. See Shaw, *supra* note 2 at 3.



services; and affective nurturance (i.e. love).<sup>18</sup>

This includes sole-support families, blended families, migrant families, and families with lesbian, gay, bisexual, transgender, and intersex parents, and reflects societal changes taking place in Hong Kong and globally.

Divorce is increasingly common in Hong Kong with the divorce rate almost triple what it was in 1991.<sup>19</sup> Hong Kong's antiquated and complex family justice system needs extensive reform to provide families with access to an affordable and effective family justice system.<sup>20</sup> Many of the modernizing reforms long

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<sup>18</sup> Alan Mirabelli, "What's in a Name? Defining Family in a Diverse Society", online: *The Vanier Institute of the Family* <vanierinstitute.ca/family-definition-diversity>. See also Kenneth McK Norrie, "The Changing Concept of 'Family' and Challenges for Family Law in Scotland" in Jens M Scherpe, ed, *European Family Law Volume II: The Changing Concept of 'Family' and Challenges for Domestic Family Law* (Cheltenham: Edward Elgar, 2016) 235.

<sup>19</sup> There were 20,019 divorce decrees granted in 2014, 15,604 in 2004, and 7,735 in 1994. See Hong Kong, Census and Statistics Department, *Marriage and Divorce Trends in Hong Kong, 1991 to 2016* (Hong Kong: Census and Statistics Department, 2018), online: <censtatd.gov.hk/hkstat/sub/sp160.jsp?productCode=FA100055>.

<sup>20</sup> There are exceptionally high caseloads for family judges in Hong Kong and calls for appointing more family court judges. The Hon Mr Justice Johnson Lam, VP stated the Judiciary should "give consideration to the potential improvement in the quality of family justice to be delivered." See Johnson Lam, Address (delivered at the 32nd AGM of the Hong Kong Family Law Association, Hong Kong, 7 November 2018), online (pdf): <mediation.judiciary.hk/en/doc/Lam%20VP%27s%20speech%20for%20the%20AGM%20of%20HK%20Fmaily%20Law%20Association.pdf> [*sic*].

advocated by Hong Kong's Law Reform Commission have not been implemented.<sup>21</sup> Although the Government of Hong Kong has acknowledged that children's-best-interests and parental-responsibility concepts should be adopted, these have not been given legislative recognition.<sup>22</sup> Hong Kong still has no equivalent comprehensive children's legislation or family-relations law as in other common-law jurisdictions.<sup>23</sup> Although family law reform has lagged, Hong Kong's Judiciary has facilitated reform by introducing active case-management measures, family mediation, specialized children's dispute-resolution schemes, and unified and simplified family court rules.<sup>24</sup>

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- <sup>21</sup> Some of the Commission's reform proposals have been implemented (e.g. those dealing with child abduction) but many of the seventy-two reform proposals in the Commission's 2005 *Report on Child Custody and Access* (*supra*, note 10) have not.
- <sup>22</sup> See Hong Kong, *The Government of the Hong Kong Special Administrative Region's Response to the List of Issues Raised by the United Nations Committee on the Rights of the Child* (Hong Kong: 2013). See also Michael Tilbury, Simon NM Young & Ludwig Ng, eds, *Reforming Law Reform: Perspectives from Hong Kong and Beyond* (Hong Kong: HKU Press, 2014) (a detailed analysis of this legislative implementation gap problem in Hong Kong).
- <sup>23</sup> See Katherine Lynch, "Reform of Family Justice in Hong Kong: Children's Dispute Resolution Issues" in Katherine Lynch & Anne Scully-Hill, eds, *International Perspectives on Disputes about Children and Child Protection*, vol 1 (Hong Kong: Chinese University Press, 2015) 187.
- <sup>24</sup> See e.g. HK, Judiciary, *Practice Directions* 15.10 (Family Mediation), 15.11 (Financial Dispute Resolution), 15.13 (Children's Dispute Resolution); The Law Society of Hong Kong, "Family Law: Case Management Measures", Circular, (12 December 2016) (introducing case management measures for matrimonial and family proceedings); HK, Chief Justice Working's Party on Family Procedural Rules, *Review of Family Procedure Rules Final Report* (Hong Kong:

There was anticipated legislative reform when the Government announced the long-awaited *Children Proceedings (Parental Responsibility) Bill (Children's Bill)* in late 2015 endorsing the shift away from a *custody, care, and control* and *access* approach to that of *parental responsibility*.<sup>25</sup> After significant public consultation, however, the Government announced in 2018 that it would delay implementation of this draft legislation. The unfortunate result is that Hong Kong is still governed by an outdated and confusing family law system that is failing its children and families.<sup>26</sup> While family law reform remains stalled in Hong Kong, other jurisdictions have called for fundamental reforms to family justice systems, introducing new legislation and ongoing process reforms.<sup>27</sup> At present, the Government of Canada and the provincial Government of Manitoba have family law reform bills pending

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Judiciary, May 2015). See also *ZJ v XWN*, [2018] HKCA 436 at para 66 (suggesting various case-management practices in appeals relating to children); Hong Kong Bar Association, Circular No 134/18 (27 July 2018) (drawing attention to practices suggested in *ZJ v XWN*).

- <sup>25</sup> See HK, Labour and Welfare Bureau, *Proposed Legislation: Children Proceedings (Parental Responsibility) Bill* (Hong Kong: LWB, 2015) [*Children's Bill*]. The Government announced the draft *Children's Bill* at the Third Children's Issues Forum in November 2015, established to foster multidisciplinary public dialogue on implementing family law reforms.
- <sup>26</sup> Hong Kong's failure to reform and modernize Hong Kong law occurs not just in child custody and access matters but also in many other areas. See Tilbury, Young & Ng, *supra* note 22 at 15, 18–20 (discussing the Government's failure to respond to reports from law reform commissions generally).
- <sup>27</sup> Although government action and reform has been slow due to lack of consensus among stakeholders and insufficient supporting research and statistical data. See Saini et al, *supra* note 7 at 383.

enactment.<sup>28</sup> Singapore and the United Kingdom (UK) enacted extensive family law reforms in 2014 and the UK is now considering introducing further radical reforms.<sup>29</sup> Scotland, Australia, and New Zealand are all currently in the midst of further comprehensive reviews.<sup>30</sup>

This article evaluates the need to reform Hong Kong's family justice system. It is particularly focused on promoting children's best interests, ensuring children's voices are heard, providing support to high-conflict

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- <sup>28</sup> Canada introduced Bill C-78 in May 2018 following a 20-year consultation period. See Bill C-78, *supra* note 4. In March 2019, Quebec committed to modernizing its family law commencing a series of eleven public consultations. See Québec, Ministry of Justice, "Family Law Reform", online: <[justice.gouv.qc.ca/en/departement/issues/family](http://justice.gouv.qc.ca/en/departement/issues/family)>. Manitoba introduced modernizing family legislation in March 2019. See Manitoba FLRC, *Modernizing Our Family Law System*, *supra* note 4. Alberta, BC, and Nova Scotia also introduced earlier family law reforms. See Canada, Department of Justice, *Legislative Background: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act (Bill C-78)* (Ottawa: DOJ, September 2018), online (pdf): <[justice.gc.ca/eng/rp-pr/fl-lf/famil/c78/legislative\\_background\\_E.pdf](http://justice.gc.ca/eng/rp-pr/fl-lf/famil/c78/legislative_background_E.pdf)> [Department of Justice, *Legislative Background*].
- <sup>29</sup> Reforms to private law child case procedures and practices. See *Singapore Report*, *supra* note 1; UK, Secretary of State for Education, *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny* (Cm 8540, 2013) [UK, *Pre-Legislative Scrutiny*].
- <sup>30</sup> See *Scottish Review*, *supra* note 4; *ALRC Final Report*, *supra* note 4; *New Zealand Consultation*, *supra* note 4. Notably, these jurisdictions are now experiencing another wave of legislative and policy reform while Hong Kong still grapples with introducing many family law reforms suggested 20 years ago.

families, addressing family-violence issues, and enhancing child-support services. The provisions of the draft *Children's Bill* are analyzed and the current lack of comprehensive family justice reform is discussed.

The Government's cautious approach to legislating doctrinal reform of *parental responsibility* replacing *custody and control* is reviewed.<sup>31</sup> Suggestions for further revision are made, with reference to comparative family justice reform. Whilst Hong Kong lags behind other jurisdictions there is some benefit as these provide alternative models of legislative reform and best measures and practices. Thereafter, the focus shifts to the right of Hong Kong children to have their voices heard in family proceedings.<sup>32</sup> As in many jurisdictions, the challenge in Hong Kong is transforming "the rhetoric of children's participation" into successful effective practice.<sup>33</sup> Some judiciary-led initiatives are discussed, along with views-of-the-child reports and independent child advocates. The importance of providing multidisciplinary family-support measures to assist children and families going through separation and divorce is then considered. By way of conclusion, creation of a formal independent family justice commission in Hong Kong is proposed. Such an institution

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<sup>31</sup> The Government has delayed implementing substantive law reforms despite committing to timely law reform. By contrast, the Judiciary has introduced a whole series of court-reform measures. See generally *supra* note 26.

<sup>32</sup> See also *UNCRC*, *supra* note 2 art 4.

<sup>33</sup> See e.g. Kristin Skjærten, "Children's Voices in Norwegian Custody Cases" (2013) 27:3 Int'l JL Pol'y & Fam 289 ("the rhetoric of children's participation is difficult to transform into successful practice" at 289).

could help integrate comprehensive multidisciplinary responses and services, as well as implement more effective and timely family law reform.<sup>34</sup>

**HONG KONG'S FAMILY JUSTICE SYSTEM:  
IMPLEMENTATION GAP IN LAW AND POLICY  
REFORM**

In December 1998, Hong Kong's Law Reform Commission encouraged substantial legislative reform relating to custody and access arrangements for children.<sup>35</sup> Thereafter, during the period 2002–05, the Commission released four further reports on guardianship and child custody, including the 2003 *Report on The Family Dispute Resolution Process* and the 2005 *Report on Child Custody and Access*.<sup>36</sup> These reports recognized the multidisciplinary problems that families experience in

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<sup>34</sup> This is important since Hong Kong lacks a permanent Law Reform Commission.

<sup>35</sup> The Commission accepted the 1998 consultation report on guardianship and custody proposing a new range of court orders reflecting the concept of “joint parental responsibility.” See Law Reform Commission of Hong Kong Sub-Committee on Guardianship and Custody, *Consultation Paper* (Hong Kong: HKLRC, 1998). In Canada, England and Wales, Scotland, Australia, and New Zealand, new laws have been enacted reflecting the parental responsibility model.

<sup>36</sup> Law Reform Commission of Hong Kong, *The Family Dispute Resolution Process* (Report) (Hong Kong: HKLRC, March 2003); Law Reform Commission of Hong Kong, *Child Custody and Access* (Report) (Hong Kong: HKLRC, March 2005). See also Law Reform Commission of Hong Kong, *Guardianship of Children* (Report) (Hong Kong: HKLRC, January 2002); Law Reform Commission of Hong Kong, *International Parental Child Abduction* (Report) (Hong Kong: HKLRC, April 2002).

separation and divorce—not just legal problems but social problems with legal elements, including issues relating to parenting, spousal and family relationships, housing and family finances, mental health, employment and workplace, and stress and anger management.<sup>37</sup> The Law Reform Commission advocated moving from a court-based adversarial system to a more consensual system recognizing children’s rights to participate in separation and divorce proceedings. The Commission also endorsed the need to provide options for dispute resolution and doctrinal changes recognizing joint parental responsibility rather than assuming sole custody.<sup>38</sup>

An important challenge in introducing family law reform in Hong Kong has been the need to shift societal attitudes about the parent-child relationship. The Commission’s 2005 *Report on Child Custody and Access* recommended changing from the use of archaic *custody* and *access* terms towards an assumption of ongoing *parental responsibility*. This emphasizes the continuing responsibilities of both parents towards their children (instead of individual parental rights) and the child’s right to enjoy a continuing relationship with both parents if in

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<sup>37</sup> As such, the child and family justice system spans a broad range of matters, involves multiple government agencies and departments, and covers diverse fields of knowledge and practice.

<sup>38</sup> There is international convergence on the importance of this paradigm shift described as a “revolution” by Sir James Munby, former President of the Family Division, and Head of (UK) Family Justice in 2014. See James Munby, Address on Family Justice Reforms (29 April 2014), online (pdf): <[judiciary.uk/wp-content/uploads/2014/05/family-justice-reforms-29042014.pdf](http://judiciary.uk/wp-content/uploads/2014/05/family-justice-reforms-29042014.pdf)>. See also Semple, *supra* note 3.

the child's best interests.<sup>39</sup> The report recommended adopting the clearer terminology of *residence* and *contact*, as *custody* has ownership connotations and complications over joint- or sole-custody applications.<sup>40</sup> The report suggested adopting the definition of *parental responsibility* provided in section 1(1) of the *Children (Scotland) Act 1995* (UK) which gives a detailed description of the responsibilities of a parent.<sup>41</sup>

Aware of mounting reform pressures and public concerns about delay in implementing the Commission's proposals, the Chief Secretary's Policy Committee established guidelines in 2011 for review of Commission reports, requiring a more timely interim response within six months of publication of the report and a detailed public response within twelve months.<sup>42</sup> Against this backdrop, the Labour and Welfare Bureau published a public consultation document in December 2011 entitled *Child Custody and Access: Whether to Implement the "Joint*

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<sup>39</sup> Under the existing law, the parent-child relationship is defined in terms of the *rights* and *authority* of each parent towards their child. The court's role was viewed as dividing up these parental rights and authority.

<sup>40</sup> In the past, the courts would frequently award one parent sole custody of the child, while the other parent's involvement was limited to a right of access. See Athena Liu & Dennis Ho, "From 'Custody' to 'Parental Responsibility': The Need for Change", *Hong Kong Lawyer* (July 2013).

<sup>41</sup> As well as a discussion of *parental rights*.

<sup>42</sup> These administrative guidelines followed a similar approach in the UK. See Law Reform Commission of Hong Kong, *2013 Report*, (HK: LRC, 2013) at 12, online (pdf): <[www.hkreform.gov.hk/en/docs/LRC2013.pdf](http://www.hkreform.gov.hk/en/docs/LRC2013.pdf)>. See also Tilbury et al, *supra* note 22 at 47–50, 64–65.



*Parental Responsibility Model” by Legislative Means* in which it collected and summarized a variety of views within the community.<sup>43</sup> Thereafter, the Bureau commenced a five-month public consultation on whether to implement the parental responsibility model by legislative means.<sup>44</sup> Those who supported joint parental responsibility, including legal professionals and children's groups, put forth numerous arguments in favour of the paradigm shift, including: that the new model was more child focused; parental hostility during divorce proceedings would be reduced; it was in line with latest international trend in family law; the parental responsibility concept cannot be adequately promoted through evolving case law under existing legislative framework; and public attitudes cannot be changed merely by public education without legislative reform.<sup>45</sup>

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<sup>43</sup> See the HK, Labour and Welfare Bureau, *Child Custody and Access: Whether to Implement the “Joint Parental Responsibility Model” by Legislative Means* (Consultation Paper) (Hong Kong: LWB, December 2011). The results of the consultation were reported to the Legislative Council in July 2013. See Michael Kirby, “Are We There Yet?” in Brian Opeskin & David Weisbrot, eds, *The Promise of Law Reform* (Federation Press, 2005).

<sup>44</sup> See *ibid.* The Labour and Welfare Bureau advocated the use of joint custody as a means of implementing *parental responsibility* and stated that joint-custody orders were common. However, Melloy JA subsequently confirmed that the Government’s assumption was incorrect: joint-custody orders are not commonly made. See Sharon D Melloy & Anne Scully-Hill, “Custody Orders in Hong Kong: Fact and Fiction” in Lynch & Scully-Hill, *supra* note 23 at 223.

<sup>45</sup> See e.g. Hong Kong Committee on Children’s Rights, “Our Views on the Consultation Paper on *Whether to Implement the ‘Joint Parental Responsibility Model’ by Legislative Means* published by the Labour and Welfare Bureau in December 2011” (April 2012), online (pdf): <[childrenrights.org.hk/v2/archive/04concerns/GuardianshipAndCusto](http://childrenrights.org.hk/v2/archive/04concerns/GuardianshipAndCusto)

However, some expressed concern that the Hong Kong public was not ready to adopt the parental-responsibility model and some opposed the legislation without simultaneous development of the necessary family-support services.<sup>46</sup> Other major stakeholders, including individual single parents, social workers, women's groups, and welfare non-governmental organizations (NGOs) expressed serious reservations that the new legislative arrangements did not adequately deal with high-conflict families and domestic-violence cases.<sup>47</sup> Concern was expressed that the law may be used by hostile parents to obstruct and harass the other parent and that litigated cases may rise since the consent and notification requirements may prolong spousal hostility. Recent tragic cases of child abuse highlight the problems with Hong Kong's existing child-protection system and outdated child-protection laws.<sup>48</sup> Although the Social Welfare

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dy\_201204\_JointParentalResp.pdf> [HKCCR, "Our Views on the Consultation Paper"].

<sup>46</sup> See Lau, *supra* note 7 (discussing the "hesitation of women's groups and single parents' groups" without "simultaneous establishment of a good support system" at 150). Others argued that the Hong Kong community was not ready for such a paradigm shift, that the provisions in the current law for joint custody were sufficient parents.

<sup>47</sup> See *ibid*; HKCCR, "Our Views on the Consultation Paper", *supra* note 45.

<sup>48</sup> Five-year-old Chan Siu-lam stopped going to school in October 2017 and died from physical abuse in January 2018, despite the school documenting her injuries and abuse. Sadly, under the current child-protection regime, there was no duty to investigate, to assess the risk Siu-lam faced, nor any mandatory duty to help her. See Sophie Hui, "Bureau resets rules on child abuse", *The Hong Kong Standard* (22 Aug 2018), online: <[www.thestandard.com.hk/sections-news\\_print.php?id=199340](http://www.thestandard.com.hk/sections-news_print.php?id=199340)>; HK, Legislative Council, *Re: Reform of*

Department has developed a multidisciplinary method to deal with domestic violence and procedural guides for handling child abuse and domestic-violence cases, it is widely recognized that the current system is dysfunctional and in need of urgent reform (particularly given its lack of any mandatory reporting mechanism for child-abuse cases).<sup>49</sup>

Thereafter, in November 2015, the Labour and Welfare Bureau announced that following consultation with the Judiciary, Department of Justice, Social Welfare Department, and Home Affairs Bureau, draft legislation had been prepared: the *Children Proceedings (Parental Responsibility) Bill*. A further four-month public consultation was conducted on this draft bill and proposed family-support measures.<sup>50</sup> Both the Hong Kong Bar Association and the Law Society of Hong Kong endorsed the bill (with suggested revisions) and urged its

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*child protection legislation*, LC Paper No CB(4)888/17-18(05) (Hong Kong: LC, 29 March 2018).

<sup>49</sup> Reform of Hong Kong's child protection system is needed to ensure the best interests of all children. See e.g. Priscilla Lui Tsang Sun Kai, "Responding to the Sub Committee on Children's Rights of the Legislative Council, Multidisciplinary Case Conference of Child Abuse and Welfare Plans for Children" (17 January 2017) (also released by the Legislative Council as LC Paper No CB(4)419/16-17(04)). See also HK, Legislative Council, LC Paper Nos CB(2)1556/15-16(01)-(09) (Hong Kong: LC, 28 May 2016) online: <legco.gov.hk/yr15-16/english/panels/ws/papers/ws\_b.htm>; HK, Legislative Council, *Strategies and measures to tackle domestic violence and support families at-risk*, LC Paper No CB(2)1142/17-18(06) (Hong Kong: LC, 9 April 2018).

<sup>50</sup> A total of about 150 written submissions were received from individuals and groups.

expeditious passage into legislation.<sup>51</sup> They firmly stated that inadequacy of support measures should not be an excuse to delay the introduction of this much-awaited-for and necessary reform. However, Legislative Council Members of the Panel on Welfare Services passed two motions in 2016–17, objecting to the bill's implementation based on the lack of concrete family-support services for divorced families and an absence of work plans to promote co-parenting.<sup>52</sup> The panel generally agreed that a new parental responsibility model should be adopted but concern was expressed about the absence of provisions dealing with domestic violence in the draft *Children's Bill*,

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<sup>51</sup> See Hong Kong Bar Association Committee on Family Law, "Response on the Children Proceedings (Parental Responsibility) Bill" (26 April 2016) [HKBA "Response"]; Law Society of Hong Kong, "The Proposed Legislation to Implement the Recommendations of the Law Reform Commission Report of Child Custody and Access: Submissions" (15 March 2016), online (pdf): <[www.hklawsoc.org.hk/pub\\_e/news/submissions/20160329.pdf](http://www.hklawsoc.org.hk/pub_e/news/submissions/20160329.pdf)> [Law Society, "Submissions"]. See also Hong Kong Committee on Children's Rights, "Our views towards the Public Consultation on the Proposed Legislation to Implement the Recommendations of the Law Reform Commission Report on Child Custody and Access" (22 March 2016), online (pdf): <[childrenrights.org.hk/v2/archive/04concerns/ChildrenProceedings\\_201603\\_Views.pdf](http://childrenrights.org.hk/v2/archive/04concerns/ChildrenProceedings_201603_Views.pdf)>.

<sup>52</sup> The Bureau reported the results of the consultation to the Legislative Council Panel on Welfare Service in May 2017, which showed that 34.5 percent of views supported of implementing the proposed legislation with 34.5 percent opposed, while 20 percent considered the proposed legislation worthy of support in principle, but requested additional resources and support measures as a prerequisite. See HK, Legislative Council Panel on Welfare Services, *Proposed Legislation to Implement the Recommendations of the Law Commission Report on Child Custody and Access and Relevant Support Measures* (Consultation Results), LC Paper No CB(2)1318/16-17(03) (Hong Kong: LC, 8 May 2017) at para 3.

the lack of a Maintenance Board to enforce maintenance orders, and insufficient support services for separating and divorced families.<sup>53</sup> In March 2017, the Labour and Welfare Bureau announced that it would not implement the proposed legislation. Instead, additional social-work resources were allocated to provide a range of early intervention services (i.e. co-parenting counselling and parenting coordination services), and five specialized co-parenting support centres were to be established from 2018 onward.<sup>54</sup> Once these supportive measures are in place, the Government pledged to consult stakeholders again on the draft bill.<sup>55</sup> The Government stressed that the draft bill was a consultative bill only, subject to further change, but offered no suggestions for future legislative reform nor an implementation timetable.<sup>56</sup>

Reviewing this extensive stakeholder consultation indicates a problem: whilst there appears to be widespread support for legal concept of *parental responsibility*, two major concerns hamper further legislative reform in Hong Kong. Firstly, the lack of substantive provisions dealing

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<sup>53</sup> See HK, Legislative Council Panel on Welfare Services, *Updated background brief prepared by the Legislative Council Secretariat for the meeting on 8 May 2017: Child Custody and Access in Hong Kong*, LC Paper No CB(2)1318/16-17(04) (Hong Kong: LC, 8 May 2017) [Hong Kong Background Brief].

