1. The response of the Hong Kong Bar Association ("HKBA") to the December 2011 Consultation Paper on Child Custody & Access ("the Consultation Paper") are as follows:-

CHAPTER TWO
The Existing Legislative Framework & The Existing Laws on Child Custody & Access

2. Paragraphs 2 to 4 of the Consultation Paper are entitled under the heading "The Existing Laws on Child Custody & Access". Chapter Two is entitled "The Existing Legislative Framework".

3. HKBA believes that the "existing law" could be better and more accurately expressed as follows:-

4. The existing law (consisting of legislation and case law) recognises concepts of "custody" (sole and joint), "care and control" and "access" (including staying access).

5. "Custody" was described thus by the Court of Appeal in PD v. KWW [2010] HKFLR184 at §31 - "The decisions to be made by a custodial parent are those of real consequence in safeguarding and promoting the child's health, development and general welfare. They include decisions as to whether or not the child should undergo a medical operation, what religion the child should adhere to, what school the child should attend, what extracurricular activities the child should pursue, be it learning a musical instrument or being coached in a sport. A parent vested with custody has the responsibility of acting as the child's legal representative."
6. “Care and control” was described thus – “By contrast, the decisions to be made by a parent who (at any time) has care and control of the child are of a more mundane, day-to-day nature, decisions of only passing consequence in themselves but cumulatively of importance in moulding the character of the child. They include a host of decisions that arise out of the fact that the parent has physical control of the child and the responsibility of attending to the child’s immediate care. They include decisions as to what the child will wear that day, what the child may watch on television, when the child will settle down to homework and when the child will go to bed. They also include the authority to impose appropriate discipline” [§32 PD v. KWW [2010] HKFLR184].

7. There is a “thin line between sole custody and joint custody” [§41 PD v. KWW [2010] HKFLR184].

8. The correct position of the existing law is however commonly misunderstood. This was also noted by the Court of Appeal – “Regrettably, empirical evidence suggests that there is a large measure of misunderstanding as to the nature and extent of the two concepts, certainly among lay people” [§29 PD v. KWW [2010] HKFLR184].

9. The Court of Appeal has taken the opportunity to clarify what the law as it stands is:-

“We have spoken of the misunderstanding that exists as to the nature and extent of the two concepts. This is most often manifested in the misperception that, if sole custody is given to one parent, that parent thereby ‘win’ the right to determine all matters big and small in the upbringing of that child while the parent who is not given custody ‘loses’ the right to have any say in the child’s upbringing......

It is to be emphasised in the strongest terms that if one parent only is given custody, that parent is not thereby given an absolute and independent authority to act without further reference to the non-custodian parent. Any
such potential misunderstanding was quashed in Dipper v. Dipper [1980] 3 WLR 626 in which Ormrod LJ said:

"It used to be considered that the parent having custody had the right to control their children's education, and in the past their religion. This is a misunderstanding. Neither parent has any pre-emptive right over the other. If there is no agreement as to the education of the children, or their religious upbringing or any other matter in their lives, that disagreement has to be decided by the court."

In the same case, Cumming-Bruce LJ, another experienced family judge, said:

"...it (is) a fallacy which continues to raise its ugly head that, on making a custody order, the custodial parent has a right to take all the decisions about the education of the children in spite of the disagreements of the other parent. This is quite wrong. The parent is always entitled, whatever his custodial status, to know and be consulted about the future education of the children and any other major matters. If he disagrees with the course proposed by the custodial parent he has the right to come to the court in order that the difference may be determined by the court."

A non-custodial parent therefore has the right to be consulted in respect of all matters of consequence that relate to the child's upbringing. While the right to be consulted does not include a power of veto, it is nevertheless a substantial right. It is not merely a right to be informed, it is a right to be able to confer on the matter in issue, to give advice and to have that advice considered.

While therefore a parent who is given sole custody is given the authority, in the event of disagreement with the non-custodial parent, to make the final decision, it should only be made after due consultation and, if the final decision that is made is considered by the non-custodial parent to be inimical to the child's best interests, the court may be called upon to determine the matter." [§33 et seq PD v. KWW [2010] HKFLR184]

10. Not only are the concepts of sole custody and joint custody commonly misunderstood – so are the concepts of care and control and access.
11. For example, it is often not appreciated that "an order awarding care and control to one parent with rights of access to the other is in fact a form of shared care and control ....This is because, when a parent exercises rights of access, especially staying access, that parent assumes care and control of the child for the time that the child is in that parent's physical custody. Rights of access, it is to be remembered, are given - in the interests of the child - to ensure continued bonding between parent and child". [§43 et seq PD v. KWW [2010] HKFLR184]

12. These confusions and misunderstandings are deeply ingrained within society, and to some degree and extent even pervades throughout the professionals and associated service providers involved in children matters.

