

# REFORM OF FAMILY JUSTICE: CHILDREN'S DISPUTE RESOLUTION IN HONG KONG

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## I. INTRODUCTION

The last twenty years have witnessed a transformation of family justice systems across the common law world, featuring particular emphasis on ensuring that the best interests of children are protected when resolving family disputes.<sup>1</sup> The evolving paradigm has shifted away from resolving family disputes in formal courtrooms via a litigious process that is viewed as lengthy, slow, complex, expensive, and far too adversarial, particularly when children are involved.<sup>2</sup> In response to these challenges, many family procedural reforms, such as modifying court rules to accommodate more informal and flexible processes and expanding judicial roles to provide greater case management and settlement facilitation, have been introduced within the global common law community.<sup>3</sup> More non-adversarial approaches to dispute resolution have developed, with increased use of informal out-of-court dispute resolution—processes often referred to collectively as “alternative dispute resolution” or “ADR” processes.<sup>4</sup> Increasingly, disputes involving children are being handled through more informal, non-adversarial

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<sup>1</sup> See examples of such efforts to reform the family justice systems in the UK (e.g. enacting the Family Procedure Rules, 2010), Australia (enacting the new Family Law Rules, 2004), New Zealand (enacting the new Family Court Rules, 2002), and more recently in Canada (e.g. enactment of the new Supreme Court Family Rules in 2010 and a new comprehensive Family Law Act in British Columbia in 2013). See further discussion by the Law Reform Commission of Hong Kong (“HKLRC”) about the reform of family justice systems in Chapters 3 and 4 of THE LAW REFORM COMMISSION OF HONG KONG, THE FAMILY DISPUTE RESOLUTION PROCESS (2003), <http://www.info.gov.hk/hkreform>.

<sup>2</sup> Too often it produces outcomes that are unproportional to the main problems in the dispute and that do not reflect the real needs of the people it is meant to serve. See ACTION COMMITTEE ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS, MEANINGFUL CHANGE FOR FAMILY JUSTICE: BEYOND WISE WORDS 3 (2013), <http://flsc.ca/wp-content/uploads/2014/10/services5.pdf>. This report is referred to throughout this chapter as “Canadian Access to Justice Report.”

<sup>3</sup> These reforms in family law reflect current community and societal values and family law research and policy developments over the past twenty-five years. See *id.* at 7.

<sup>4</sup> *Id.*

processes like mediation and collaborative practice.<sup>5</sup> Prevention and early resolution of disputes are said to reduce the detrimental effect of conflict on children.<sup>6</sup> The need to protect the best interests of children is now an important feature of family justice reform. The central focus is on providing better, more effective ways of determining what is in the children's best interests and providing children with the opportunity to be heard and to participate in proceedings affecting them—either directly or through a representative.<sup>7</sup>

The introduction of civil justice reforms and family justice reforms in Hong Kong over the past ten years demonstrates that these reform shifts are also prevalent in Hong Kong.<sup>8</sup> Civil and family justice reforms address concerns about the inefficiency, complexity, and high cost of traditional adversarial courtroom litigation.<sup>9</sup> Hong Kong's family justice system spans a broad range of family and matrimonial matters, including marriage dissolution, children related applications, and ancillary and other financial re-

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<sup>5</sup> See general discussion of this trend in Rt. Hon. Lord Justice Thorpe, *Children's Dispute Resolution: The English Experience*, and J. McHale, QC, *Children's Dispute Resolution: A Canadian Perspective*, papers presented at the 2d Children's Issues Forum, Hong Kong (Aug. 27, 2012).

<sup>6</sup> For a discussion of early dispute resolution initiatives discussed in a Canadian Access to Justice Report, see *supra* note 2, at 19–45.

<sup>7</sup> Hong Kong is a signatory to the United Nations Convention on the Rights of the Child (“UNCRC”) since 1994, which outlines not only the basic human rights for children but also specifically provides in Article 12 for a child who is capable of forming his or her own views to have the opportunity to be heard in judicial proceedings affecting the child—either directly or through a representative. See further discussion of the rights of children to be heard in the CHIEF JUSTICE'S WORKING PARTY ON FAMILY PROCEDURE RULES, *REVIEW OF FAMILY PROCEDURE RULES: INTERIM REPORT AND CONSULTATIVE PAPER XXII–XXVII*, 11, 137–47 (2014) [hereinafter 2012 Chief Justice's Working Party Report].

<sup>8</sup> The Civil Justice Reforms (“CJR”) were introduced in Hong Kong in April 2009 and thereafter, Practice Direction 15.12 came into effect at the same time extending some of the CJR into Hong Kong's family justice system. For further discussion in the 2012 Chief Justice's Working Party Report, see *supra* note 7, at 3–6.

<sup>9</sup> These civil justice reforms reflect similar changes instituted in England, Scotland, Canada, Australia, and New Zealand and other common law jurisdictions. In the UK, the Family Justice Review was established by the Ministry of Justice, the Department of Education, and the Welsh Assembly Government with an aim to improve the family justice system by making it quicker, simpler, more cost effective, and more fair whilst continuing to protect children and vulnerable adults from risk of harm. See *FAMILY JUSTICE REVIEW FINAL REPORT* (2011), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/217343/family-justice-review-final-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217343/family-justice-review-final-report.pdf) (recommending a radical review of the family justice system). In March 2012, the UK Family Justice Board was created to oversee improvement to the UK family justice system. See also *MAKING THE FAMILY JUSTICE SYSTEM MORE EFFECTIVE*, UK MINISTRY OF JUSTICE AND DEPARTMENT FOR EDUCATION (2013).

lief.<sup>10</sup> However, the system continues to be fragmented with “labyrinth procedures” that are not conducive to efficient and effective resolution of disputes.<sup>11</sup> Unlike other jurisdictions, Hong Kong does not have any comprehensive ordinances dealing with family and children’s matters.<sup>12</sup> Concerns have been expressed about the lack of adequate access to family justice in Hong Kong and the barriers to effective and responsive resolution of family disputes due to complex, unaffordable, and inaccessible dispute resolution procedures.<sup>13</sup> Part of the objectives of both the 1st and 2nd Children’s Issues Forums in Hong Kong in 2009 and 2012 was to raise awareness in Hong Kong of the pressing need to minimize the adversarial impact of family proceedings on children and to enact specialized children’s dispute resolution procedures.<sup>14</sup>

In 2012, the HKSAR Chief Justice established a Working Party on Family Procedural Rules recognizing that Hong Kong’s family justice system was suffering from a number of defects including adversarial excesses in contested family cases which continue to be resolved in a hostile litigious culture and the lack of an accessible cohesive self-contained set of procedural rules applicable to family matters.<sup>15</sup> Similar “access to justice” concerns are seen in other family justice common law systems.<sup>16</sup> The Chief Jus-

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<sup>10</sup> See further discussion of the broad subject matters that fall within Hong Kong’s current family justice system in 2012 CHIEF JUSTICE’S WORKING PARTY REPORT, *supra* note 7, at II.

<sup>11</sup> There is a myriad of Ordinances relating to family and children’s matters, which lack coherence and consistency and there is also an array of different rule making authorities. *Id.* at III, 12–16.

<sup>12</sup> There is no unified procedural code in Hong Kong that applies to family and children’s dispute resolution matters and many specific proceedings lack any rules. See discussion of this problem in the 2012 Chief Justice’s Working Party Report, *supra* note 7, at XXII.

<sup>13</sup> This is partly due to the fact that the new CJR measures have not been extended and implemented with full force within Hong Kong’s family justice system. Practice Direction 15.12 lacks any statutory backing and can only be considered as an interim measure. See also Winnie Chow & Linda Heathfield, *A Gentle Divorce in Hong Kong? Fact or Fallacy?*, paper presented at the 9th LawAsia Family Law Conference (2012).

<sup>14</sup> See Sharon Melloy, *A Less Adversarial Process in Hong Kong: The Future Direction*, in CHILDREN’S ISSUES FORUM: THE RESOLUTION OF DISPUTES RELATING TO CHILDREN 153–169 (Katherine Lynch & Michael Wong eds., 2009) (commenting on specific problems with Hong Kong’s family justice system).

<sup>15</sup> See discussion in the 2012 Chief Justice’s Working Party Report, *supra* note 7, at III, 12–16.

