



**THE LAW REFORM COMMISSION  
OF HONG KONG**

**香港法律改革委員會**

**SUB-COMMITTEE**

**ON**

**GUARDIANSHIP AND CUSTODY**

**CONSULTATION PAPER**

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This Consultation Paper has been prepared by the Sub-committee on Guardianship and Custody of the Law Reform Commission. It does not represent the final views of either the Sub-committee or the Law Reform Commission, and is circulated for comment and criticism only.

The Sub-committee would welcome submissions on the proposals contained in this Consultation Paper. You are invited to make your views known to the Sub-committee, in writing, by 1 March 1999.

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It may be helpful for the Commission and the Sub-committee, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, the Commission will assume that the response is not intended to be confidential.

Miss Paula Scully, Senior Government Counsel, was principally responsible for the writing of the Consultation Paper.



# THE LAW REFORM COMMISSION OF HONG KONG

## SUB-COMMITTEE ON GUARDIANSHIP AND CUSTODY

### CONSULTATION PAPER

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# Introduction

## Terms of reference

1. On 21 April 1995, under powers granted by the Governor-in-Council on the 15 January 1980, the Attorney General and the Chief Justice referred the topic of guardianship and custody to the Law Reform Commission in the following terms:

*“to consider the law relating to guardianship and custody of children, and to recommend such changes as may be thought appropriate”.*

2. This Consultation Paper is one of a number of references in the area of family law dealt with by the Commission. The Commission has already produced reports on illegitimacy<sup>1</sup> and the grounds for divorce and time limits for divorce.<sup>2</sup> Both those reports have been implemented in legislation by the Parent and Child Ordinance (Cap 429) and the Matrimonial Causes (Amendment) Ordinance (Cap 179) (Ord. No. 29 of 1995) respectively.

## Scope of the reference

3. Hong Kong's law on guardianship and custody is to be found in a number of ordinances. Principal among these is the Guardianship of Minors Ordinance (Cap 13). Private law aspects of guardianship and custody are also dealt with in the Matrimonial Causes Ordinance (Cap 179), the Matrimonial Proceedings and Property Ordinance (Cap 192) and the Separation and Maintenance Orders Ordinance (Cap 16).

4. One of the catalysts for review of the law relating to guardianship and custody was the enactment in 1989 of the Children Act in England, which incorporated major reforms. In particular, there was concern about the restriction in section 10 of the Guardianship of Minors Ordinance (Cap 13), which limited an application for custody or access to parents or the Director of Social Welfare. Thus, grandparents or other relatives actually looking after a child were unable to make application under this Ordinance and instead had to apply for wardship in the Court of First Instance of the High Court.

5. Guardianship can be defined as all the rights that a parent has towards his or her child. When a parent dies, another person may be appointed guardian by a will, known as a testamentary guardian. There is much confusion as to the meaning and scope of the term “custody”. It can be confined to the physical custody and day to day care and control of a child after a divorce, or in broader terms to mean something akin to guardianship, whereby the parent without care and control retains a right to be involved, to different degrees, in the upbringing of a child. Access to see his child has

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<sup>1</sup> Topic 28, December 1991.

<sup>2</sup> Topic 29, November 1992.



traditionally been seen as the main right given to a non-custodial parent. In rare situations this can result in the child spending so much residential time with both parents that it amounts to shared physical custody, an option increasingly popular in the United States.

## **Private law and public law**

6. This reference is confined to the private law aspects of guardianship and custody. Public law will only be dealt with insofar as there is an overlap with the powers of the Director of Social Welfare to intervene in private law disputes. Child care law in the sense of public law is excluded. There are practical reasons for this limitation, as a review of the public law aspects would considerably delay the completion of this reference.

7. There are also policy and conceptual reasons for this choice. The powers of intervention by the state in the lives of a family differ markedly from when a child is the subject of child abuse and needs protection, to when a child is involved in a private law dispute between two parents. It can also confuse the issues, as only a minority of the children who are the subject of a private law dispute will also be the subject of care applications by the Director of Social Welfare under the Protection of Children and Juveniles Ordinance (Cap 213).

## **The sub-committee**

8. In May 1996 the Law Reform Commission appointed a sub-committee chaired by the Hon Mrs Miriam Lau to consider the terms of reference and to make proposals to the Law Reform Commission for reform. In August 1998 the sub-committee completed their deliberations and now make their proposals on reform available to the public for consultation.

