

## **LEGISLATIVE COUNCIL BRIEF**

### **DOMICILE BILL**

#### **INTRODUCTION**

    A At the meeting of the Executive Council on 23 January 2007, the Council ADVISED and the Chief Executive ORDERED that the Domicile Bill, at Annex A, should be introduced into the Legislative Council.

#### **THE PROBLEM**

2. Domicile has been defined as "the place or country which is considered by law to be a person's permanent home". It is an important legal concept, since it determines which system of law governs a person's legal status (see para.32 below for details). The existing rules for determining an individual's domicile are complex and confusing, and can sometimes lead to absurd results (see para.33 below).

#### **JUSTIFICATIONS**

3. The purpose of the Bill is to simplify the complex and confusing common law rules for determining a person's domicile, and to make it easier to ascertain a person's domicile. The Bill deals only with a natural person's domicile, not the domicile of a corporation.

4. In April 2005, the Law Reform Commission (the Commission) published a report entitled 'Rules for Determining Domicile' (the Report). This concluded that domicile is a complex and confusing area of the

common law. The Commission made a number of recommendations for legislative improvement, a summary of which is at Annex B. The Commission considers that, for practical purposes, the recommendations would not change the domicile of many people, with the exception of a married woman's domicile which will no longer depend on that of her husband.

5. The Commission also recommended a major change in the law relating to the domicile of children so that this will no longer be directly tied to the parents' domicile. This proposal will ensure that the domicile of children more closely reflects modern realities. The Commission also recommended the abolition of the concept of domicile of origin so that the domiciliary rule will be better tuned to modern conditions. The Bill incorporates the Commission's recommendations.

6. The concept is unconnected with, and distinct from, nationality, right of abode and citizenship. The central notion of domicile is that of a long-term relationship between person and place, on the basis of which the system of law governing certain issues (as explained in paragraph 32) is determined. The meaning of the other concepts is as follows –

- (a) Nationality is about the relationship between a citizen of a nation and the nation itself, customarily involving allegiance by the citizen and protection by the nation (Black's Law Dictionary). While a person can be stateless, or have more than one nationality at the same time, he cannot be without a domicile, and can have only a single domicile at any one time for a particular purpose.
- (b) Citizenship means the status of being a citizen. A citizen is a person who, by either birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil rights and protections. (Black's Law Dictionary)
- (c) The concept of domicile (居籍) does not have anything to do with a person's right of abode in Hong Kong (居港權) because

his right of abode does not depend on his domicile. Right of abode is a concept used in the context of the Immigration Ordinance and the Basic Law (e.g. BL 24). A person who enjoys the right of abode in Hong Kong has the right to land in Hong Kong and the right not to have imposed upon him any condition of stay in Hong Kong. He also has the right not to have a deportation order made against him; and not to have a removal order made against him. All Hong Kong permanent residents enjoy the right of abode. (Halsbury's Laws of HK, Vol. 14, para. 215.003) Regarding “居籍” as the equivalent of “domicile”, it shall be construed in accordance with section 10C of the Interpretation and General Clauses (Cap. 1), which provides –

“Where an expression of the common law is used in the English language text of an Ordinance and an analogous expression is used in the Chinese language text thereof, the Ordinance shall be construed in accordance with the common law meaning of that expression.”

Pursuant to section 10C, “居籍” as an equivalent of the common law expression of “domicile” will have the common law meaning of “domicile”. The expression “domicile” having nothing to do with “right of abode”, neither does “居籍” have anything to do with “居港權”. It should also be noted “居籍” is the established Chinese rendition of “domicile” (when used in relation to a natural person) in various existing ordinances of Hong Kong.

## **THE BILL**

7. The main provisions of the Bill are as follows.

### **Clause 3 – General rules**

8. Clause 3 of the Bill sets out general principles governing

domicile (Recommendation 14(b) of the Report). These principles reflect the existing common law and do not change that law:

- (a) no person can be without a domicile;
- (b) no person can at the same time and for the same purpose have more than one domicile; and
- (c) where an individual's domicile is in issue before any court in Hong Kong, the issue is to be determined by the law of Hong Kong.

#### **Clause 4 - Domicile of children**

9. To replace the existing concepts of domicile of origin and domicile of dependency, the Commission recommends a single test, which ties the child's domicile to the jurisdiction with which he is most closely connected, as well as two presumptions so as to simplify the law.

10. Clause 4 implements that recommendation –

- (a) by providing that a child is domiciled in the country or territory with which he is most closely connected;
- (b) by introducing 2 rebuttable presumptions to assist in the determination of the country or territory of closest connection, that is to say –
  - (i) where the child's parents are domiciled in the same country or territory and the child has his home with either or both of them, it shall be presumed, unless the contrary is proved, that the child is most closely connected with that country or territory; and
  - (ii) where the child's parents are not domiciled in the same country or territory and the child has his home with one of them, but not with the other, it shall be presumed, unless the contrary is proved, that the child is most closely connected with the country or territory in which

the parent with whom he has his home is domiciled.