<sup>16</sup> See discussion of these global access to justice concerns as far back as 1995 in LORD WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR (1995). Although Lord Woolf did not deal specifically with reform of the family court system in his interim report, his proposed reforms were relevant for case management and making available and encouraging the use of ADR processes. See also LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT (1996) and more recently in the Canadian Access to Justice Report, *supra* note 2.

tice of Canada recently commented on the failure to provide a family justice system in Canada that was “accessible, responsive and citizen-focused” despite many previous reform initiatives aimed at improving access to justice.<sup>17</sup> Access to justice concerns and the theme of “insufficiency of reforms” are of particular concern given Hong Kong’s high divorce rate with many of these divorces involving contested issues over children.<sup>18</sup>

This article discusses evolving family justice system reforms in Hong Kong and the inherent problems that persist with the system, particularly as they relate to the resolution of disputes involving children.<sup>19</sup> The important initiatives of the Hong Kong Judiciary are highlighted (including the various mediation practice directions issued and pilot schemes established), along with challenges of legislative reform in the family justice area. Underlying all of this are the various paradigm shifts occurring within family justice systems, including the emergence of the “shared or joint parental responsibility” concept, the increased use of ADR processes for children’s issues outside of formal courtroom proceedings, and the greater direct involvement of children in dispute resolution proceedings. Particular attention is paid to the development of family mediation and other out-of-court processes such as collaborative practice, which focus on allowing children’s voices to be heard in a non-adversarial setting.

Throughout the article, the extensive work of The Law Reform Commission of Hong Kong (“HKLRC”) is also considered, along with the “implementation gap” that has resulted between the vision of the HKLRC and the reality of the current family justice

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<sup>17</sup> See discussion by the Chief Justice of Canada, BEVERLEY McLACHLIN, P.C., *Foreword to ACTION COMMITTEE ON ACCESS TO JUSTICE IN CIVIL AND FAMILY MATTERS, ACCESS TO CIVIL & FAMILY JUSTICE: A ROADMAP FOR CHANGE i* (2013); WHITE PAPER ON FAMILY RELATIONS ACT REFORMS: A PROPOSAL FOR A NEW FAMILY LAW ACT, MINISTRY OF ATTORNEY GENERAL, JUSTICES SERVICES BRANCH, CIVIL POLICY AND LEGISLATION OFFICE 3–6 (2010), <http://www.vancouver.sun.com/pdf/Family-Law-White-Paper.pdf>.

<sup>18</sup> Between 1991 and 2013, the number of divorces in Hong Kong showed a staggeringly large increase from 6,295 in 1991 to 22,271 in 2013. See CENSUS AND STATISTICS DEPARTMENT, MARRIAGE AND DIVORCE RATES IN HONG KONG 12 (2015), <http://www.statistics.gov.hk/pub/B71501FA2015XXXXB0100.pdf>. There has also been a marked increase in the number of family cases contested before the Hong Kong courts over the past four years. See statistics available at monthly digest of statistics in HKSAR Department of Justice website. DEP’T OF JUST. H.K. SPECIAL ADMIN. REGION, [www.doj.gov.hk](http://www.doj.gov.hk).

<sup>19</sup> See discussion of the path dependent nature of this evolutionary change in Hong Kong below. See also Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System* (John M. Olin Ctr. for Studies in L., Econ. and Pub. Pol., Working Paper No. 270, 2003), [http://digitalcommons.law.yale.edu/lepp\\_papers/270](http://digitalcommons.law.yale.edu/lepp_papers/270).

system.<sup>20</sup> Unfortunately, many of the promising recommendations contained in previous HKLRC Reports have either not been implemented or are only partially implemented in Hong Kong.<sup>21</sup> The article addresses the challenge of ensuring effective and timely family justice law reform in Hong Kong that responds to current community needs.<sup>22</sup> The procedural reform proposals suggested by the Chief Justice's Working Party Report are also considered with the need for innovative new practices and procedures for children's dispute resolution. The urgent necessity to conduct more empirical research about Hong Kong's family justice system and, more specifically, about children's dispute resolution, is also stressed to ensure the best possible advocacy, protection, and policy making by the HKSAR Government. This article concludes by urging increased multi-disciplinary collaboration and cooperation among all stakeholders involved in children's dispute resolution and the family justice system in Hong Kong.

## II. HONG KONG'S FAMILY JUSTICE SYSTEM: SHIFT FROM "CUSTODY" TO "PARENTAL RESPONSIBILITY"

At the present time, Hong Kong lacks a comprehensive ordinance that deals exclusively with children's matters and, more broadly, with family and matrimonial matters.<sup>23</sup> There is no con-

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<sup>20</sup> There has been a gap between the strongly worded recommendations of past HKLRC Reports and the failure of family justice systems to implement them. Hong Kong is not the only jurisdiction to face this implementation gap. See, e.g., the discussion in the Canadian Access to Justice Report, *supra* note 2, at 8–10, wherein they stated that in Canada “there is a gap between the vision of the previous [reform] reports and the reality of today's family justice systems.”

<sup>21</sup> The slow pace of law reform is evident in other areas such as insolvency, labor and personal data privacy. See discussion of this issue in REFORMING LAW REFORM: PERSPECTIVES FROM HONG KONG AND BEYOND 18–20, 45–48 and 63–65 (M. Tilbury, S. Young & L. Ng eds., 2014). See editorial discussion of this issue in Margaret Ng, *Government always finds 'good' reasons to delay law reforms*, SOUTH CHINA MORNING POST, Jan. 10, 2011, at Letters to the Editor.

<sup>22</sup> For a detailed analysis of the challenges of effective law reform in Hong Kong, see Tilbury, Young & Ng, *supra* note 21.

<sup>23</sup> The GMO governs court proceedings relating to the custody and upbringing of children. This Ordinance states the principle that the welfare of the child in question is to be the first and paramount consideration of the courts. GMO at § 3(a). The MCO governs divorce and the MPPO contains provisions relating to ancillary and other relief in matrimonial proceedings. Section 19 of MPPO states that the court may make such order as it thinks fit for the custody and education of a child in matrimonial proceedings such as divorce. Procedural rules for custody applications are in the Matrimonial Causes Rules (Cap. 179 sub. leg.). A “sole custody” order is quite common, under which the child concerned lives with the custodial parent who has the right to make the decisions regarding the upbringing of the child. The non-custodial parent is usually

solidated modern family justice legislation enacted in Hong Kong that reflects current social values, family research and policy. Hong Kong's substantive law on the custody of children is primarily contained in a few ordinances, including the Guardianship of Minors Ordinance, Cap. 13 ("GMO"), the Matrimonial Causes Ordinance, Cap. 179 ("MCO"), the Matrimonial Proceedings and Property Ordinance, Cap. 192 ("MPPO") and the Separation and Maintenance Orders Ordinance, Cap. 16 ("SMOO"). There are also specific pieces of legislation, such as the Child Abduction and Custody Ordinance, Cap. 512, Child Care Services Ordinance, Cap. 243, Protection of Children and Juveniles Ordinance, Cap. 213 and Toys and Children's Products Safety Ordinance, Cap. 424, upholding the rights of children and protecting and safeguarding their best interests. As a result, the existing rules and procedures are seriously fragmented and, in some cases, there are simply no rules at all.<sup>24</sup> Unlike other jurisdictions, Hong Kong has no equivalent Children Act as in the UK, or Family Law Act as in Australia and Canada, and no Care of Children Act as in New Zealand.<sup>25</sup>

In 1995, the HKLRC by Hong Kong's Attorney General and the Chief Justice referred to the topic of guardianship and custody of children in the following broad terms: "to consider the law relating to guardianship and custody of children, and to recommend such changes as may be thought appropriate."<sup>26</sup> In May 1996, the Sub-committee, appointed by the Commission, identified a number of key topics for review, including: the guardianship of children on the death of a parent; the approach of the law and the courts to custody and access arrangements for children; the use of dispute resolution procedures in family cases; and parental child abduction.<sup>27</sup> In December 1998, the Sub-committee published its "Con-

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granted access, which means the right to maintain contact with the child. Under section 5 of SMOO, a husband or wife may apply for the legal custody of a child of the marriage on a ground under section 3.

<sup>24</sup> See 2012 CHIEF JUSTICE'S WORKING PARTY REPORT, *supra* note 7, at XXII and discussion in this article regarding the proposal to introduce a unified set of procedural rules for children proceedings.

<sup>25</sup> Earlier in 1989, England and Wales enacted the Children Act, c. 41. See further discussion in Keith Hotten, *Children and Collaborative Practice in Hong Kong*, <http://keithhotten.net/family-mediation/collaborative-practice/>.

<sup>26</sup> See THE LAW REFORM COMMISSION OF HONG KONG, REPORT ON GUARDIANSHIP CUSTODY (1998) [hereinafter the 1998 Consultation Report].