<sup>54</sup> See HK, Legislative Council Panel on Welfare Services, *2017 Policy Address: Policy Initiatives of the Labour and Welfare Bureau*, LC Paper No CB(2)35/17-18(01) (Hong Kong: LC, 24 October 2017); HK, Legislative Council Panel on Welfare Services, *2018 Policy Address: Policy Initiatives of the Labour and Welfare Bureau*, LC Paper No CB(2)30/18-19(01) (Hong Kong: LC, 30 October 2018).

<sup>55</sup> See *ibid.*

<sup>56</sup> See *ibid.*

with domestic abuse and violence in the draft *Children's Bill* and secondly, a lack of family-support services. The Government has in fact resisted implementing the necessary legislative reform on the basis of insufficient pre- and post-separation support services established within the community.<sup>57</sup> As experience in other jurisdictions indicates, however, comprehensive legislative reform and development of family support services are both required despite the inherent challenges.<sup>58</sup> Unfortunately, in Hong Kong, the need for progressive family law reform is not high on the Government's political agenda with other business and political issues dominating the Government's focus.<sup>59</sup> Moreover, the involvement of various government departments and bureaus makes coordinating family justice reform particularly challenging.<sup>60</sup> No doubt Hong Kong's lack of a permanent, professional, full-time law reform commission to support systematic law reform also makes

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<sup>57</sup> This is exactly what the Law Society and Bar Association warned against. See HKBA "Response", *supra* note 51; Law Society "Submissions", *supra* note 51. It reflects what Kirby describes as "periods of conservatism and resistance to change" in law reform. Kirby, *supra* note 43.

<sup>58</sup> See e.g. the comprehensive family justice reform efforts in Canada, UK, Scotland, Australia, and New Zealand at *supra* notes 1 and 4.

<sup>59</sup> E.g. cross-border legal and business issues, including the proposed extradition legislation and the Belt and Road Initiative. Bureaucratic inertia, lack of political will, and weak reform leadership also hamper much needed family law reform in Hong Kong.

<sup>60</sup> The Labour and Welfare Bureau, who is responsible for the Children's Bill, may lack the necessary legislative-drafting expertise and human resources to undertake effective reform. Moreover, implementing the reform is further compromised by a dysfunctional legislature. See Tilbury, Young & Ng, *supra* note 22 at 4, 15.

implementing this family law reform very difficult. The Commission's minimal administrative and research staff and insufficient resources means that promoting and supporting systematic law reform on a continual basis is challenging.<sup>61</sup> Without such reform, however, Hong Kong's family law remains archaic, complex, and difficult to access.<sup>62</sup>

While the draft *Children's Bill* represents important legislative reform, there is urgent need to amend and redraft this bill to be more comprehensive in scope and to respond to the needs of separating and divorced families.<sup>63</sup> The Government must ensure that adequate and sustainable public resources and bureaucratic supports are available for the progressive realization of children's rights under the bill. While the 2018 Chief Executive Policy Address and

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<sup>61</sup> Proposed reforms will increase secretarial support services but the Commission will remain non-permanent and staffed by volunteers. See HK, Legislative Council Panel on Administration of Justice and Legal Services, *Enhancing the operation model for the Law Reform Commission of Hong Kong*, LC Paper No CB(4)365/17-18(03) (Hong Kong: LC, 20 December 2017); Tilbury, Young & Ng, *supra* note 22 at 4, 14–15.

<sup>62</sup> The court's current approach to an issue on children depends on which statutory jurisdiction is invoked, whether it is the *Guardianship of Minors Ordinance* (HK), Cap 13, *Matrimonial Proceedings and Property Ordinance* (HK), Cap 192, *Matrimonial Causes Ordinance* (HK), Cap 179, *Separation and Maintenance Orders Ordinance* (HK), Cap 16, *Protection of Children and Juveniles Ordinance* (HK), Cap 213, or some other legislation.

<sup>63</sup> The Hong Kong Judiciary has been vocal in calling for implementation of the family law reform recommendations of Hong Kong's Law Reform Commission. See *PD v KWW*, [2010] HKCA 172 at paras 79–81, CACV 188/2009, Lam J; *SMM v TWM*, [2010] HKCA 173 at para 29, CACV 209/2009, Cheung JA.

Budget allocated public funding for some family support services, government action to date on the *Children's Bill* has been muted. Government commitment is necessary to provide a reasonable timeline for legislative revision, further stakeholder consultations, and law reform implementation.<sup>64</sup>

### **COMPARATIVE FAMILY JUSTICE SYSTEM REFORM: FUTURE DIRECTION FOR HONG KONG REFORM**

Hong Kong is not alone in experiencing difficulty in family justice reform. Widely shared common problems in family justice systems continue to persist across a range of different legislative and practice configurations.<sup>65</sup> Hong Kong can learn from the different ways these common-law jurisdictions respond with legislative changes, as well as the range of support measures and practices adopted and their effectiveness.<sup>66</sup>

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<sup>64</sup> And to ensure that major stakeholder groups are further consulted. Family law reform must be raised higher on the Government's current law reform agenda.

<sup>65</sup> Many of the same problems underlying the need for further amendment and revision of the Hong Kong's family justice system are present in other common law countries. See Shaw, *supra* note 2.

<sup>66</sup> Hong Kong's Labour and Welfare Bureau should consider this comparative reform, how these reform measures work in practice, what factors affect their effective implementation and any relevant research.



### Canada: Modernizing the *Federal Divorce Act* (Bill C-78) 2018

Canada's family law system, as in Hong Kong, has been criticized as time consuming and expensive, with a high proportion of self-represented family litigants and an overly adversarial court process detrimentally affecting children.<sup>67</sup> In May 2018 the Canadian Government introduced new legislative reform—Bill C-78—significantly amending Canada's federal family laws related to divorce, separation, and parenting.<sup>68</sup> The proposed legislation introduces changes to the *Divorce Act*, the *Family Orders and Agreements Enforcement Assistance Act*, and the *Garnishment, Attachment and Pension Diversion Act*.<sup>69</sup> The bill introduces reforms

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<sup>67</sup> Critics suggest there are deep structural problems in Canada's family justice system. See Family Justice Working Group, *Meaningful Change for Family Justice*, *supra* note 2; John-Paul Boyd, "Family justice in Canada is at a breaking point", *The National (Canadian Bar Association)* (25 February 2019), online: <nationalmagazine.ca/en-ca/articles/law/opinion/2019/family-justice-in-canada-is-at-a-breaking-point>.

<sup>68</sup> See Bill C-78, *supra* note 4 (receiving Royal Assent 21 June 2019). See also John-Paul E Boyd, "A Brief Overview of Bill C-78, An Act to Amend the Divorce Act and Related Legislation", *Canadian Research Institute for Law and the Family* (May 2018), online: <canlii.org/t/285j> [Boyd, "A Brief Overview of Bill C-78"].

<sup>69</sup> *Divorce Act*, RSC 1985, c 3 (2nd Supp); *Family Orders and Agreements Enforcement Assistance Act*, RSC 1985, c 4 (2nd Supp); *Garnishment, Attachment and Pension Diversion Act*, RSC 1985, c G-2. Family law in Canada is shared jurisdiction between federal and provincial/territorial governments. The *Divorce Act* applies to married couples who are divorcing. Provincial/territorial laws apply to unmarried or common-law couples and to married couples who are separated but not divorcing. See Nicholas Bala, "Bill C-78: Reforming the Parenting Provisions of the Divorce Act", *Association of Family*

protecting children in high-conflict divorces, emphasizing non-adversarial alternatives to protracted court litigation and abandoning archaic proprietary terms *custody* and *access*, instead using neutral language for sharing of *parental responsibilities*.<sup>70</sup> Of relevance for Hong Kong are the bill's four key legislative objectives including to: promote the best interests of children; address family violence; help reduce child poverty; and make Canada's family justice system more accessible and efficient.<sup>71</sup>

***Promoting the Best Interests of Children: Using Child-focused Language***

Bill C-78 promotes child's best interests as the top priority when making parenting decisions and provides a list of specific key factors that a court must consider when deciding what would be in a child's best interests in the child's particular situation.<sup>72</sup> Along with the main

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*and Conciliation Courts (Ontario)* (2018), online: <[afccontario.ca/age-of-protection-cyfsa-legislation-changes-2-2](http://afccontario.ca/age-of-protection-cyfsa-legislation-changes-2-2)>.

<sup>70</sup> Bill C-78 owes much to family legislation previously enacted in British Columbia in 2013 and Alberta in 2003. See Department of Justice, *Legislative Background*, *supra* note 28.

<sup>71</sup> Bill C-78 will also bring Canada closer to becoming a party to two international family law conventions: the 1996 Hague Convention on the Protection of Children (*Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, 19 October 1996, HCCH 34) and the 2007 Hague Child Support Convention (*Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, 23 November 2007, HCCH 38).

<sup>72</sup> Best interest of the child will continue to be the only consideration applied by the court in making a parenting order or a contact order. However, Bill C-78 provides a non-exhaustive list of factors to be

considerations of the child's physical, emotional and psychological safety and wellbeing, other factors include: the nature and strength of the child's relationships with parents, grandparents, and other important people in their life; the child's linguistic, cultural and spiritual heritage and upbringing, including Indigenous heritage; and the child's views and preferences.<sup>73</sup> The codified best-interests criteria will help courts tailor parenting arrangements for each child's specific situation. There is no legislative presumption of equally shared time with the child, but the courts are required to order the maximum amount of parenting time for each parent that is in the child's best interests.<sup>74</sup>

Bill C-78 proposes language changes used to describe parenting arrangements making the law more child-focused, with a greater emphasis on the actual tasks of parenting. The bill uses *parenting orders* and *parenting time* to replace orders for *custody* and *access* under the *Divorce Act*. A parenting order would set out each parent's *decision-making responsibilities*, which refers to making important decisions on behalf of a child, and *parenting*

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taken into account in determining a child's best interest. See Bill C-78, *supra* note 4, cl 12.

<sup>73</sup> See *ibid*, s 12.

<sup>74</sup> Some stakeholders advocated for *equal shared parenting* although significant research raises concerns about a legal presumption of equal parenting time. See Nicholas Bala et al, "Shared Parenting in Canada: Increasing Use But Continued Controversy – Shared Parenting in Canada" (2017) 55:4 Fam Ct Rev 513. See also Australia's proposed abolition of presumption of equal shared parenting: Rhoades, *supra* note 2.

*time*.<sup>75</sup> Both parents could have parenting time, depending on each child's best interests. The new wording is neutral and emphasizes that both former spouses will be caring for their child when the child is with them.<sup>76</sup> The clarity of these legislative provisions has much to offer Hong Kong.

***Considering the Impact of Family Violence on the Best Interests of the Child***

As in Hong Kong, the *Divorce Act* does not include detailed measures for dealing with family violence, even though a substantial body of research indicates the profound impact family violence has on children.<sup>77</sup> Bill C-78 fills this gap by introducing a number of measures to address family violence and reflects an approach Hong Kong may consider adopting.<sup>78</sup> Firstly, the court's

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<sup>75</sup> See Bill C-78, *supra* note 4, cl 1(7) ("means an order made under subsection 16.1(1)," which is "an order providing for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage").

<sup>76</sup> An important amendment to the *Divorce Act* addresses issues with parents or children relocating following a divorce: the bill creates a new framework for children's relocation. See Bill C-78, *supra* note 4, cl 12 (which inserts a new s 16.9(1) into the *Divorce Act*).

<sup>77</sup> See Department of Justice, *Legislative Background*, *supra* note 28 at 14–16; Peter Jaffe et al, *Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce* (Ottawa: Department of Justice, 2014). See also Birnbaum & Bala, *supra* note 6; Harold & Sellers, *supra* note 6.

<sup>78</sup> The Canadian Government also introduced new federal legislation on domestic abuse that includes broader parameters around "intimate partner violence," a higher threshold for bail, and increased sentences for repeat offenders. See Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make*

determination of the best interests of the child must now consider the presence of any family violence and its impact. Thus, the court must take family violence into account when deciding parenting arrangements.<sup>79</sup> *Family violence* is broadly defined as any conduct that is:

violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person—and in the case of a child, the direct or indirect exposure to such conduct.<sup>80</sup>

This includes “physical abuse,” “sexual abuse,” “threats to kill or [harm] [persons, pets, or property],” “harassment,” “psychological abuse,” and “financial abuse.”<sup>81</sup> The Canadian Bar Association had suggested revising the *family violence* definition to explicitly include that violence against non-family members can be a means

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*consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (assented to 21 June 2019), SC 2019, c 25.

<sup>79</sup> See Bill C-78, *supra* note 4, s 12 (presenting the new ss 16(3), (4) of the *Divorce Act*). Judges have previously taken the risk of violence into account in making such decisions but Bill C-78 codifies a detailed list of factors for the court to take into consideration.

<sup>80</sup> *Bill C-78, supra* note 4, s 1(7) (amending the definitions of the *Divorce Act*). BC followed this same approach in its Family Law Act (2013) which adds a lengthy list of factors, including family violence, to be considered in determining the new “parenting arrangements” in children’s best interests.

<sup>81</sup> *Bill C-78, supra* note 4, s 1(7) (under the definition of *family violence*). See also Boyd, “A Brief Overview of Bill C-78”, *supra* note 68 at 2.

of intimidating, harassing, or threatening a spouse or ex-spouse.<sup>82</sup>

The bill recognizes the complex nature of family violence and provides a list of factors to assist courts' assessments of the impact of family violence and its potential effect on future parenting when determining parenting arrangements. These factors include the "seriousness and frequency of the family violence"; "whether there is a pattern of coercive and controlling behaviour"; "whether the family violence is directed toward the child or [the degree to which the child is] exposed to family violence"; the "risk of harm to the child"; and "any steps taken by the [perpetrator] to prevent further family violence . . . and improve [their child care ability]."<sup>83</sup> Secondly, before making parenting, contact, or support orders, courts must consider any other proceedings or orders involving any of the parties.<sup>84</sup> This is to avoid situations where orders made by a family court conflict with orders (e.g. restraining orders) made by a criminal court.<sup>85</sup>

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<sup>82</sup> See Canadian Bar Association, "Bill C-78, Divorce Act amendments" (November 2018) at 4–5 (recommendation 10) [CBA, "Bill C-78"].

<sup>83</sup> See Bill C-78, *supra* note 4, cl 12 (presenting the new ss 16(3)–(4) of the *Divorce Act*).

<sup>84</sup> See Bill C-78, *supra* note 4, cl 8 (adding a new s 7.8(2) to the *Divorce Act*). The court has a duty, where appropriate, to consider any civil protection orders, child protection orders, or matters of a criminal nature.

<sup>85</sup> For example, the family court may order contact or parenting time that conflicts with an existing restraining order against one of the parties. See discussion in Department of Justice, *Legislative Background*, *supra* note 28 at 14–18.

### *Introducing Measures to Help Reduce Child Poverty*

After a divorce or separation, spouses and children in Canada and Hong Kong are at much greater risk of living in poverty if they do not get the financial support that they are owed.<sup>86</sup> Bill C-78 introduces measures to streamline administrative processes and make family justice more efficient with particular focus on child-support provisions. Provincial child-support administrative services will be able to perform some tasks that are currently left to the courts, making it faster, less costly, and less adversarial to determine or recalculate child-support amounts.<sup>87</sup> Provincial recalculation services will be allowed to recalculate child support at any time if needed, instead of on a fixed schedule.<sup>88</sup> Bill C-78 also includes more tools to establish and enforce child support. For example, in certain circumstances, the government can release tax information to help ensure a child-support amount is accurate.<sup>89</sup>

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<sup>86</sup> Research in both Canada and Hong Kong shows divorced populations and their children experience worse financial conditions and economic outlook than the general population. See Lau, *supra* note 7; Department of Justice, *Legislative Background*, *supra* note 28 at 28; The University of Hong Kong Centre for Suicide Research and Prevention, “A Study on the Phenomenon of Divorce in Hong Kong, Final Report”, LC Paper No CB(2)2288/13-14(01) (Hong Kong: Legislative Council, 9 June 2014) at 7–8 [UHK, “Phenomenon of Divorce in Hong Kong”].

<sup>87</sup> See Department of Justice, *Legislative Background*, *supra* note 28 at 21–22.

<sup>88</sup> The process of varying a support order for parties living in different provinces or territories would be streamlined, allowing only one court to be involved instead of courts in both jurisdictions.

<sup>89</sup> Bill C-78 amends the *Family Orders and Agreements Enforcement Assistance Act* (*supra*, note 69) to allow release of information to help obtain and vary a support provision and expand release of information

***Making the Family Justice System More Accessible and Efficient***

Bill C-78 encourages parents and professionals to use *family dispute resolution processes* to settle disagreements outside the court process using negotiation, mediation, and other collaborative processes.<sup>90</sup> The bill imposes new duties on both parties and their lawyers: family lawyers must encourage clients to use ways other than court litigation to resolve disputes, including giving them information about family justice services that might help them.<sup>91</sup> Parties with parenting time, decision-making responsibility or contact are required to exercise these rights in a manner consistent with the best interests of the

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to provincial family justice government entities. In keeping with Canada's privacy laws, only certain groups, such as a judge or maintenance-enforcement program, would be allowed to have this information.

<sup>90</sup> See Bill C-78, *supra* note 4, cl 8 (adding a new s 7.3 to the *Divorce Act* that directs parties to use "family dispute resolution process[es]"). The Canadian Bar Association is concerned that the definitions for these terms are vague with little guidance on appropriate training or qualifications for those offering services. See CBA, "Bill C-78", *supra* note 82 at 4.

<sup>91</sup> See Bill C-78, *supra* note 4, cl 8 (adding new ss 7.1–7.4 to the *Divorce Act*). The National Association of Women are concerned that the increased use of out-of-court processes could force victims of family violence to accept unfair settlements. See Luke's Place Support and Resource Centre & National Association of Women and the Law, "Joint brief on Bill C-78", online (pdf): <[ourcommons.ca/Content/Committee/421/JUST/Brief/BR10190233/br-external/NationalAssociationOfWomenAndTheLaw-e.pdf](http://ourcommons.ca/Content/Committee/421/JUST/Brief/BR10190233/br-external/NationalAssociationOfWomenAndTheLaw-e.pdf)>.



child.<sup>92</sup> Parties are required to try to resolve the matter that could be the subject of the *Divorce Act* order through family dispute resolution processes and they must provide complete, accurate, and current information (financial information or support).<sup>93</sup> Bill C-78 received Royal Assent on June 21, 2019 but is not yet in force.<sup>94</sup> Although Bill C-78 is progressive reform, as in Hong Kong, “there are concerns that governments will not provide sufficient resources to allow for proper implementation and for the kind of ‘cultural changes’ intended by the new law.”<sup>95</sup>

### **Manitoba: Introducing a Family Law Modernization Act 2019**

Progressive law reform is also happening at the provincial level in Canada. In June 2018, Manitoba’s Family Law Reform Committee released a report, *Modernizing Our Family Law System*, aimed at reducing the cost and adversarial nature of processes used to resolve family law disputes.<sup>96</sup> Proposals include introducing an innovative

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<sup>92</sup> See Rachel Birnbaum & Nicholas Bala, *Making Parenting Plans in Canada's Family Justice System: Challenges, Controversies and the Role of Mental Health Professionals* (Toronto: Carswell, 2019).

<sup>93</sup> This is not an absolute requirement; it is required only “to the extent that it is appropriate to do so.” Bill C-78, *supra* note 4, cl 8 (providing the text of the new s 7.3 of the *Divorce Act*).

<sup>94</sup> See *ibid.*

<sup>95</sup> See Bala, *supra* note 69.

<sup>96</sup> See Manitoba FLRC, *Modernizing Our Family Law System*, *supra* note 4; Rhoades, *supra* note 2 at 2–3. Previously in Manitoba, a private member had introduced Bill 224, *The Family Law Reform Act (Putting Children First)*, 2nd Sess, 41st Leg, Manitoba, 2017 (not proceeded with).

mandatory mediation pilot project, early triage intervention, and a less adversarial administrative process.<sup>97</sup> The Manitoba judiciary also proactively enacted its own less adversarial family court reforms in February 2019. These included new case-management measures, implementing time limits for court scheduling, and requiring early triage and case conferences.<sup>98</sup> Thereafter, in March 2019, Manitoba introduced Bill 9, the *Family Law Modernization Act* which introduced reforms to settle divorce matters, property division, and custody arrangements through faster out-of-court systems with a simplified child- and spousal-support process.<sup>99</sup>

This bill is the first of its kind in Canada to mandate an out-of-court dispute-resolution service when resolving issues such as child custody, division of property, and child

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<sup>97</sup> See Manitoba FLRC, *Modernizing Our Family Law System*, *supra* note 4.

<sup>98</sup> See MB, Practice Direction Re: New Model for Scheduling and Case Flow Management (to be implemented as of 1 February 2019), online (pdf): <[manitobacourts.mb.ca/site/assets/files/1152/practice\\_direction\\_and\\_schedule\\_a\\_final\\_april\\_8\\_2019.pdf](http://manitobacourts.mb.ca/site/assets/files/1152/practice_direction_and_schedule_a_final_april_8_2019.pdf)>.

<sup>99</sup> See Bill 9, *The Family Law Modernization Act*, 4th Sess, 41st Leg, 2019 (assented to 3 June 2019), SM 2019, c 8 (enacting in separate Schedules the *Family Dispute Resolution (Pilot Project) Act*, *Child Support Service Act*, and amending the *Arbitration Act (Family Law)* and *Family Maintenance Act*). Each of these Schedules comes into force “on a day to be fixed by proclamation.” Manitoba has proclaimed into force on 1 July 2019 all of Schedule C (*The Arbitration Amendment Act (Family Law)*) except for s 21 all of Schedule D (*The Family Maintenance Amendment Act*). See Proclamation, 19 June 2019, (2019), online (pdf): <[web2.gov.mb.ca/laws/statutes/proclamations/2019c8\(2019-07-01\).pdf](http://web2.gov.mb.ca/laws/statutes/proclamations/2019c8(2019-07-01).pdf)>.

and spousal support.<sup>100</sup> This is also the first time that recommendation orders resulting from the dispute-resolution services are as binding as court orders.<sup>101</sup> Mandatory mediation is established for couples applying to resolve matters under Manitoba's *Family Maintenance Act*.<sup>102</sup> Married couples will still have to file for divorce in the superior court but have the option of resolving conflicts under the three-year Winnipeg-based pilot project to test a new *facilitated-resolution* model beginning in early 2020.<sup>103</sup> This will include creation of an administrative *Family Dispute Resolution Service* with two phases. The first facilitative-resolution phase will use a *resolution officer* to help parties come to a mutually satisfactory agreement.<sup>104</sup> If the dispute cannot be resolved in this first phase it then proceeds to a second adjudicatory phase before an *adjudicator* who makes a recommended order

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<sup>100</sup> See *ibid*, Schedule A (enacting the *Family Dispute Resolution (Pilot Project) Act*), ss 3(1)–3(2).