#### **Clause 5 - Domicile of adults**

11. The existing rules on the acquisition by an adult of a domicile of choice have long been criticised as artificial and uncertain. They are artificial because a person's domicile of origin persists long after any connection with the country concerned has ended, making it difficult to establish a new domicile of choice. They lead to uncertainty because of difficulties in determining a person's intention.

12. Under the existing law, the act required to acquire domicile is "residence" which the courts have held "means very little more than physical presence". The word "residence", however, gives the impression of connoting something more than mere physical presence. The Commission is of the view that "presence" in the country concerned can best bring out the essence of the act required to acquire a domicile.

13. According to some older authorities, the existing law also requires an intention to reside permanently in a place before a person can acquire a new domicile. The courts have criticised this stringent requirement as unrealistic since it may well mean that "no man would ever have a domicile at all, except his domicile of origin". The Commission favours a different test, namely, an intention to make a home in the country concerned indefinitely.

14. Clause 5(2) implements the above recommendations.

#### **Clauses 6 and 7 – Acquiring a domicile in Hong Kong and another country or territory**

15. The Commission's recommendations in relation to the question whether the presence in the country concerned has to be lawful in order to acquire a domicile are implemented by clauses 6 and 7.

16. Clause 6(1) sets out a general rule that lawful presence in Hong Kong is required for an adult to acquire a domicile in Hong Kong. Clause 6(2) states that an adult's presence in Hong Kong is to be

presumed to be lawful unless the contrary is proved. Under clause 6(3), in exceptional circumstances where strict adherence to the general rule would result in injustice, an adult may acquire a domicile in Hong Kong even when his presence in Hong Kong is unlawful.

17. Clause 7 provides that, in deciding whether an adult acquires a domicile in a country or territory other than Hong Kong, one of the factors to be considered is whether his presence in that country or territory is lawful by the laws of that country or territory.

### **Clause 8 – Domicile of adults under disability**

18. Two aspects of the existing law on domicile of the mentally incapacitated lead to artificiality. First, the domicile of a mentally incapacitated person freezes at the onset of his incapacity. Second, if his incapacity commences before the age of majority, his domicile will be determined as if he were a child as long as he remains incapacitated. The Commission recommends that:

- (a) a mentally incapacitated adult should be domiciled in the country with which he is most closely connected;
- (b) a mentally incapacitated adult, on recovery of his capacity, should retain the domicile which he last held before his recovery, and he may then acquire a domicile of his choice; and
- (c) the relevant provision should be phrased so as to cover not only the mentally incapacitated, but also persons in a comatose, vegetative or semi-vegetative state, and any other person who for one reason or another is not able to form the required intention.

Clause 8 implements those recommendations.

### **Clause 9 – Continuity of domicile**

19. The Commission recommends adopting the rule that a person's domicile will continue until he acquires a new one. Clause 9 implements that recommendation.

### **Clause 10 – Domicile in country comprising two or more territories**

20. Under existing Hong Kong law, where a person lives in a federal or composite state without deciding in which constituent part of that state to settle permanently or indefinitely, he will not acquire a new domicile in any constituent part of that state.

21. Clause 10 implements a recommendation in the Report by providing that an adult who is present in a country comprising two or more territories, and who intends to make a home somewhere in that country for an indefinite period but has not formed an intention to make a home in any particular territory in that country, will be domiciled in the constituent territory with which he is most closely connected.

### **Clause 11 – Standard of proof**

22. Under existing law, the standard of proof may be higher than a mere balance of probabilities where the domicile to be displaced is a domicile of origin. Clause 11 implements the recommendation in the Report by providing that the normal civil standard of proof on a balance of probabilities applies in all disputes about domicile.

### **Clauses 12 and 13 – Domicile before and after commencement date**

23. If the rules for determining domicile are reformed, it is likely that the existing domicile of some persons may be affected. It is therefore necessary to consider the transition from the existing rules to the new rules. The Commission recommends that:

- (a) the new legislation should not have retrospective effect;

- (b) a person's domicile at any time before the commencement date of the new legislation should be determined as if the legislation had not been passed; and
- (c) his domicile at any time on or after that date should be determined as if the new legislation had always been in force.

Clauses 12 and 13 implement those recommendations. Clause 13(3) provides that, for the purposes of determining the domicile of a person on or after the commencement date, various common law rules (including that relating to the domicile of origin) are abolished.

**Clauses 14 and 15 – Consequential Amendments**

24. Clauses 14 and 15 contain consequential amendments to the Matrimonial Causes Ordinance (Cap. 179) (MCO).

**LEGISLATIVE TIMETABLE**

25. The legislative timetable will be as follows –

Publication in the Gazette	26 January 2007
First Reading and commencement of Second Reading debate	7 February 2007
Resumption of Second Reading debate, committee stage and Third Reading	To be notified

**IMPLICATIONS OF THE PROPOSAL**

26. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no economic, productivity, environmental or sustainability implications. There are also no financial or civil service implications.

