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**Background brief for the Bills Committee on
Guardianship of Minors (Amendment) Bill 2011**

Purpose

This paper sets out the background of the Guardianship of Minors (Amendment) Bill 2011 and gives a brief account of the discussions by the Panel on Welfare Services ("the Panel") on the Administration's proposal to amend the Guardianship of Minors Ordinance (Cap. 13) ("GMO") for implementing the recommendations of the Report on Guardianship of Children published by the Law Reform Commission ("LRC") in 2002.

Background

2. The issue of guardianship and custody of children was referred to LRC by the then Attorney General and the Chief Justice in April 1995. The LRC 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 LRC. The Subcommittee published in 1998 a consultation paper which recommended changes to the law relating to guardianship and custody of children, non-adversarial dispute resolution processes, and the law on child abduction.

3. In January 2002, LRC published the Report on the "Guardianship of Children" ("the Report"). According to the Administration, the Report mainly focused on issues relating to guardians appointed by parents and the court for minors¹ pursuant to GMO in the event of the death of one or both parents. For the purpose of encouraging parents to make guardianship arrangements for their children, the Report reviewed

¹ For the purposes of Cap. 13, a minor is a child who has not yet attained 18 years of age.

the relevant legislation and made nine recommendations to simplify the law and procedures for appointing guardians. Recommendations of the Report and the Administration's response to the Report, which was issued to the Chairman of LRC in October 2009, are extracted in **Appendices I** and **II** respectively.

Discussions by the Panel

4. When the Panel was briefed on the Administration's position on the recommendations in the Report on 8 February 2010, members were given to understand that the Administration would proceed to make the necessary legislative amendments to take forward the recommendations. At its meeting on 14 March 2011, the Panel was briefed on the legislative proposal to amend GMO.

Appointment and removal of guardians

5. While welcoming the suggestion of enshrining in law the principle that parents should take into account the views of the child in appointing guardians, members asked whether an official solicitor could be appointed to represent the child's views in the event that the child strongly objected to the guardianship appointment and whether the child would be allowed to indicate his/her preference for an appointed guardian when he/she had attained a prescribed age limit.

6. The Administration advised that under the proposed arrangement, the appointing parents would be required to take into account the views of the child when appointing a guardian for him/her and to declare whether they had done so in the standard form for appointing guardians. However, the appointment of a guardian was the decision of the appointing parent. Should the appointing parent be required to seek the consent of the child before making the guardianship arrangements, such a requirement might dissuade the parent from making such arrangements for the child. This would also depart from the objective of the Report to encourage parents to make guardianship arrangements for their children.

7. On the proposal for removing the power of the surviving parent to veto the taking office of a guardian appointed by the deceased parent, there was concern as to whether the surviving parent could raise objection to the guardianship appointment. The Administration explained that the guardian appointment made by a deceased parent could be nullified by the surviving parent as the current law allowed the latter to veto the

taking office of a guardian appointed by the former. Under the proposed arrangement, in the event that either or both of the surviving parents and the appointed guardian made a petition to the court in respect of the guardianship appointment, the court would make a ruling having regard to the well-being and interests of the child.

8. Some members pointed out that should guardians be allowed to withdraw from acting as a guardian after taking office without the need to give an account for the decision, this would be detrimental to the healthy development of the child. As such, the Administration should set out the incidental conditions for withdrawal of guardianship appointment. According to the Administration, there was no provision in the law for a guardian to withdraw from acting as a guardian after taking office, regardless of whether the appointed guardian was willing to accept or capable of assuming the responsibilities. The Administration noted that the guardian's withdrawal of his/her appointment might have negative impact on the child. Yet, it would also be against the interests of a child if the guardian was required to continue holding his/her title but was indeed not willing/able to perform his/her duty properly. The proposal of allowing a guardian to withdraw from a guardian appointment would ensure that the interests of the child would be well protected if the guardian was incapable of performing his/her role properly. In the circumstances, other persons could apply to the court to be the guardian of the child or the court could appoint guardianship if so warranted. The Administration considered that the proposed arrangement had struck a proper balance in protecting the well-being and interests of the child.