<sup>101</sup> See *ibid*, Schedule B (enacting the *Child Support Service Act*), ss 3(8), 5(9); *ibid*, Schedule A (enacting the *Family Dispute Resolution (Pilot Project) Act*), s 31(3).

<sup>102</sup> See *ibid*, Schedule E. Developed after extensive consultation with major stakeholders.

<sup>103</sup> Bill 9, the *Family Law Modernization Act* contains six sections and corresponding schedules that enact or amend several provincial acts, including the *Child Support Service Act*, *Arbitration Act* and the *Family Maintenance Act*. The pilot project will be restricted to the *Family Maintenance Act* matters.

<sup>104</sup> Couples with court orders relating to domestic violence, expedited child-custody cases, or who have already begun proceedings under the federal *Divorce Act* are exempt. See Bill 9, *supra* note 99, Schedule A (enacting the *Family Dispute Resolution (Pilot Project) Act*), s 3(3).

which is deemed as a court order if neither party objects.<sup>105</sup> Before proceeding to court, both parties must have made early attempts of resolution (through mediation), prepare parenting plans for shared custody, and provide financial disclosure. There is mixed reaction from Manitoba's legal community to these reforms, with concern that while this system is streamlined, it will still funnel the parties into another adversarial system albeit with an administrator.<sup>106</sup>

Child-support processes are also simplified under Bill 9 and will enable many to be dealt with outside the courts.<sup>107</sup> Manitoba's Child Support Service will have greater authority with enhanced power to make child-support decisions for families without a court application.<sup>108</sup> Moreover, awards for child support will also be enforceable in the same manner as court orders.<sup>109</sup> The Maintenance Enforcement Program will also have expanded administrative authority so parents can make support arrangements outside of courts.<sup>110</sup>

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<sup>105</sup> The Government will also expand the quality and amount of public information expressed in clear plain language concerning family law, including rights and obligations and non-adversarial resolutions. See Manitoba FLRC, *Modernizing Our Family Law System*, *supra* note 4.

<sup>106</sup> See Sean Kavanagh, "Manitoba chief justice promises to speed up process for divorce", *CBC News* (28 August 2018); Deanne Sowter, "Can we reframe the family law reform conversation please?", *Winkler Institute for Dispute Resolution* (4 November 2017).

<sup>107</sup> See Bill 9, *supra* note 99, Schedule B (enacting the *Child Support Service Act*).

<sup>108</sup> See *ibid*, Schedule B.

<sup>109</sup> See *ibid*, Schedule B, ss 3(8), 5(9).

<sup>110</sup> See *ibid*, Schedule E (the *Family Maintenance Amendment Act*), s 8 (amending the *Family Maintenance Act* to add ss 53.2(1)–(6) and

### **England and Wales: Family Justice System in Crisis with New Reforms Coming**

In 2011, the UK Family Justice Review in England and Wales recommended a radical review of the family justice system emphasizing the need for children's interest to be central to the operation of the family justice system and stressing that the family justice system did not currently operate as a "coherent, managed system."<sup>111</sup> Reform focused on five broad reform categories: a system with children's needs at its heart, changes to public law, changes to private law, developing the leadership of the family justice system, and the judiciary and wider workforce.<sup>112</sup> In 2014, the single Family Court became a reality and a comprehensive *Children and Families Act 2014* (UK) was implemented.<sup>113</sup> Reforms were designed to improve child welfare and make the court process more effective and efficient. The act provides for a new *Child Arrangements*

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others). See also Manitoba, Legislative Review Committee, *Transforming Child Welfare Legislation in Manitoba: Opportunities to Improve Outcomes for Children and Youth, Report of the Legislative Review Committee* (Winnipeg: LRC, September 2018) (recommending a complete overhaul of Manitoba's child welfare system).

- <sup>111</sup> See *Family Justice Review Final Report*, *supra* note 1 at 6. The Family Justice Review also found the family justice system was "not a system at all" and that vulnerable children were having their "futures undermined" (at 5).
- <sup>112</sup> In 2012 the Government accepted and committed to action on the vast majority of the 134 recommendations. See *UK Policy paper*, *supra* note 1.
- <sup>113</sup> *Children and Families Act 2014* (UK). The Family Court replaced the three-tier system of family proceedings courts, county courts, and the High Court and became the single point of entry for an application in each local area.

*Order* replacing the previous separate residence and contact order. One of the most controversial issues in the Family Justice Review was shared parenting: following the review, the Government launched a public consultation with Section 11 of the act the eventual outcome.<sup>114</sup> There is no presumption of shared parenting, but Section 11, entitled “Welfare of the child: parental involvement” introduces a presumption of continued parental involvement into the welfare checklist in Section 1 of the *Children Act 1989 (UK)*.<sup>115</sup>

Despite these 2014 reforms, however, the President of the Family Division has repeatedly stated that the family justice system in England and Wales is in crisis, fuelled by an untenable workload created by the large number of applications to take vulnerable children into care.<sup>116</sup> Noting that nearly 40 percent of separating and divorced parents are unable to sort out the arrangements for their own child without the need to apply for a court order, Lord Justice McFarlane stated in April 2019 that radical reform of

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<sup>114</sup> See *ibid*, s 11. The *Final Report* concluded there should not be “any legislation that might risk creating an impression of a parental ‘right’ to any particular amount of time with a child”. See *Family Justice Review Final Report*, *supra* note 1 at para 4.27.

<sup>115</sup> See UK, “Pre-Legislative Scrutiny”, *supra* note 29 at 30 which reads: “[the amendment sends] an important message to parents about the valuable role they both play in their child’s life.”

<sup>116</sup> There was a thirty-year high of children being taken into the UK’s care system in 2018. A review in June 2018 found that the child welfare and family justice system was in crisis, overstretched by spiralling demand and diminishing resources and undermined by austerity cuts and rising poverty. See *Crisis Care Review: Options for Change* (London: Family Rights Group, 2018), online (pdf): <[frg.org.uk/images/Care\\_Crisis/CCR-FINAL.pdf](http://frg.org.uk/images/Care_Crisis/CCR-FINAL.pdf)>.

working practices and processes is required.<sup>117</sup> Private-law child-case reforms being discussed focus on “‘solutions-based processes’ engaging a ‘dispute resolution alliance’ of local services, with court reserved only for those cases [with] a justiciable problem.”<sup>118</sup> This may include a triage process with differentiated case management, early intervention and support services, and wider public parenting education.<sup>119</sup>

### **Singapore: Creation of “Family Justice Courts” and Integrated Family Support Services**

The reforms now being discussed in England and Wales sound similar to Singapore’s family justice reform process led by a Chief Justice driven to re-conceptualize the family courts as a forum for sustainable solutions involving a proactive judiciary, collaborative counsel, and multidisciplinary professionals.<sup>120</sup> In 2013–14,

<sup>117</sup> See Sir Andrew McFarlane, President of the Family Division, Address at the Resolution Conference 2019 (April 5, 2019), online (pdf): <judiciary.uk/wp-content/uploads/2019/04/Resolution-Key-Note-2019-final.docx-8-APRIL-2019.pdf> (“around 38% of couples need to go to court to resolve disagreements over how they should care for their child post-separation . . . a far cry from the previous comfortable urban myth based on a figure of 10%” at 13).

<sup>118</sup> *Ibid* at 16. Other projects are in progress to “digitise the entire court system,” “reform practice in public law child cases,” and “establish the Financial Remedies Court.” *Ibid* at 4.

<sup>119</sup> See *ibid*. See also Mervyn Murch, *Supporting children when parents separate: Embedding a crisis intervention approach with family justice, education and mental health policy* (Bristol: Policy Press, 2018).

<sup>120</sup> Singapore has developed a family justice infrastructure and introduced initiatives to “infuse therapeutic jurisprudential principles and techniques (initially pursued by the multidisciplinary teams) throughout the entire family justice system ecosystem.” Ng et al,

Singapore's Chief Justice appointed an inter-agency Committee for Family Justice to complete a comprehensive review of its family justice system resulting in progressive reform.<sup>121</sup> As with Canada and the UK, the review focused on sufficiently protecting and representing children's interests, the need for early family support, and less-adversarial dispute-resolution services outside the courts.<sup>122</sup> In 2014, the committee released its report resulting in the enactment of the *Family Justice Act 2014* (SK) and reforms to the *Children and Young Persons Act 1993* (SK). Given Singapore's close proximity to Hong Kong and their shared colonial history and common-law systems, Singapore's family justice reforms are particularly relevant.

Singapore has adopted a "judge-led approach" to adjudicating family disputes, referring to the judge being sensitive to the individual circumstances of the parties and exercising the court's power in a more pro-active role.<sup>123</sup> A new specialized judicial institution was created called the specialized Family Justice Courts which are a distinct and

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"Family Justice Courts—Innovations, Initiatives and Programmes: An Evolution Over Time" (2018) 20 Sing Ac LJ 617 at 640. See also Chief Justice Sundaresh Menon, "The Evolution of Family Justice", *The Law Gazette* (Singapore: Law Society of Singapore, 2016).

<sup>121</sup> Reforms of Singapore's family justice system have been primarily led by the judiciary. See Ng et al, *supra* note 120 (calling it a "judge-led" approach); Waleed Haider Malik, *Judiciary-Led Reforms in Singapore: Framework, Strategies, and Lessons* (Washington: The World Bank, 2007) at 39–58.

<sup>122</sup> See Ng et al, *supra* note 120.

<sup>123</sup> Including the power to direct parties to appropriate family support services.



specialized body of courts comprising three courts: the Family Courts, the Youth Courts, and the Family Division of the High Court.<sup>124</sup> As a result, all family-related proceedings in Singapore are heard under one roof, something many stakeholders have long advocated for in Hong Kong.<sup>125</sup> The Family Justice Courts simplified and streamlined family court processes and practices and implemented differentiated case management processes and practices directly related to advancing the best interests of the child.<sup>126</sup> Uncontested simplified track procedure is for straightforward uncontested divorce cases. Separate tracks docketed to a single judge are for more complex contested cases involving high-conflict and domestic-abuse concerns.<sup>127</sup>

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<sup>124</sup> Described as the beginning of a new court paradigm. See Ng et al, *supra* note 120 at 626. The Law Society of Hong Kong has repeatedly requested for a dedicated Family Court to be developed. Currently, the Family Court of Hong Kong is part of the District Court rather than specialist family court.

<sup>125</sup> All three courts are led by a Presiding Judge. The Government appointed Judicial Commissioners and increased numbers of family specialist judges. See Ng et al, *supra* note 120 at 626–627.

<sup>126</sup> See *ibid* at 627.

<sup>127</sup> See *Singapore Report*, *supra* note 1 at 28–30. Other possible tracks include cases involving young children, unrepresented litigants, financial matters, and international dimensions. This approach is supported by empirical research, see e.g. Nicolas Bala, Rachel Birnbaum & Justice Donna Martinson, “One Judge For One Family: Differentiated Case Management for Families in Continuing Conflict” (2010) 26:2 Can J Fam L 395; Susie Burke, Jennifer McIntosh & Heather Gridley, “Parenting After Separation: A Literature Review Prepared for the Australian Psychological Society” (July 2009), online (pdf): [The Australian Psychological Society <psychology.org.au/getmedia/f5dfbf01-b110-4ecf-](http://www.theaustralianpsychologicalsociety.org.au/getmedia/f5dfbf01-b110-4ecf-)

Increased out-of-court processes were strategically introduced, including informal negotiation, collaborative law, and mediation by the government's Family Resolution Chambers.<sup>128</sup> Stressing the importance of multidisciplinary services, mandatory mediation and counselling was introduced for divorcing couples and for all other children's-issues applications.<sup>129</sup> A Child Focused Resolution Centre established in 2011 provides this mandatory mediation and counselling.<sup>130</sup> Divorce-support specialist agencies set up by the Ministry of Social and Family Development provide a range of pre- and post-divorce support services, including counselling, psychotherapy services, and supervised visitation and exchange in government-supported contact centres.<sup>131</sup> All of the separate alternative dispute resolution (ADR) and multidisciplinary centres have now been amalgamated under a single division, the "Family Dispute Resolution and Specialist Services Division" to leverage specialist

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b04f578e7dc8136a/Parenting\_separation\_2009-position-statement.pdf>.

<sup>128</sup> Relying on the social science research of Kimberley C Emery & Robert E Emery, "Who Knows What is Best for Children? Honoring Agreements and Contracts Between Parents Who Live Apart" (2014) 77 L & Contemporary Problems 151.

<sup>129</sup> See *Family Justice Act 2014* (Singapore) (No 27 of 2014), s 26(9).

<sup>130</sup> Cases without minor children may be referred to court mediation at a party's request but cases with more than \$3 Million assets will be referred to the Singapore Mediation Centre or private mediation. See Ng et al, *supra* note 120 at 623.

<sup>131</sup> The Government has collaborated with community partners to establish contact centres and a mandatory parenting programme for those disagreeing on divorce or other matters with children under 21 years of age. See Ng et al, *supra* note 120 at 629–34.

competencies and skill sets.<sup>132</sup> Recent evaluation of this division supports the value of this approach.<sup>133</sup>

### **Scotland, Australia, and New Zealand: Current Reviews of Family Justice Systems**

It is significant that as of 2019, three jurisdictions (Scotland, Australia, and New Zealand) are in the midst of major family justice reviews calling for comprehensive integrated multidisciplinary reform.<sup>134</sup> They all address issues similar to the ones in Hong Kong: ensuring the centrality of children's "best interests" in decision-making, dealing with high-conflict families, addressing domestic abuse and family violence, facilitating children's participation in proceedings affecting them, alleviating children's poverty, and increasing opportunities for out-of-court dispute resolution. These jurisdictions are relevant for Hong Kong as the Law Reform Commission referred to

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<sup>132</sup> For example, the evidence based "Functional Family Therapy" program targets the entire family and involves therapists, social workers and psychologists working together with the family long term within the home. The has proven to have a lasting positive effect on children and families where others have failed. See Daniel ZQ Gan et al, "The Implementation of the Functional Family Therapy (FFT) as an Intervention for Youth Probationers in Singapore" (2018) *J Marital & Fam Therapy* 1.

<sup>133</sup> In 2017 almost 70 percent of cases were fully resolved through court mediation, with a further 15 percent of cases not fully resolved reaching partial resolution. See discussion in Ng et al, *supra* note 120 at 630; Debbie Ong J, "Family Justice Courts: In the Next Phase", speech delivered at Family Justice Courts Workplan 2018 (28 February 2018) at para 62.

<sup>134</sup> The overall aim of these reviews and reform is to shape family law in view of contemporary society and to improve people's holistic experience in the family justice system.

them when completing its 2005 *Report on Child Custody and Access*, as did the Government when preparing the provisions of the draft *Children's Bill*.

***Scotland: Family Justice Modernizing Strategy 2018–19***

In July 2018 the Scottish Government committed substantial resources to a five-year reform process, undertaking consultation and review of the *Children (Scotland) Act 1995* (Scot).<sup>135</sup> The aim is to create a progressive “family justice modernizing strategy” with children at the centre of the family justice system.<sup>136</sup> A September 2018 consultation paper focuses on broad areas including obtaining views of a child and barriers to children’s involvement in family law cases, reliable enforcement of contact orders and development of less adversarial out-of-court alternatives. The consultation proposes enhanced protection for domestic-abuse victims

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<sup>135</sup> The consultation covers a broad and radical ambit with potential to shape child and family legislation in light of contemporary society. The government intends to introduce a comprehensive family law bill thereafter: Scotland, Scottish Civil Justice Council, *Views of the child in Family and Civil Partnership actions* (Edinburgh: Scottish Civil Justice Council, 2019), online: <[www.scottishciviljusticecouncil.gov.uk/new-rules/2019/04/02/views-of-the-child-in-family-and-civil-partnership-actions](http://www.scottishciviljusticecouncil.gov.uk/new-rules/2019/04/02/views-of-the-child-in-family-and-civil-partnership-actions)>.

<sup>136</sup> The Scottish Government has initiated two significant pieces of work on the strategy. See Scotland, Scottish Government, *Review of the Children (Scotland) Act 1995* (Edinburgh: Scottish Government, 2019) <[www2.gov.scot/Topics/Justice/law/17867/review-of-children-scotland-act-1995](http://www2.gov.scot/Topics/Justice/law/17867/review-of-children-scotland-act-1995)>; Children in Scotland, “Family Justice Modernisation Strategy: A Consultation” (September 2018), online (pdf): <[childreninscotland.org.uk/wp-content/uploads/2018/09/Family\\_Law\\_Review.pdf](http://childreninscotland.org.uk/wp-content/uploads/2018/09/Family_Law_Review.pdf)>.

and their children by utilizing domestic-abuse risk assessments, banning personal cross examination of domestic-abuse victims, and improving interaction between criminal and civil courts regarding domestic abuse.<sup>137</sup> In late May 2019, the Government published an analysis of consultation responses with the final report expected sometime in 2020.<sup>138</sup>

***Australia: Family Law for the Future, 2018–19***

In 2017 the Australian Law Reform Commission (ALRC) announced a comprehensive review of its family law system—the first since the *Family Law Act 1975* (Austl), 1975/53 commenced.<sup>139</sup> As in Hong Kong, Australia’s existing jurisdictional framework for the resolution of family law disputes lacks an appropriate framework for collaboration, coordination, and integration between the family law system, family support services, and the family-violence and child-protection systems.<sup>140</sup> The March 2019 *Final Report* included sixty recommendations

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<sup>137</sup> See Scotland, Scottish Government, *Review of Children (Scotland) Act 1995 consultation: Analysis*, (Edinburgh, Scottish Government, 2019), online: <[www.gov.scot/publications/analysis-consultation-responses-consultation-review-children-scotland-act-1995/](http://www.gov.scot/publications/analysis-consultation-responses-consultation-review-children-scotland-act-1995/)>.

<sup>138</sup> *Ibid* at 73–85.

<sup>139</sup> Key themes emerging about the family law system include that it is: unsafe; does not enforce parenting orders adequately; overly complex; expensive; slow; and lacks accountability.

<sup>140</sup> The Discussion Paper, “Review of the Family Law System”, was released in October 2018 with broad family law reform proposals. See *ALRC Discussion Paper*, *supra* note 4. The ALRC had previously released its “Issues Paper” in March 2018 to which it received over 480 submissions.

considerably scaled back from those put forth in the 2018 Discussion Paper due to limits on public funding and financial resource constraints.<sup>141</sup> The factors to be considered when determining parenting arrangements that promote a child's best interests are reduced and simplified.<sup>142</sup> These factors are: what arrangements best promote the safety of the child and parents (including safety from family violence, abuse, or other harm); views of the child; developmental, psychological, and emotional needs of the child; child's significant relationships where it is safe to do so; parental capacity to care for the child; and anything else relevant.<sup>143</sup> The presumption of equal shared parenting is to be abolished and the presumption of "equal shared parental responsibility" is replaced with presumption of "joint decision making about major long-term issues."<sup>144</sup>

The report recommends that family law matters be subject to rigorous case management by the courts with a simplified approach to property division.<sup>145</sup> Broader amicable dispute resolution is encouraged, including

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<sup>141</sup> *ALRC Final Report, supra* note 4.

<sup>142</sup> See *ibid* at 165–70 (Recommendation 5).

<sup>143</sup> See *ibid*.

<sup>144</sup> The report recommends removing mandatory consideration of equal shared time and amending the presumption of equal shared parental responsibility. See *ALRC Final Report, supra* note 4, Recommendations 7, 8.

<sup>145</sup> See *ALRC Final Report, supra* note 4, Recommendation 34 (encouraging the Family Court to draft a "Practice Note for Case Management").

mediation, collaborative law, and family arbitration.<sup>146</sup> With regard to family violence, the ALRC recommends amending the *Family Law Act* to provide for a statutory tort of family violence by which compensation for harm caused by family violence can be pursued.<sup>147</sup> The most controversial proposal is that the resolution of family law disputes be returned to the states/territories and that the federal Family Court eventually be abolished with the objective of improving the handling of domestic-violence and child-protection cases.<sup>148</sup>

***New Zealand: Strengthening the Family Justice System, 2018–19***

Many of the challenges in Hong Kong’s family justice system are prevalent in New Zealand despite controversial reforms in 2014 introducing a system of out-of-court processes (e.g. a specialized Family Dispute Resolution

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<sup>146</sup> See *ibid*, Recommendations 21–29. These recommendations encourage separated couples to resolve their parenting matters, and property and financial matters, outside the courts.

<sup>147</sup> See *ibid*, Recommendation 19.

<sup>148</sup> See *ibid*, Recommendation 1. The view is that this can be remedied by having a single court focused on the best interests of the child that is able to resolve all family law, child protection and domestic issues together. The Coalition Government was forced to drop the proposed merger after it failed to secure enough support. See Matthew Doran, “National family court should be scrapped and powers given to states, according to review of the system”, *Australian Broadcasting Corporation* (9 April 2019), online: <[www.abc.net.au/news/2019-04-10/family-court-powers-should-be-given-to-states-alrc-review-finds/10988862](http://www.abc.net.au/news/2019-04-10/family-court-powers-should-be-given-to-states-alrc-review-finds/10988862)>.

procedure) and in-court processes (e.g. case tracks).<sup>149</sup> The reforms also limited the role of professionals by removing lawyers from the early stages of in-court processes that are not urgent.<sup>150</sup> Parties unable to agree on parenting arrangements must participate in a “Parenting Through Separation” program and mediation process prior to court.<sup>151</sup> Unfortunately, early evaluations of the effect of 2014 reforms and current empirical research confirm that significant barriers still exist despite these reforms.<sup>152</sup> These include costly procedures and lengthy delays, limited participation of children in proceedings and an inflexible family justice model unresponsive to families’ complex multidisciplinary needs.<sup>153</sup> As in Hong Kong, the New Zealand public are also concerned about how the

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<sup>149</sup> The 2014 reforms attracted a lot of criticism: See Bill Atkin, “Controversial Changes to the Family Justice System in New Zealand: Is the Private Law/Public Law Division Still Useful” (2015) 29:2 Int’l JL Pol’y & Fam 183.

<sup>150</sup> See *ibid.* The changes also severely limited parties’ access to legal advice and representation.

<sup>151</sup> See *ibid.* Unless their situation was urgent in which case they may proceed to court. See NZ, Ministry of Justice, *Making a Parenting Plan* (Wellington: MOJ, July 2016) at 6, online (pdf): <[www.justice.govt.nz/assets/Documents/Publications/MOJ0504-Jul16.pdf](http://www.justice.govt.nz/assets/Documents/Publications/MOJ0504-Jul16.pdf)>.