27. The Bill does not contain any express binding effect provision.

## **PUBLIC CONSULTATION**

28. The Commission conducted a full public consultation exercise on its provisional recommendations between March and May 2004. More than 50 bodies were consulted, including the Law Society, the Bar Association, legal academics, chambers of commerce, business associations and political parties. The Commission's consultation paper was published in conjunction with a press release to both the print and broadcast media and was also made available on the Commission's website. The Legislative Council's Panel on Administration of Justice and Legal Services was consulted on the Commission's proposals at its meeting on 26 April 2004 and made no adverse comment. The Commission's consultation paper was generally well received and was supported by the majority of those who commented on the proposals.

29. In May 2006, the Department of Justice consulted on the legislative proposals to implement the Commission's recommendations. The Department of Justice sent both a consultation paper and a draft Bill to a number of parties, including the Law Society of Hong Kong, the Hong Kong Bar Association, the Faculty of Law of the University of Hong Kong, the School of Law of the City University of Hong Kong and the School of Law of the Chinese University of Hong Kong. The Hong Kong Bar Association gave comments on certain technical details of the draft Bill but has no objection to the proposal. The others being consulted expressed support for the draft Bill or made no comment. The Legislative Council's Panel on Administration of Justice and Legal Services was consulted on the legislative proposals at its meeting on 27 November 2006 and did not object to the legislation being introduced.

## **PUBLICITY**

30. A press release is to be issued on 24 January 2007. A spokesman will be available to answer enquiries.

## **BACKGROUND**

31. Domicile has been defined as “the place or country which is considered by law to be a person's permanent home”. The concept of domicile is different from that of nationality, citizenship and right of abode.

32. The concept of domicile is used in various areas of both common law and statute law to determine the system of law which should govern a person's civil status and certain aspects of the administration of his or her property, including:

(a) Legal capacity to marry

Legal capacity to marry is governed by the law of each party's antenuptial domicile. A marriage is valid in respect of legal capacity if each of the parties has capacity to marry under the law of his or her antenuptial domicile.

(b) Succession to an intestate's movables

Succession to an intestate's movables, wherever situated, is governed by the law of his domicile at the date of his death. By contrast, all questions of succession to an intestate's immovables are governed by the *lex situs* (i.e. the law of the place where the land is situated).

(c) Personal capacity to make a will

A testator's personal capacity to make a will of movables is governed by the law of his domicile. Personal capacity is determined by criteria which relate to a person himself, rather than his property. Those criteria, according to which domiciliary law applies, may include his physical or mental state, or his age or marital status.

(d) Formal validity of a will

A will is treated as properly executed if its execution conformed to the internal law in force in the territory where it was executed, or in the territory where, at the time of its execution or of the testator's death, the testator was domiciled or had his habitual residence, or was a national.

(e) Jurisdiction of court in proceedings for divorce, etc

The court has jurisdiction in proceedings for divorce and nullity if either party to the marriage was domiciled at the date of the petition or habitually resident for a period of three years before that date, in Hong Kong. The court has jurisdiction in proceedings for judicial separation if either party to the marriage was domiciled at the date of the petition in Hong Kong.

(f) Jurisdiction of court in proceedings for presumption of death and dissolution of marriage

The court has jurisdiction in proceedings for presumption of death and dissolution of marriage if a petitioner was domiciled at the date of the petition or habitually resident for a period of three years before that date, in Hong Kong.

(g) Declarations of legitimacy, etc

A person may, if he is domiciled in Hong Kong, apply by petition to the court for a decree declaring that he is a legitimate child of his parents; or that the marriage of his parents or of his grand-parents was a valid marriage; or that his own marriage was a valid one.

(h) Recognition of overseas divorces or legal separations

An overseas divorce or legal separation will be recognised in Hong Kong if, at the time of the institution of the proceedings

in the country concerned, either spouse was domiciled in, habitually resident in, or a national of, that country.

(i) Legitimation by subsequent marriage of parents

If the father of an illegitimate child is domiciled in Hong Kong at the date of his subsequent marriage with the mother of the child, the child will be legitimated.

(j) Declaration of a person's status

If a person is domiciled or habitually resident in Hong Kong, he may apply to the court for a declaration that (1) a person named in his application is or was his parent; (2) he is a legitimate child of his parents; or (3) he has become a legitimated person.

(k) Service of process out of the jurisdiction

Service of a writ out of the jurisdiction is permissible in Hong Kong if relief is sought against a person domiciled or ordinarily resident within the jurisdiction, or the claim is made for the administration of the estate of a person who died domiciled within the jurisdiction.

(l) Direct application of Chinese law and custom as Hong Kong domestic law

The direct application of Chinese law and custom as Hong Kong domestic law (e.g., in relation to a union of concubinage entered into before 7 October 1971) is confined to Chinese persons domiciled in Hong Kong. Hong Kong law does not treat Chinese law and custom as the personal law of all ethnic Chinese, regardless of their domicile. Merely being an ethnic Chinese or a Chinese inhabitant of Hong Kong does not suffice.