<sup>27</sup> Fifty-one submissions were received during the three-month consultation exercise. Those who responded included members of the legal profession, social workers, welfare organizations, youth groups, women's groups, counselors, mediators, educational institutions, government departments, and private individuals.

sultation Paper on Guardianship and Custody,” which addressed shifts occurring in the approach of law and the courts toward custody and access arrangements for children, the use of dispute resolution procedures in family cases, parental abduction, and the guardianship of children on the death of a parent.<sup>28</sup> This 1998 Consultation Paper suggested replacing old terminology in family proceedings and introducing a new range of court orders reflecting the paradigm shift away from a focus on “custody,” which underscores the rights and authority of parents, towards a more child centric concept of “joint parental responsibility” highlighting the duty of parents to care for their children and emphasizing the rights of children.<sup>29</sup> This newer approach was set out as a possible model for Hong Kong’s future legislative reform.<sup>30</sup> Subsequently, the HKLRC released 4 reports over a three-year period under its reference on guardianship and custody of children:<sup>31</sup>

- January 2002, Report on the Guardianship of Children;
- April 2002, Report on International Parental Child Abduction;<sup>32</sup>
- March 2003, Report on The Family Dispute Resolution Process; and
- March 2005, Report on Child Custody and Access.

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<sup>28</sup> See 1998 Consultation Report, *supra* note 26.

<sup>29</sup> *Id.* at par. 1.3.

<sup>30</sup> The HKLRC accepted the 1998 Consultation Report.

<sup>31</sup> See HKLRC, <http://www.hkreform.gov.hk>.

<sup>32</sup> The HKLRC released its REPORT ON INTERNATIONAL PARENTAL CHILD ABDUCTION in April 2002 recommending ways to strengthen Hong Kong’s legal protections against child abduction, so as to better support the operation of the Hague Convention on the Civil Aspects of International Child Abduction (the “Convention”). This important international convention, in force in Hong Kong since September 1997, provides that children abducted from one Convention member state to another should be located and returned to their home jurisdictions as quickly as possible. The Commission’s recommendations included: the introduction of legislative restrictions on removing a child from the jurisdiction without the required consents; a specific power to the court to order the disclosure of the whereabouts of a child; a specific power to the court to order the recovery of a child; and a specific power to the authorities to hold a child suspected of being abducted so that he can be returned to the custodial parent or taken to a place of safety. The Convention was subsequently incorporated into Hong Kong law through the enactment of the Child Abduction and Custody Ordinance, Cap. 512 (“CACO”). Subject to the provisions of the CACO, the provisions of the Convention as set out in Schedule 1 to the CACO have the force of law in Hong Kong. Each Contracting State to the Convention designates a Central Authority to discharge the relevant functions under the Convention. In Hong Kong, such functions are discharged by the Secretary for Justice.

A. *Guardianship & Custody of Children: The Pressing Need  
for Legislative Change*

The first “Report on the Guardianship of Children”, published in January 2002, addressed the law governing the appointment of guardians for children in the event of the death of one or both parents. Ten years later, the guardianship recommendations were finally followed up by the Labour and Welfare Bureau (“LWB”), resulting in the enactment of the Guardianship of Minors (Amendment) Ordinance 2012, which simplifies the legal arrangements for the appointment and removal of guardians, the revocation and disclaimer of appointment of guardians, the assumption of guardianship, and the resolution of disputes between guardians.<sup>33</sup>

In March 2005, the HKLRC published its “Report on Child Custody and Access” (the “2005 Child Custody Report”) recommending the implementation of the “joint parental responsibility model” by legislative means to replace the existing custody and access model under the existing family law.<sup>34</sup> The joint parental responsibility concept 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 this is in the child’s best interests.<sup>35</sup> This new approach aims to make it easier for both parents to maintain an active involvement in the lives of their children after they divorce.<sup>36</sup>

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<sup>33</sup> See Ordinance No. 1 of 2012.

<sup>34</sup> See review of the HKLRC report background in Athena Liu & Dennis Ho, *From ‘Custody’ to ‘Parental Responsibility’: The Need for Change*, H.K. LAW., 2013, at 29. See also Maureen Mueller, *Suffer the Children (of Divorce): A Jurisprudential Thought*, H.K. LAW., July 2013, at 36. Members of the Legislative Council were briefed on these HKLRC Reports at the Panel on Welfare Services meeting held on 8 February 2010. See LEGISLATIVE COUNCIL PANEL ON WELFARE SERVICES, HONG KONG LAW REFORM COMMISSION REPORT ON CHILD CUSTODY AND ACCESS, LC Paper No. CB(2)845/09-10(05) (2013), <http://www.legco.gov.hk/yr12-13/english/panels/ws/papers/ws0708cb2-1483-2-e.pdf>.

<sup>35</sup> In a number of overseas jurisdictions, including England, Scotland, Canada, New Zealand and Australia, former child custody laws similar to Hong Kong’s have been replaced with laws reflecting the joint parental responsibility model. These reforms include the introduction of a range of new court orders, to sweep away the old “custody” and “access” terminology in family proceedings. See further discussion in Liu & Ho, *supra* note 34.

<sup>36</sup> Under the existing law, the parent-child relationship is defined in terms of the “rights” and “authority” of each parent towards their child. In a divorce, the court’s role is often viewed as dividing up this bundle of parental rights and authority between them. In the past, the courts would often award one parent sole custody of the child, with all the decision-making power that that implied, while the other parent’s involvement was limited to a right of access. This often resulted in the contact between the child and the non-custodial parent dwindling as time went by. See further discussion of sole and joint custody orders, *infra* note\*.

The Commission's proposal to shift to a new paradigm of joint parental responsibility was supported by four main reasons: the confusion and inadequacy in the current law, a shift in societal values, the importance of adhering to Hong Kong's obligations under international treaties, and the expressed views of judges on pressing need for change.<sup>37</sup> The HKLRC also proposed providing better mechanisms to ensure that the views of children be heard in family proceedings affecting them and also suggested amending the legislation governing care and protection proceedings to better protect children's rights.<sup>38</sup>

### B. *Joint Parental Responsibility: The Implementation Gap in Hong Kong*

Despite persistent calls for reform, Hong Kong continues to use the antiquated concepts of custody and access over the more modern joint parental responsibility.<sup>39</sup> More than 10 years have passed since the Commission's publication of the 2005 Child Custody Report and the main proposals of the Report have yet to be implemented.<sup>40</sup> Hong Kong is still using old concepts of custody, care and control, and access while England, Scotland, Canada, Australia, and New Zealand are using the more modern joint parental responsibility model.<sup>41</sup> Aware of mounting reform pressures

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<sup>37</sup> See discussion in Liu & Ho, *supra* note 34.

<sup>38</sup> See THE LAW REFORM COMMISSION OF HONG KONG, REPORT: CHILD CUSTODY AND ACCESS (2005), <http://www.hkreform.gov.hk/en/docs/raccess-e.pdf> [hereinafter 2005 Child Custody Report].

<sup>39</sup> See, e.g., Chow & Heathfield, *supra* note 13. Both the Hong Kong Bar Association and the Law Society of Hong Kong have been advocating for change, although there has been discussion over the redundancy of the term "joint" when referring to parental responsibility. See discussion in Liu & Ho, *supra* note 34.

<sup>40</sup> In 2010, Ludwig Ng noted that Hong Kong's failure to bring the law into line with modern conditions extended not just to child custody and access, but also into many other areas, such as legal aid, patents, corporate rescue, consumer protection, product liability, surveillance, and privacy. Ng noted the failure of the Government to take timely action to implement, or even respond to, the recommendations in HKLRC reports. See L. Ng, *Reforming Law Reform*, H.K. LAW., Dec. 2010, at 18. See also further discussion of the problem of implementing HKLRC recommendations in Tilbury, Young & Ng, *supra* note 21, at 15, 18–20.