<sup>152</sup> See Geoff Adlam, “The 2014 Family Court changes: Their impact and what is happening now” (5 Oct 2018), online: *New Zealand Law Society* <[www.lawsociety.org.nz/practice-resources/the-business-of-law/access-to-justice/the-2014-family-court-changes-their-impact-and-what-is-happening-now](http://www.lawsociety.org.nz/practice-resources/the-business-of-law/access-to-justice/the-2014-family-court-changes-their-impact-and-what-is-happening-now)>.

<sup>153</sup> See generally *supra* note 4. See New Zealand, Family Violence Clearinghouse, *Consultation open on family court review*, online: <[nzfvc.org.nz/news/consultation-open-family-court-review](http://nzfvc.org.nz/news/consultation-open-family-court-review)>.



Family Court and related services deal with family violence and its effect on children and families.<sup>154</sup>

In May 2018, the Government of New Zealand established an independent panel to review the 2014 family justice reforms relating to parenting arrangements and guardianship matters with a final report released in June 2019 after lengthy public consultation.<sup>155</sup> Key recommendations include introducing a “joined up family justice service” bringing together the siloed and fragmented elements of the current in- and out-of-court family justice services and rolling back many of the 2014 reforms (e.g. providing parties with access to legal aid and legal representation in court).<sup>156</sup> Early settlement is encouraged through provision of quality accessible information and government-funded counselling and

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<sup>154</sup> See Government of New Zealand, Minister of Justice, “Family Court Rewrite”, online: <[www.justice.govt.nz/justice-sector-policy/key-initiatives/family-court-rewrite/#key-dates](http://www.justice.govt.nz/justice-sector-policy/key-initiatives/family-court-rewrite/#key-dates)>.

<sup>155</sup> See New Zealand, Ministry of Justice, *Te Korowai Ture a-Whanau: The final report of the Independent Panel examining the 2014 family justice reforms* (Wellington: Ministry of Justice, May 2019) <[www.justice.govt.nz/justice-sector-policy/key-initiatives/family-court-rewrite/#final-report](http://www.justice.govt.nz/justice-sector-policy/key-initiatives/family-court-rewrite/#final-report)> [*New Zealand Final Report*]. Many of the 70 recommendations in the 142-page report include legislative changes to the *Care of Children Act 2004* to include recognition of Maori cultural customs and practices.

<sup>156</sup> See *ibid* at 28–31 discussing meaning of “Te Korowai Ture a-Wahanau,” an integrated family justice system that protects, supports, and empowers parents, whanau, and their children as they deal with parenting and guardianship issues. See also *ibid* at 84–86 (legal representation in court).

family dispute resolution mediation services.<sup>157</sup> The *Care of Children Act 2004* (NZ), 2004/90 and the *Family Dispute Resolution Act 2013* (NZ), 2013/79 are to be revised to include children's participation as a guiding principle with express reference to the *UNCRC*.<sup>158</sup> Parents and guardians must consult children on important matters affecting them, taking account of the children's age and maturity.<sup>159</sup> There are also extensive recommendations dealing with family violence and children's safety, including ensuring judges make timely findings of fact in cases of alleged violence or abuse and undertake ongoing risk assessment.<sup>160</sup> The central theme of all the recommendations is a transition from a siloed family justice system to a collaborative integrative system recognizing the need for strong reform leadership from the government, judiciary, legal profession, and all other family justice services.

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<sup>157</sup> See *ibid* at 60–62 (quality accessible information), 62–64 (counselling), 67–69 (family dispute resolution services) and 72–74 (access to early legal advice).

<sup>158</sup> See *ibid* at 7.

<sup>159</sup> The Ministry of Justice is directed to review appropriate models of children's participation, particularly in family dispute resolution, including development of a best practice toolkit. See *ibid* at 34–36.

<sup>160</sup> See *ibid* at 48–54. Various recommendations are also made to strengthen the Family Court, including increasing judicial resources; providing criteria for appointment of lawyer for child; improving the system of psychological report writers; providing for court directed counselling; identifying and responding to complex cases; providing case tracks and judicial, settlement and pre-trial hearing conference. See *ibid* at 77–102.

**HONG KONG'S DRAFT *CHILDREN'S BILL*:  
FURTHER COMPREHENSIVE LEGISLATIVE  
REFORM NEEDED**

This comparative overview highlights ongoing problems within family justice systems and the challenges of responsive, timely law reform. This provides a useful backdrop to review Hong Kong's draft *Children's Bill* and offer suggestions for further reform.

**The *Children's Bill*: Consolidating Necessary  
Legislative Reform**

The draft *Children's Bill* of 2015, discussed above, incorporates many of the reforms recommended by the Law Reform Commission in its 2005 *Report on Child Custody and Access*. The bill consolidates the existing substantive provisions dealing with children's disputes, parenting arrangements on divorce, guardianship, disputes with third parties, or disputes between parents without accompanying divorce proceedings into one ordinance. The bill adopts many of the Commission's reform recommendations by legislative means, including using the child-centric concept of *parental responsibility* to replace the archaic terminology of *custody*, *care*, and *control* with their outdated connotations of parental ownership and rights over children.<sup>161</sup> There is recognition that both parents remain involved in the children's upbringing under

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<sup>161</sup> See Anne Scully-Hill, "A Critical Evaluation of the Draft Children Proceedings (Parental Responsibility) Bill" (2016) 46:1 Hong Kong LJ 387; Lau, *supra* note 7.

a Child Arrangement Order.<sup>162</sup> The bill also provides that grandparents may apply for parental responsibility and contact with the child when appropriate.<sup>163</sup> The bill sets out the circumstances requiring notice to the other parent to make it clear both parents are able to be consulted on important decisions, including medical, dental, educational, and religious matters. Express consent from both parents will be required to remove the child from the jurisdiction for more than a month or permanently.

Clause 3(2) finally confers legislative status on the welfare checklist for the child's best interests which is important as previously family court judges in Hong Kong have been following a checklist based on equivalent English legislation.<sup>164</sup> Providing a formal checklist is important for judges and lawyers, but also for the public, making it clear what factors the court must consider. These include the voice of the child; their physical, emotional and educational needs; the child's age, maturity, sex, social, and cultural background; the parent's ability to meet the child's needs; and in appropriate circumstances, whether there has been any family violence. Importantly, the *Children's Bill* expressly recognizes the need for children's

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<sup>162</sup> The bill enlarges the scope of persons who are entitled to apply with or without leave for a Child Arrangement Order, including the children themselves.

<sup>163</sup> Although, the *Children's Bill* does not go as far at the proposed reforms in Scotland that are discussing granting automatic parental responsibility rights to grandparents and others. See *Scottish Review*, *supra* note 4.

<sup>164</sup> Various statutory lists are introduced covering parental responsibility and major decisions concerning the child's upbringing requiring express consent of or notification to the other parent. *Cf Children and Families Act 2014*, *supra* note 113.

views to be taken into account and streamlines the process by which children can request independent legal representation. Constructive suggestions are now offered on some of the necessary amendments and additions to the *Children's Bill*.<sup>165</sup>

### **Key Legislative Objectives Must be Expressed Within the *Children's Bill***

Unfortunately, the true guiding principles intended by the draft *Children's Bill* have failed to be completely reflected in the bill's provisions. The Government has presented the bill as an important comprehensive piece of legislation and yet they have not rationalized and consolidated Hong Kong's fragmented framework of laws relating to children as was hoped.<sup>166</sup> Hong Kong should consider adopting the approach of Canada's Bill C-78 by expressly recognizing important legislative objectives at the outset of the *Children's Bill*, namely: to promote the best interests of children; address family violence; help reduce child poverty; and make Hong Kong's family justice system more accessible and efficient.<sup>167</sup> A clear statement of the bill's legislative objectives would help ensure the provisions of the *Bill* address the deficiencies of Hong

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<sup>165</sup> The draft *Children's Bill* makes no mention of child and spousal support orders, but this is an important issue within Hong Kong's family justice system that must be addressed.

<sup>166</sup> The Government of Hong Kong's statutory duties under the draft bill should be clarified.

<sup>167</sup> In March 2013, the British Columbia Government introduced a new Family Law Act replacing the antiquated 1972 *Family Relations Act*. See *Family Law Act*, SBC 2011, c 25.

Kong's family justice system.<sup>168</sup> The title of the bill should be also broader as in other jurisdictions to reflect its intended comprehensive nature (e.g. the *Child and Families Act* as in England and Scotland or the *Child and Young Persons Act* as in Singapore).<sup>169</sup> The bill is intended to cover a wide range of children related matters and the title should reflect this.<sup>170</sup> The current references to *proceedings* and *parental responsibility* within the bill's title unnecessarily limits the perceived scope of the legislation.<sup>171</sup>

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<sup>168</sup> The ALRC takes an alternative approach, recommending repeal of the objects provisions in section 60B of the *Australian Family Law Act* given its overlap with the best-interests factors in section 60C. However, it does recommend a legislative provision stating the overarching purpose of family law is to facilitate the efficient and just resolution of disputes. See *ALRC Final Report*, *supra* note 4 at 19, 47–49, 162–63.

<sup>169</sup> The bill's title should reflect consolidating legislation relating to children in one ordinance. Suggestions from Hong Kong Bar Association: "Children Bill"; and from the Law Society of Hong Kong: "Children Arrangements Bill."

<sup>170</sup> PathFinders expressed disappointment that the Bill is silent as to the Government's treaty obligations under the *UNCRC*. See PathFinders, "Pathfinders Limited's Submission in response to the November 2015 Public Consultation Invitation issued by the LWB regarding the Proposed Legislation to Implement the Recommendations of the Law Reform Commission Report on Child Custody and Access as set out in the Children Proceedings (Parental Responsibility) Bill" (April 2016) [PathFinders Submission Response].

<sup>171</sup> By including the word *proceedings* in the bill's title, the true meaning of *parental responsibility* (that a parent, within the meaning of the legislation, has an inherent responsibility to their child from birth) is misleading. This is not something which is only *activated* once parents separate or divorce.

### More Expansive Child-Inclusive Language Required

Overall, better clarity and greater use of child-focused language and terminology is required within the provisions of the *Children's Bill*, particularly when compared to the clarity of language in Bill C-78 and in the proposals by the ALRC reforms. The Vanier Institute's expansive definition of "family" should be expressed in the bill's provisions reflecting contemporary society in Hong Kong.<sup>172</sup> For example, the current definition of *child of the family* is too narrow and does not provide for unmarried parents, single parents, same sex parents or divorced parents. One suggestion is changing the definition to *child of the parties to a current or former domestic cohabitation relationship*.<sup>173</sup> Similarly, the definition of *parent* is unnecessarily narrow given changing conceptions of family units and parenthood.<sup>174</sup> The inclusion of the reference to *children's proceedings* is also confusing since it is unclear what types of proceedings that it encompasses.<sup>175</sup>

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<sup>172</sup> The Hong Kong Bar Association thought the definition too narrow and suggested that a better definition is needed to avoid the validity of the legislation being challenged in future.

<sup>173</sup> See Scully-Hill, *supra* note 161 at 393–94.

<sup>174</sup> See generally earlier discussion at *supra* notes 15, 16. See also dicta of the Court of Final Appeal in *W v Registrar of Marriages*, [2013] HKCFA 39.

<sup>175</sup> The current wording implies that jurisdiction to hear care and supervision applications has been extended from Juvenile Court to the High Court and District Court. See discussion in Scully-Hill, *supra* note 161 at 394.

### **Revise Provisions on Parental Responsibilities and Rights**

The draft *Children's Bill* in Clause 5 replicates the definition for *parental responsibility* found in Section 1 of the *Children (Scotland) Act 1995* (Scot) but does not include the parts that make clear it is the parents who have the obligation and the children who have the rights.<sup>176</sup> Currently, this message is evident only in the draft bill's explanatory summary but not in its substantive provisions. It has not been made sufficiently clear in the drafting of the bill that parents only have rights or the ability to exercise rights over children when in the furtherance of their parental-responsibility obligations. Some parents may continue to perceive that they enjoy rights without understanding that these are only to be exercised in performance of their obligations to promote a child's welfare and best interests. On this issue, the Law Society of Hong Kong suggested that it is necessary to qualify the rights of the parents to clarify that these rights are conferred *in order to enable [the parent] to fulfill his parental responsibilities in relation to his child* to prevent confusion.<sup>177</sup> These provisions of the draft *Children's Bill* require revision. This is particularly important given the

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<sup>176</sup> Clause 5(2) lists practical applications of parental responsibility but does not expand on the nature and standards of parental responsibility. See *ibid* at 395.

<sup>177</sup> See Law Society of Hong Kong, "The Proposed Legislation to Implement the Recommendations of the Law Reform Commission Report of Child Custody and Access: Submissions", *supra* note 51.



review of Scotland's family justice system is re-considering "parental responsibilities and rights."<sup>178</sup>

### **Paramount "Best Interests of the Child"**

While the legislative recognition codifying the formal welfare checklist in the *Children's Bill* is positive, the "general principles" in Clause 3(2) intended to help the court determine what is in the best interests of the child are not specific enough. While there is a catch-all provision in the best-interests welfare checklist in Clause 3(2)(k) for *any other fact or circumstances that the court considers relevant*, neither *delay* or *finality* are expressly included. Several submissions raised concerns about delay in the court process and the detrimental impact of delay on the child. Research indicates that delay in the matters of children's arrangements can lead to a significant negative impact on children.<sup>179</sup> A number of recommendations were suggested to address this concern, for example, the Hong Kong Bar Association recommended that the consideration of delay should be incorporated into the welfare checklist in Clause 3(2) as a free standing section comparable to Section 1(2) of the *Children Act 1989* (UK).<sup>180</sup> Against Child Abuse also recommended having mechanisms in place to shorten the time in which matters come to court

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<sup>178</sup> The Labour and Welfare Bureau must monitor legislative reforms in Scotland and redraft the provisions on parental responsibilities and rights so that they are clearer and more comprehensive.

<sup>179</sup> The permanency (or finality) of arrangements for children is often paramount to ensuring a stable environment. See discussion in Scully-Hill, *supra* note 161 at 397.

<sup>180</sup> The Hong Kong Committee on Children's Rights recommended the introduction of target times for the court process to minimize delay

and that in emergency situations, parties should be allowed to make the application *ex parte*.<sup>181</sup>

### **Addressing Family Violence Within in the *Children's Bill***

The *Children's Bill* is silent on the challenging issue of domestic violence unlike Canada, Manitoba, England and Wales, and Singapore who all have specific provisions in their family laws dealing directly with family violence and domestic abuse. It is at the forefront of ongoing reviews in Australia, Scotland, and New Zealand. Serious concerns were expressed among stakeholders that the *Children's Bill* as drafted would open up room for an abusive or uncooperative parent to delay or obstruct progress.<sup>182</sup> Curiously the Law Reform Commission suggested reforms to deal with domestic abuse in its 2005 *Report on Child Custody and Access* but these reforms have not been included in the *Children's Bill*.<sup>183</sup> Protecting people from violence must be part of the Government's response to family-relationship breakdown, and non-adjudicative responses have limited efficacy in cases with severe domestic violence.<sup>184</sup> It is important to provide best

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<sup>181</sup> See generally *supra* note 49.

<sup>182</sup> The Hong Kong Bar Association, Law Society of Hong Kong and Against Child Abuse recommended inclusion of measures to deal with high conflict and domestic violence cases.

<sup>183</sup> These include revising the deficiencies in protection afforded by Hong Kong's Domestic and Cohabitation Relationships Violence Ordinance, Cap 189 (e.g. providing a specific crime of domestic violence).

<sup>184</sup> See Semple & Bala, *supra* note 9; Australian Institute of Social Relations, Commonwealth of Australia, *Multi-disciplinary Collaboration and Integrated Responses to Family Violence* (2010).

practices for dealing with allegations of domestic violence and abuse in post-separation and post-divorce parenting arrangements.<sup>185</sup>

More provisions dealing with child safety and family violence and abuse are needed in the *Children's Bill*.<sup>186</sup> There is only brief mention in the *Children's Bill's* at Clauses 3(2)(f) and (g) of "harm suffered" or "risk of harm and family violence" with no further details.<sup>187</sup> By contrast, Canada's Bill C-78 directs that the court's determination of the child's best interests must now consider the presence of any family violence and its impact. Thus, the court must take family violence into account when deciding on parenting arrangements, which includes physical abuse, sexual abuse, threats of harm to persons, pets and property, harassment, psychological abuse, and financial abuse.<sup>188</sup> Bill C-78 also addresses the complexity of family violence by guiding the court in assessing family violence and its potential impact on future parenting. The court must consider matters such as the nature, seriousness and frequency of the violence; whether there was a pattern of coercive and controlling behaviour;

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<sup>185</sup> See Rosemary Hunter, Adrienne Barnett & Felicity Kaganasr, "Introduction: contact and domestic abuse" (2018) 40:4 J Soc Welfare & Fam L (identifying best practices in contact disputes with allegations of domestic abuse).

<sup>186</sup> Clause 3(2) only provides that the presumption of parental involvement will not apply where there is evidence that the involvement of that parent in the child's life would put the child at risk of suffering harm.

<sup>187</sup> At present there is no codified law against witnessing family violence by a child and Hong Kong's Domestic Violence Ordinance has a limited definition of domestic violence that needs reform.

<sup>188</sup> See discussion in Boyd, *supra* note 67 at 2.

whether the family violence is directed at the child; and the degree to which the child is exposed to family violence.<sup>189</sup> Family violence is also a high priority in the recent Australian family law reform proposals—the first factor that courts will be directed to consider when determining parenting arrangements promoting a child's best interests are “what arrangements best promote the safety of the child and the child's caregivers, including safety from family violence, abuse or other harm.”<sup>190</sup> The Hong Kong Government should review these different legislative approaches and amend the *Children's Bill* to include more specific provisions addressing family violence and abuse, particularly when determining parenting arrangements.

### **Provide Efficient Variation of Court Orders**

The *Children's Bill* should provide a mechanism for efficient variation of court orders because they may need to be changed according to the child's development and the parents' evolving situations.<sup>191</sup> Clause 29 deals with the

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<sup>189</sup> These also include the risk of harm to a child; and any steps taken by the perpetrator to prevent further family violence and improve childcare taking ability. See Bill C-78, *supra* note 4, cl 12 (enacting new ss 16(3)–(4) on best interests of the child and factors relating to family violence).

<sup>190</sup> See *ALRC Final Report*, *supra* note 4 at 29, 165–71. The New Zealand reforms also include a legislative checklist for judicial consideration relevant to a child's safety, including: the nature, seriousness and frequency violence used; whether there is a historic pattern of violence or threats of violence (including coercive and controlling behaviour); the likelihood of further violence occurring; and the physical and emotional harm caused to a child by the violence.

<sup>191</sup> A child's circumstances may change due to a change in parent's ability to care for the child.

matter of varying, discharging suspending, or reviving orders made by the court. However, an additional mechanism should be included in the Bill for parents who can agree to a change of arrangements given in a subsisting court order, without the need to attend court. Canada's Bill C-78 and Manitoba's Bill 9 contain such provisions enabling parents to efficiently alter court orders upon mutual agreement.<sup>192</sup> In March 2019 the ALRC also recommended developing a new service in Australia to help parents manage their court-ordered parenting arrangements to reduce the need for families to go back to court for further orders.

Stakeholders raised concerns about the high rate of families returning to court following the making of orders, as well as complaints about the costs and stress of responding to contravention applications.<sup>193</sup> It is important, particularly in high-conflict families, that the ability to appeal interim orders is controlled. The ability to appeal on unmeritorious grounds is a form of systems abuse, used by the abuser as a weapon of harassment. The *Children's Bill* should recognize that once a decision has been made by the court as to the child's upbringing, this should not be subject

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<sup>192</sup> See Bill 9, *supra* note 99, cl 8 (which adds a new s 53.2(1): "the debtor and the creditor may, by an agreement that complies with this section, change the maintenance obligations under a maintenance order"); Bill C-78, *supra* note 4, cl 12 (which adds 16.6(1): "[t]he court shall include in a parenting order or a contact order, as the case may be, any parenting plan submitted by the parties unless").

<sup>193</sup> See Law Society, "Submissions", *supra* note 51.

to repeated appeals and applications without significant change in the child's circumstances.<sup>194</sup>

In Australia, the ALRC recommends controlling appeals from interim parenting orders by limiting appeals to those meeting stringent tests of "sufficient doubt" and "substantial injustice."<sup>195</sup> The ALRC also recommends parties involved in contested proceedings for final parenting orders meet with a Family (Court) Consultant to have their orders explained to them. The court should also have the necessary powers to order more intensive engagement with a Family (Court) Consultant where it would assist the parties to put in place arrangements to facilitate compliance with their orders. Parties should be clearly informed as to the threshold circumstances that must arise before it may be appropriate to make a new application for parenting orders where final orders have been made previously. This practice of Family Consultants should be considered for potential application in the Hong Kong courts.

### **Address the Special Needs of Vulnerable Children**

The draft Bill fails to address issues relating to parents outside the traditional matrimonial family model, such as those who are in prison, parents from cross-border marriages (or without immigration status), and ethnic minorities.<sup>196</sup> Children of imprisoned parents are

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<sup>194</sup> See *ALRC Final Report*, *supra* note 4 at 20–21, 348–52 (Recommendations 40, 41).

<sup>195</sup> *Ibid.*

<sup>196</sup> It also fails to address families with special-needs children who require additional assistance. See the Hong Kong Committee on Children's

detrimentally affected by their parent's imprisonment and their needs should be considered in the *Children's Bill*, with support and therapeutic counselling services offered as well.<sup>197</sup> Provisions governing these cases, and those relating to *the public child* (referring to abandoned children and children not in a permanent home setting), would be useful in the *Children's Bill*. Additionally, caregivers who are not the child's parents cannot make applications on behalf of the child unless they fulfill certain conditions (e.g. have lived with the child for a number of days, etc.).<sup>198</sup> NGOs and community organizations, which are reasonably concerned with or work closely with the child, should be eligible to make applications on behalf of the child as well.<sup>199</sup>

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Rights, *supra* note 51; PathFinders Limited, "Oral Submission to the Hong Kong SAR's Legislative Council's Subcommittee on Children's Rights Reform of Child Protection Legislation" (4 April 2018), online (pdf): <[pathfinders.org.hk/public/wp-content/uploads/Oral-submission\\_-Reform-of-child-protection-legislation-4-April-2018-FINAL.docx-2.pdf](http://pathfinders.org.hk/public/wp-content/uploads/Oral-submission_-Reform-of-child-protection-legislation-4-April-2018-FINAL.docx-2.pdf)>.

<sup>197</sup> It is important to recognize that children of prisoners constitute a group of vulnerable children with special needs. See *UNCRC*, *supra* note 2, arts 19, 20; Tavi Chun-Yee Yau & Ho-Yin Chung, "Children with an imprisoned parent: children's and caregiver's narratives" (2014) 7:1 *China J Soc Work* at 92–112 (suggesting therapy, counselling and mentoring programmes, training for prison staff and public education).

