

The Hong Kong Council of Social Service

Report-back session of study visit on joint parental responsibility model in Australia

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Domestic violence in the Hong Kong context

- domestic violence has aroused a great amount of public concern in recent years - rapid increase in the number of cases registered by the Social Welfare Department
- the need to protect victims of spousal abuse and also their children, whether they are the direct abuse victims or not, has been widely recognized
- that partner violence is harmful to children

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Reported domestic violence cases per 100000 households

Year	Reported domestic violence cases per 100000 households
1981	2.89
1986	54.39
1996	68.12
1997	55.75
1998	58.53
1999	53.73
2000	52.63
2001	58.77
2002	79.16
2003	112.88
2004	205.68
2005	119.72
2006	211.87

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Prerequisite conditions for the development of discussions on domestic violence and child custody (Jaffe and Crook, 2004)

1. an institutionalized custody and access system,
2. ready access to the justice system
3. recognition that partner violence is a public and criminal matter
4. recognition that exposure to partner violence is harmful for children
5. existence of a service sector that advocate for victims of abuse and their children,
6. a history of the above five conditions which is long enough to permit some research and analysis

Hong Kong fulfills some of these conditions although there are not many related research studies.

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The Report of the Law Reform Commission of Hong Kong 2005

- changing philosophy, language and practice of parental responsibility
- the Report regarded cases of family violence the "small minority" which needed to be taken special care by the courts in applying the new joint parental responsibility model
- recognized the observation that the courts in many places have had placed too much emphasis on maintaining parental contact and therefore have not addressed the issue of domestic violence, thus resulting in a risk to the safety and well-being of the children
- upholding the priority of child's interests in cases with DV
- recommending special handling of cases involving DV
- safety of DV victims (mothers/child only; mother and child) is to be protected before, during and after contacts
- Nine recommendations regarding cases involving family violence

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The Report of the Law Reform Commission of Hong Kong 2005

- Recommendations – DV laws
- 33. Review the law relating to DV and reform to improve its scope and effectiveness
- 34. Introduce a broad, all-encompassing definition of DV
- 35. the court given power, when making an injunction under the DV Ordinance (Cap189), to suspend a prior access or contact order or vary a prior order so as to make a supervised access or contact order; to make interim consequential orders determining the residence of a child or any other aspect of parental responsibility including maintenance that meet the best interests of the child; an onus of the parties to disclose prior relevant orders when applying for an injunction

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- Recommendations – courts' power
- 36. Guidelines for the judiciary at all levels setting out the approach the courts should adopt when DV is put forward
- 37. the court should be able to make a proper assessment of any risk to a child including being able to **investigate allegations of DV at interim hearings**; to have access to the criminal records of parents

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- Recommendations – other support
- 38. the Administration should review the current arrangements and facilities allowing for supervised contact
- 39. on-going training for all the disciplines engaged in the Family Justice System including the legal profession and judiciary
- 40. the Administration consider a review of data protection arrangements for victims of DV
- 41. Long term research on the effects on children witnessing and/or being the victims of DV; detailed collection and evaluation of information of court proceedings in these cases

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Custody considerations for DV cases

- the merits of the model of joint parental responsibility in principle
- child's welfare is a top concern
- for DV cases, victims' welfare is also a top concern – adult/child only; adult and child
- child's welfare and adult victims' welfare is linked and can be in conflict for some cases
- that children are best served when they have access to both parents cannot be presumed

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Custody considerations for DV cases

- contact is the most common context for abuse after separation
- DV consists of coercive control rather than physical assault; cc is less tangible and harder to identify than violence
- DV may or may not have been documented or alleged when a petition for divorce is filed
 - Documented DV – police, social welfare, court
 - Self-reported/ alleged
 - Not alleged and not detected

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Custody considerations for DV cases