<sup>41</sup> See, e.g., the Family Law Amendment (Shared Parental Responsibility) Act that came into force in Australia in July 2006. *Shared Parental Responsibility Act 2006* (Cth). Some commentators have suggested that in the absence of similar legislative reform, the Hong Kong Judiciary are making increased joint custody orders as a way of *de facto* implementing the "joint parental responsibility concept." See more discussion of this point in Liu & Ho, *supra* note 34; Yuk Ki Lee & Avnita Lakhani, *The Case for Mandatory Mediation to Effectively Address Child Custody Issues in Hong Kong*, 26 INT'L J. L. POL'Y & FAM. 327 (2012).

and public concerns expressed about the delays in considering and implementing HKLRC proposals, the Chief Secretary's Policy Committee established guidelines in 2011 for review of HKLRC reports, requiring more timely interim response within 6 months of publication of the report and a detailed public response within 12 months.<sup>42</sup> Against this backdrop, the LWB published a public consultation document in December 2011 entitled "Child Custody and Access: Whether to Implement the Joint Parental Responsibility Model by Legislative Means?" in which it collected and summarized a variety of views within the community.<sup>43</sup> Those who support the joint parental responsibility approach (mainly legal professionals and some children's groups) argue as follows:

- new model is more child focused;
- parental hostility during divorce proceedings would be reduced;
- in line with latest international trend in family law; and
- concept of the model cannot be adequately promoted through evolving case law under existing legislative framework and the mindset of the public cannot be changed merely by public education without legislative reform.<sup>44</sup>

Those who objected or who had reservations (includes individual single parents, social workers, women's groups and welfare NGOs) cited the following reasons:

- courts already have the flexibility to make appropriate type of custody order;
- new consent and notification requirement may be used by non-cooperative parents to obstruct and harass ex-spouses;
- number of litigated cases may rise since the consent and notification requirements may prolong the hostility between divorced parents;
- Hong Kong community may not be ready for such a paradigm shift in parenting concept;

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<sup>42</sup> These administrative guidelines followed a similar approach in the UK and can be found at HKLRC, <http://www.hkreform.gov.hk/en/news/NewsArchive2011>. For further discussion of these guidelines, see Tilbury, Young & Ng, *supra* note 21, at 47–50, 64–65.

<sup>43</sup> See LABOUR AND WELFARE BUREAU, CONSULTATION PAPER ON CHILD CUSTODY AND ACCESS: WHETHER TO IMPLEMENT THE 'JOINT PARENTAL RESPONSIBILITY MODEL' BY LEGISLATIVE MEANS (2011). The results of the consultation were reported to the Legislative Council in July 2013.

<sup>44</sup> For example, the Hong Kong Committee on the Rights of Children published its response to the LWB. HONG KONG COMMITTEE ON THE RIGHTS OF CHILDREN, <http://www.childrenrights.org.hk>.

- the model should be further developed and promoted under existing legislative framework; and
- support services to divorced families should be enhanced to tie in with the proposed legislative reform.<sup>45</sup>

The LWB is now considering the consolidation of relevant existing provisions, and incorporating new provisions into one Ordinance as recommended by the HKLRC.<sup>46</sup> The Bureau is currently working on detailed legislative and implementation proposals, and that it will further engage the stakeholders and interested parties before enacting legislation.<sup>47</sup> This indicates the numerous challenges facing effective legislative reform in Hong Kong—it may simply not be high on the political agenda of the executive government and effective reform may be difficult as various government departments may be involved making reform coordination difficult.<sup>48</sup> Moreover, Hong Kong lacks a permanent, professional, full time law reform commission, and there is inadequate administrative and research staff and insufficient resources. Promoting and supporting systematic law reform on a continual basis is very challenging.<sup>49</sup>

### III. FAMILY DISPUTE RESOLUTION REFORM: NEED FOR A CONSENSUAL AND NON-ADVERSARIAL SYSTEM

Family mediation is an important cooperative decision-making process in which a qualified and impartial third party mediator assists the parties in resolving their family disputes. In the early 1980s a number of NGOs—such as the Hong Kong Welfare Society, Hong Kong Catholic Marriage Advisory Council and Hong Kong Family Law Association—began offering mediation services

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<sup>45</sup> See discussion of this in LABOUR AND WELFARE BUREAU, *supra* note 43.

<sup>46</sup> At the same time, the Bureau is considering the implementation arrangements with regard to the experience of other jurisdictions as well as local circumstances. For example, the Children and Families Act came into force in the UK in April 2014. Children and Families Act, 2014, c. 6. One of the most significant changes introduced was compulsory attendance at a mediation information and assessment meeting (“MIAM”). The court has a general power to adjourn proceedings in order for non-court dispute resolution to be attempted, including attendance at a MIAM to consider family mediation and other options.

<sup>47</sup> The Government put child custody and access on the agenda of the Legislative Council Panel on Welfare Services in 2013.

<sup>48</sup> The relevant Government departments may lack the necessary expertise and resources to undertake effective reform which can be further compromised by the existence of a dysfunctional legislature. See further discussion of these points in Tilbury, Young & Ng, *supra* note 21.

<sup>49</sup> *Id.* at 4, 15 (discussing the need to improve the law reform process in Hong Kong and to invest adequate resources in a professional law reform commission).

in Hong Kong. Mediation has now become a central part of the process of family dispute resolution in Hong Kong in large part due to the efforts of the Judiciary who have established specialist working parties and engaged in consultation techniques to generate successful law reform.<sup>50</sup> The Judiciary have helped expand family mediation within the court system, developed specialized children's dispute resolution procedures, and more recently, they have undertaken major reform work towards modernizing and unifying family procedure rules.<sup>51</sup>

### A. *Development and Expansion of Family Mediation by Judiciary*

In 1995 the Chief Justice established a Working Group to Review Practices and Procedures Relating to Matrimonial Proceedings which recommended the introduction of family mediation in Hong Kong but only when there was a sufficient number of qualified mediators available.<sup>52</sup> In October 1997, a Working Group was established to consider a Pilot Scheme for the Introduction of Mediation into Family Law Litigation in Hong Kong and proposed the launch of a three-year pilot scheme in the Family Court.<sup>53</sup> A Mediator's Coordinator's Office, funded and monitored by the Judiciary, was established in the Family Court to administer the mediation scheme. Researchers from the Hong Kong Polytechnic University completed surveys and found that the majority of the respondents, between 80% and 86%, preferred mediation to litigation for resolving family disputes.<sup>54</sup> The interviews conducted with the parties who had participated in the Pilot Mediation Scheme indicated that 80.5% of them were "satisfied" or "very satisfied"

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<sup>50</sup> See discussion of this point in Tilbury, Young & Ng, *supra* note 21, at 11–13.

<sup>51</sup> For discussion about the 2010 Chief Justice's Working Party on Mediation and the work of the 2012 Chief Justice's Working Party on Family Procedure, see *infra*, note 71.

<sup>52</sup> See Report of the Working Group to Review Practices and Procedures Relating to Matrimonial Proceedings (August 1996) at Part XII.

<sup>53</sup> See REPORT OF THE WORKING GROUP TO CONSIDER PILOT SCHEME FOR THE INTRODUCTION OF MEDIATION INTO FAMILY LAW LITIGATION IN HONG KONG 17, LC Paper No. CB(2)1045/99-00(02) (1999).

<sup>54</sup> The Judiciary commissioned the University to complete a consultancy study on the three-year pilot scheme. See HONG KONG POLYTECHNIC UNIVERSITY, EVALUATION STUDY OF THE PILOT SCHEME ON FAMILY MEDIATION: FINAL REPORT (2004), [http://www.judiciary.gov.hk/en/publications/hkpu\\_finalreport.pdf](http://www.judiciary.gov.hk/en/publications/hkpu_finalreport.pdf), and discussion in Yuk-chung Chan et al., *The Development of Family Mediation Services in Hong Kong: Review of an Evaluation Study*, 29 J. SOC. WELFARE & FAM. L. 7 (2007).

with the mediation service for various reasons, including that the mediation “helped to save time and money,” “reduced tension between the parties . . . [and] promoted an environment conducive to settlement and agreement,” and “produced an environment more conducive to on-going co-parenting. The evaluation research concluded that family mediation was a viable alternative to litigation in Hong Kong and recommended that a family mediation service be developed in Hong Kong that allowed court-based and community-based mediation services to exist in parallel.”<sup>55</sup>

In March 2003, the HKLRC released its “Report on The Family Dispute Resolution Process” (the “2003 Family Dispute Resolution Report”) reviewing the ways in which child custody and access disputes were dealt with in Hong Kong and in comparative jurisdictions in the UK, Australia and New Zealand.<sup>56</sup> The Report noted that the negative impact of the adversarial process on family relationships can be minimized by encouraging the early use of alternative dispute resolution methods. The Commission highlighted the emerging approach of using non-adversarial means to resolve family disputes, particularly through the implementation of the Pilot Scheme on Family Mediation in 2000, which provided considerable evidence of the viability of family mediation in Hong Kong.<sup>57</sup> The Commission endorsed the use of mediation and the work of the Pilot Scheme and advocated for its expansion into a permanent service. The Report made thirty-four recommendations to strengthen family mediation services and to enhance the family litigation process including providing access to mediation as an integral part of the Family Court system.<sup>58</sup> In addition, the Commission proposed mechanisms for considering the views of the child in the mediation process and the introduction of parenting plans. Six years later, in 2009, the HKSAR Government finally

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<sup>55</sup> *Id.*

<sup>56</sup> In the UK the 2014 Children and Families Act, c. 6, placed a statutory requirement on applicants in relevant family proceedings to first attend a MIAM before making an application to court (unless an exemption applies).