<sup>198</sup> *Against Child Abuse* noted that it is not uncommon for grandparents or other close relatives to take care of a child during the daytime while sending the child back to his parents at night.

<sup>199</sup> See PathFinders Submission Response, *supra* note 170.

## **RIGHTS OF CHILDREN TO HAVE THEIR VOICES HEARD: EXPAND CHILD-INCLUSIVE PRACTICES**

The *Children's Bill* does provide in Part 6 for the views of the child to be taken into account but there are scant details on the mechanisms and procedures for ascertaining children's views.<sup>200</sup> Enabling appropriate ways by which children and young people can safely and effectively participate in decision-making about them is important pursuant to Article 12, *UNCRC*, but also consistent with expressed views of children and young people.<sup>201</sup> A substantial body of research on the voice of the child in post-separation interventions indicates that children want to have the opportunity to be heard in matters concerning them.<sup>202</sup> They want their parents to listen to their perspectives and have ongoing and meaningful communication with them about the separation and divorce process and parenting arrangements.<sup>203</sup> Moreover, children

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<sup>200</sup> See *Children's Bill*, *supra* note 25, cls 60–63. In 2012 the Chief Justice, in the absence of any legislative provision, issued a guidance note for the Judiciary in respect of hearing children in proceedings.

<sup>201</sup> Australia, Scotland, and New Zealand are all considering practical measures to ensure effective participation of children in family proceedings and that their views are duly considered. See generally *supra* note 4. This is consistent with *UNCRC*, case law, and social science research. See *UNCRC*, *supra* note 2, art 12; *Gordon v Goertz*, [1996] 2 SCR 27, 19 RFL (4th) 177; Carson et al, *supra* note 2.

<sup>202</sup> Rachel Carson states the conclusion from recent research on children's participation in family proceedings was: "give children a bigger voice more of the time." See Carson et al, *supra* note 2 at 95–96.

<sup>203</sup> Children may not want to make choices regarding arrangements, but they do want their input and views accurately considered when decisions are made. They also want potential flexibility and change



are more likely to consider custody arrangements to be fair if they are given a say in the decision-making process.<sup>204</sup> Decision-making influence rather than decision-making power may be most meaningful for children's participation. All of this represents a paradigm change in viewing children not simply as vulnerable and in need of protection but also viewing children as sufficiently competent and capable actors capable of expressing their views in parental disputes.<sup>205</sup> This requires shifting from adults as gatekeepers of children's participation and voices to viewing children as active players in decisions affecting them.<sup>206</sup>

Current research indicates that children's participation in child arrangement decisions should include them at all levels of practice, policy, and research.<sup>207</sup> Practitioners, researchers, and policy makers must consider social science research and allow and empower children themselves to determine their manner of participation. In

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accommodated with the decision-making process. See *ibid* at 96. See also Rachel Birnbaum & Nicholas Bala, "The Child's Perspective On Representation: Young Adults Report On Their Experiences With Child Lawyers" (2009) 25:1 Can J Fam L 11 at 22–25.

<sup>204</sup> See Catherine Quigley & Francine Cyr, "Children's perspectives on parenting coordination: Insights from the Montreal Parenting Coordination Pilot Project" (2017) 14 J Child Custody 151.

<sup>205</sup> See Kristin Skjørten, *supra* note 33 at 289.

<sup>206</sup> See Nicholas Bala et al, "Children's Voices in Family Court: Guidelines for Judges Meeting Children" (2013) 47:3 Fam LQ 379 [Bala et al, "Children's Voices"].

<sup>207</sup> See Rachel Birnbaum & Michael Saini, "A scoping review of qualitative studies about children experiencing parental separation" (2012) 20:2 Childhood 260.

Hong Kong, children's participation in family proceedings needs to be transformed into more effective practice.<sup>208</sup> More coherent and comprehensive child-inclusive policies and programs should be developed to facilitate greater participation by children and young people in decision-making affecting them.<sup>209</sup> Singapore has dedicated a government department for children's voice and participation. In Hong Kong, the Children's Council could potentially fulfill that role.<sup>210</sup> The UK government's Voice of the Child Advisory Group has provided useful direction to enhance children's voices in the family justice system, including (a) define and deliver child inclusive practices; (b) provide appropriate information and support for children (e.g. recognize the importance of communicating court orders and explaining decisions to children); and (c) change the dispute resolution culture so children's participation is ensured.<sup>211</sup> Hong Kong's Judiciary has

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<sup>208</sup> The HKCRC is researching barriers to greater participation of children in family proceedings in Hong Kong.

<sup>209</sup> Coordinated discussion with practitioners, researchers, children and their families, as well as government policy-makers, is required for effective child participation. Children must be involved at every level with their needs and interests informed by themselves and not by adults. A Children's Rights Impact Assessment Framework should be applied assessing by the government assessing the impact of government policies and practices on children.

<sup>210</sup> For discussion of Singapore's Office of the Voice of Children, see *Singapore Report*, *supra* note 1.

<sup>211</sup> Carson highlights the need for clear and accurate explanation of decisions made. See Carson et al, *supra* note 2 at 96. See also *Re A (Letter to a Young Person)* [2017] EWFC 48 (the first case by English High Court judge delivering his judgment in the form a letter to a fourteen year-old). Other suggestions from the Scottish consultation involve children's voices being expressed through specialised child

facilitated this to some degree through judicial interviews with children, specialized children's dispute-resolution procedures and a family mediation scheme.<sup>212</sup> Two other practices are considered: guidelines and protocols for views-of-the-child reports and child advocates independently representing children in proceedings.

### **Judicial Interviews of Children: More Training and Detailed Guidelines**

Judicial interviews of children in child-arrangement cases are important for involving children and ascertaining their views and preferences.<sup>213</sup> However, this is not without controversy as there are divergent professional views involved in the family law process.<sup>214</sup> Jurisdictions vary in the extent to which legislation provides for and regulates judicial interviews.<sup>215</sup> Many common law jurisdictions have no applicable legislation but the courts have recognized the judge's inherent authority to meet with a child.<sup>216</sup> Some jurisdictions, go even further and create a

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friendly court forms, letters and videos to judges, drawings and diagrams, emails and web apps and avatars.

<sup>212</sup> Introducing many of the proposals suggested in 2005 by the Law Reform Commission.

<sup>213</sup> See Rachel Birnbaum & Nicholas Bala, "Judicial Interviews With Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio" (2010) 24:3 Int'l JL Pol'y & Fam 300 at 312 [Birnbaum & Bala, "Judicial Interviews"].

<sup>214</sup> See discussion of this controversy in Bala et al, "Children's Voices", *supra* note 206 at 379.

<sup>215</sup> See *ibid* at 384.

<sup>216</sup> See *ibid*.

detailed statutory mandate for judges to interview children, presumptively requiring an interview if requested by either parent.<sup>217</sup> Whilst Clause 60 of the draft *Children's Bill* does not go this far, it does permit a judge to interview a child to determine the child's views and preferences without creating any presumption.<sup>218</sup>

Hong Kong's Law Reform Commission recommended the Judiciary issue guidelines or protocols to supplement proposed legislative reform.<sup>219</sup> In 2012, the Judiciary responded by issuing new Guidance on Meeting Children notes, providing the Family Court with greater opportunities to hear the child. While these Guidance Notes are useful in outlining the factors that may assist judge in determining whether to meet with a child, they provide only minimal guidance to judges and little more.<sup>220</sup> They do not provide what Nicholas Bala describes as the important "contextual framework and detailed discussion" about conducting judicial interviews with children.<sup>221</sup> By incorporating academic research within more detailed guidelines, Bala gives useful suggestions for the meeting structure and possible interview questions that can be

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<sup>217</sup> See Ohio in section 3109.04 of the Ohio Revised Code. See Birnbaum & Bala, "Judicial Interviews", *supra* note 213.

<sup>218</sup> This current approach in Hong Kong is in section 3 of the Guardianship of Minor's Ordinance (Cap. 13): "In relation to the custody . . . in any proceedings before any court . . . the court . . . shall regard the best interests of the minor as the first and paramount consideration, and shall take into account the child's view."

<sup>219</sup> See 2005 Child Custody Report, *supra* note 10 at 263–64.

<sup>220</sup> See Birnbaum & Bala, "Judicial Interviews", *supra* note 213.

<sup>221</sup> See Bala et al, "Children's Voices", *supra* note 206 at 389–401.

modified to suit the nature of each case.<sup>222</sup> The Judiciary should consider this important research, as well as judicial guidelines enacted in other jurisdictions, which encourage consistency in evidence-based practice when communicating with children.<sup>223</sup> More training and education is required for all professionals involved in interviewing children and youth, and social science research needs to be incorporated more into this judicial practice.<sup>224</sup> Judicial interviews should occur more frequently than they do in Hong Kong but established policies should provide more detailed assistance to judges. The role of family judges is changing: they should not be traditional adjudicative judges, but rather, they should possess knowledge of current social science and empirical research on children and family disputes, as well as the skills to manage difficult litigation and interviews with children.<sup>225</sup>

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<sup>222</sup> See *ibid* at 401–07. Encouraging consistency in evidence-based practice when dealing with matters relating to communicating with children, rapport building, and discussing family situation, separation experience, child’s relationship to parents and plans for the future, and personal perspectives and preferences.

<sup>223</sup> See e.g. Association of Family and Conciliation Courts, Ontario and The Advocates Society (co-sponsors), “Guidelines for Judicial Interviews and Meetings with Children in Custody & Access Cases in Ontario” (2013).

<sup>224</sup> Very little judicial training for judges in interviewing children has been carried out in Hong Kong. See discussion of the need for judicial training in Birnbaum & Bala, “Judicial Interviews”, *supra* note 213 at 330–31.

<sup>225</sup> See the therapeutic jurisprudential role played by family judges in Ng et al, *supra* note 120 at 642, 644.

### **Specialized Children's Dispute Resolution Procedures**

The general frustration felt by the Government's legislative inaction undoubtedly provided the impetus behind the Judiciary's establishment of a three-year mandatory specialized Children's Dispute Resolution (CDR) Pilot Scheme for any disputes involving children.<sup>226</sup> The Judiciary formally adopted Practice Direction 15.13 from April 2016 as an important child-inclusive feature of family court proceedings designed to promote settlement and faster resolution of disputes.<sup>227</sup> Family judges have greater control in child-arrangement proceedings that cut down on unnecessary disputes between divorced couples that are often bogged down by irrelevant evidence.<sup>228</sup> A preliminary hearing, the Children's Appointment, must be held followed by the substantive Children's Resolution Hearing and then the trial, should the CDR not be successful. At the Children's Appointment, the judge acts as a settlement facilitator with power to direct the parties to attend counselling, a parenting education program, parenting coordination or any other form of third-party

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<sup>226</sup> This mandatory pilot scheme applied to all disputes relating to children arising out of divorce proceedings except adoption and was effective October 2012 by Practice Direction 15.13 on Children's Dispute Resolution Pilot Scheme (CDR). It is linked to Practice Direction 15.11 Financial Dispute Resolution Scheme.

<sup>227</sup> The overall objective is supporting parents to effectively parent their children post separation and divorce—it emphasizes the best interests of the children and the duties and responsibilities of parents.

<sup>228</sup> The specialized CDR procedures give judges broader case management powers and encourage the parties to settle their disputes through negotiation and mediation outside of the trial process.

intervention, mediation, and collaborative practice.<sup>229</sup> The Children's Appointment provides an important opportunity for children to voice their views as the judge may appoint separate legal representation for the child, a guardian *ad litem*, or direct that a judicial interview shall take place. This is important given the previous reluctance of Hong Kong judges to meet with children. There is now express recognition that children have a voice and a right to participate in the CDR proceedings.<sup>230</sup> The challenge with ever-increasing caseloads and shortage of family judges will be ensuring that children's participation in such procedures is meaningful and effective.

### **Family Mediation: Develop Child Inclusive Approach to Mediation**

In May 2000, the HKSAR Judiciary introduced the Pilot Scheme on Family Mediation that was made a permanent feature of the Family Court following rigorous evaluation in 2004.<sup>231</sup> In March 2003, the Law Reform Commission released its Report on The Family Dispute Resolution

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<sup>229</sup> The CDR procedure is not privileged ensuring that the child's best interests are discussed openly.

<sup>230</sup> Where a child has indicated that they would like to see the judge, or if the judge deems it appropriate, they can direct that a judicial interview take place. See Hong Kong, Judiciary, *Practice Direction SL5* (Guidance on Meeting Children).

<sup>231</sup> This is a clear policy directive from the Judiciary to the legal profession, parents and public to resolve parenting disputes in less adversarial means than courtrooms (i.e. negotiation and mediation). See Hong Kong Polytechnic University, *Evaluation Study on The Pilot Scheme on Family Mediation, Final Report* (2004), online (pdf): <[legco.gov.hk/yr03-04/english/panels/ajls/papers/aj0223cb2-1381-01-e.pdf](http://legco.gov.hk/yr03-04/english/panels/ajls/papers/aj0223cb2-1381-01-e.pdf)>.

Process suggesting expanding the pilot family-mediation scheme, strengthening mediation services, and increasing access to court-based mediation.<sup>232</sup> The Government was slow to act on the Commission's reports and in 2009 a Judiciary working group, including representatives of Hong Kong children, made recommendations to advance children's interests in family proceedings.<sup>233</sup> In May 2012, the Judiciary issued Practice Direction 15.10 on family mediation establishing the duty of legal counsel to assist the court in encouraging the parties to use mediation as an alternative dispute-resolution procedure.<sup>234</sup>

Recent research on children's experiences in family mediation, however, indicates the need to improve the process in Hong Kong.<sup>235</sup> A child-inclusive approach and practice in mediation is important because children want to

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<sup>232</sup> The report focused on strengthening family mediation services, granting judges greater case management powers, considering the views of the child in the mediation process and the introduction of parenting plans. See Hong Kong, Judiciary, *Practice Direction 15.11*; Department of Social Work, Chinese University of Hong Kong, *A Study on Family Mediation Services in Hong Kong, Final Report (2017)* (long term funding needed for family mediation) [UHK, *Study on Family Mediation Services*].

<sup>233</sup> The working group consisted of members of the Judiciary, Official Solicitors Office, Legal Aid, the Social Welfare Department, Bar and the Law Society, Hong Kong Family Law Association, and children representatives.

<sup>234</sup> Order 25 (17) provides that the parties shall try to settle disputes by mediation/ADR processes.

<sup>235</sup> See Mooly Mei-Chung Wong, "A Qualitative Study of Parent's and Children's Views on Mediation" (2019) 60:6 J Div & Remarriage 418 (need for views of children to be heard in mediation). See also HK Law Reform Commission, *Child Custody Report, supra* note 10 (stressed the need for considering the views of children in the mediation process).



express their views and participate in mediations where decisions are being made about their best interests.<sup>236</sup> Children's participation rights under Article 12, *UNCRC* should not be compromised by the mediation process.<sup>237</sup> Local NGOs and community organisations have worked to develop a child-inclusive approach to mediation in Hong Kong.<sup>238</sup> There are different ways to involve children in the mediation process: the child may express their views in a separate meeting with the mediator, the child may share views directly with the mediator and the parents, or a clinician may consult with the child followed by therapeutic feedback conversations with the parents (that may involve a views-of-the-child report).<sup>239</sup> The child's

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<sup>236</sup> Hong Kong children want to be involved in mediations, see Yuk-Chung Chan et al, "The Development of Family Mediation Services in Hong Kong: A Review of the Evaluation Study" (2007) 29 *J Soc Welfare & Fam L* 3 at 9–10. See also Janet Walker & Angela Lake-Carroll, "Hearing the voices of children and young people in dispute resolution processes: promoting a child-inclusive approach" (2014) *Fam Law* 157.

<sup>237</sup> See discussion in Adrian L James et al, "The Voice of the Child in Family Mediation: Norway and England" (2010) 18 *Int'l J Child Rts* 313.

<sup>238</sup> See the Hong Kong Jockey Club Community Project Grant: Family Mediation Service Project; Gigi Leung, *Development of Child Inclusive Divorce Mediation in Hong Kong* (Hong Kong: City University of HK, 2013).

<sup>239</sup> The objective is to focus the parent's co-parenting efforts on understanding the child's inner perspectives of experiencing parental conflict rather than focusing on their acrimony towards each other. See discussion in Ng et al, *supra* note 120 at 632–34. See also Rachel Birnbaum, Nicholas Bala & John-Paul Boyd, "The Canadian Experience with Views of the Child Reports: A Valuable Addition to the Toolbox?" (2016) 30:2 *Int'l JL Pol'y & Fam L*; Rachel Birnbaum & Nicholas Bala, "Views of the Child Reports: The Ontario Pilot

involvement focuses the parents on developing a co-parenting plan that suits their child and reflects their child's expressed views and wishes.

There is considerable support to develop a standardized child-inclusive mediation process in Hong Kong with a professional accreditation and training system.<sup>240</sup> England and Wales have made significant efforts to ensure that the voice of the child is heard in mediation.<sup>241</sup> All family mediators must now have child-inclusive mediation training as of 2018, helping to facilitate children's voices being heard within the mediation process in a more direct manner.<sup>242</sup> Hong Kong's Mediation Council should follow suit and introduce similar changes to their code of practice. The Judiciary can also consider mandating child-inclusive mediation in Practice Direction 15.10 as research indicates that children want to be heard in mediations as much as

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Project" (2017) 31:3 Int'l JL Pol'y & Fam 344 [Birnbaum & Bala, "Views of the Child"].

<sup>240</sup> See efforts by the Hong Kong Family Welfare Society and Social Workers Registration Board. Social Workers Registration Board, "Parenting Coordination (PC) Training—A Certificate Program for professionals" (2015), online: <[swrb.org.hk/cpd/en/EventDetail.asp?Uid=1695](http://swrb.org.hk/cpd/en/EventDetail.asp?Uid=1695)>.

<sup>241</sup> The Family Mediation Council's Code of Practice requires that children above ten be heard in mediations. See UK, Ministry of Justice, *Government response to Voice of the Child: Advisory Group report* (March 2015).

<sup>242</sup> The Family Mediation Council and Family Mediation Standards Board approved new standards for child inclusive mediation. See Family Mediation Council, News Release, "Child Inclusive Mediation" (2018), online: <[familymediationcouncil.org.uk/2018/05/14/child-inclusive-mediation-2/](http://familymediationcouncil.org.uk/2018/05/14/child-inclusive-mediation-2/)>.

they want to be heard in litigation proceedings.<sup>243</sup> While this does require significant investment in training and accreditation of family justice professionals, it facilitates increased participation by children in the mediation process.

### **Views of The Child Reports: Introduce Guidance and Protocols**

The *Children's Bill* is clear that the views of children must be considered in decision-making in the child's best interests. Children's views can be expressed in letters to the judge, judicial interviews, and through lawyers appointed to represent the child's views in court. Non-evaluative views-of-the-child reports prepared by legal or mental health professionals are increasingly popular to involve children in the resolution of parenting disputes.<sup>244</sup> Such reports are used to obtain evidence about children's views, preferences, worries, concerns, perceptions, experiences, and wishes for consideration in a range of dispute resolution processes (including negotiation, mediation, and litigation).<sup>245</sup> These reports may be prepared by social

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<sup>243</sup> Singapore's child-inclusive mandatory mediation and counselling process is based on Jennifer McIntosh, "Child Inclusion as a Principle and as Evidence-Based Practice Application to Family Law Services and Related Sectors" (2007) ARFC 1.

<sup>244</sup> These non-evaluative reports give the child an opportunity to express their views to a neutral person who prepares a report for parents and the court. They are different from the court ordered child custody investigation reports prepared by social workers offering assessments and opinions.

<sup>245</sup> An important feature is that the interviewer offers the child an opportunity to exclude some or all of the confidential matters discussed

workers, psychologists, mediators, or lawyers who should have appropriate training, skills, and experience for interviewing children.<sup>246</sup> Views-of-the-child reports can be a useful and expeditious way of engaging children in family proceedings. Nicholas Bala describes views-of-the-child reports as a valuable addition to the “family justice tool box” emerging as another method to hear from children involved in their parents’ dispute.<sup>247</sup> They allow children’s views and preferences to be shared with the court and their parents, lawyers, mediators, judges, and mental health professionals, satisfying the court’s obligation under Article 12, *UNCRC*. Research shows that children appreciate being listened to about their views and experiences as a result of parental separation and children have better relationships when they believe their voices have been heard.<sup>248</sup>

Since they are a less expensive option when compared to child legal representations or full child-custody investigation reports, views-of-the-child reports may be used by self-represented litigants in Hong Kong or those with low income. Preparation of these reports and sharing of children’s views promotes settlement, saves

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from the final report. There is discussion between them on report preparation.

<sup>246</sup> See Rachel Birnbaum & Michael Saini, “A Qualitative Synthesis of Children’s Participation in Custody Disputes” (2012) 22:4 *Res Soc Work Practice* 406; Michelle Hayes and Rachel Birnbaum, “Voice of the Child Reports in Ontario: Content Analysis of Interviews with Children” (2019) *J Div & Remarriage* 60.

<sup>247</sup> See Birnbaum & Bala, “Views of the Child”, *supra* note 239 at 344 (abstract).

<sup>248</sup> See Carson et al, *supra* note 2.

money for the parties and the government, and promotes the best interests of children.<sup>249</sup> There are inherent limitations with these reports, however, in that they may not reveal the true views and opinions of children who may be subject to parental pressure or manipulation. Moreover, their views may be fluid, developing, or may sometimes be misguided.<sup>250</sup> Such reports cannot be a substitute for full custody evaluations; particularly if parental alienation, domestic violence and abuse, child abuse, or neglect issues are present.<sup>251</sup> In cases of chronic high-conflict cases they may not be as useful where a custody investigation report or child-representative lawyer may more likely promote settlement. Bala urges undertaking more research on the value and limitations of these reports and their impact on judicial and parent decision-making in parenting disputes.<sup>252</sup>

In Hong Kong there are no widely accepted standardized guides or protocols as to the conduct and preparation of the views-of-the-child reports.<sup>253</sup> As this can lead to inconsistency in practice, improving process for ordering and preparing such reports and using clear standardized protocols would be valuable. For example, Nova Scotia introduced *Voice of Child Report Guidelines* in 2015, providing a framework for a standardized views-of-the-child report useful for social workers, lawyers,

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<sup>249</sup> See Birnbaum & Bala, “Views of the Child”, *supra* note at 239 at 358.

<sup>250</sup> See *ibid.*

<sup>251</sup> See *ibid.*

<sup>252</sup> See *ibid.*

<sup>253</sup> Other than the Social Welfare Department’s Child Custody Investigation Report, Guide for Parents.

judges, family litigants, children, and mental health professionals.<sup>254</sup> These guidelines seek to increase understanding of the purpose and scope of views-of-the-child reports and promote consistent, ethical, and reliable practice in preparing such reports.<sup>255</sup> In Australia, Family Consultants (psychologists or social workers) prepare and write these reports and the ALRC recently proposed mandatory national accreditation for private family report writers.<sup>256</sup> It would be useful to amend the *Children's Bill* to encourage use of the views-of-the-child reports as way of expanding opportunities for children's participation. Establishing practice guidelines and using protocols would help them become useful standardized practice in Hong Kong.