13. HKBA believes that legislative reform is necessary and the only effective means by which to clarify the confusion and get rid of the misunderstandings. Amongst other reasons, the terms that exist in the present Ordinances are of antiquated origin and their archaic nature renders it difficult and sometimes impossible for professionals and associated service providers to explain to lay-parents or their children.

14. Indeed, the case of PD v. KWW [2010] HKFLR184 in the Court of Appeal very much illustrates an oft seen phenomenon, of parents wasting time, costs and judicial resources in litigating for sole or joint custody and/or care and control / access, because of these confused misunderstandings.

15. In paragraph 2.12 of the Consultation Paper, it is said that "the custodial parent retains the rights to veto the opinions of the access parent and make the final decision". This is similarly expressed in paragraph 4 of the Consultation Paper.

16. Whilst the Court of Appeal in PD v. KWW did describe the rights of the non-custodial parent as "not including a power of veto"; the reverse however is not necessarily so, and does not follow. The non-custodial parent has "a substantial
right. It is not merely a right to be informed, it is a right to be able to confer on
the matter in issue, to give advice and to have that advice considered”.

17. Further, whilst the Court of Appeal did say that “the custodial parent who is
given sole custody is given the authority to make the final decision” this is
immediately qualified by the necessary precondition that this be “after due
consultation with the non-custodial parent”.

18. HKBA believes that it is not apt to describe this as amounting to the ‘retention’
of a ‘right to veto’ as such.

19. HKBA agrees with and strongly support the sentiments of LRC as set out in
paragraphs 2.15(a), (b) and (d) of the Consultation Paper.

20. In particular in relation to paragraph 2.15(a) and (b), it is the experience of
HKBA Members that most parent-clients have great difficulty with properly
understanding the legal concepts of ‘sole custody’, ‘joint custody’, ‘care and
control’ and ‘access’. Much time and effort is wasted in almost every case in
having to in effect “undo” the widely held misconceptions and
misunderstandings that have been deeply ingrained.

21. This is exacerbated by the use of not only outmoded concepts, but also
antiquated and archaic terms of art - whose meanings may have changed over
time and developed extensively; compounding the confusion and
misunderstanding.

22. Whilst case-law have developed to a stage where there is said to be no more
than a “thin line” between sole and joint custody orders, the idea that ‘sole
custody’ creates a ‘winner / loser’ situation still remains overwhelmingly
prevalent amongst parent-clients. Much time and costs are wasted because
parent-clients refuse to accept “joint custody” arrangements, insist upon
obtaining “sole custody” orders, or refuse to “lose” custody to the other parent.
23. As a matter of law, “all matters of consequence” necessarily involve a process of consultation, conferral, advice and consideration, whether custody is sole or joint. In joint custody cases, disagreement results in the necessity of a court application to resolve and determine the issue; whereas in sole custody cases, the custodial parent is given authority to make the final decision after due consultation and consideration, but the other parent remains at liberty to take out a court application nevertheless.

24. The practical difference in reality therefore, amounts to little more than a question of how strongly the client-parent feels about the issue or question at stake. If there is strong disagreement, a court application is available whatever the custody order, and in reality becomes inevitable whether the order is for joint or sole custody.

25. The terminologies “sole custody” and “joint custody” however, engender concepts that are very far removed from this legal position, not least in the minds of lay-parents, who are after all the final and ultimate parties directly engaged in litigation before the Courts.

26. HKBA believes that as a most basic starting point, the terminologies involved have to be overhauled. Apart from difficult terms of art such as ‘custody’, ‘care and control’ and ‘access’ (which are in themselves difficult to understand and explain), there is no doubt whatsoever that venturing away from the labels “sole” and “joint” would be of great improvement and will effect a paradigm shift in the whole way of thinking.

27. Curing this mischief necessarily involves statutory reform – and is one amongst other reasons that HKBA believes that legislative reform is necessary and unavoidable.

28. HKBA supports abolition of “custody” orders and removal of the terminology and concept from the statutes. It is only through legislative reforms that the Courts will no longer be mandated to make orders for “custody”.

~ 6 of 17 ~
29. In this regard, HKBA agrees with and supports the recommendations of LRC set out in paragraphs 3.4 (especially 3.4(c)) and 3.7 of the Consultation Paper.