<sup>57</sup> The Report recognized that not all disputes are appropriate for mediation but stated that the mediation process remained a highly suitable one for many couples who are undergoing divorce and endeavoring to make the best possible arrangements for their children’s future.

<sup>58</sup> The Report focused on strengthening family mediation services and granting judges greater case management powers. Chapter 5 dealt with court-based support services for family mediation. Chapter 6 focused on the role of mediators to maintain the integrity of the mediation process and the quality of services. Chapter 7 focused on the family litigation process itself. In line with the implementation of the Pilot Scheme on Family Mediation and CJR, the Report focused on minimizing the adversarial nature of family proceedings through settlement conferences and expanded judicial case management powers.

issued a formal response to the 2003 Family Dispute Resolution Report referring to the challenges of coordinating law reform efforts as follows:

The Administration welcomes and supports the recommendations in the LRC's report. As regards the report's detailed recommendations (for example, the provision of funding and resources support for the Non-Governmental Organisations conducting mediation services), as they touch upon various policy areas including funding support, child and family welfare and court powers and procedures which come under different bureaux and departments, their implementation is only feasible with the policy and resource support from the relevant bureaux and stakeholders from the integrated child and family welfare perspectives, and also support from the legal profession and the courts.<sup>59</sup>

In May 2012, the Judiciary issued a "Practice Direction on Family Mediation" (PD 15.12), which sets out the duty of the parties and their legal representatives to assist the Court in encouraging the parties to use mediation as an alternative dispute resolution procedure.<sup>60</sup> Order 25 provides that the parties shall try to settle disputes by mediation/ADR processes.<sup>61</sup> In addition, in May 2012, the Family Council launched a pilot scheme to provide sponsorship for interested organizations on family mediation service.<sup>62</sup> The Judiciary's objective in establishing these pilot mediation schemes is to send a clear message to the Hong Kong community—that it values settling family disputes in a non-adversarial way which may help the parties reach a faster and fairer resolution of their dispute and thus reduce the emotional distress and tension they experience throughout the process.<sup>63</sup>

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<sup>59</sup> The Government stated that the Home Affairs Bureau was ready "to coordinate efforts and input from relevant bureau and stakeholders in further pursuing the recommendations of the LRC."

<sup>60</sup> With the implementation of the CJR, legal aid has been extended to cover mediations since 2009. Between 2 April 2009 and 28 February 2015, the Legal Aid Department has approved funding for appointment of mediators in 631 matrimonial cases.

<sup>61</sup> See Order 25(17). In addition, the Judiciary also introduced Practice Direction 15.11 and established a Financial Dispute Resolution Pilot Scheme that commenced in 2012. A Practice Direction on a new pilot scheme for private adjudication of financial disputes in matrimonial and family proceedings has also come into effect since 19 January 2015.

<sup>62</sup> The pilot scheme is extended to last until January 2016. See FAM. COUNCIL H.K., [www.familycouncil.gov.hk](http://www.familycouncil.gov.hk).

<sup>63</sup> See HKSAR Secretary for Justice Rimsy Yuen, SC, JP, *Family Issues, Dispute Resolution and Related Matters*, speech at the meeting of the Hong Kong Family Law Association (Mar. 12, 2013), <http://www.doj.gov.hk/eng/public/pdf/2013/sj20130312e.pdf>.

B. *Development of Specialized Children's Dispute Resolution Procedures by Judiciary*

In November 2009, the first Children's Issues Forum focused on the need to implement the various proposals of the HKLRC in the 2003 Child Custody Report and the 2005 Family Dispute Resolution Report.<sup>64</sup> In 2012, the Judiciary announced the establishment of a three-year Children's Dispute Resolution ("CDR") Pilot Scheme effective in October 2012 in the form of Practice Direction 15.13.<sup>65</sup> This mandatory pilot scheme is in effect for a three-year period and applies to all disputes relating to children arising out of divorce proceedings, except adoption matters.<sup>66</sup> The overall objective of Practice Directions 15.13 is to support parents so that they can effectively parent their children post separation and divorce—it emphasizes the best interests of the children and the duties and responsibilities of parents.<sup>67</sup> It allows family judges to have greater control in child custody proceedings that cut down on unnecessary disputes between divorced couples that are often bogged down by irrelevant evidence. The real purpose of the new procedures is to focus on the children's welfare, reduce bitterness among the family, and encourage the parents to settle their differences outside the formal courtroom setting and adversarial trial process.<sup>68</sup>

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<sup>64</sup> See "Foreword" in Lynch & Wong, *supra* note 14, at ix–xi. In his concluding comments at this Forum, Mr. Justice Hartmann endorsed the need to implement the HKLRC recommendations relating to family justice and children's dispute resolution and discussed the establishment of a judicial working group to oversee the implementation of new court procedures. On the issues of timeliness and implementation for HKLRC Reports, see discussion by Tilbury, Young & Ng, *supra* note 21, at pp. 16–20.

<sup>65</sup> The PD was introduced on July 23, 2012 and became effective on October 3, 2012 for a 3-year period until October 3, 2015. This PD followed the introduction of the Practice Direction 15.11 Financial Dispute Resolution Scheme.

<sup>66</sup> The PD applies to all children matters in the Family Court and is mandatory.

<sup>67</sup> The Practice Direction seeks: "to support mothers and fathers, so that they are able to effectively parent their children post separation or divorce. The intention is to ensure that whilst the best interests of children remains the court's paramount concern, that lasting agreements concerning children are obtained quickly and in a less adversarial atmosphere. The focus is therefore on the children's best interests together with the duties and responsibilities of their parents."

<sup>68</sup> Reflecting the civil justice reforms introduced earlier in Hong Kong, the specialized children's dispute resolution procedures give judges broader case management powers and encourage the parties to settle their disputes through negotiation and mediation outside of the formal trial process. See Patsy Moy, *Family Judges to have More Control over Child Custody Cases*, SOUTH CHINA MORNING POST (Jan. 12, 2015), <http://www.scmp.com/news/hong-kong/article/1028461/family-judges-have-more-control-over-child-custody-cases>.

C. *Children's Appointment & CDR Hearing: Hearing the Voice of the Child*

The CDR procedure involves a preliminary hearing during the Children's Appointment, followed by a substantive hearing known as the "Children's Dispute Resolution Hearing" ("CDR hearing"). The matter proceeds to trial if settlement is not achieved at the CDR hearing. Prior to the Children's Appointment, each party must file and exchange the Children's Form (Form J) and a concise statement of issues relating to the children. The Children's Form is a standard form designed to help all interested parties and the court to determine the best arrangements for the parties' children. Each party is required to provide detailed information with respect to the children such as the children's current living arrangements, including where they sleep and who helps them with their homework, arrangements as to access, how and when the children communicate with both parties, what the children do when the parents are at work and what happens in the holidays.<sup>69</sup> The Children's Form also contains a section on future parenting arrangements which encourages the parties to think about matters which they may not otherwise do, such as how they propose to maintain communication with the other parent, or their friends and other family members and who will care for their children if they themselves are not available.<sup>70</sup>

At the Children's Appointment, the judge may adjourn any matters relating to the children for mediation, collaborative practice, or negotiation. The judge may also direct that the parties attend counseling, a parenting education program, or any other form of third party intervention that may assist the parties. The Children's Appointment also gives an opportunity for the child to voice his views. Where a child has requested to see the judge, the judge may direct that a judicial interview shall take place. These provisions are in line with the court's objectives to create lasting agreements in a less adversarial atmosphere where the focus is on the children's best interests.<sup>71</sup>

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<sup>69</sup> The Form also asks for details in respect to the children's schooling, including travel arrangements and what happens after school, how the children's schooling is currently dealt with and proposed arrangements for the future.

<sup>70</sup> The Children's Appointment will, in most instances, fall on the same date as the First Appointment, which is the preliminary hearing under the Financial Dispute Resolution process to avoid multiple court appearances.

<sup>71</sup> A guardian *ad litem* may be appointed to represent the child and report back to the judge if deemed necessary.

At the CDR hearing, the judge acts in the role of a conciliator. CDR hearings are not privileged which means that anything said or any admission made in the course of the CDR hearing is admissible as evidence in trial. The significance of this is that the same judge who hears the same case in trial would be aware of the parties' offers and counter offers of settlement. Unlike the procedures for Financial Dispute Resolution hearings, which are conducted on a without prejudice basis, CDR hearings are open because it is thought to be inappropriate for parties to hide behind the "without prejudice" privilege where the welfare of children is concerned.<sup>72</sup> If settlement is not achieved at the CDR hearing, the matter will proceed to trial.

