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Panel on Welfare Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 8 February 2010**

**Reports of the Law Reform Commission on Guardianship of Children
and on International Parental Child Abduction**

Purpose

This paper provides background information on the reports of the Law Reform Commission on Guardianship of Children and on International Parental Child Abduction.

Background

2. The topic of guardianship and custody of children was referred to the Law Reform Commission by the then Attorney General and the Chief Justice in April 1995. The Law Reform Commission appointed a Subcommittee on Guardianship and Custody in May 1996 to consider the law relating to guardianship and custody of children, and to make proposals to the Commission. The Subcommittee published in 1998 a consultation paper which recommended changes in the law relating to guardianship and custody of children, non-adversarial dispute resolution processes, and the law on child abduction.

3. Between 2002 and 2005, the Law Reform Commission published four reports on the "Guardianship of Children" (published in January 2002), "International Parental Child Abduction" (published in April 2002), "The Family Dispute Resolution Process" (published in March 2003) and "Child Custody and Access" (published in March 2005).

Report on Guardianship of Children

4. The Report dealt with the law relating to the appointment of guardians for children in the event of the death of one or both parents. The Commission's focus in reviewing the law of guardianship of children was on recommending ways to simplify the law and procedures in this area, so that more parents would be encouraged to take the positive step of making guardianship arrangements for their children.

5. The Commission recommended in the report –

- (a) the introduction of a more simple, standardised procedure for the appointment of guardians for children;
- (b) widening the court's power to appoint guardians for children, so that any person might apply to be made a guardian of a child, not only in cases where the child had no parent with parental responsibility for him, but also in cases where a custody order for the child had been made in favour of the parent who had died;
- (c) removing the current right of the surviving parent to veto a testamentary guardian from acting, so that either the surviving parent or the guardian might apply to the court if there was a dispute between them on the best interests of the child;
- (d) that a testamentary guardian appointed by the parent who had custody of the child should be able to act automatically as guardian for the child on the death of that parent;
- (e) that, as far as practicable, the views of the child on the appointment of the guardian should be taken into account;
- (f) that a child's guardian should be able to appoint a guardian for the child in the event of the guardian's death;
- (g) that there should be a system for withdrawing from acting as guardian similar to the system for appointing a guardian; and
- (h) that the High Court's power to remove or replace a guardian in the best interests of the child should be extended to the District Court.

Report on International Parental Child Abduction

6. The Report dealt with the law relating to the abduction of children across international borders by parents in contested custody cases. The Commission's focus in reviewing the law in the area was on recommending ways to strengthen Hong Kong's current legal protections against child abduction, so as to better support the operation of the Hague Convention on the Civil Aspects of International Child Abduction¹.

7. The Commission's recommendations included –

- (a) the introduction of legislative restrictions on removing a child from the jurisdiction without the required consents;
- (b) a specific power to the court to order the disclosure of the whereabouts of a child;
- (c) a specific power to the court to order the recovery of a child; and
- (d) a specific power to the authorities to hold a child suspected of being abducted so that he could be returned to the custodial parent or taken to a place of safety.

8. The Commission also proposed –

- (a) an expansion of legal aid availability and a speeding up of the processing of legal aid applications for Hague Convention cases;
- (b) a review of the adequacy of the current provisions in Hong Kong regarding stay of custody proceedings pending the outcome of related Hague applications; and
- (c) a review of the provisions regarding the confidentiality of information relating to Hague proceedings.

Implementation plan

9. Upon the reorganisation of the Government Secretariat in 2007, the reports on Guardianship of Children, International Parental Child Abduction and Child Custody and Access will be followed up by the Labour and Welfare Bureau. The report on the Family Dispute Resolution Process will continue to be followed up by the Home Affairs Bureau.

¹ The Hague Convention on Civil Aspects of International Child Abduction, which has been in force in Hong Kong since September 1997, provides that children abducted from one Convention-member state to another should be located and returned to their home jurisdictions as quickly as possible.

10. The Secretary for Labour and Welfare advised the Law Reform Commission of the Administration's detailed responses to the reports on Guardianship of Children and International Parental Child Abduction in October 2009. The Administration intended to take forward all the recommendations of the two reports, either in full or in a modified form.

11. The Administration will consult the Panel on Welfare Services on its responses to the two reports before proceeding with the legislative exercise to implement the recommendations.

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