30. As an aside, in paragraph 2.10(b) of the Consultation Paper, HKBA notes it is said that joint custody orders “are now commonly made”. HKBA have made enquiries with practising barristers who are well-experienced and familiar with this area of practice. After consulting their views, whilst HKBA agrees that joint custody orders are now more often and more readily made than, say, in times past [and HKBA notes the quotation from PD v. KWW at paragraph 2.14 of the Consultation Paper that “orders of joint custody are [now] in no way exceptional”] - the experience of HKBA Members is that sole custody orders remain the norm, and that in contested custody cases a joint order is not usually nor ‘commonly’ the result.

CHAPTER THREE

31. HKBA has read and considered Chapter Three of the Consultation Paper. HKBA agrees with and supports the recommendations therein, subject to the following comments.

32. In the list of decisions requiring both parents’ express consent at paragraph 3.6(b)(i) of the Consultation Paper, HKBA suggests that change of the child’s name (i.e. first, middle or any name, whether English, Chinese or otherwise; and not merely the surname only) ought to be included.

33. In relation to paragraph 3.8(a) of the Consultation Paper concerning the proposed rights of third-parties to apply for orders - HKBA notes that the Reports of Social Welfare Officers often include interviews with and considerations regarding non-parent care-givers or other persons with regular or frequent contact with the child; such as grandparents (especially those that reside with one or other of the parents), other relatives of the parents and partners (married or unmarried) of the parents. These are often taken into
account by Social Welfare Officers in their reports and recommendations and also by the Family Court in making its determinations and decisions.

34. As matters present stand, non-parent care-givers only really become involved indirectly by way of being interviewed or as ‘witnesses’ in giving relevant (and often highly relevant) evidence; this is so even where the non-parent care-giver is in reality the primary care-giver and is intended to so continue in the future. Many parents themselves lead busy lives with hectic schedules, and the bedrock of consistency and daily-care is provided by primary care-givers who are not the parents themselves. The Family Court often finds these factors to be highly relevant.

35. It is far more desirable to furnish such non-parent care-givers with legal standing, as opposed to only hearing from them indirectly by way of interview or as witnesses providing evidence. HKBA support the removal of the limitations on the rights of third-parties.

36. Under the existing law which involves custody, care and control and access - HKBA anticipates that even if third-parties be given legal standing, it will only be in rare cases that custody or care and control orders would be made in favour of non-parent care-givers directly. However, HKBA believes that there will be many cases in which access orders or orders for maintenance could be more appropriately made to third-parties directly (e.g. access by grandparents or other close family members, or maintenance payment to primary care-givers directly).

37. Under the proposed new laws - whilst HKBA anticipates that it might be unusual for residence orders to be made to non-parent care-givers directly (as opposed to being made to the parent directly, with whom such third-party resides together), there are many cases in which contact orders or maintenance orders can and ought appropriately to be made to third-parties directly (e.g. contact by grandparents or other close family members, or maintenance payment to primary care-givers directly).
HKBA believes that whilst the threshold test of “living together for one year out of the previous three years” (paragraph 3.8(a) of the Consultation Paper) represents an appropriate benchmark for applying for residence orders and perhaps even maintenance orders; this is not appropriate for contact orders. The threshold test for legal standing without leave to apply for contact orders might more appropriately be defined by reference to ‘regularity of contact’ in times past and/or ‘closeness of familial relationship’ in terms of degree.

HKBA believes that the precise threshold test for each type of order is a matter that requires further consideration.

Insofar as domestic violence is concerned (paragraph 3.8(c) of the Consultation Paper) – quite apart from the other legislations and laws that provide protection and relief, domestic violence and abuse are matters that can also be addressed by way of “specific issues orders” and “prohibited steps orders” and/or the variation or suspension of “residence” and “contact” orders.

CHAPTER FOUR

In light of the existing law as it now stands (for which see above) and the methods and modes available and which will be available under the proposed laws (“specific issues orders” and “prohibited steps orders” and/or the variation or suspension of “residence” and “contact” orders, as well as other legislations and laws that provide protection and relief), HKBA does not believe and does not support the view that the proposed new legislations allow for any greater scope or ambit for harassment by abusive parents nor for worsening of domestic violence.

Under the existing laws, so-called ‘abusive parents’ are able to ‘harass’ by way of taking out Court applications, even where sole custody orders are in place. Under the proposed new laws, these matters can be addressed by way of “specific issues orders” and “prohibited steps orders” and/or the variation or
suspension of “residence” and “contact” orders. Moreover, there exist and will
exist other legislations and laws that provide additional protection and relief.