The new procedure provides the Family Court with greater opportunities to hear the child in accordance with Hong Kong's obligations under domestic and international law.<sup>73</sup> In the domestic context, the focus on the best interests of children enables the court to fulfill its obligations under the welfare principle in section 3 of the Guardianship of Minor's Ordinance (Cap. 13) which states that "In relation to the custody or upbringing of a minor . . . 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." While there is no provision in the existing rules relating to judicial meetings of children, this gap has been dealt with by two guidance notes issued by the HKSAR Judiciary: "Separate Representation for Children in Matrimonial and Family Proceedings" (July 23, 2012) and "Guidance on Meeting Children" (March 28, 2012). It is important to note

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<sup>72</sup> However, Keith Hotten argues that the absence of "without prejudice" privilege may hinder rather than help parents in reaching agreement as to custody and access arrangements. Although the CDR hearing is meant to offer a relatively informal pre-trial mediation process, it is at least arguable that by the time the parents opted for litigation, the best interests of the child have hardened and become whatever that parent subjectively believes those best interests to be. Thus, the removal of privilege or "without prejudice" negotiations from the CDR process may (unlike private mediation) promote caution and obstinacy, both for the parent and legal advisers who may not be quite as willing to lay out all their cards on the table in the Children's Form fourteen days prior to the Children's Appointment. See extensive discussion of this point in Hotten, *supra* note 25.

<sup>73</sup> As a signatory to the United Nations Convention on the Rights of the Child, the pilot scheme is in accordance with its international obligations under Article 12 to take into account a child's views either directly or indirectly whether in person or through a representative.

that while these guidance notes are useful, they provide guidance to judges and no more.<sup>74</sup>

The CDR Pilot Scheme has helped to modernize the family justice system and the law that applies to the resolution of disputes relating to children—both procedurally but also substantively with an emphasis on the duties and responsibilities of parents rather than the rights and authority of parents over their children.<sup>75</sup> The effectiveness of Practice Direction 15.13 will be monitored and reported back to the Judiciary.

#### D. *Chief Justice's Working Party on Family Procedure Rules: Unified Family Procedure*

In February 2014, the Chief Justice's Working Party published an Interim Report and Consultative Paper seeking the views of relevant stakeholders on 136 proposals for procedural reform.<sup>76</sup> Currently, both the Family Court and the High Court basically exercise concurrent jurisdiction on family and matrimonial matters. However, the court procedures are quite fragmented with much cross-referencing to the rules of the High Court and the District Court.<sup>77</sup> The rules governing the practice and procedure are contained in various instruments supplemented by practice directions and they are difficult to use and cumbersome to navigate. This Interim Report highlights the importance of ensuring the accessibility, fairness and efficiency of family justice with streamlined procedures pro-

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<sup>74</sup> For a more detailed analysis of the role of judicial interviews with children, see Nicholas Bala & Rachel Birnbaum, *Hearing the Voice of Children in the Family Justice Process: The Role of Judicial Interviews*, *THE FAM. WAY* (2013).

<sup>75</sup> See earlier discussion on the joint parental responsibility approach endorsed by the HKLRC in the 2005 Child Custody Report, *supra* note 38.

<sup>76</sup> Some of the reform objectives include that the family justice system is to be accessible, fair and efficient; undue and excessive procedural distortions are to be reduced; the procedural rules are to be both simple and simply expressed for the benefit and comprehension of both qualified and lay court users and the court administration; the procedures in the Family Court and the High Court are to be aligned; and a simpler approach with modernized process is to be adopted for contested family and matrimonial cases.

<sup>77</sup> It would be preferable for the major rules reform to follow and have the opportunity to respond to legislative reform of the family court in Hong Kong but that is not possible. The slow pace of legislative reform hampers the much needed modernization of Hong Kong's family justice system to reflect the scope and scale of social, economic, and procedural changes, as well as the research and policy developments over the past three decades. See detailed discussion of this problem in Tilbury, Young & Ng, *supra* note 21.

moting a conciliatory dispute resolution culture providing for ADR processes.<sup>78</sup>

A key proposal put forth by the Working Party is the introduction of a new single unified family procedure code (the “New Code”) aimed at simplifying and unifying the rules—it will enable both lawyers and unrepresented litigants to refer to one single procedural source for guidance.<sup>79</sup> The Working Party suggests adopting England’s Family Procedure Rules 2010 as the New Code’s broad, basic framework.<sup>80</sup> The proposals seek to reduce the adversarial excesses in the culture of family litigation and they also facilitate a more streamlined procedure and contribute to a common approach across the Family Court and the High Court, resulting in a more efficient, cost-effective, and user-friendly family justice system. To ensure that the rules are coherent, cohesive, and consistent, a new “Family Procedure Rules Committee” is proposed as the single rule-making authority for the New Code.<sup>81</sup> The Working Party states that the New Code “should ensure that children’s welfare is adequately addressed and where necessary, children are represented and heard.”<sup>82</sup> In an important press release on May 28, 2015, the Chief Justice announced that the recommendations made by the Working Party (including 133 reform proposals in the Final Report) had been accepted with widespread public support.<sup>83</sup> The Judiciary will now proceed with the legislative work required to implement the recommendations made—particularly, the adoption

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<sup>78</sup> Recognizing that access to justice for all is one of the foundations of a democratic state and that the state has an interest in ensuring a robust family justice system. See 2012 CHIEF JUSTICE’S WORKING PARTY REPORT, *supra* note 7, at 9: “An effective family justice system should share all the typical characteristics of a well-functioning civil justice system . . . .”

<sup>79</sup> Many countries have adopted a unified code of family procedures, including UK Australia and New Zealand.

<sup>80</sup> The UK Family Procedure Rules 2010 provide a comprehensive modernized procedural code for family proceedings in the English family courts. It is supplemented by Practice Directions, forms and pre-application protocols. Rules encouraging ADR are firmly woven into these Rules and the courts must consider, at every stage in proceedings, whether ADR is appropriate. The court can, both on its own initiative and on the submissions of the parties, adjourn the proceedings for a specified period to allow the parties to engage with resolving their disputes outside the context of a full trial.

<sup>81</sup> The Law Society of Hong Kong has welcomed this review and concurs that the UK Family Procedure Rules 2010 could be adopted as the broad and basic framework for the New Code. The Law Society notes that careful planning and time-tabling are important as the legislative process could be lengthy.

<sup>82</sup> See 2012 CHIEF JUSTICE’S WORKING PARTY REPORT, *supra* note 7, at 21.

<sup>83</sup> See *Acceptance of Final Report on Review of Family Procedure Rules*, HKSAR JUDICIARY PRESS RELEASE (May 28, 2015), <http://www.info.gov.hk/gia/general/201505/28/P201505280419.htm>.

of a single set of self-contained procedural rules for Hong Kong's family justice system and the establishment of a new Family Procedure Rules Committee as the single rule-making authority for making the New Code and any subsequent amendments.<sup>84</sup>

#### IV. DEVELOPMENT OF COLLABORATIVE PRACTICE IN HONG KONG

The family law area has often led the way in adopting innovative dispute resolution processes, contributing to a more mainstream adoption of these processes (such as mediation) in a broader range of civil disputes. The exponential growth and development of collaborative law and practice—a multidisciplinary settlement oriented dispute resolution process that was recently introduced in Hong Kong<sup>85</sup>—is a good example of this phenomenon.<sup>86</sup> Collaborative law and practice originated in 1990 by Minnesota family lawyer Stu Webb, as an innovative means of settling matrimonial disputes in a respectful manner without going to court.<sup>87</sup> Frustrated by the misery the adversarial process caused to his clients, their families, and himself, Stu Webb advocated for a new “collaborative process” in which husbands and wives agree to resolve all issues of their case outside the court together with their lawyers, and often a team of professionals. The team assists the

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<sup>84</sup> *Id.*

<sup>85</sup> Hong Kong is the first Asian state to formally establish a collaborative practice group and the University of Hong Kong Faculty of Law is the first University in Asia to formally incorporate a “Collaborative Law & Practice” course in its law curriculum. See HKU LL.M. IN ARBITRATION & DISPUTE RESOLUTION, [www.law.hku.hk/llmarbdr](http://www.law.hku.hk/llmarbdr).

<sup>86</sup> For example, Uniform Collaborative Law Act exists in the United States and Australia that has developed national guidelines for collaborative practice in family law. See, e.g., *Collaborative Law Act*, UNIFORM L. COMM'N, <http://www.uniformlaws.org/Act.aspx?title=Collaborative%20Law%20Act>. While originally developed in the family law context, collaborative practice is now moving into other substantive area of civil disputes with greater formal recognition and regulation of the process.