## **Membership and method of work**

9. On 8 June 1996 the sub-committee commenced their consideration of a background paper prepared by the secretariat to assist them in their work. The sub-committee held a total of 34 meetings.

10. The membership of the sub-committee is

Hon Mrs Miriam Lau, JP  
Chairperson

Partner  
Alfred Lau & Co., Solicitors

H H Judge de Souza  
Deputy Chairman

Judge  
Family Court

Miss Rosa Choi	Assistant Principal Legal Aid Counsel Legal Aid Department
Ms Bebe Chu	Partner Stevenson, Wong & Co., Solicitors
Ms Robyn Hooworth	Mediator
Mr Anthony Hung	Partner Lau, Kwong & Hung, Solicitors
Ms Jacqueline Leong, SC	Barrister
Dr Athena Liu	Lecturer Faculty of Law University of Hong Kong
Mr Thomas Mulvey, JP	Director Hong Kong Family Welfare Society
Mrs Cecilia Tong	Regional Officer Social Welfare Department
Ms June Wee	Barrister
Miss Wong Lai-cheung	Counsellor Hong Kong Catholic Marriage Advisory Council

Miss Paula Scully, Senior Government Counsel, acted as Secretary to the sub-committee.

### **Format of the Consultation Paper**

11. This Consultation Paper examines the present state of the law of guardianship and custody in Hong Kong, and puts forward various options for reform. It is impossible to deal with substantive provisions of the law in isolation from the context in which those provisions are used in a dispute between parents, or between a parent and a third party, in relation to guardianship, custody or access. This paper will deal with the substantive provisions but also the methods of dispute resolution that are used, or capable of being used, for resolving such disputes.

12. Part I of the Paper deals with the substantive law in practice in Hong Kong and overseas. Chapter 1 deals with the legal and social background to the law, including the impact of the United Nations Convention on the Rights of the Child. Chapter 2 focuses on the substantive provisions of the various ordinances dealing with

guardianship and custody and problems with them. It includes the Family Court's way of handling these disputes, and the current situation on mediation in Hong Kong.

13. Chapters 3, 4, and 5 of the Consultation Paper deal with comparative developments from the perspective of the substantive provisions of the law. Chapter 3 focuses on the English provisions of the Children Act 1989. Chapter 4 deals with Scotland. Chapter 5 looks at substantive provisions and developments in Australia and New Zealand. Chapter 6 identifies options for reform in Hong Kong of the substantive provisions of guardianship and custody.

14. Part II of the Consultation Paper deals with non-adversarial dispute resolution for guardianship and custody disputes. Chapter 7 focuses on comparative non-adversarial dispute resolution processes, particularly mediation which is now becoming the preferred method of dispute resolution for disputes involving children. Chapter 8 looks at recent English developments in how divorce and ancillary matters such as custody are dealt with. Chapter 9 deals with family dispute resolution in Australia and New Zealand. Chapter 10 focuses on the dispute resolution process in Canada and the United States. Chapter 11 deals with the legal systems of Mainland China, Japan and Singapore. Chapter 12 sets out options for reforms in the dispute resolution methods of resolving guardianship and custody disputes.

15. Part III, in chapter 13, deals with the Hague Convention on the Civil Aspects of Child Abduction, and the domestic civil and criminal law on child abduction. Chapter 14 summarises the options for reform in child abduction law. Chapter 15 summarises the conclusions and recommendations for reform of the law in Hong Kong. Annex 1 sets out relevant sections from the English Children Act 1989, the Children (Scotland) Act 1995 and the Australian Family Law Reform Act 1995 that the sub-committee used as a basis for some options for draft legislation for Hong Kong. Annex 2 is a Flow Chart dealing with proposed court processes including case management and support services for the handling of disputes concerning children at the Family Court.

16. This Consultation Paper contains the preliminary recommendations of the sub-committee. The purpose of circulating the Consultation Paper is to invite members of the public, agencies and organisations from the non-governmental sector and the relevant government bureaux and departments and other interested parties to express their views on the recommendations. The sub-committee will take these views into account in finalising their recommendations, which will then be presented in a final report to the Law Reform Commission.