43. HKBA supports the views expressed in paragraphs 4.4 to 4.7 (in particular
paragraph 4.6) of the Consultation Paper.

CHAPTER FIVE

44. HKBA notes that with the exception of Singapore, all major common law
jurisdictions have abandoned and abolished the old laws through legislative
reform and have implemented new laws in replacement thereof.

45. The legislative refinements and adjustments that have occurred in major
common law jurisdictions are certainly matters that ought to be taken on board
in guiding the local legislation. However, whilst there is much to be learnt from
the developments and experiences of the major common law jurisdictions, in
particular as to how best to develop the local jurisprudence and how best to
implement the new model, HKBA notes that none of the major common law
jurisdictions have sought to resile from or undo the legislative reforms at any
time - and in none of the major common law jurisdictions has it been suggested
that the old laws were preferable or better. The fundamental merits of the
reform are not in question.

46. All legislation (whether old or new) have room for improvement, not least to
cater for changing societal views and concerns. That foreign legislations have
developed for the better and improved over time is of itself something to take
on board positively, and not to be viewed with scepticism.

47. A survey of the major common law jurisdictions does not support the view that
legislative reforms are unnecessary – indeed, the developments and experiences
abroad very much support the view that legislative reform is highly desirable,
and that Hong Kong has fallen very far behind in the modernisation and
development of the law and the associated jurisprudence and mind-set of thinking.

48. With the legislative refinements and adjustments that have occurred in the major common law jurisdictions, Hong Kong is now well placed to learn from these experiences abroad, to develop and implement the local law upon the shoulders of foreign developments, adjusted to cater for local considerations.

Singapore Women's Charter

49. The Women's Charter provides for joint parental responsibility i.e. the parents would be “mutually bound to co-operate” with each other *inter alia* in caring for the children:-

"PART VI

RIGHTS AND DUTIES OF HUSBAND AND WIFE

*Rights and duties*

46.-(1) Upon the solemnization of marriage, the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children."

"Joint Parental Responsibility Model"

50. The Law Reform Commission refers to “parental responsibility” not “joint parental responsibility”.

51. See *inter alia* the Executive Summary (emphasis supplied):-while parents exercising parental responsibility should be able to act independently in relation to the day-to-day care and best interests of the child (Recommendation 12), those decisions affecting the child which should require the other parent to be notified, or should require the other parent's express consent, should be specified in legislation (Recommendation 13).
52. HKBA is therefore of the view that the Consultation Paper is in error in its repeated references to the "joint parental responsibility model" purportedly recommended by the Law Reform Commission: this is Singaporean terminology.

"Fundamental Philosophical Differences"

53. As to shared parenting and residence, the Singapore Consultation and the Singapore Judiciary would have been bound by their Court of Appeal decision (CV v. CY) requiring the promotion of joint parental responsibility through the use of joint custody or no custody orders. This explains the Singapore Law Reform Division's conclusion that legislation was not necessary for the development of the law towards a "Joint Parental Responsibility Model".

54. The Hong Kong position is very different: we are bound by our Court of Appeal decisions including SMM v. TWM (HKCA; CACV No. 209/2009 09 June 2010), at para. 68, requiring legislation. As there are "fundamental philosophical differences" between the concepts, the law cannot be developed judicially in Hong Kong.

55. In SMM v. TWM, the then Chairman of the Bar, Russell Coleman S.C. submitted that the Court below could, in addition to joint custody, have imposed a shared care and control order, which, he argued, was akin to shared parenting and a shared residence order. However, Mr. Justice Cheung JA refused to do so, recognising that there are "fundamental philosophical differences" between the concepts, and that until legislation was introduced, declined to engage in discussion as to the extent to which shared residence was the same as a joint custody, care and control order.

56. The relevant passages in SMM v. TWM are cited in full, emphasis provided:-

"Difference between residence order and custody order
58. As to the difference between residence orders and custody orders, Hale LJ referred to the Law Commission's Report Law Com No. 172 (1988) on Guardianship and Custody:

"Apart from the effect on the other parent, which has already been mentioned, the main difference between a residence order and a custody order is that the new order should be flexible enough to accommodate a much wider range of situations. In some cases, the child may live with both parents even though they do not share the same household. It was never our intention to suggest that children should share their time more or less equally between their parents. Such arrangements will rarely be practicable, let alone for the children's benefit. However, the evidence from the United States is that where they are practicable they can work well and we see no reason why they should be actively discouraged. None of our respondents shared the view expressed in a recent case [Riley v. Riley] that such an arrangement, which had been working well for some years, should never have been made. More commonly, however, the child will live with both parents but spend more time with one than the other. Examples might be where he spends term time with one and holidays with the other, or two out of three holidays from boarding school with one and the third with the other. It is a far more realistic description of the responsibilities involved in that sort of arrangement to make a residence order covering both parents rather than a residence order for one and a contact order for the other. Hence we recommend that where the child is to live with two (or more) people who do not live together, the order may specify the periods during which the child is to live in each household. The specification may be general rather than detailed and in some cases may not be necessary at all."