33. Despite the importance of the concept of domicile, the rules for determining a person's domicile are unnecessarily complicated and technical, and sometimes lead to absurd results. Some examples of anomalies are as follows –

- (a) A domicile of origin is given to every person at birth by operation of law. It reflects the domicile of the relevant parent at the time of the child's birth. Where a child is born or where his parents live is irrelevant. As a consequence, the same domicile of origin can be passed on from generation to generation even though few members of the family have actually lived in the country of their domicile. Further, a person's domicile of origin revives throughout his life at any time when he loses his domicile of choice without acquiring a new domicile of choice. This can result, for example, in a person finding out late in life that he has the domicile of a jurisdiction with which he has had no connection since childhood.
- (b) The rules determining the domicile of dependency of children differ between legitimate and illegitimate children. In general terms, a legitimate child's domicile of dependency follows that of his father, while an illegitimate child's follows that of his mother. This is a well-settled rule, but it can lead to some strange results. For instance, where the parents of a legitimate child live apart, and the child lives with the mother in England and has no home with the father in Hong Kong, the child's domicile still follows that of his father. It is also difficult to justify in principle why the domicile of a child depends on whether or not his parents are married.
- (c) A married woman's domicile is the same as, and changes with, her husband's domicile. This rule applies even where the spouses live apart in different countries, whether or not this is according to a formal separation agreement. The rule applies even where a wife has obtained a decree of judicial separation.

C

34. Annex C tabulates the effect of the current rules and the proposed rules for comparison. The table attempts to illustrate the anomalies of the current rules and how the proposed rules are intended to rationalize the mechanism of determining a natural person's domicile. As a person's domicile can only be definitively determined by the courts after considering the complete factual matrix, the determination of the domicile of the persons in question in these illustrations is included for reference only.

### **ENQUIRY**

35. Any enquiry on this brief can be addressed to Ms Kitty Fung, Senior Government Counsel, Legal Policy Division, Department of Justice, at Tel. No. 2867 4226.

Department of Justice

24 January 2007

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**DOMICILE BILL**

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**Matrimonial Causes Ordinance**

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# A BILL

To

Consolidate and reform the law for determining the domicile of individuals.

Enacted by the Legislative Council.

## PART 1

### PRELIMINARY

#### 1. Short title and commencement

(1) This Ordinance may be cited as the Domicile Ordinance.

(2) This Ordinance shall come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

#### 2. Interpretation

(1) In this Ordinance –

“child” (未成年人) means an individual who has not attained the age of 18 (whether or not the individual is married under the law of any country or territory and whether or not the individual is a parent), and “adult” (成年人) shall be construed accordingly;

“court” (法院) includes a magistrate;

“parents” (父母), in relation to a child, means the father and the mother of that child and includes –

(a) the adoptive parents of the child;

(b) the step-parents of the child; and

(c) the parents of the child who are not married to each other.

(2) In this Ordinance, a reference to a country or territory, in relation to an individual whose domicile at any time is in question, is a reference to a country or territory that has its own system of law at that time.

## PART 2

### DETERMINATION OF DOMICILE

#### **3. General rules**

(1) Every individual has a domicile.

(2) No individual has, at the same time and for the same purpose, more than one domicile.

(3) Where the domicile of an individual is in issue before any court in Hong Kong, that court shall determine the issue in accordance with the law of Hong Kong.

#### **4. Domicile of children**

(1) A child is domiciled in the country or territory with which he is for the time being most closely connected.

(2) In determining which country or territory a child is for the time being most closely connected with, the court shall take into account all relevant factors, including which country or territory the child intends to have his home in.

(3) Where the child's parents are domiciled in the same country or territory and the child has his home with either or both of them, it shall be presumed, unless the contrary is proved, that the child is most closely connected with that country or territory.

(4) Where the child's parents are not domiciled in the same country or territory and the child has his home with one of them, but not with the other, it shall be presumed, unless the contrary is proved, that the child is most closely connected with the country or territory in which the parent with whom he has his home is domiciled.

#### **5. Domicile of adults**

(1) On becoming an adult, an individual retains (subject to subsection

(2)) the domicile that he had immediately before he becomes an adult.

(2) Subject to sections 6, 7 and 8, an adult acquires a new domicile in a country or territory if –

- (a) he is present there; and
- (b) he intends to make a home there for an indefinite period.

#### **6. Acquiring a domicile in Hong Kong**

(1) An adult does not acquire a domicile in Hong Kong under section 5(2) unless he is lawfully present in Hong Kong.

(2) An adult's presence in Hong Kong shall be presumed to be lawful unless the contrary is proved.

(3) In exceptional circumstances where it is proved that strict adherence to subsection (1) would result in injustice, an adult may despite subsection (1) acquire a domicile in Hong Kong even though his presence in Hong Kong is unlawful.

#### **7. Acquiring a domicile in another country or territory**

In deciding for the purposes of section 5(2) whether an adult acquires a domicile in a country or territory other than Hong Kong, one of the factors that shall be considered is whether his presence in that country or territory is lawful by the law of that country or territory.

#### **8. Domicile of adults under disability**

(1) An adult lacking the capacity to form the intention necessary for acquiring a domicile is domiciled in the country or territory with which he is for the time being most closely connected.