- Conflict of interests in arrangement of child custody and maintenance comes with a petition of divorce
- Relationship service and legal professionals tend to be more careful if not skeptical about reporting DV at this point of time
- Since it is most often women who raise the problem of DV, they are being suspected to use it as a tactic to protect their own interests
- the legitimacy of the psychological cost of women in custody considerations being undermined
- The risk of being seen as "unfriendly parents"

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Experiences in other places

- Different practices across nations and cities
- New Zealand: a presumption against contact when DV was established – revised according to UN's convention on child rights
 - Some states in the US changed their custody laws in favour abuse victims by giving them the presumption of custody, removing the presumption of joint custody, banning sole custody or unsupervised visitation for perpetrators

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Experiences in other places

- The example of California
- DV was determined through documentation in the file or through detection by the mediator
- The court's screening form failed to signify DV in 14.7% of cases
- Mediators failed to account for DV in 56.9% of cases
- The mediator recommended primary physical custody for the father significantly more often in DV cases than in non-DV cases; as likely to recommend joint custody in DV as in non-DV cases; supervised visitation was recommended in 18.6% of cases. (Johnson, et al., 2005)

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Experiences in other places

- Studies in Kentucky and California
 - DV couples were as likely as those without such allegations to be steered into mediation and mediators held joint sessions in nearly half of the cases which was against the regulations (Hirst, 2002)
 - Of cases with a documented pre-existing history of abuse, almost three-quarters had either no mention of DV in the marital dissolution file or only mentioned unsubstantiated allegations; the family court was made aware of documented abuse in fewer than one case in four (Kernic et al., 2005)

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Experiences in other places

- Experience of Australia
 - exception to the requirement to attend FDR
 - non-application of the presumption of equal share parental responsibility
 - The presumption in favour of shared parental responsibility and child's right to meaningful involvement with each parent strengthened the tendency for DV not given adequate consideration
 - Widespread misunderstanding of the introduction of 'equal shared parenting' among family law system professionals
 - rate of shared care-time arrangements among parents with safety concerns no different to that among those without
 - Less emphasis is placed post-reform on the protection from harm principles; DV, coercive control in particular, was minimized
 - Allegations of DV not dealt with adequately in the legal system; also for screening of DV
 - Still a view of some legal professionals that allegations are tactical strategy to protect one's interests

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Some thoughts for the 2005 reform proposal

- that non-application of the presumption of equal share parental responsibility for cases with DV not explicitly stated
- More focused on physical and documented violence
 - The model of episodic, injurious physical violence is seriously misleading; many DV incidents are relatively minor from a medical or criminal justice perspective;
 - Coercive control: typically low level violence but ongoing, through multiple tactics, leading to cumulative effect on a person's sense of dignity, autonomy and decision-making ('entrapment')
 - The risk of neglecting cases with a history of coercive and controlling acts but without a compelling documentary record of injury or third party corroboration
- Given the complicated nature of DV and the dominant model that emphasizes physical violence, there is a doubt that lawyers, mediators and judges have the sensitivity and competence to identify cases not involving physical violence

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Some thoughts for the 2005 reform proposal

- The risk of missing out DV not documented and not alleged
- The ways that allegations of DV is handled is critical; the need for welfare report for all alleged cases? For all cases?
- Reactions of victims are easily judged to be exaggerated, paranoid, even 'crazy'; concerns on ground to judge victims' fear of contacts after divorce as 'irrational' or manipulative

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Some thoughts for the 2005 reform proposal

- the risk of trouble-making or abusive spouses to harass the other spouse with the introduction of the new notification requirements
- having no recommendation on the arrangements and facilities for supervised contact in the Report but only a call for the Administration to review the current practice
- recognizing a great transformation in culture required by the new approach of parental responsibility but can only propose the Administration to educate the public
- poor support services for divorced couples in general and families with DV in particular

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Some thoughts for the 2005 reform proposal

- Stating the principle of non-application of the presumption of equal share parental responsibility for cases with DV does not end the story
- The impact of this presumption is seen in cases with DV
- Co-parenting does not apply to all cases
- Fundamental issues about the notion of “the superiority of dual parenting” that extends beyond marriage

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