59. The type of order suggested by the Law Commission is shared residence orders. As observed by Lord Hoffmann in Holmes-Moorhouse v. Richmond upon Thames LBC [2009] 1 WLR at [7] that nowadays in England shared residence orders are not unusual. They do not necessarily provide for the children to spend equal time with each parent.
Reliance on shared residence order

60. Apart from having joint custody of the child, the father wanted shared care and control as well. He argued that an order for joint custody and shared care and control would be akin to shared parenting and a shared residence order with the child sharing his time and residence with both parents (even if it does not necessarily have to mean time shared on an exactly equal basis).

.......... 

The proper approach

68. Until Hong Kong introduces residence orders by legislation, it is not helpful for me to enter into any discussion as to what extent a shared residence order is the same as a joint custody, care and control order. From the material I have just referred to, there are fundamental philosophical differences between the two types of orders.”

CONSULTATION QUESTIONS

57. To be read together with the above views and comments of HKBA, HKBA’s response to the Consultation Questions are as follows:-

Q1. Yes. For the reasons provided by LRC and for the reasons above-mentioned herein.

Q2. Yes. For the reasons provided by LRC and for the reasons above-mentioned herein.
Q3. Yes. For the reasons provided by LRC and for the reasons above-mentioned herein. Legislative reform is necessary and ought to be implemented as soon as practicable.

Q4. No. Promotion alone without legislative reform does not address the concerns of LRC and HKBA for the reasons above-mentioned herein.

Q5. See above for HKBA’s views, comments and suggestions above-mentioned herein.

Q6. Yes. HKBA’s additional reasons in support are as above-mentioned herein.

Q7. No. Promotion alone without legislative reform does not address the concerns of LRC and HKBA for the reasons above-mentioned herein. Further, case law development in the common law jurisdiction takes time and the coincidental appearance of a relevant and material fact scenario that happens to come together brings the relevant factors and matter before the attention of Appellate Courts. Moreover, this places the responsibility and burden upon private litigants to develop local jurisprudence – something that is not only unfair but is also a risk that private litigants are increasingly unwilling to undertake (especially when no necessarily tangible or substantial benefits are to be obtained – as in often the case in children matters).

Q8. What lessons do you think we can learn from these overseas jurisdiction (i.e. England and Wales, Australia and Singapore)? The HKBA considers that the experiences of England and Wales and Australia are more appropriate to Hong Kong than Singapore for the following reasons:-
a. Paragraph 5.28 of the December 2011 Consultation Paper states that the Women's Charter governs Singapore's laws on custody which, it is said, is in line with the study conducted by the Attorney-General's Chambers in 2005;

b. The situation in Singapore is clearly very different to the situation in Hong Kong where the current legislation is not governed by any gender specific charter but rather gender neutral legislation;

c. Furthermore the detailed and broad ranging consultation process which began in Hong Kong May 1996 and resulted in the March 2005 Report made 72 recommendations which unequivocally required legislative change;

d. The fact that Singapore's study concluded legislative change was not necessary in Singapore is no basis for ignoring Hong Kong's own consultation process which clearly recommended legislative change;

e. HKBA is of the view that too many definitions would result in increased litigation, and that Courts should be allowed more flexibility.

Q9. Which jurisdiction(s) do you think can serve as the best reference for Hong Kong in considering our way forward, and why?

a. HKBA is firmly of the view that England and Wales and Australia serve as the best references for Hong Kong;
b. Both jurisdictions recognize the importance of legislation and common law in the development of jurisprudence;

c. Both jurisdictions have actively implemented legislation to clarify and focus the direction of family law to be child centric, as opposed to parent centric.

Q10. See above for HKBA's views, comments and suggestions.

58. HKBA also notes and urges attention to the Judgment of the Honourable Mr. Justice Lam in PD v. KWW [2010] HKFLR 184 at §78 to §81, in particular the observation that had the Recommendations of LRC in 2005 regarding Child Custody and Access been taken forward and implemented, the rights and responsibilities of parents towards their children would have been more clearly and specifically defined, and appeal such as that which the Court of Appeal was dealing with could have been avoided. The Honourable Mr. Justice Lam also took the opportunity to urge the administration to make progress in these directions.

Dated: 8 May 2012