(2) Whether an adult lacks that capacity is a question of fact.

(3) When that capacity is restored to an adult, he retains the domicile that he had immediately before the capacity was restored.

## **9. Continuity of domicile**

Where an individual is domiciled in a country or territory as determined in accordance with this Ordinance, he continues to be so domiciled until he acquires another domicile, whether under section 4, 5, 8 or 10.

## **10. Domicile in country comprising 2 or more territories**

In any case where –

- (a) an adult is present in a country comprising 2 or more territories and intends to make a home in that country for an indefinite period; but
- (b) the application to him of the other provisions of this Ordinance does not show that he is domiciled in any particular territory within the country,

then (notwithstanding the other provisions of this Ordinance) he shall be treated, until he acquires another domicile (whether under section 5 or 8 or this section), as domiciled in the territory within that country with which he is for the time being most closely connected.

## **11. Standard of proof**

Any fact that needs to be proved for the purposes of this Ordinance shall be proved on a balance of probabilities.

## **12. Domicile before commencement date**

The domicile that an individual had at a time before the commencement date of this Ordinance shall be determined as if this Ordinance had not been enacted.

## **13. Domicile on or after commencement date**

(1) The domicile that an individual has at a time on or after the commencement date of this Ordinance shall be determined as if this Ordinance had always been in force.

(2) For the purposes of a determination under subsection (1), this Ordinance applies in place of –

- (a) the rules of common law for determining the domicile of an individual that are inconsistent with this Ordinance; and
- (b) the enactment repealed by section 14.

(3) For the purposes of a determination under subsection (1) and without prejudice to subsection (2)(a), this Ordinance abolishes the following rules of common law –

- (a) the rule that a domicile of origin is given to every individual at birth by operation of law;
- (b) the rule that a child has a domicile of dependency;
- (c) the rule that a married woman has at all times the domicile of her husband;
- (d) the rule on the acquisition of the domicile of choice based on residence and intention of permanent residence;
- (e) the rule on the revival of the domicile of origin;
- (f) the rule that a mentally incapacitated adult retains the domicile that he had when he became mentally incapacitated for so long as he remains in that condition; and
- (g) the rule that the standard of proof required to prove that an individual's domicile changes from a domicile of origin to a domicile of choice is more onerous than that required to prove a change from a domicile of choice to another.

(4) Except as provided in this section, nothing in this Ordinance affects any rules of common law.

## PART 3

### CONSEQUENTIAL AMENDMENTS

#### Matrimonial Causes Ordinance

#### 14. Interpretation (Part III)

Section 11C(2) of the Matrimonial Causes Ordinance (Cap. 179) is repealed.

#### 15. Certain existing rules of recognition to continue in force

Section 59(a) is amended by repealing “the spouses’ domicile” and substituting “either spouse’s domicile”.

#### Explanatory Memorandum

The object of this Bill is to implement the recommendations of the Law Reform Commission’s report on “Rules for Determining Domicile” published in April 2005 (“the Report”). Domicile is what is termed in private international law a “connecting factor”: it determines under which system of law and within the jurisdiction of the courts of which country or territory certain issues (principally related to an individual’s status or property) are to be determined. The recommendations in the Report seek to clarify and simplify the law for determining an individual’s domicile, and introduce certain changes to bring the law in line with modern conditions.

2. Part 1 provides for preliminary matters (short title, commencement and definitions). As defined in clause 2 –

- (a) a child is an individual under 18, irrespective of whether the individual is married or is a parent (see recommendation 5 of the Report);

- (b) a reference to parents includes adoptive parents, step-parents and parents of a child who are not married to each other;
- (c) a country or territory means a country or territory that has its own system of law (the concept is also referred to by some legal writers as a law district).

3. Part 2 (comprising clauses 3 to 13) contains the rules for determining the domicile of an individual.

4. Clause 3 sets out the general rules as to domicile: that every individual has a domicile, that no individual has, at the same time and for the same purpose, more than one domicile, and that where an individual's domicile is in issue before any court in Hong Kong, the issue is to be determined by the law of Hong Kong. This clause implements recommendation 14(b) of the Report.

5. Clause 4 implements recommendation 4 of the Report –

- (a) by providing that a child is domiciled in the country or territory with which he is most closely connected;
- (b) by introducing 2 rebuttable presumptions to assist in the determination of the country or territory with which a child is most closely connected, that is to say –
  - (i) where the child's parents are domiciled in the same country or territory and the child has his home with either or both of them, it shall be presumed, unless the contrary is proved, that the child is most closely connected with that country or territory; and
  - (ii) where the child's parents are not domiciled in the same country or territory and the child has his home with one of them, but not with the other, it shall be presumed, unless the contrary is proved, that the child is most closely connected with the

country or territory in which the parent with whom he has his home is domiciled.

6. Under clause 5(1), an individual will retain his last childhood domicile on becoming an adult (i.e. on reaching the age of 18), unless he acquires a new domicile. Two requirements are set out in clause 5(2) for the acquisition of a new domicile by an adult, namely –

- (a) he is present in another country or territory; and
- (b) he intends to make a home in that country or territory for an indefinite period.