### **Children's Legal Representation: Develop Child Advocates System**

Section 62 of the draft *Children's Bill* consolidates the circumstances in which the child may be separately represented. This is augmented by the Practice Direction SL6 "Guidance on Separate Representation for Children in Matrimonial and Family Proceedings" issued by the

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<sup>254</sup> See Nova Scotia, Department of Justice, *Voice of Child Report Guidelines: Information on Conducting a Court-ordered Voice of the Child Report in Private Family Law Proceedings in Nova Scotia* (Halifax: NS DOJ, 2015) at Appendix B.

<sup>255</sup> See *ibid.* They help the court in determining the child's best interests and increase confidence all parties have in the process and the report.

<sup>256</sup> See *ALRC Discussion Paper*, *supra* note 4, Recommendation 53. In Singapore greater consistency is provided as custody evaluation reports are prepared by in house family specialists and social welfare reports by government psychologists.

Judiciary in 2012, providing legal authority to appoint counsel for children.<sup>257</sup> Separate representation for children by the official solicitor is not the norm but rather decided by broad judicial discretion in the best interest of the child on a case-by-case basis.<sup>258</sup> Sections 14 and 15 of the practice direction set out the range of circumstances the court will consider in ordering separate representation for a child; the views and perspectives of the child can be expressed in these proceedings. By comparison, other jurisdictions have substantially expanded the role of independent child representatives.

Singapore established a government-funded Office of Child Representatives with a panel of child representatives available to assist the court in high-conflict child-custody cases.<sup>259</sup> The child representative can interview the child and the parents, as well as the child's teachers, school counselors, and other persons in the child's life prior to preparing an independent submission setting out recommendations to assist judicial custody decisions. Similarly, the ALRC proposes developing a formal system of children's advocates in Australia to assist children expressing their views and navigating the family justice system.<sup>260</sup> A statutory provision will require

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<sup>257</sup> Hong Kong, Judiciary, *Practice Direction PDSL6* (also provides for the appointment of a "guardian ad litem" to represent the child's interests in court).

<sup>258</sup> See *ibid*, ss 13, 14. See also *ibid*, s 15 (sets out a list of circumstances where a judge could consider making an order for a child to be separately represented).

<sup>259</sup> See Ng et al, *supra* note 120 at 631–32.

<sup>260</sup> See *ALRC Final Report*, *supra* note 4, Recommendation 44. See also *New Zealand Final Report*, *supra* note 155.

Independent Children's Lawyers to comply with the Guidelines for Independent Children's Lawyers that provide guidance as to the courts' expectations of them.<sup>261</sup>

Multiple Canadian provinces have established government agencies responsible for child legal representation in family cases. Hong Kong should review the most comprehensive child representative program, Ontario's Office of the Children's Lawyer (OCL).<sup>262</sup> The OCL is a government-funded service that plays one or both of two roles in separation and divorce cases, either by providing a lawyer to represent the child or conducting a clinical investigation and preparing a report about the child's interests.<sup>263</sup> The OCL adopts a multidisciplinary approach employing both lawyers and social workers to provide these services, with both professionals collaborating where necessary. Research suggests that "lawyers for the parties consider the OCL's presence in a case to be helpful, as do the child clients."<sup>264</sup> However, this

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<sup>261</sup> See *ALRC Final Report*, *supra* note 4, Recommendation 44.

<sup>262</sup> See *Courts of Justice Act*, RSO 1990, c C.43, ss 89, 112.

<sup>263</sup> The OCL has about 500 lawyers and 280 social workers on staff with an annual operating budget of approximately \$40 million. See Semple & Bala, *supra* note 9 at 18; Birnbaum & Bala, "The Child's Perspective On Representation", *supra* note 203 at 61. See also Rachel Birnbaum & Dena Moyal, "How social workers and lawyers collaborate to promote resolution in the interests of children: The interface between law in theory and law in action" (2003) 21:3 *Can Fam LQ* 379. Birnbaum & Bala suggest OCL lawyers should "generally adopt a traditional advocacy approach, guided by the child's express wishes" instead of opining about the child's interests. Birnbaum & Bala, "The Child's Perspective On Representation", *supra* note 203 at 22.

<sup>264</sup> Semple & Bala, *supra* note 9 at 18–19. See also Rachel Birnbaum, "Examining Court Outcomes in Child Custody Disputes: Child Legal



program requires substantial public funding as these services can be expensive.<sup>265</sup>

Hong Kong should review the Singaporean, Australian, and Canadian models of child representatives and evaluate the merits of establishing a more formal institution such as an Office of Child Representatives organised and funded by a government agency.<sup>266</sup> An institutional structure helps provide for initial screening of cases, selection, and professional training of professionals, and is more likely to deliver quality representation to meet children's needs.<sup>267</sup> Given the need for substantial government funding and support, this merits detailed policy discussion.

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Representation and Clinical Investigations" (2005) 24:2 Can Fam LQ 167 at 176.

<sup>265</sup> See e.g. Sunny Dhillon, "B.C. project offers children independent representation in court", *The Globe and Mail* (1 April 2018), online: <[theglobeandmail.com/canada/british-columbia/article-bc-project-offers-children-independent-representation-in-court/](http://theglobeandmail.com/canada/british-columbia/article-bc-project-offers-children-independent-representation-in-court/)> (the Society for Children and Youth of BC launched an Independent Representation in Court project in 2018 with an annual budget of CAD\$460,000).

<sup>266</sup> Bala states that the availability of government funding is key factor in determining whether a lawyer is appointed for a child. See discussion in Nicholas Bala & Rachel Birnbaum, "Rethinking the Role of Lawyers for Children: Child Representatives in Canadian Family Relationship Cases" (2018) 59:4 C de D 787 at 809.

<sup>267</sup> See *ibid* at 810, 812–27 (discussion of a two-role model for independent children's lawyers—a "Child's Rights and Interests Advocate" or a "Child's Lawyer Instructional Advocate").

## DEVELOP AND EXPAND FAMILY-SUPPORT SERVICES IN HONG KONG

Public consultations and social science research indicate a need for more pre- and post-separation and divorce support services in Hong Kong.<sup>268</sup> The efforts of the Social Welfare Department and NGOs (e.g. the Hong Kong Family Welfare Society) are important in increasing social worker support, providing co-parenting and parenting coordination services and public education. However, they are insufficient to meet the diverse needs of children and families experiencing marriage breakdown in Hong Kong.<sup>269</sup> It is useful to focus on developing evidence-based support measures to help high-conflict separating and divorced families and protecting children and families from domestic abuse.<sup>270</sup>

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<sup>268</sup> Many family support services are provided by NGOs and community organizations—some obtain limited government funding while other must find their own funding sources. See HK, Legislative Council Panel on Welfare Services, *Proposed Legislation to Implement the Recommendations of the Law Reform Commission Report on Child Custody and Access and Relevant Support Measures* (LC Paper No CB(2)1318/16-17(03)) (May 2017), online (pdf): <[legco.gov.hk/yr16-17/english/panels/ws/papers/ws20170508cb2-1318-3-e.pdf](http://legco.gov.hk/yr16-17/english/panels/ws/papers/ws20170508cb2-1318-3-e.pdf)>.

<sup>269</sup> There were 20,019 divorces granted in 2014 and there are some 65,000 children below the age of 18 in single-parent families. See Jennifer Ngo, “Children of divorces need more than new Hong Kong custody law, critics say”, *South China Morning Post* (11 December 2015), online: <[beta.scmp.com/news/hong-kong/education-community/article/1889609/children-divorces-need-more-new-custody-law](http://beta.scmp.com/news/hong-kong/education-community/article/1889609/children-divorces-need-more-new-custody-law)>.

<sup>270</sup> Parental alienation and domestic violence issues are not unique to Hong Kong and much can be learned from the range of legal and therapeutic support services offered in other jurisdictions.

The Hong Kong Government recently committed increased public funding for family support services—HKD\$28 million (USD\$3.5 million) was allocated 2018–19 to the Social Welfare Department with HKD\$43 million (USD\$5.5 million) full-year provisions with effect from 2019–20.<sup>271</sup> But how much long-term public funding is the Government prepared to commit to develop sustainable pre- and post-separation and divorce support services?<sup>272</sup> This is an important issue given the Government of Hong Kong’s traditional *laissez faire* and non-interventionist approach to governance. Furthermore, in determining the priorities for future expansion of support services, a needs analysis or scoping study must be conducted. Of the many NGOs and more limited public-sector programs and services, which ones have the strongest demonstrated efficacy?<sup>273</sup>

The Government should also consider multi-disciplinary family support services developed in other countries, especially those supported by empirical research

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<sup>271</sup> See HK, *Chief Executive Policy Address* (2018) at para 65 [HK, *Policy Address 2018*]; HK, *Government Budget 2018 Media Sheet* (2018) at Appendix 2, para 3(a)(ix), online (pdf): <budget.gov.hk/2018/eng/pdf/2018-19%20Media%20Sheet.pdf> [2018 *Budget*]. The Hong Kong government has budgeted HKD\$20 billion (USD\$2.5 billion) to purchase properties for welfare facilities and HKD\$1.36 billion (USD\$173 million) to support elderly and childcare services. See discussion in KPMG, “Hong Kong Budget Summary 2019–2020” (2019) at 11, online (pdf): <assets.kpmg/content/dam/kpmg/cn/pdf/en/2019/02/hong-kong-budget-summary-2019-2020.pdf> [KPMG, “Budget Summary 2019”].

<sup>272</sup> See generally Semple & Bala, *supra* note 9; Atkin, *supra* note 149.

<sup>273</sup> See generally Semple & Bala, *supra* note 9; Atkin, *supra* note 149. Further empirical research needs to be conducted in Hong Kong.

regarding their effectiveness.<sup>274</sup> These tend to favour a more facilitative role played by government, blending judicial and non-judicial processes to help families resolve their differences and ensure the best interests of the child are protected.<sup>275</sup> The current family justice reviews in Scotland, Australia, and New Zealand reflect this, stressing the need for governments to develop a range of measures and services aimed at: protecting victims of family violence; supporting high-conflict families in separation and divorce; alleviating child poverty by improving child- and spousal-support services; and developing amicable out-of-court dispute-resolution options. Hong Kong should review overseas experience in determining how best to commit financial and human resources in expanding family support services.<sup>276</sup>

### **Address Family Violence: Protection and Support for Children and Families**

The draft *Children's Bill* should include provisions protecting children and families from domestic abuse, the incidence of which is increasing in Hong Kong. According to Social Welfare Department statistics, during the period January–March 2019, there were 237 new cases of child

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<sup>274</sup> Hong Kong's Judiciary is pro-actively visiting family courts in Singapore and Australia to review innovative approaches to family justice services. See Lam, *supra* note 20 (“a delegation of Hong Kong judges . . . visited family courts in Singapore, Melbourne, and Sydney in late October [2018]”).

<sup>275</sup> See generally Bala & Semple, *supra* note 9; Atkin, *supra* note 149.

<sup>276</sup> There is a discernible shift in government attitude towards increasing public support for social services. Note the Government's increased financing of child and elder care services in 2018. See *2018 Budget*, *supra* note 271; KPMG, “Budget Summary 2019”, *supra* note 271.

abuse reported and 862 spousal-abuse cases.<sup>277</sup> Of concern is the extent to which children in troubled families are affected by their experiences. The Government responded to the urgency in 2018 by allocating HKD\$28 million to increase human resources of the Family and Child Protective Services Units.<sup>278</sup> While the financial support is important, a more comprehensive review of domestic abuse in Hong Kong is needed. An integrated systematic response involving all aspects of family law, domestic violence, and child-protection systems must be developed using a multidisciplinary approach with greater inter-agency collaboration.<sup>279</sup> Other comparable jurisdictions are doing just that.<sup>280</sup>

New research indicates the enormous social and financial costs of domestic abuse: in England Wales in 2016–17, it is estimated to be a staggering GBP 66

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<sup>277</sup> See HKSAR, Social Welfare Department, “Statistics on Child Abuse, Spouse/Cohabitant Battering and Sexual Violence Cases” (last visited 28 May 2019), online: <[swd.gov.hk/vs/english/stat.html](http://swd.gov.hk/vs/english/stat.html)>.

<sup>278</sup> See *2018 Budget*, *supra* note 271 (strengthening child protection and support services, e.g. outreach and counselling).

<sup>279</sup> The Hong Kong Government should commit to developing an integrated systematic response, including revising the deficiencies in the *Domestic and Cohabitation Relationships Violence Ordinance* (HK), Cap 189.

<sup>280</sup> For example, Scotland is adopting an integrated approach to addressing family violence risk assessment and interventions. See Scottish Government, *Improving Multi-Agency Risk Assessment and interventions for victims of domestic abuse: consultation* (30 November 2018), online: <[gov.scot/publications/improving-multi-agency-risk-assessment-interventions-victims-domestic-abuse/](http://gov.scot/publications/improving-multi-agency-risk-assessment-interventions-victims-domestic-abuse/)>.

billion.<sup>281</sup> Following intense public scrutiny, the UK government announced on May 21, 2019 that a panel of experts would hold a three-month inquiry reviewing how the family courts handle a range of offences, including child abuse, domestic violence, and domestic abuse with a report expected in August 2019.<sup>282</sup> This follows a new domestic-violence bill introduced in January 2019 containing an expansive statutory definition of domestic abuse.<sup>283</sup> In 2016, Australia's Family Law Council

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<sup>281</sup> See UK, Home Office, *The economic and social costs of domestic abuse* (Research Report 107) by Rhys Oliver et al (21 January 2019) at 41–42, online: <[gov.uk/government/publications/the-economic-and-social-costs-of-domestic-abuse](http://gov.uk/government/publications/the-economic-and-social-costs-of-domestic-abuse)>.

<sup>282</sup> This inquiry is aimed at ensuring the courts act explicitly in children's best interests. See UK, Ministry of Justice, Press Release, "Spotlight on child protection in family courts" (24 May 2019), online: <[gov.uk/government/news/spotlight-on-child-protection-in-family-courts](http://gov.uk/government/news/spotlight-on-child-protection-in-family-courts)>. In 2018, the UK pledged GBP 22 million (USD\$27 million) and in Jan 2019 a further GBP 8 million (USD\$10 million) for domestic abuse support and a new Domestic Abuse Commissioner. See UK, Ministry of Housing, Communities, and Local Government, Press Release "£22 million for projects to support domestic abuse survivors" (10 November 2018); UK, Home Office, Press Release, "Government publishes landmark domestic abuse bill" (21 January 2019) ("£8 million of Home Office funding to support children affected by domestic abuse").

<sup>283</sup> See UK, Home Department, "Transforming the Response to Domestic Abuse, Consultation Response and Draft Bill" (January 2019). For the first time, the Bill contains a statutory definition of *domestic abuse* to include economic abuse acknowledging that controlling a partner's money can amount to manipulative behavior. See *ibid* at 5. Cf Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019, c 25 (modernized provisions related to violence against an intimate

completed a comprehensive review of the intersection of family law and child-protection systems with recommendations focused on building collaborative and integrated services and identifying, assessing, and responding to risks of children.<sup>284</sup> A 2018 parliamentary inquiry followed up with integrated multidisciplinary reform proposals.<sup>285</sup> Suggestions include a court-based integrated-services model whereby professionals from specialist family-violence services and other service sectors (e.g. mental health professionals) are embedded within the family law system.<sup>286</sup>

These jurisdictions indicate there must be greater alignment and integration between the family law, child-welfare protection, and domestic-violence systems in Hong

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partner); *Domestic Abuse Act 2018* (Scot), ASP 5; *Domestic Violence—Victims’ Protection Act 2018* (NZ), 2018/21.

<sup>284</sup> See Austl, Commonwealth, *Family Law Council, Families With Complex Needs and the Intersection of the Family Law and Child Protection Systems: Final Report* (2016). Cf Singapore’s 2015 “National Framework for Child Protection” discussed in Committee on the Rights of the Child, *Combined fourth and fifth reports submitted by Singapore under article 44 of the Convention*, UN Doc CRC/C/SGP/4-5 (2017) at para 63.

<sup>285</sup> See Austl, Commonwealth, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Report of the Inquiry Into a Better Family Law System to Support and Protect Those Affected by Family Violence* (Canberra: December 2017) [*Report on a Better Family Law System* (Austl)]. See also *New Zealand Consultation*, *supra* note 5 (addressing similar concerns in New Zealand).

<sup>286</sup> Greater development of “family safety services” were proposed, along with early “whole of family” risk assessment mechanisms incorporating the expertise of family violence specialists in the family law system. See *Report on a Better Family Law System* (Austl), *supra* note 285 at 305–06.

Kong. This includes clearer child-protection service policies, improved understanding of professional roles, increased inter-agency coordination, communication and training, and greater use of judicial case management.<sup>287</sup> While this type of comprehensive review is time-consuming and requires substantial government commitment and resources, other more immediate measures and services could be adopted.

### ***Establish Family Violence Training Programs***

Hong Kong should consider the Australian proposal for a mandatory national family-violence training program for all family law professionals (including judges, court staff, lawyers, family consultants, and children's advocates) to ensure they understand the complexities of family violence and how abuse can affect people involved in family law proceedings.<sup>288</sup> A formal training program enhancing the Judiciary's knowledge and skills in domestic violence cases is important since little specialist training has been offered in the past.<sup>289</sup> Developing a domestic-abuse

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<sup>287</sup> See Claire Houston, Nicholas Bala & Michael Saini "Crossover cases of High-Conflict Families Involving Child Protection Services: Ontario Research Findings and Suggestions for Good Practices" (2017) 55:3 Fam Ct Rev 362.

<sup>288</sup> See *ALRC Final Report*, *supra* note 4 (recommending a mandatory national family violence training program for all family law professionals at 111–43).

<sup>289</sup> Little or no judicial training appears to have been offered on handling of cases involving domestic violence in Hong Kong in financial year 2017–18; the last training appears to have been in 2014. See Emma Lau, "Controlling Officer's Reply (JA041)" in *Examination of Estimates of Expenditure 2018-19*, online (pdf): <legco.gov.hk/yr17-18/english/fc/fc/w\_q/ja-e.pdf> ("[f]amily Court Judges attended training on dealing with domestic violence cases in 2014"). See also



reference publication, such as Australia's *Family Violence Best Practice Principles*, for use by the judiciary, court staff, legal professionals, and family litigants would also be useful.<sup>290</sup> With sufficient funding, a formal Family Advocacy and Support Services program as in Australia could be developed to provide family violence victims with access to specialist support workers in court proceedings.<sup>291</sup>

***Revise Practice Direction SL 10.1: Broaden Definition of "Domestic Violence"***

The Vice-President of the Court of Appeal, Johnson Lam, introduced Practice Direction SL10.1 in February 2019 providing guidance for child-arrangement cases where domestic abuse is a factor (which is similar to its UK equivalent, Practice Direction 12J). This sets out what the court is required to do in any case where domestic abuse is alleged or admitted and applies to any application relating to children where there are allegations that a party or child has experienced domestic abuse. Following the Cobb Review in the UK that investigated complaints about

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Peter G Jaffe et al, "Enhancing judicial skills in domestic violence cases: the development, implementation and preliminary evaluation of a model US programme" (2018) 40:4 J Soc Welfare & Fam L 496.

<sup>290</sup> See Austl, Commonwealth, Family Violence Committee, *Family Violence Best Practice Principles*, 4th ed (2016). See also National Council of Juvenile and Family Court Judges, *A Judicial Guide to Child Safety in Custody Cases*, by Bowles et al (Reno, NV: 2008).

<sup>291</sup> A similar service was recently started in the UK, with the Government allocating £900,000 for NGOs to provide specially trained staff to offer dedicated support to domestic abuse victims in the family court. See UK, Ministry of Justice, *Women's Aid Public Policy Conference: David Gauke speech* (23 January 2019).

inadequate compliance, however, Practice Direction 12J was revised in October 2017 to place greater emphasis on both the indirect harm that domestic abuse can cause to a child and parent, and the impact of non-physical forms of abusive behaviour.<sup>292</sup> However, Hong Kong's Practice Direction SL 10.1 does not contain this expanded definition of *domestic abuse*. Amendment is needed to include a similarly broad approach to domestic abuse to include both indirect harm to children witnessing domestic abuse, as well as non-physical forms of abusive behavior. Furthermore, Hong Kong policy makers should review the outcome of the UK Panel of Expert's consultation on domestic abuse, expected in August 2019, which is again reviewing the courts' application of Practice Direction 12J.<sup>293</sup>

### ***Develop Specialist Integrated Family-Violence Court Divisions***

Given allegations of domestic abuse in child arrangement cases, Hong Kong should develop a specialist integrated domestic-violence division within its court system or a specialist integrated domestic-violence court (IDVC) as established in the USA, UK, Canada, and Singapore.<sup>294</sup>

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<sup>292</sup> Following the Cobb Review 2016 set up to review complaints about inadequate compliance with Practice Direction 12J, it was amended to include a broader definition of domestic abuse to include psychological, physical, sexual, financial, or emotional abuse and clearer details on fact find hearings.

<sup>293</sup> See UK, Ministry of Justice, "Spotlight on child protection in family courts", *supra* note 282.

<sup>294</sup> There have been reported cases of violence within the Family Court despite heightened security measures. There have also been repeated calls to set up IDVCs in Hong Kong. See HKSAR, Press Release,

The stated goals of IDVCs have been to provide a more holistic and multidisciplinary approach to family problems; more effective judicial monitoring to increase accountability for offenders and compliance with court orders (e.g. for child support); increased protection to support to victims and witnesses of domestic violence; improved judicial decision-making and reduction in delay due to effective case management; and better access to and coordination of support services (i.e. legal and social services).<sup>295</sup>

The social science research underpinning such specialist courts is worthy of review.<sup>296</sup> IDVCs, such as Ontario's IDVC established in 2011 and Singapore's dedicated fast-track *violence track* set up in 2014, provide promising interventions to address domestic violence that involves both criminal and family law courts.<sup>297</sup> IDVCs offer support and protection for victims, and can help

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"LCQ12: Support for separated or divorced couples and their families" (15 November 2017) (referring to "Integrated Family Service Centres").

<sup>295</sup> See Mandy Burton, "Specialist Divorce Violence Courts for child arrangement cases: safer courtrooms and safer outcomes?" (2018) 40:4 J Soc Welfare & Fam L 533; Dee Cook et al, "Evaluation of Specialist Domestic Violence Courts/Fast Track Systems", Research Report, (2004), online: <hdl.handle.net/2436/22612> (analyzing the positive benefits and challenges of specialist domestic violence courts and acknowledging the need for more empirical research on such courts).