<sup>87</sup> See IACP, *The Birth of Collaborative Practice*, DEV. COLLABORATIVE PRACT. (2008), <http://www.collaborativedivorce.com/lawyers/development.htm> (last visited July 2, 2013). Collaborative Law should not be confused with the newer process of “Cooperative Law” which involves an express agreement to utilize a good faith interest-based negotiation protocol to resolve legal disputes but does not include a Disqualification Agreement disqualifying the collaborative lawyers from representing the parties in subsequent litigation. For more detailed comparative analysis of the collaborative law and cooperative law processes, see John Lande, *Lessons for Collaborative Lawyers and Other Dispute Resolution Professionals from Colorado Bar Ethics Opinion 115*, MEDIATE.COM (Apr. 2007), <http://www.mediate.com/articles/landej3.cfm?nl=127> (last visited Sept. 25, 2013).

divorcing couples in creating a plan for their children and making financial and legal arrangements according to their own needs and preferences. In collaborative practice, each client is represented by his or her own collaborative lawyer. In some cases, the collaborative process takes place as a multi-disciplinary team, involving two divorce coaches, a neutral child specialist (if the couples have children) and a neutral financial specialist. Each client selects their own collaborative lawyer and divorce coach. Together, the clients select a neutral financial specialist and a neutral child specialist.<sup>88</sup> Instead of conforming to arbitrary decisions imposed by a court judge, the divorcing couples agree to negotiate in a civil and good manner to formulate legal and financial arrangements which are creative and mutually acceptable, which take the highest priorities of both clients into account, and which work in the best interests of their children.<sup>89</sup>

#### A. *Essential Elements of Collaborative Practice Process*

Collaborative practice is a flexible approach and takes many forms, but it consists of several core elements which distinguishes itself from other means of dispute resolution. These important elements are set out in a “Participation Agreement”, entered into by the spouses and their “collaborative divorce team” before the process starts. Under this contractual document, they agree to:<sup>90</sup>

- negotiate a mutually acceptable out-of-court settlement, with shared solutions that take into account the highest priorities of both clients;
- work in confidentiality, and in a respectful manner;
- engage in open communication and disclosure of all documents and information that relate to the issues; and
- sign a disqualification agreement in which the lawyers agree to withdraw from the case if the disputed parties decide to litigate. Other professionals involved will also agree to

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<sup>88</sup> IACP, *WHAT IS COLLABORATIVE DIVORCE* (2008), <http://www.collaborativedivorce.com/lawyers/general.html> (last visited July 2, 2013).

<sup>89</sup> Divorced couples battle in court for matrimonial property and child custody, bear the psychological pressure of lengthy trials and grueling cross-examinations, only to end up with more distrust and their money spent on lawyers' fees. Also, binding court decisions according to rigid legal principles may not meet the specific needs of each family.

<sup>90</sup> See Nancy Cameron, *Introduction to Collaborative Practice Workshop at the University of Hong Kong*, UNIV. H.K. (2008), <http://www.law.hku.hk/llmarbdr/files/12.11.08-Nancy-Cameron-Workshop.pdf>.

withdraw from the participation, testimony or subpoena of that litigation.<sup>91</sup>

A key feature of the collaborative process is the “no court” disqualification agreement which is an enforceable agreement to disqualify lawyers (and other professionals) if the matters in dispute proceed to litigation.<sup>92</sup> This disqualification agreement is intended to motivate the parties and their legal counsel to settle the dispute and reach an agreement rather than incur the increased costs and time of subsequent court litigation with new lawyers.<sup>93</sup> In the agreement, the parties agree to work respectfully, in confidentiality, and with full disclosure. To ensure that lawyers will focus on settlement and will not use the disclosed information on future litigation tactics, a disqualification agreement is signed in which the lawyers agree to withdraw from the case if the disputed parties decide to litigate. The client-centred decision making process embraces interest-based negotiations in a team based approach to conflict resolution which aims to de-escalate conflict and improve communication between the disputing parties.<sup>94</sup>

Collaborative practice has been praised for avoiding several shortcomings often encountered in traditional courtroom litigation. Firstly, court procedures and lawyers’ correspondences are lengthy and usually, as a result, incur substantial legal fees. It is possible that much of the savings of the separating spouses would be spent on litigation and little would be left for themselves and their children. The cost of collaborative practice may be theoretically lower since the parties are in control of the process and may decide to disengage the professionals and settle at any time. Secondly, contested trials are stressful for the clients, their children, and the lawyers. Instead of relieving the pain of the parties, contentious

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<sup>91</sup> A Disqualification Agreement is also essential in preserving confidentiality of collaborative practice since it guarantees that information disclosed in the process will not be disclosed by the same lawyers in open court. See more detailed analysis of collaborative law and practice in NANCY J. CAMERON, *COLLABORATIVE PRACTICE: DEEPENING THE DIALOGUE* (2015).

<sup>92</sup> This is known as the “disqualification agreement” or sometimes referred to as the “withdrawal agreement,” the “limited retention agreement” or the “collaborative commitment.”

<sup>93</sup> The disqualification agreement creates significant settlement pressure on both the parties and their legal counsel.

<sup>94</sup> The interest-based approach to negotiation (as opposed to the more traditional adversarial approach to negotiation), has a central focus on identifying and selecting options for resolving the dispute which maximizes the best interests of all the disputing parties. For a more detailed discussion of this approach to negotiation—also referred to as the “problem solving” approach, see the ground breaking work of ROGER FISHER ET AL., *GETTING TO YES* 40–80 (2d ed. 1991) and Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 *UCLA L. REV.* 754, 794–829 (1984).

testimonies and cross-examination may further damage their relationship, create emotional distress and upset for their children, and revealing details of scandals and domestic lives in public courts may cause embarrassment or moral stigmatization to the parties concerned. Collaborative practice, on the contrary, keeps process, discussion and negotiation details absolutely confidential. It also focuses on collaborative and cooperative problem solving between the parties instead of fault-finding. Each client is represented by his or her own lawyer and often a multidisciplinary team of professionals, including child psychologists and financial planners, may get involved to help resolving issues relating to the children and re-organization of the families' financial matters.<sup>95</sup>

### B. *Establishment of Hong Kong Collaborative Law Practice Group*

The inaugural “Hong Kong Collaborative Practice Group” was established in 2010 when the Hong Kong Family Law Association conducted the first ever collaborative practice training for a number of interested family barristers and solicitors in January.<sup>96</sup> It is likely that collaborative law and practice will continue to expand for the following reasons:

- with Hong Kong's high divorce rate there is pressing need for a process which resolves matrimonial disputes more amicably and which better caters for the well-being of children;<sup>97</sup>

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<sup>95</sup> A full multidisciplinary team consists of lawyers and divorce coaches representing their respective clients, a neutral child specialist and a neutral financial specialist. The combination of lawyers and specialists can take various forms depending on the parties' needs.

<sup>96</sup> See HONG KONG COLLABORATIVE PRACTICE GROUP, <http://hkcollaborativegroup.family-law-international.com/wphk>. In June 2009 the Secretary for Justice's Family Sub-Group on Publicity and Public Education received a report from Ms. Winnie Chow of the Hong Kong Family Law Association on the potential development in Hong Kong of a new settlement oriented form of family dispute resolution referred to as “Collaborative Practice” (CP). The 2010 Report of the Working Group on Mediation recommended that the future development of collaborative practice in Hong Kong be explored (see Recommendation 12). DEP'T JUST., REPORT OF THE WORKING GROUP ON MEDIATION 41 (2010), <http://www.gov.hk/en/residents/government/publication/consultation/docs/2010/Mediation.pdf>.

<sup>97</sup> There has also been a marked increase in the number of family cases contested before the Hong Kong courts over the past four years. See CENSUS & STATISTICS DEPARTMENT, *supra* note 18.

- the relative cost-effectiveness, efficiency, and fairness of the collaborative process is in line with the objectives of the CJR;
- Hong Kong has a large pool of professionals in law, medicine, psychology, finance, and other disciplines, which enables interdisciplinary models to be formed easily; and
- The Government and the Judiciary are supportive of Hong Kong expanding family dispute resolution processes and further developing as an international dispute resolution centre.<sup>98</sup>

## V. THE WAY FORWARD: MULTIDISCIPLINARY INTEGRATED REFORM AND IMPLEMENTATION

It is important to bridge the implementation gap for family justice reform, and provide modern consolidated legislation that creates an accessible, fair, and efficient family justice system that encourages consensual child-centric forms of dispute resolution.