Clause 5 implements recommendations 6(a) and 7 of the Report.

7. Clauses 6 and 7 implement recommendation 6(b) and (c) of the Report. Clause 6(1) sets out the general rule that lawful presence in Hong Kong is required for an adult to acquire a domicile in Hong Kong. Clause 6(2) states that an adult's presence in Hong Kong is to be presumed to be lawful unless the contrary is proved. Under clause 6(3), in exceptional circumstances where strict adherence to the general rule would result in injustice, an adult may acquire a domicile in Hong Kong even when his presence in Hong Kong is unlawful. Clause 7 provides that, in deciding whether an adult acquires a domicile in a country or territory other than Hong Kong, one of the factors to be considered is whether his presence in that country or territory is lawful by the law of that country or territory.

8. Clause 8 implements recommendation 10 of the Report and provides that an adult who lacks the capacity to form the intention necessary for acquiring a new domicile is domiciled in the country or territory with which he is most closely connected. The reference to an adult who lacks that capacity covers an adult who lacks the capacity for whatever cause, and includes an adult who is in a comatose, vegetative or semi-vegetative state.

9. Clause 9 provides for continuity of domicile. This together with the abolition of the doctrine of revival of domicile of origin (see paragraph 12(b) below) implements recommendation 8 of the Report.

10. Clause 10 makes special provisions for the acquisition of a domicile in a country comprising 2 or more territories. This implements recommendation 12 of the Report by providing that an adult who is present in a country comprising 2 or more territories and intends to make a home somewhere in that country for an indefinite period, but has not formed an intention to make a home in any particular territory in that country, will be domiciled in whichever of the constituent territories with which he is most closely connected.

11. Clause 11 implements recommendation 11 of the Report and provides that the normal civil standard of proof on a balance of probabilities applies in proving any fact for the purposes of the new law, if enacted.

12. Clauses 12 and 13 implement recommendation 13 of the Report –

(a) The rules in clauses 3 to 11 do not apply in determining the domicile that an individual had before the commencement date of the Bill as enacted.

(b) In determining the domicile that an individual has on or after the commencement date of the Bill as enacted, the rules in clauses 3 to 11 apply as if they had always been in force, in place of the rules of common law for determining the domicile of an individual that are inconsistent with this Bill and the enactment repealed by clause 14. In particular, the common law rules on the domicile of origin and the domicile of dependency of children (which rules differentiate between children born in or out of wedlock), the common law rules on the domicile of dependency of married women, the acquisition of the domicile of choice (based on residence and intention of permanent residence) and the revival of domicile of origin as well as the common law rule that a mentally incapacitated adult retains his domicile immediately before incapacitation are abolished (recommendations 2, 3, 8 and 9 of the Report).

The rule that the standard of proof required to prove that an individual's domicile changes from a domicile of origin to a domicile of choice is more onerous than that required to prove a change from a domicile of choice to another will also be discarded, as the normal civil standard of proof will apply under clause 11.

13. Part 3 (comprising clauses 14 and 15) contains consequential amendments to the Matrimonial Causes Ordinance (Cap. 179) ("that Ordinance") –

- (a) Section 11C(2) of that Ordinance allows a married woman to have her own independent domicile for certain limited purposes (e.g., the jurisdiction of court in respect of divorce, nullity, judicial separation). This provision is an exception to the common law rule of domicile of dependency of a married woman. With the abolition of that rule, that provision will no longer be necessary. Therefore, clause 14 repeals that section 11C(2).
- (b) Under section 59 of that Ordinance, a divorce or legal separation obtained in, or is recognized as valid in, the country of a married couple's domicile is recognized as valid in Hong Kong. With the abolition of the domicile of dependency of a married woman, the husband and the wife may have different domiciles. Clause 15, therefore, amends that section 59 so that a divorce or legal separation obtained in, or is recognized as valid in, the country of either spouse's domicile is recognized as valid in Hong Kong.

## Chapter 5

### Summary and practical effects of recommendations

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#### Summary of recommendations

#### Chapter 3 - Should domicile be retained as a general connecting factor?

5.1 Domicile should be retained as a general connecting factor, but the existing rules for determining a person's domicile should be modified as recommended in this Report. (*Recommendation 1*)

#### Chapter 4 - The law in other jurisdictions, options for reform and recommendations

5.2 We recommend that the concept of domicile of origin and that of domicile of dependency should be discarded. (*Recommendation 2*)

5.3 We recommend that there should be no differentiation between legitimate and illegitimate children in determining their domicile. (*Recommendation 3*)

5.4 We recommend the following rules for determining a child's domicile:

- (a) a child's domicile should be in the country with which he is most closely connected;
- (b) where a child's parents have their domicile in the same country and the child has his home with either or both of them, he is presumed to be domiciled in that country, unless he is proved to be most closely connected with another country; and
- (c) where a child's parents are not domiciled in the same country and the child has his home with only one of them, he is presumed to be domiciled in the country where the parent with whom he has his home is domiciled, unless he is proved to be most closely connected with another country.