<sup>296</sup> See Rachel Birnbaum et al, "Canada's First Integrated Domestic Violence Court: Examining Family and Criminal Outcomes at the Toronto IDVC" (2016) 32:6 J Fam Violence 621 ("the first quantitative study to examine Canada's only Integrated Domestic Violence Court" at 621).

<sup>297</sup> See *ibid* at 622.

facilitate access to intervention programs for abusers.<sup>298</sup> The safety and well-being of victims and children in IDVCs is a priority, with particular focus on encouraging compliance with child-support and custody and access orders.<sup>299</sup> When support services are provided to victims of domestic violence during family separation, children benefit from the involvement of both parents. The “clustering” and “fast-tracking” of domestic-abuse cases within these specialist courts enhances the effectiveness of court and support services for victims.<sup>300</sup> Australia will soon pilot specialist integrated family-violence court divisions in its Magistrates Courts across the country.<sup>301</sup> The Government should consider doing the same in Hong Kong.

### ***Develop Family Protection Centres***

The new Family Protection Centre established by Singapore’s Family Justice Court in 2017 as a “one-stop purpose-built area” provides “victims of family violence with a safe, private[,] and conducive environment to file their personal protection applications.”<sup>302</sup> Hong Kong should study this specialized centre which is designed to

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<sup>298</sup> Since 2005 IDVCs have been developed in the UK with some measurable benefits. See “Better courts: A snapshot of domestic violence courts in 2013”, *New Economics Foundation* (1 February 2014), online: <[neweconomics.org/2014/02/better-courts](http://neweconomics.org/2014/02/better-courts)>.

<sup>299</sup> See *ibid* at 4; Birnbaum et al, *supra* note 296 at 628–29.

<sup>300</sup> See Burton, *supra* note 295; Cook et al, *supra* note 295.

<sup>301</sup> This will enable family law issues in family violence cases to be determined by one court rather than being dealt with by federal Family Courts and state Magistrates Courts. See also *supra* note 148.

<sup>302</sup> See Ng et al, *supra* note 120 at 636–37.

allow applicants to proceed from registration using simplified court forms, to risk assessment with a court family specialist or family-violence specialist to affirmation by a court judge. An innovative “Integrated Family Application Management System” has also been established by the Family Justice Courts to provide a “comprehensive end-to-end system that . . . streamline[s] and simplif[ies] processes for all family violence [applications], as well as maintenance applications.”<sup>303</sup>

### **Supporting High-Conflict Families—Parenting Coordinators and Contact Centres**

In the public consultations for the *Children’s Bill*, stakeholders were clear that parenting coordination and contact centres must be formally established. Empirical research supports the need for expanding pre- and post-separation interventions, including non-court services such as counselling, divorce education, parenting competency, and parenting coordination.<sup>304</sup>

### ***Expand Parenting Coordination Service—Public Funding, Certification, and Guidelines***

Parenting coordination is an important dispute resolution option for high-conflict separated and divorced families,

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<sup>303</sup> *Ibid.*

<sup>304</sup> See Yuk King Lau & Glenn Stone, “Difficult But Possible: Evaluation study on the effectiveness of the co-parenting supportive service for divorced families in Hong Kong”, *Hong Kong Jockey Club Parenting Coordination Service for Divorced Families* (2018) at v, 42–45; UHK, “Phenomenon of Divorce in Hong Kong”, *supra* note 86 at 9, 19. See also Semple & Bala, *supra* note 9.

combining legal and mental health services to comprehensively manage the restructuring of the family.<sup>305</sup> Available research evidence suggests that parenting coordination is effective in achieving its intended goals, including enhancing parents' adjustment to divorce, creating co-parenting agreements with reduced conflict, facilitating mutual support between parents, enhancing children's well-being.<sup>306</sup> Parenting coordination services are offered through community organizations, such as the Hong Kong Family Welfare Society and the Hong Kong Catholic Marriage Advisory Council (with financial support from Community Chest and the Hong Kong Jockey Club).<sup>307</sup> The Hong Kong Government recently pledged HKD\$29 million in 2018–19 to enhance support services for separated/divorced families, providing co-parenting

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<sup>305</sup> By using parenting coordinators, families can successfully create and/or implement co-parenting agreements with reduced stress and conflict, ensure timely decision-making concerning children, and avoid protracted fights. See Semple & Bala, *supra* note 9; John-Paul Boyd, "Obtaining Evidence in High Conflict Parenting Disputes, Part 4: Parenting Coordination", *Law Now* (2 March 2017).

<sup>306</sup> Evidence suggests that parenting coordination is effective in reducing the number of motions filed and court appearances in the year parenting coordination starts and thereafter. See Robin M Deutsch, Gabriela Misca & Chioma Ajoku, "Critical Review of Research Evidence of Parenting Coordination's Effectiveness" (2018) 56:1 Fam Ct Rev 119. See also Semple & Bala, *supra* note 9.

<sup>307</sup> The parenting coordination services are partially funded by a three-year \$HKD3.8 million grant from the Community Chest since 2013. See also Lau & Stone, *supra* note 304; Hong Kong, Social Welfare Department, "Social Welfare Department (SWD) & NGOs Service Units Providing Social Services to Separated and Divorced Families", online: <[www.swd.gov.hk/coparenting/html\\_en/support.html](http://www.swd.gov.hk/coparenting/html_en/support.html)>.

and parental-coordination services.<sup>308</sup> This is a positive step as this service can be expensive since many parenting coordinators are specialist lawyers and mental health professionals.<sup>309</sup> Sufficient government funding and resourcing of parenting coordination is needed for long-term sustainability.<sup>310</sup>

An express provision should also be included in the draft *Children's Bill* that would enable a judge to order parents to participate in family-support services such as parenting coordination and counselling.<sup>311</sup> A child-inclusive approach to parental coordination should also be developed in Hong Kong to facilitate child participation in the process.<sup>312</sup> Given the danger that the parenting-

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<sup>308</sup> HKD\$56 million budgeted for full-year 2019–20. There has not been any public discussion of how much money is allocated to contact centres and parenting coordination. See *Budget 2018*, *supra* note 271, Appendix 2 at para 3(a)(vi).

<sup>309</sup> See Semple & Bala, *supra* note 9 at 19; Ngo, *supra* note 269. See also Lorne D Bertrand & John-Paul Boyd, “The Development of Parenting Coordination and an Examination Of Policies And Practices In Ontario, British Columbia And Alberta”, Report, *Canadian Research Institute for the Law and Family* (December 2017).

<sup>310</sup> More resources are needed in Hong Kong for increased staffing and expansion of office space for parenting coordination. See Lau & Stone, *supra* note 304 (evaluation report).

<sup>311</sup> Recommended in Lau & Stone, *supra* note 304 at 1; Lau, *supra* note 7. This has also been done in Singapore. See *Singapore Report*, *supra* note 1 at 35–36. It is also recommended by the ALRC in Australia. See *ALRC Final Report*, *supra* note 4. By contrast, Canada’s Bill C-78 has attracted criticism as it contains no such provision allowing parties in high-conflict cases to ask the court to appoint a parenting coordinator.

<sup>312</sup> As many organisations, such as the Law Society of Hong Kong, are trying to do. Cf Barbara Jo Fidler & Philip Epstein, “Parenting Coordination in Canada: An Overview of Legal and Practice Issues”

coordination process may be exploited by perpetrators of domestic abuse, Hong Kong should develop a clear process to screen out prospective cases for domestic abuse. Specialised parenting-coordination protocols and procedures should be developed for domestic-abuse cases.<sup>313</sup> A mandatory training and accreditation system for parenting coordinators should be established to ensure quality and enable effective official oversight.<sup>314</sup> Both Canada and Australia have established training and certification schemes and practice guidelines for parenting coordinators.<sup>315</sup> The Singapore *Recommendations of the Committee for Family Justice* also recognized the utility of having divorce-support agencies and family-violence specialists.<sup>316</sup> The important role played by parenting coordinators in assisting high-conflict families in Hong

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(2008) 5:1/2 J Child Custody 53 (discussing the importance on giving children a voice in parenting coordination).

- <sup>313</sup> See e.g. Association of Family and Conciliation Courts, “Guidelines for Parenting Coordination” (2019), online (pdf): <[afccnet.org/Portals/0/Guidelines for Parenting Coordination 2019.pdf](http://afccnet.org/Portals/0/Guidelines%20for%20Parenting%20Coordination%202019.pdf)> [AFCC, “Guidelines”].
- <sup>314</sup> For example, a Certified Specialist in Parenting Coordination requiring stringent criteria and continuous improvement. Hong Kong could refer to provincial guidelines on parenting coordination in Ontario and British Columbia that closely follow AFCC guidelines. See *ibid* (particularly Appendix A on comprehensive training of parenting coordinators).
- <sup>315</sup> Canada and Australia provide detailed guidelines for best practice and procedures for parenting coordination; ethical obligations; and training, expertise and qualifications. Scotland has also proposed establishing a publicly funded Parenting Coordinator pilot scheme. See Scottish Review, *supra* note 4.
- <sup>316</sup> See *Singapore Report*, *supra* note 1 at 6–8.



Kong merits professional accreditation and sufficient public funding and resourcing.

***Expand Co-Parenting Support Centres: Regulation of Contact Centres***

The Chief Executive's 2018 Policy Address announced that five specialized "co-parenting support centres" (or contact centres) will be established in Hong Kong from 2019–20 onwards to strengthen support for divorced families and to "coordinate and arrange children contact."<sup>317</sup> Since 2016, the Hong Kong Family Welfare Society has been operating a Pilot Project on Children Contact Service aimed at facilitating child-contact arrangements with the non-residing parents.<sup>318</sup> The scope of service includes supported and supervised contact as well as exchange, programs, and public education for promotion of parental responsibility.<sup>319</sup>

The important role played by such contact centres in Hong Kong merits specific inclusion in the draft *Children's Bill* (rather than in explanatory materials where it is now). The Government should consider in the

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<sup>317</sup> See HK, *Policy Address 2018*, *supra* note 271 at para 223(iv).

<sup>318</sup> The Pilot Project, commissioned to the Hong Kong Family Welfare Society with financing from the Lotteries Fund, will be evaluated in the near future. See HK, Children's Rights Forum, *33rd Meeting of Children's Rights Forum* (Minutes) (28 September 2018).

<sup>319</sup> See *ibid.* The Pilot Project was extended to September 2019 and the Government plans to incorporate this Pilot Project into the new co-parenting support centres. See HK, Social Welfare Department, "Pilot Project on Children Contact Service" (last reviewed on 27 January 2019), online: <[swd.gov.hk/en/textonly/site\\_pubsvc/page\\_family/sub\\_listofserv/id\\_projectccs/](http://swd.gov.hk/en/textonly/site_pubsvc/page_family/sub_listofserv/id_projectccs/)>.

*Children's Bill* empowering the court with power to order families and parents to utilize the services of the contact centres.<sup>320</sup> It would also be useful to expand the role of these centres to facilitate the parents' understanding of court orders, educate children about their rights and allowing them to freely express their perspectives, and provide a child-specific social worker/psychologist with power to assess families and children at risk for high-conflict and domestic-abuse situations.<sup>321</sup> The social worker could also refer to a safe-house for at-risk children (e.g. perhaps modeled on Singapore's Family Protection Centre).<sup>322</sup>

Relevant for Hong Kong is whether these expanded contact centres should be government-regulated. The ALRC recommends amending Australia's *Family Law Act 1975* (Cth) to require "any organization offering a Children's Contact Service to be accredited" and to "make it an offence to provide a Children's Contact Service without accreditation."<sup>323</sup> The Scottish Consultation is also discussing whether contact centres should be regulated and weighing the benefits in doing so against the argument that an onerous level of compliance might force some centres

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<sup>320</sup> See Hong Kong Family Welfare Society, "Parade of Light - Pilot Project on 'Child-focused' Intervention Programme for Children Facing Parental Conflicts / Separation or Divorce", online: <[hkfws.org.hk/en/news/latest-news/parade-of-light](http://hkfws.org.hk/en/news/latest-news/parade-of-light)>.

<sup>321</sup> With power and resources to direct parents and children to available resources and different community-based agencies (e.g. referral to family counsellors or parenting coordinators).

<sup>322</sup> See PathFinders Submission Response, *supra* note 170.

<sup>323</sup> See *ALRC Final Report*, *supra* note 4 at 416–22 (recommendation 54).

to close.<sup>324</sup> All forty-four Scottish contact centres follow “National Standards and Practice Procedures for Child Contact Centres”,<sup>325</sup> standards that the Hong Kong Government could look to for review and consider adopting. The Government should consider this regulation issue and determine the current qualifications and training contact-centre staff should possess (e.g. training on children’s rights, domestic abuse, parental alienation, trauma, play therapy, attachment and child protection).<sup>326</sup> The centres should undergo regular screening checks. This also highlights the need for Hong Kong Government to ensure the new contact centres have adequate levels of funding to provide a consistent level of service and the required staff training.

### **Alleviating Child Poverty and Financial Hardship**

Enforcement of child- and spousal-support orders creates significant challenges in Hong Kong, particularly in high-

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<sup>324</sup> Many respondents felt contact centres should be regulated to provide minimum/consistent standards and to ensure the children’s safety. Many respondents also felt contact centres should be government funded. See *Scottish Review*, *supra* note 4, Part 4.

<sup>325</sup> See Scottish Government, Minister for Community Safety and Legal Affairs, “Review of Part 1 of the Children (Scotland) Act 1995 and creation of a Family Justice Modernisation Strategy: A Consultation” (May 2018), online (pdf): <gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2018/05/review-part-1-children-scotland-act-1995-creation-family-justice/documents/00535359-pdf/00535359-pdf/govscot%3Adocument/00535359.pdf> (Annabelle Ewing) at 29; Scottish Government, “PE01635: Relationships Scotland submission”, *Petition PE01635: Review of section 11 of the Children (Scotland) Act 1995* (9 January 2017).

<sup>326</sup> Cf “UK National Association of Child Contact Centres”, online: <naccc.org.uk>.

family-conflict cases.<sup>327</sup> Potential enforcement challenges for support orders in separation and divorce disputes often start even before litigation commences due to difficulty obtaining the required disclosure of financial information from parties.

***Develop Maintenance Enforcement Program (Board)***

Empirical research indicates that delays in support payments and difficulties in recovering arrears often create substantial financial difficulties for families and cause childhood poverty.<sup>328</sup> Stakeholders in the *Children's Bill's* public consultations expressed frustration with difficulties collecting and enforcing maintenance orders in Hong Kong.<sup>329</sup> Whilst the Government has introduced limited

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<sup>327</sup> The Government has recognised this and has introduced measures such as: relaxing requirements for court to issue attachment of income orders and imposing interest or surcharge on default maintenance payers. See discussion on this issue in the public consultations on the provisions of the *Children's Bill* in Hong Kong *Background Brief*, *supra* note 53.

<sup>328</sup> See Claudia Irigoyen, "The UK's Child Support Act" (18 August 2017), online: *Centre for Public Impact* <[www.centreforpublicimpact.org/case-study/child-support-act-uk/](http://www.centreforpublicimpact.org/case-study/child-support-act-uk/)>; The Centre for Social Justice, "Why Family Matters: A comprehensive analysis of the consequences of family breakdown" (6 April 2019) at 7, online: <[centreforsocialjustice.org.uk/library/why-family-matters-comprehensive-analysis-of-the-consequences-of-family-breakdown/](http://centreforsocialjustice.org.uk/library/why-family-matters-comprehensive-analysis-of-the-consequences-of-family-breakdown/)>; The Centre for Social Justice, "The Hidden Parent Poverty Trap: Child Maintenance and Universal Credit" (10 March 2019) at 3, online: <[centreforsocialjustice.org.uk/library/the-hidden-parent-poverty-trap-child-maintenance-and-universal-credit/](http://centreforsocialjustice.org.uk/library/the-hidden-parent-poverty-trap-child-maintenance-and-universal-credit/)>.

<sup>329</sup> See Lau, *supra* note 7 at 153. See also HK, Census and Statistics Department, *Thematic Household Survey, Report No 61, Enforcement of Maintenance Orders* (2015–16).

improvements to the system of collecting maintenance payments and enforcing maintenance orders, there are persistent calls for a maintenance board.<sup>330</sup> This would help address many of the underlying concerns expressed by NGOs and individual stakeholders.

Several countries have established publicly funded maintenance-enforcement programs and specialist administrative agencies to provide systems and procedures to deal with payments, variations, and arrears in support payments.<sup>331</sup> Examples include the UK's Child Maintenance Service and Ontario's Family Responsibility Office which can garnish wages and seize property from support obligors (among other techniques) and use the funds collected to support recipients who are often economically vulnerable.<sup>332</sup>

The UK introduced a new child-maintenance compliance-and-arrears strategy in 2018 with stronger collection and enforcement measures, including a new

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<sup>330</sup> See e.g. Law Society, "Submissions", *supra* note 51 at 15 (recommending a maintenance board).

<sup>331</sup> See, the Canada, UK, and Australia, for example.

<sup>332</sup> See UK, Department for Work and Pensions, "Child Maintenance Service" (2019), online: <[childmaintenanceservice.direct.gov.uk/public/](http://childmaintenanceservice.direct.gov.uk/public/)>; Ontario, Ministry of Children, Community, and Social Services, "Welcome to the Family Responsibility Office" (2019), online: <[www.mcscs.gov.on.ca/en/mcscs/programs/familyResponsibility/index.aspx](http://www.mcscs.gov.on.ca/en/mcscs/programs/familyResponsibility/index.aspx)>. Singapore has set up an online facility for child maintenance claims. See Singapore, "Integrated Family Application System", online: <[ifams.gov.sg/sop/process/IFAMS/FSC#iFAMS](http://ifams.gov.sg/sop/process/IFAMS/FSC#iFAMS)>.

collection process for historical maintenance debts.<sup>333</sup> Australia has significantly reformed its child-support scheme, introducing stronger incentives for parents to comply with child-support agreements and court orders.<sup>334</sup>

In 1998 and 2018, the Hong Kong Government considered setting up a maintenance board but declined to do so, stating that there were no significant benefits above the existing system.<sup>335</sup> Instead, the Government commissioned a consultancy study in 2018 to examine the proposed establishment of a maintenance-enforcement board with a report expected in July 2019.<sup>336</sup> The Government should consider various efficiency initiatives when reviewing the future consultation report and planning for maintenance reform in Hong Kong. For example, Singapore is developing an online facility for child maintenance claims and Canada's Bill C-78 streamlines

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<sup>333</sup> See UK, Department for Work and Pensions, "Child maintenance compliance and arrears strategy" (Guidance) (2018). Scotland recently completed a consultation on maintenance arrears following this UK approach.

<sup>334</sup> See *Child Support Reform (New Formula and Other Measures) Regulations 2018* (Cth), F2018L00308.

<sup>335</sup> See HK, Legislative Council Secretariat, "Child Support Agencies in Overseas Countries" by Eva Liu & SY Yue, *Research Papers*, RP04/98-99 (7 December 1998); HK, Legislative Council, *Official Record Of Proceedings*, 2017–2018 (23 May 2018); HK, Legislative Council, *Official Record Of Proceedings*, 2017–2018 (30 May 2018) at 11605 [HK, Council Proceedings (30 May 2018)].

<sup>336</sup> See HK, Council Proceedings (30 May 2018), *supra* at 335 at 11605. The Family Council commissioned a consultant to review the existing system of collecting maintenance, payment, and enforcement of maintenance orders with local compliance and default statistics. The Government took no action on this report.

the administrative process and improves efficiency in child support provisions. Manitoba is developing a family-relations pilot project to simplify the child-support processes by allowing the Maintenance Enforcement Program and Child Support Service to make child-support decisions without a court application.<sup>337</sup> Manitoba will also allow parties to change or vary child and spousal orders by agreement.

### **Develop Early Intervention Services: Information Sessions and “Family Justice Centres”**

Research indicates that families who are separating in Hong Kong need a variety of information at the outset. This includes information on early, out-of-court dispute-resolution processes, legal aid, the divorce process, filing, division of property, child arrangements, maintenance, court processes, public housing, counselling services, and the Comprehensive Social Security Assistance payment scheme.<sup>338</sup>

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<sup>337</sup> Moreover, awards for maintenance and child support will also be enforceable as if they were court orders. See Manitoba FLRC, *Modernizing Our Family Law System*, *supra* note 4.

<sup>338</sup> Providing this information at the outset of family problems is important. Recent publication of a bilingual reference book, *Duxbury etc*, published by family lawyers for the public, litigants, and legal practitioners in the Family Court is promising. The book contains useful resources on main areas of family law, summarizing concepts and structure on ancillary relief, child custody, divorce, domestic violence, as well as information in costs, tax, MPF, and CSSA. See Azan Marwah et al, *Duxbury etc* (Hong Kong: 2019).

### ***Mandatory Family-Separation Information Sessions***

Public education of parents, children and practitioners (including judges, social work, legal, medical, and educational professionals and NGOs) as to the inherent and on-going nature of parental responsibility and the parent-child relationship needs long-term support.<sup>339</sup> Providing legal information to help self-represented litigants in Hong Kong's family justice system is also vital. Whilst significant improvements have been made (e.g. to the Judiciary's Self-Represented Litigation Resources Centre, Integrated Mediation Office and Mediation Coordination Centre Helpline), better access to legal information and advice about family law issues is needed.<sup>340</sup> The Government should consider establishing staff-supported family law information centres, such as Ontario's Family Law Information Centres and the Vancouver Justice Access Centre's Self-help and Information Services.<sup>341</sup>

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<sup>339</sup> Beyond what Government and NGOs are already doing (e.g. extending the two-year pilot scheme on parenting and divorce education by the Home Affairs Bureau and the Family Council, supported by a HKD\$3 million public grant).

<sup>340</sup> See Macfarlane, *supra* note 15 (noting that providing information has been a core component of the government's response to Canada's self-litigation issue in family courts).

<sup>341</sup> This was previously called the BC Supreme Court Self-Help Information Centre. It provides self-help and information services staff. See "Vancouver Justice Access Centre's Self-help and Information Services Website", online: <[supremecourtsselfhelp.bc.ca](http://supremecourtsselfhelp.bc.ca)>. See also "Family Law Information Centres (FLICs)", online: *Ontario Ministry of the Attorney General* <[attorneygeneral.jus.gov.on.ca/english/family/infoctr.php](http://attorneygeneral.jus.gov.on.ca/english/family/infoctr.php)>.



It would benefit Hong Kong to require parents to attend information sessions that would provide: information on dispute-resolution options, education about the effects of separation and divorce on children, and education about co-parenting responsibility.<sup>342</sup> Many jurisdictions, including Canada, England and Wales and Singapore, have enacted mandatory information sessions for families going through separation and divorce. In Ontario, for example, attendance at a two-hour mandatory information program is obligatory for all family litigants.<sup>343</sup> England and Wales have established mandatory Mediation Information Assessment Meeting (MIAMs) but they have not had the effect of keeping people out of court as was the government's intention.<sup>344</sup> MIAMs appear to be ineffective in practice, with the

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<sup>342</sup> The 2017 evaluation of family mediation services in Hong Kong suggested mandatory information sessions for anyone filing a divorce petition in Hong Kong. See UHK, *Study on Family Mediation Services*, *supra* note 232 at 186.