### A. *Implementation of Legislative Reform Required in Hong Kong*

Modern consolidated legislation governing family justice and children's dispute resolution as proposed by the HKLRC should be introduced forthwith by the Government.<sup>99</sup> It is heartening that the Department of Justice and the LWB have commenced joint drafting work to incorporate provisions to implement the various HKLRC proposals into one consolidated Ordinance—this would also include all existing substantive provisions dealing with disputes relating to children, arrangements on divorce, guardianship, disputes with third parties, or disputes between parents without accompanying divorce proceedings, including those provisions in the Guardianship and Minors Ordinance (Cap 13), the Separation and Maintenance Orders Ordinance (Cap 16), the Matrimonial Causes Ordinance (Cap 179) and the Matrimonial Proceedings and Property Ordinance (Cap 192). Upon determining the detailed legisla-

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<sup>98</sup> See Yuen, *supra* note 63.

<sup>99</sup> After conducting a public consultation on implementing the parental responsibility model by legislative means, the LWB reported results of the consultation to Legislative Council Panel on Welfare Service in July 2013 and set out the way forward.

tive and implementation proposals, the Government must make it a top priority to ensure timely engagement of all stakeholders and interested parties in order to formally enact the necessary legislation by 2016. Time is of the essence in this matter.

### B. *Implement Unified Family Court Model in Hong Kong*

It is also important to restructure Hong Kong's family court system to more effectively and efficiently resolve family and children disputes, to ensure the views of children are expressed, the best interests of children respected.<sup>100</sup> Priority should be given to establishing a unified family court in Hong Kong—a single, specialized court that has legal authority to hear all family matters with specialized judges, simplified procedures, offering a range of dispute resolution methods and variety of early front end family services.<sup>101</sup> In addition to implementing the proposed unified set of family procedure rules, it is also important for the Government to give due consideration to the introduction of a unified family court.<sup>102</sup>

### C. *Increased Integration of Early Consensual Approaches to Dispute Resolution*

It is important in Hong Kong to establish a system of robust “front-end loaded” family dispute resolution services offering more consensual and problem solving approaches. It is necessary to introduce innovative child-centric community based services, which facilitate a broader integration of consensual values and problem solving approaches into the family justice culture in Hong Kong.<sup>103</sup>

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<sup>100</sup> See McLachlin, *supra* note 17, at i.

<sup>101</sup> See discussion of this proposal in the 2012 Chief Justice's Working Party Report, *supra* note 7, at 19–21; Canadian Access to Justice Report, *supra* note 2, at 46–56.

<sup>102</sup> The path dependent nature of law reform in the family justice area is illustrated here—meaning that the outcome or decision recommended in the reform process is shaped by specific and systemic ways by the historical path leading to it. It would be preferable to have a unified family court system introduced first and then develop a set of unified family procedure rules for use in this unified court. See Hathaway, *supra* note 19.

<sup>103</sup> See discussion in Canadian Access to Justice Report, *supra* note 2, at 18 encouraging the use of a full range of non-court options. Included in this would be the further development of “child inclusive mediation” in Hong Kong, referring to the inclusion of the views and voices of children in the mediation process through specialist mediation professionals. See discussion of

Consideration should be given to developing “multi-service centres” for public dispute resolution which can provide a range of accessible and affordable options for resolving family disputes, particularly those involving children. One potential innovation for Hong Kong is “Family Justice Centres,” which can serve as a single entry point for people seeking help with family problems, such as separation and divorce.<sup>104</sup> The Centre could offer a range of early and affordable dispute resolution processes, including providing information, negotiation, mediation, collaborative law, parenting coordination, adjudication, and arbitration.<sup>105</sup> Such a Centre may also act as a cooperative resource hub to allow other justice agencies to provide free information and legal advice to dispute resolution and referrals.<sup>106</sup>

#### D. *Urgent Need for More Empirical Research and Data Collection*

There is a pressing need for the collection of more detailed empirical data and evidence about family justice in Hong Kong to support better reform, policy making, and implementation strategies.<sup>107</sup> The basis for achieving successful reform in the family justice and children’s dispute resolution area is evidence based approaches—using evidence as a foundation for change to create

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child inclusive mediation in F. Bell, J. Cashmore, P. Parkinson & J. Single, *Outcomes of Child Inclusive Mediation*, 27 *INT’L J. L. POL’Y & FAM.* 116 (2013).

<sup>104</sup> Family Justice Centres have already been established in Australia with much success; see further discussion in Patrick Parkinson, *Children’s Dispute Resolution: The Australian Experience*, paper presented at the 2nd Children’s Issues Forum, Hong Kong (August 2012).

<sup>105</sup> This reflects the suggestion made many years ago by Mr. Justice Neil Kaplan (as he then was) for the establishment in Hong Kong of “Neighbourhood Justice Centres.” A good model for this are the “BC Justice Access Centres” established in 2014 providing a single point of entry for people seeking help with family and civil problems. See Suzanne Anton, QC, *BC’s Justice Access Centres: The Right Services at the Right Time*, 73 *ADVOC.* 113 (2015).

<sup>106</sup> Also, consideration should be given to introducing processes like family arbitration in Hong Kong to deal with issues relating to payment of children’s maintenance. In 2012, the Institute of Family Law Arbitrators was established in the UK with the support of the Chartered Institute of Arbitrators.

<sup>107</sup> In a recent public speech, the HKSAR Secretary for Justice Rimsky Yuen, SC, JP highlighted the need for more empirical research to be conducted in the family justice and dispute resolution area (despite the challenges posed by confidentiality). See Yuen, *supra* note 63. The HKLRC has also highlighted the need for better empirical data and research statistics to assist in planning of law reform policies and their implementation.

systems that truly respond to the needs of the community.<sup>108</sup> For example, research funding should be made available to gather data and evidence about the awareness, usage, experience, and outcomes of the different alternative out of court family dispute resolution processes in Hong Kong (in particular, mediation) in order to better inform future policy and practice reform.<sup>109</sup>

### E. *Multidisciplinary Collaboration & Coordinated Family Justice System Encouraged*

There are many dedicated and passionate people in Hong Kong trying hard to make the system work and there have been many reform efforts at different levels.<sup>110</sup> But problems persist due to systemic challenges in Hong Kong's family justice system, particularly as it relates to children, including a lack of institutional structures that can design and implement timely and appropriate change and a lack of coordination to ensure consistent and cost effective reform. Greater multi-disciplinary collaboration and cooperation is urged among all stakeholders involved in the family justice system in order to develop consensus priorities and coordinate reform initiatives. There is a need to bring together all stakeholders (including members of the Judiciary and Department of Justice, government officials, barristers and solicitors, mediators, social

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<sup>108</sup> This is also reflected in the comments offered by Her Honor Judge Sharon Melloy on the need to analyze custody orders being made through collection and evaluation of court data and statistics concerning child custody disputes. See Melloy, *supra* note 14. For further discussion of the need for solid empirical research to support sound policy making and reform of family justice systems, see Canadian Access to Justice Report, *supra* note 2, at 18.

<sup>109</sup> See, e.g., empirical research completed in 2014 the UK, "Mapping Paths to Family Justice", an independent 3-year research funded by the Economic & Social Research Council undertaken by the Universities of Exeter and Kent. MAPPING PATHS TO FAMILY JUSTICE (2014), <http://socialsciences.exeter.ac.uk/law/research/frs/researchprojects/mappingpathstofamilyjustice/>. Another useful example is research conducted by the UK Ministry of Justice Analytical Series in January 2015, "Mediation Information and Assessment Meetings and Mediation in Private Family Law Disputes." BECKY HAMLYN, ET AL., MEDIATION INFORMATION AND ASSESSMENT MEETINGS AND MEDIATION IN PRIVATE FAMILY LAW DISPUTES: QUANTITATIVE RESEARCH FINDINGS (2015), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/399573/miams-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399573/miams-report.pdf). This research considered the use of mediations prior to applying to court and collected useful survey evidence from mediation practitioners and statistical data from a review of court files of 300 cases.

<sup>110</sup> See comments of Mr. Justice Michael Hartmann commenting that the work of the First Children's Issues Forum was important as it illustrated why "in children's matters, a multi-disciplinary approach is the feasible one. That is why it has been so good to see so many experts from different fields at this conference. That is why what lies ahead is so promising." Lynch & Wong, *supra* note 14.

workers, psychologists and medical professionals, legal aid providers, academics, NGOs) for ongoing cross-sector dialogue to discuss ways of delivering a more responsive, accessible system for family justice services—particularly those involving children.<sup>111</sup>

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<sup>111</sup> See McLachlin, *supra* note 17, at i (“The aim of the Action Committee composed of leaders in the civil and family justice community and a public representative, each representing a different part of the justice system. Its aim is to help all stakeholders in the justice system develop consensus priorities for civil and family justice reform and to encourage them to work together in a cooperative and collaborative way to improve access to justice.”).