In this context, "parents" includes adoptive parents of a child. In applying the

closest connection test, the courts should take account of all relevant factors, including the child's intention. (*Recommendation 4*)

5.5 We recommend that any person who is not mentally incapacitated may acquire a domicile of his choice once he attains the age of 18. (*Recommendation 5*)

5.6 We recommend that :

- (a) the act necessary for a person of full age and capacity to acquire a domicile should be presence in the country concerned;
- (b) as a general rule, lawful presence in Hong Kong should be required to acquire a domicile in Hong Kong, but in exceptional circumstances, where strict adherence to the rule would lead to injustice, the court should have discretion to depart from the rule; and a person's presence should be presumed to be lawful, unless and until the contrary is established; and
- (c) in deciding whether an individual has acquired a domicile in a country other than Hong Kong, one of the factors to be considered by the Hong Kong courts should be whether or not the presence in that country is lawful by the laws of that country. (*Recommendation 6*)

5.7 We recommend that the requisite intention for a person of full age and capacity to acquire a domicile should be that the individual intends to make a home in the country concerned for an indefinite period. (*Recommendation 7*)

5.8 We recommend that the domicile a person has at any time should continue until he acquires a different one, whether by choice or by operation of law. (*Recommendation 8*)

5.9 We recommend that the domicile of dependency of married women should be abolished. (*Recommendation 9*)

5.10 We recommend that:

- (a) a mentally incapacitated adult should be domiciled in the country with which he is most closely connected;
- (b) a mentally incapacitated adult, on recovery of his capacity, should retain the domicile which he last held before his recovery, and he may then acquire a domicile of his choice;
- (c) the relevant provision should be phrased so as to cover not only the mentally incapacitated, but also persons in a comatose, vegetative or semi-vegetative state, and any other person who for one reason or another is not able to form the required intention. (*Recommendation 10*)

5.11 We recommend that the normal civil standard of proof on a balance of probabilities should apply in all disputes about domicile. *(Recommendation 11)*

5.12 We recommend that a person who is present in a federal or composite state and intends to make his home there indefinitely should, if not held to be domiciled in any law district within that state under the general rules recommended in this Report, have his domicile in the law district with which he is for the time being most closely connected. *(Recommendation 12)*

5.13 We recommend that:

- (a) the Recommended Legislation should not have retrospective effect;
- (b) a person's domicile at any time before the commencement date of the Recommended Legislation should be determined as if the legislation had not been passed;
- (c) his domicile at any time after that date should be determined as if the Recommended Legislation had always been in force. *(Recommendation 13)*

5.14 We recommend:

- (a) that the Recommended Legislation on the rules for determining natural persons' domicile should be as comprehensive as possible;
- (b) that the Recommended Legislation should set out the following general rules on domicile:
  - no person can be without a domicile;
  - no person can at the same time for the same purpose have more than one domicile;
  - for the purposes of a Hong Kong rule of the conflict of laws, the question of where a person is domiciled is determined according to Hong Kong law;
- (c) that the Recommended Legislation should include a saving provision for the existing common law rules which are not inconsistent with the new statutory rules. *(Recommendation 14)*

## **Practical effects of recommendations**

5.15 We hope that the recommendations in this Report will improve this complex and confusing area of common law by simplifying the concept of domicile and making the ascertainment of a person's domicile easier.

Annex 3 tabulates the current rules and the proposed rules for comparison. In practical terms, we do not think that the recommendations would change the domicile of many people, with the exception of the proposed abolition of the married women's domicile, which would change the domicile of some married or recently divorced women. Those changes may have already taken effect as a consequence of Article 8 of the Basic Law., but we feel it is important to resolve this matter clearly, to remove any uncertainty, to deal with transitional problems expressly, and to eliminate a discriminatory rule from Hong Kong law once and for all.

5.16 Another major change is that relating to the domicile of children. The existing rules are essentially based on the Victorian idea of the father being the *pater familias*, and we believe that our proposals would more closely reflect modern realities. Lastly, the abolition of the concept of domicile of origin may also impact on some people's domicile. It is worth mentioning that the formation of the concept and its special tenacity were influenced by the desire of those resident in colonies overseas at the height of the British Empire more than a century ago to have their private and family life governed by the law of their homeland. In a different age, we question the validity of this special bias in favour of a person's first domicile, especially in the light of greatly increased mobility. We believe that the abolition of domicile of origin would make the domiciliary rules more in tune with the modern world.