<sup>343</sup> BC also introduced mandatory parenting sessions after separation. See *Provincial Court (Family) Rules*, BC Reg 417/98, rule 21. Evaluations of these information sessions report high satisfaction rates but that there may be problems with attendance: despite being mandatory many spouses in Ontario did not attend the required meetings. See Semple & Bala, *supra* note 9 at 36; Saini et al, *supra* note 7 at 388 (24.2 percent attendance rate for applicants and 13.8 percent attendance rate for respondents).

<sup>344</sup> MIAMs existed under the UK's Family Procedure Rules. See *Family Procedure Rules 2010* (UK), rule 3.9(1). They became a statutory requirement in *Children and Families Act 2014* (UK), s 10. See also *Practice Direction 3A* (UK); Andrew Moore & Sue Brookes, "MIAMs: a worthy idea, failing in delivery", *Family Law Week* (31 October 2017).

overall take up rate for MIAMs being quite low.<sup>345</sup> However, structural reforms of the MIAMs are underway, including proposals for more rigorous monitoring of the quality of the delivery of MIAMs and increased enforcement by judges and court staff of the MIAM requirement.<sup>346</sup> Singapore also provides mandatory mediation and counselling for divorcing couples and for all other applications related to children's issues. The experience of such meetings is more positive in Singapore, where pre-filing consultation services are generally conducted by trained social workers provided by the government's Divorce Specialist Agency.<sup>347</sup>

***Develop Family Justice Centres: One-Stop Family Justice Model***

A common need identified across comparative family-justice reforms is the expansion, coordination, and integration of multidisciplinary front-end services. Hong Kong's Social Welfare Department operates sixty-five

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<sup>345</sup> See research findings discussed in UK Ministry of Justice, *Mediation Information and Assessment Meetings (MIAMs) and mediation in private family law disputes, Quantitative research findings* (2015). Although it was difficult to establish levels of attendance at MIAMs before proceedings were started, it was clear that the applicant had attended a MIAM in only 19 percent of the 300 cases and had not done so in 41 percent.

<sup>346</sup> See Report to the President of the Family Law Division, Private Law Working Group, *A Review of the Child Arrangements Programme* (June 2019), online (pdf): <[www.judiciary.uk/wp-content/uploads/2019/07/Private-Law-Working-Group-Review-of-the-CAP-June-2019.pdf](http://www.judiciary.uk/wp-content/uploads/2019/07/Private-Law-Working-Group-Review-of-the-CAP-June-2019.pdf)>.

<sup>347</sup> See *Singapore Report*, *supra* note 1 at para 90 (applicable to divorcing couples with children aged fourteen or younger).

Integrated Family Service Centres (IFSCs) which provide a range of preventive, supportive, and remedial family services.<sup>348</sup> Recent evaluation of the IFSC service delivery model was very positive but increased financial support and human resources are required.<sup>349</sup> There is a gap in the current services provided by IFSCs, however, as no upfront dispute-resolution referral services are currently offered. Consideration should be given to redeveloping the IFSCs into truly integrated multidisciplinary multi-service centres—possibly renamed as *Family Justice Centres*—establishing a single entry-point for people seeking help with family problems, including separation and divorce. These Family Justice Centres would operate as collaborative resource hubs, gathering together government agencies and NGOs offering free or affordable services providing front-end information, self-help resources, legal advice, therapeutic counselling, preventive measures, early intervention services, and consensual

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<sup>348</sup> IFSCs provide good support for delivery of multidisciplinary community-based support services. See generally “SWD Integrated Family Service Centres”, online: *HK Social Welfare Department* <swd.gov.hk/en/index/site\_aboutus/page\_familyserc2>.

<sup>349</sup> See Department of Social Work and Social Administration, The University of Hong Kong, “Building Effective Family Services: Review of the Implementation of the Integrated Family Service Centre Service Model”, Report, (2010). The government recently increased the number of frontline social workers of the IFSCs. See HK, Legislative Council Panel on Welfare Services, *Updated background brief prepared by the Legislative Council Secretariat for the meeting on 10 April 2017, Implementation of the Integrated Family Service Centre service mode* (LC Paper No CB(2)1137/16-17(08)) (10 April 2017), online (pdf): <legco.gov.hk/yr16-17/english/panels/ws/papers/ws20170410cb2-1137-8-e.pdf>.

dispute-resolution processes.<sup>350</sup> Triage can be used to allocate cases between adjudicative and non-adjudicative interventions, offering a range of accessible and affordable services and options, e.g. negotiation, mediation, parenting coordination, collaborative practice, arbitration, and formal courtroom litigation where necessary.<sup>351</sup> A triage intake-assessment service can be developed with effective screening for mental health issues and risk of child- and domestic-abuse problems.<sup>352</sup> As in Singapore, it can be used to prioritize for attention cases that indicate high conflict, safety risks to children, or domestic abuse.<sup>353</sup>

Australia also long endorsed this approach with its existing Family Relationship Centres and the ALRC's October 2018 discussion paper proposed the development of new Family Hubs providing separating families and their children with a visible entry point for accessing a

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<sup>350</sup> See Semple & Bala, *supra* note 9 at 49–50; Suzanne Anton, “BC’s Justice Access Centres: The Right Services at the Right Time” (2015) 73:1 Advocate 113; Patrick Parkinson, “Family Law and the Indissolubility of Parenthood” (2006) 40:2 Fam LQ 237.

<sup>351</sup> See Preventive Triage and Referral Working Group, Action Committee on Access to Justice in Civil and Family Matters, “Responding Early, Responding Well: Access to Justice through the Early Resolution Services Sector”, Final Report (12 February 2013) (advocating for triage).

<sup>352</sup> Considering the impact of potential power imbalances between the parties as well. Triage is typically conducted through a questionnaire and/or interview with a court staff person. See generally Shaw, *supra* note 2 at 47–51.

<sup>353</sup> Also known as “differentiated case management” as developed in Singapore. Triage is the effort to determine at an early stage which interventions are most appropriate and effective for each case, based on its specific characteristics. See Semple & Bala, *supra* note 9 at 43.

range of legal and support services, including legal assistance, dispute resolution, counselling, and advice. While this proposal was not adopted in the March 2019 Final Report, the ALRC did recommend considerable expansion of the range of services provided by the existing Family Relationship centre to include case management, financial counselling, family property mediation, legal advice, and child-contact services.<sup>354</sup> Other reference models are the Justice Access Centres established in British Columbia in 2014 providing a single point of entry for people seeking help with family and civil problems.<sup>355</sup> The Law Reform Commission of Ontario has recommended the creation or enhancement of multidisciplinary, multi-function centres or networks.<sup>356</sup> New Zealand is also proposing an integrated Family Justice Service providing accessible, quality information and allowing assessment, triaging, and early intervention with specialist family-violence expertise.<sup>357</sup> Singapore has adopted this one-stop

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<sup>354</sup> See ALRC, “Discussion Paper”, *supra* note 141; *ALRC Final Report*, *supra* note 4 at 464–71 (Recommendations 59 and 60).

<sup>355</sup> There are examples of such family justice resource centres effectively operating in other jurisdictions—e.g. more than twenty Justice Access Centres are now operating throughout British Columbia.

<sup>356</sup> See the Law Reform Commission of Ontario, “Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity”, Final Report (February 2013), online: <[lco-cdo.org/en/our-current-projects/family-law-reform](http://lco-cdo.org/en/our-current-projects/family-law-reform)>. Canada’s Bill C-78 also includes provisions aimed at making existing government family support services more effective and Manitoba has introduced innovative family support and disputes resolution measures in its new Family Modernization Law Act.

<sup>357</sup> See *New Zealand Final Report*, *supra* note 155 (development of an integrated family justice service referred to as “Te Korowai Ture ā-Whānau”).

family justice model with its Family Justice Courts which are empowered to direct parties to a range of appropriate therapeutic services and dispute-resolution processes. These include child-inclusive counselling, post-divorce counselling, supervised visitation and exchanges services, parenting and child programs, mediation, and collaborative practice. The courts can also involve social and psychological professionals within court proceedings.<sup>358</sup>

### **MULTIDISCIPLINARY COLLABORATION WITHIN FAMILY JUSTICE SYSTEMS**

Whilst modernizing legislative reform is long overdue in Hong Kong, there is also need for more ambitious comprehensive integrated reform of the family justice system.<sup>359</sup> It is useful to consider multidisciplinary institutions established within family justice systems in Canada, England and Wales and Australia. With mixed success, they share common objectives of developing multidisciplinary responses and integrated service delivery within family justice systems with coherent and coordinated law reform.<sup>360</sup>

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<sup>358</sup> See *Singapore Report*, *supra* note 1 at 8.

<sup>359</sup> Also reflected in family justice reforms in other jurisdictions. For example, in 2019 the ALRC stated that Australia's *Family Law Act 1975* (Cth) should be completely redrafted, proposing restructuring of children's provisions. See *ALRC Final Report*, *supra* note 4 (Recommendation 55). Similar comments are expressed in the *New Zealand Final Report* calling for the establishment of a ministerial advisory group to monitor implementation of the recommended integrated family justice reforms. See *New Zealand Final Report*, *supra* note 155.

<sup>360</sup> The Hon Mr Justice Lam, VP stated that Hong Kong's family justice system must "adopt a holistic approach involving multi-disciplinary

### **Canada: National Action Committee on Access to Civil and Family Justice**

In 2013, the Chief Justice of Canada's Supreme Court lamented a family justice system that remained inaccessible and unresponsive to many children and families despite many previous reform initiatives aimed at improving access to justice.<sup>361</sup> A multidisciplinary, national Action Committee on Access to Civil and Family Justice was formed in 2014, bringing stakeholders in the justice system together in a forum to collaborate on priorities for family justice reform.<sup>362</sup> These included simplifying court processes, improving access to legal services, early prevention triage and referral, and enhancing family justice.<sup>363</sup> One central problem was the lack of integrated services and multi-disciplinary responses, made worse by the lack of any agency with sole responsibility for delivering family justice throughout Canada.<sup>364</sup> Therefore, "access to justice implementation

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assessment and treatment/services to achieve satisfactory outcome for all the parties." Lam, *supra* note 20.

<sup>361</sup> See discussion in Canadian Bar Association's Access to Justice Committee, *Reaching equal justice report: an invitation to envision and act* (Canada: 2013), online: <[cba.org/Publications-Resources/Resources/Equal-Justice-Initiative/Reaching-Equal-Justice-An-Invitation-to-Envisi-\(1\)](http://cba.org/Publications-Resources/Resources/Equal-Justice-Initiative/Reaching-Equal-Justice-An-Invitation-to-Envisi-(1))>.

<sup>362</sup> See Family Justice Working Group, *Meaningful Change for Family Justice*, *supra* note 1.

<sup>363</sup> See *ibid.* See also "Canadian Forum on Civil Justice" (last visited 5 August 2019) online: *Action Committee on Access to Justice in Civil and Family Matters* <[cfcj-fcjc.org](http://cfcj-fcjc.org)>.

<sup>364</sup> See Family Justice Working Group, *Meaningful Change for Family Justice* *supra* note 1 at 6.

commissions” were formed across the country involving the judiciary, court administration, and multiple stakeholders. The aim was coherent, collaborative, and coordinated family justice reform (with piloting, implementation, and reform evaluation). Fundamental reforms were proposed, including: earlier, more effective intervention services, greater use of out-of-court dispute-resolution procedures, improved access to justice, more evaluative research, and improved data collection.<sup>365</sup> Although the level of engagement from family justice stakeholders has been high and innovations and reforms implemented, “government action and response has been slow”, due partially to the lack of stakeholder consensus about the provision and funding of support services.<sup>366</sup>

### **England and Wales: National Family Justice Board**

Initial proposals for formal inter-agency cooperation within the England and Wales family justice system emerged out of a 2002 scoping study that recommended further modernizing reforms, improved services for families, and increased inter-agency working between the courts and statutory agencies.<sup>367</sup> In July 2004, the thirty-

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<sup>365</sup> The need for more evaluative research and data collection was stressed to support evidence-based decision making and policy formulation: see *ibid* at 23.

<sup>366</sup> See “Inventory of Reforms” (last visited 3 May 2019), online: *Canadian Forum on Civil Justice* <[cfcj-fcjc.org/inventory-of-reforms](http://cfcj-fcjc.org/inventory-of-reforms)>; Saini et al, *supra* note 7 at 383.

<sup>367</sup> See UK, Lord Chancellor’s Department, *Scoping Study on Delay in Children Act Cases Findings and Action Taken* (London: LCD, March 2002), online: <[web.archive.org/web/20040215213905/www.dca.gov.uk/family/scopestud.htm](http://web.archive.org/web/20040215213905/www.dca.gov.uk/family/scopestud.htm)>.



member Family Justice Council chaired by the President of the Family Division was established to support and promote formal multidisciplinary collaboration and effective inter-agency cooperation and to develop best practice and consistent procedures.<sup>368</sup> A key role was to monitor the system's effectiveness in delivering better and quicker outcomes for families and children. Thereafter, the 2011–13 UK Family Justice Review Reports suggested further reform as the family system was still not operating as a coherent, managed system.<sup>369</sup>

A multidisciplinary Family Justice Board was therefore formed to oversee and drive improvements in system performance, provide leadership, and improve cross-agency working (with forty-four local Family Justice Boards set up).<sup>370</sup> Chaired by the Ministry of Justice and Department for Education, its focus has been on four key aspects: reducing delay in children's cases; resolving private law cases out of court; tackling variations in the performance of local family service agencies; and importantly, building greater cross-agency integration and coordination.<sup>371</sup> Despite a positive start, however, the

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<sup>368</sup> See *Family Justice Review Final Report*, *supra* note 1.

<sup>369</sup> See *ibid.*

<sup>370</sup> The Family Justice Board has an independent Chair who is accountable to both the Justice Secretary and Education Secretary, including through a set of Key Performance Measures (KPMs).

<sup>371</sup> The Board has three subgroups: Family Justice Council, the Family Justice Young People's Board, and a Performance Improvement Subgroup. See UK, Department for Education and Ministry of Justice, *A Brighter Future for Family Justice* (2014), online (pdf): <[gov.uk/government/uploads/system/uploads/attachment\\_data/file/346005/family-justice-review-update.pdf](http://gov.uk/government/uploads/system/uploads/attachment_data/file/346005/family-justice-review-update.pdf)>.

Board has been heavily criticized. In June 2018, the President of the Family Division stated that neither the National Family Justice Board nor the local Family Justice Boards are working effectively and in a manner envisaged by the Family Justice Review.<sup>372</sup> Lord Justice McFarlane criticized the national board for inactivity and infrequent meetings stating that “for the single element in the system that brings the key players together locally and nationally not to be functioning is a disaster.”<sup>373</sup> This underscores the importance of operational accountability, measurable performance outcomes, and effective and robust leadership within such institutions.

#### **Australia: Proposal for Establishment of new Family Law Commission**

Australia also experienced pressure for multidisciplinary reform with the need to re-develop its family justice system in a systematic and integrated manner.<sup>374</sup> The ALRC's Interim Report in October 2018 proposed the creation of a new independent statutory body, the Family Law Commission, to oversee the operation of the family law system and provide accreditation for family law

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<sup>372</sup> The President is the Rt Hon Sir Andrew McFarlane. See UK, Judiciary, *President of the Family Division*, online: <[www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/profile-pfd/](http://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/profile-pfd/)>.

<sup>373</sup> Calling for the decline in these boards to be reversed immediately with new leadership in place. See Speech by Lord Justice McFarlane, Judiciary of England and Wales, “Care Crisis Review Launch” (13 June 2018).

<sup>374</sup> See *ALRC Final Report*, *supra* note 4 at 32–38, 111–43. See also *New Zealand Final Report*, *supra* note 155 (calling for systemic integrated reform of family justice services and a development strategy ensuring evaluation and review every three years).

professionals who work within it.<sup>375</sup> However, the March 2019 Final Report scaled this back due to concerns about resourcing and overlap with existing bodies, such as the Family Law Council. Instead, the ALRC proposed expanding the Family Law Council's jurisdiction to include monitoring and regular reporting on the performance of the family law system and making recommendations to improve the family law system, including research and law reform proposals.<sup>376</sup> The Family Law Council is a statutory body composed of a chairperson and usually eight to ten members (including judges, lawyers, social workers, counselors, and government officials) who are appointed by the Attorney-General in consultation with the Prime Minister and Cabinet.

The ALRC also recommended that a Children and Young People's Advisory Board be set up to facilitate children and young people's participation in policy and practice discussion and development.<sup>377</sup> The expanded role of the Family Law Council as a high-level statutory body has much to offer Hong Kong.

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<sup>375</sup> See *ALRC Final Report*, *supra* note 4 at 386; Singapore is also proposing accreditation system for family law practitioners.

<sup>376</sup> See *ALRC Final Report*, *supra* note 4 at 22, 385–95.

<sup>377</sup> See *ibid* at 395–97. New Zealand's Final Report also recommends a children's advisory group be established to provide advice and insight into children's experiences in care of children's matters and to inform policy and practice. See *New Zealand Final Report*, *supra* note 155 at 107–09.

### **Hong Kong: Potential Establishment of a Hong Kong Family Justice Commission**

In Hong Kong, support services are fragmented across many different government departments, bureaus and divisions, and NGOs, with little integration and no formal coordination.<sup>378</sup> A more integrated multi-disciplinary collaborative system of decision-making and policy formulation for children and families is needed.<sup>379</sup> While some limited multi-stakeholder approaches have been established, none provide the required top-level integration and coordination comparable to approaches in Canada, England and Wales, and Australia.<sup>380</sup> An independent multidisciplinary Hong Kong Family Justice Commission could be established as a top-level statutory body to monitor the performance of the family justice system and drive continuous reform.<sup>381</sup> This commission could support and promote multidisciplinary collaboration and effective inter-agency cooperation and develop best

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<sup>378</sup> The Chief Executive recognized this in the 2018 Policy Address stating the government needed to “promote cross-sector and cross-profession collaboration.” HK, *Policy Address 2018*, *supra* note 271 at para 174.

<sup>379</sup> The Government has stated that there are “high-level mechanisms” for coordination and cooperation in children’s rights but these mechanisms are unclear.

<sup>380</sup> For example, the Family Court User’s Committee, Law Society’s Family Law Association, Hong Kong Bar Association’s Committee on Family Law, Family Council, and Commission on Children.

<sup>381</sup> A feasibility study can be conducted to gauge support within Hong Kong for establishment of such a high level formal multidisciplinary commission. Securing agreement for the creation of a statutory body and allocation of public funding financial resources may prove challenging but is necessary.

practices and consistent procedures.<sup>382</sup> A core focus could be on empirical research and data to support evidence-based policy formulation on family justice issues.<sup>383</sup> It could be a forum that gathers major stakeholders together to evaluate relevant family support programs and services needed in Hong Kong.<sup>384</sup> Existing programs and services can be identified and leveraged to integrate new support services through pilot projects followed by evaluation. An accreditation process supporting the professional development of family law system service providers could also be developed by the commission to better accommodate perspectives of child and young people.<sup>385</sup>

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<sup>382</sup> Mindful of the challenges of collaboration. See Canadian Bar Association's Access to Justice Committee, *supra* note 361 at 132–38.

<sup>383</sup> There is a need to gather justice-system metrics and build capacity in Hong Kong for data gathering and analysis. The real challenge with reform is lack of empirical evidence to know how the system works and whether reform efforts are effective. See UHK, *Phenomenon of Divorce in Hong Kong*, *supra* note 86 at 9–10; Sharon D Melloy, "Family Law Crossroads: Where to from Here? An Analysis of the Current Proposals for Change" (2003) 33 Hong Kong LJ 289 at 304–05.

<sup>384</sup> Semple and Bala suggest questions including: "In what circumstances should users be required to pay for family justice services? Should services be delivered under a triage model, or through tiers? Should adjudicative functions and settlement-seeking/relationship-building functions be kept separated or brought together?" Semple & Bala, *supra* note 9 at 1. See also Law Reform Commission of Ontario, *supra* note 356 (discussing the concept of "comprehensive multidisciplinary multifunction service delivery" at 89).

<sup>385</sup> And accommodate their participation more in decision-making that affects them. See Carson et al, *supra* note 2 at 95. Consider also developing best practice guidelines for lawyers practicing family law. See e.g. BC Branch, Canadian Bar Association, "Best Practice Guidelines for Lawyers Practicing Family Law" (15 July 2011).

The structure of this proposed commission needs careful planning. Keeping the collaborative structure manageable in size, multidisciplinary in membership (including all the major family justice stakeholders), and led by senior members of the family judiciary is key. Developing a focused mandate, strategic action plan, regular timetable of meetings, measurable outcomes, annual reporting, and accountability with regular performance reviews are also important.

### CONCLUSION

The value of comparative experiences in family justice reform allows Hong Kong to benefit from progressive legislative reform, support services, and best practices introduced in other jurisdictions. Robust political will and reform leadership is required from government to implement modernizing legislative reform. In revising the *Children's Bill*, the Labour and Welfare Bureau should review Canada's Bill C-78, and its measures dealing with domestic violence included in the best-interests-of-children welfare checklist. The ALRC's extensive reform proposals dealing with domestic violence in Australia are also useful. It is recommended that the government embrace an evidence-based approach for assessing support measures to improve access to family justice and the overall functioning of Hong Kong's family justice system. Singapore's integrated multidisciplinary therapeutic jurisprudential approach and the formation of the specialised Family Justice Courts, along with the formation of a pilot Integrated Domestic Violence Court, have much

to offer.<sup>386</sup> Establishment of a Maintenance Board, along with simplified administrative procedures for payment and collection of arrears of child support, and efficient and effective dispute-resolution pathways are needed. Ultimately, the Hong Kong government should consider undertaking a comprehensive review of the jurisdictional framework between its family law system, family support services, and family-violence and child-protection systems.<sup>387</sup> While this requires substantial effort and significant time to implement, other proposals dealing with domestic violence and abuse could be introduced in the short-term. Establishment of a multidisciplinary Family Justice Commission in Hong Kong could provide the institutional structure needed to help facilitate and drive this important family justice reform.

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<sup>386</sup> Singapore's one-stop family justice model provides a model of what could be achieved in Hong Kong with strategic evidence-based planning, government commitment, and sufficient funding and resources.

<sup>387</sup> This needs strong partnerships, expanded interagency cooperation and multidisciplinary collaboration with diverse professional, and civil-society stakeholders. Issues of professional culture and practice must be addressed by judges, government officials, legal, medical, social work and educational professionals, and NGOs.