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**TABLE COMPARING THE EFFECTS OF THE CURRENT RULES  
WITH THE PROPOSED RULES**

	<i>Under the Current Rules</i>	<i>Under the Proposed Rules</i>
<p><b><i>Abolition of domicile of origin</i></b></p> <p>(1) F and his wife (M) lived and were domiciled in Hong Kong when C, their child, was born within wedlock. M then remarried an Englishman and moved permanently to England with C.</p>	<p>C's domicile of origin follows F's domicile at the time of C's birth (ie Hong Kong), even though C has only maintained a loose link to Hong Kong after moving to England. In addition, C's domicile of dependency, during F's lifetime, is the same as, and changes with, F's domicile.</p>	<p>There will be no domicile of origin, and C, as a child, will be presumed to be domiciled in the jurisdiction where M, the parent with whom he has his home, is domiciled. In this case, if M has a domicile in England (which is probably the case), C will be presumed to be domiciled there. If, for any reason, the presumption does not apply, C will be domiciled in the jurisdiction with which he is most closely connected. In other words, his domicile will not artificially follow F's, and the court will consider all the relevant factors before determining the jurisdiction with which he has the closest connection. Depending on the facts, that is likely to be England.</p>
<p>(2) When B was born, his parents</p>	<p>Since B had abandoned his New Zealand domicile</p>	<p>There will be no domicile of origin and so no</p>

	<i><b>Under the Current Rules</b></i>	<i><b>Under the Proposed Rules</b></i>
were domiciled in Hong Kong. At the age of 5, he moved with his parents to New Zealand, and then acquired a domicile of choice there on reaching the age of majority. He left New Zealand at the age of 50 with the intention of settling permanently in Australia. On his way to Australia, B died in a plane accident.	of choice and had not acquired a new domicile, his Hong Kong domicile of origin, received at birth, would revive upon the abandonment. This is so, even though he only had had a weak connection with Hong Kong.	revival of it. A person's domicile will continue until he acquires another one. Since B had not acquired a new domicile when he died, his New Zealand domicile would persist.
<b><i>Domicile of children</i></b>  (3) B, a child born within wedlock, migrated to Sydney from Hong Kong with his parents who then acquired a New South Wales domicile. Both of his parents subsequently died in Sydney and B returned to Hong Kong to be brought up by his grand-parents.	B's domicile of dependence follows his father's (ie New South Wales). Despite the fact that B has not returned to, and has had a weak connection with, Sydney, his New South Wales domicile of dependence persists until he acquires a domicile of choice after attaining the age of majority.	B will be domiciled in the jurisdiction with which he is most closely connected, and the presumptions will not apply as his parents have already passed away. His domicile will not artificially follow his deceased parents', and the court will consider all the relevant factors before determining the jurisdiction with which he has the closest connection. Depending on the facts, that is probably Hong Kong.
<b><i>Domicile of Married women</i></b>  (4) W, domiciled in Hong Kong,	W is still domiciled in France because of her domicile of dependency as a married woman,	W's domicile would be determined in the same

	<i>Under the Current Rules</i>	<i>Under the Proposed Rules</i>
<p>married H who was domiciled in France. The couple lived in France after the wedding in Hong Kong. A few years later, W went back to Hong Kong, and then obtained a decree of judicial separation.</p>	<p>despite the decree of judicial separation and the fact that the couple are living in different jurisdictions.</p>	<p>way as that of other adults, instead of artificially linking her domicile to her separated husband's. Accordingly, W may be domiciled in Hong Kong, provided that she intends to make her home in Hong Kong indefinitely.</p>
<p><b><i>Domicile of adults under disability</i></b></p> <p>(5)</p> <p>B, domiciled in Hong Kong, became a person under disability when he was 25 years old and was then sent to Shanghai for treatment so that his sister, his remaining next-of-kin, could take care of him. B has already lived in Shanghai for a number of decades since then.</p>	<p>B's Hong Kong domicile persists so long as he remains a person under disability.</p>	<p>B will be domiciled in the jurisdiction with which he is most closely connected. The court will consider all the relevant factors before determining the jurisdiction with which he has the closest connection. Depending on the facts, that may be the Mainland of the PRC.</p>
<p>(6)</p> <p>C, a child born within wedlock, became a person under disability. At 16, he was sent by his father (F), domiciled in Hong Kong, to an institution in Guangdong province and has</p>	<p>C's domicile of dependency continues even though he has already passed the age of majority. Hence, his domicile changes with that of his father. C is, therefore, domiciled in British Columbia, even though he has never been there.</p>	<p>C will be domiciled in the jurisdiction with which he is most closely connected. The court will consider all the relevant factors before determining the jurisdiction with which he has the closest connection. Depending on the facts, that may be the Mainland of the PRC.</p>

	<i>Under the Current Rules</i>	<i>Under the Proposed Rules</i>
remained there since then. C was still a person under disability at 29 when F migrated to Vancouver permanently so that F could be looked after by F's married daughter.		
<p><b><i>Domicile in a federal or composite state</i></b></p> <p>(7)</p> <p>B, with a Hong Kong domicile of origin, left Hong Kong at the age of 2 and later acquired a domicile of choice in New Zealand. At 60, he moved to Australia with the intention of settling there permanently. He has been living in New South Wales for a few months, without deciding in which city to make his home.</p>	<p>Since B has abandoned his New Zealand domicile without acquiring a new one, his Hong Kong domicile of origin would revive although he has rarely returned to Hong Kong and has had a weak connection with it since the age of 2.</p>	<p>B will be domiciled in the jurisdiction within Australia with which he is most closely connected. The court will consider all the relevant factors before determining the jurisdiction with which he has the closest connection. Depending on the facts, that may be New South Wales.</p>

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