Powers of court to appoint guardians

9. In regard to the recommendation on extending the powers of the Court of First Instance to remove a guardian to the Family Court, some members took the view that as children and juveniles affairs were dealt with by the Court of First Instance, the Family Court and the Magistrates' Court, the Administration and LRC should study whether the arrangements should be rationalised such that issues relating to the welfare of children and juveniles would best be dealt under the jurisdictions of the Family Court. The Administration clarified that arrangements relating to the appointment of guardianship for the purpose of GMO was within the jurisdictions of the Family Court and the Court of First Instance, save for that only the Court of First Instance was empowered under section 8 of GMO to remove a guardian. The LRC therefore recommended that GMO should be amended to the effect that similar powers should be given to the District Court, including the Family Court.

Public consultation

10. Members noted that the recommendations of LRC were made after conducting extensive consultation with the stakeholders, including children welfare organisations, on the subject of guardianship. The Administration had also approached frontline social workers for their feedback in the course of examination of the Report, and the latter responded positively to LRC's recommendations.

Relevant papers

11. A list of the relevant papers available on the Legislative Council website is in **Appendix III**.

Council Business Division 2
Legislative Council Secretariat
5 July 2011

**Recommendations of the Report on Guardianship of Children
published by the Law Reform Commission of Hong Kong**

Recommendation 1

(Appointment of guardians)

We recommend:

- (a) the adoption of a provision similar to section 5(5) of the English Children Act 1989 that parents who have parental rights and authority may appoint guardians by a document in writing, with their signature attested by two witnesses, without the need to make a formal will or deed;
- (b) the introduction of a standard form for the appointment of a guardian, which should explain briefly a guardian's responsibilities and be signed by the proposed guardian. (These forms could be made available, for example, at the Legal Aid Department and the District Offices where the Free Legal Advice Scheme of the Duty Lawyer Service operates, and on the Internet);
- (c) that the guardian should have to accept office as guardian expressly or impliedly if he has not formally consented to act as guardian. This could also be achieved by the completion of a form.

Recommendation 2

(Disclaimer)

We recommend that there should be a system for withdrawing from acting as a guardian similar to the system for appointing a guardian. If the proposed guardian had already consented to act, by signing the appropriate form, then he would have to formally disclaim if he did not

want to act at a later time. The disclaimer should be formal, in writing, and notified to the executor or administrator of the estate. The Director of Social Welfare should be notified of the disclaimer if there is no executor, administrator or surviving parent, so that steps can be taken to protect the best interests of the child.

Recommendation 3

(Veto of surviving parent)

We recommend that the right to veto of the surviving parent in section 6(2) of the Guardianship of Minors Ordinance (Cap. 13) should be removed. Then, either the surviving parent or the guardian could apply to a court under section 6(3) if there is a dispute between them on the best interests of the child.

Recommendation 4

(Views of child on appointment of guardian)

We recommend that a similar provision to section 7(6) of the Children (Scotland) Act 1995 be introduced so that the views of the child on the appointment of the guardian may, so far as practicable, be taken into account.

Recommendation 5

(When appointment of guardian takes effect)

We recommend that:

- (a) a testamentary guardian should be able to act on the death of the parent who appointed the testamentary guardian if the child was residing with that parent prior to his death. The appointment of the testamentary guardian would not take immediate effect on the

death of the parent but a pro-active step of obtaining the court's permission would have to be taken by the guardian;

- b) if a parent had obtained a custody order prior to his death, then a testamentary guardian appointed by that parent should be able to act automatically as testamentary guardian on that parent's death.

Recommendation 6

(Court appointment of guardian)

We recommend that section 7 of the Guardianship of Minors Ordinance (Cap. 13) be repealed and a similar provision to section 5(1) of the English Children Act 1989, with regard to the appointment of a guardian, be enacted.

Recommendation 7

(Appointment by guardian)

We recommend the adoption of a provision along the lines of section 5(4) of the English Children Act 1989 allowing a guardian to appoint a guardian for the child in the event of the guardian's death.

Recommendation 8

(Removal or replacement of guardian)

We recommend that section 8 of the Guardianship of Minors Ordinance should be retained, but that it should be amended to give similar powers to the District Court.

Recommendation 9

(Guardian of the estate)

We recommend the retention of the status quo in relation to the powers of the Official Solicitor to act as guardian of the estate.

**Administration's Response to
The Law Reform Commission Report
on Guardianship of Children**

Overall Response:

The Law Reform Commission (LRC) has published the Report on Guardianship of Children (the Report) in relation to the law (mainly the Guardianship of Minors Ordinance (Cap. 13)) which governs the appointment of guardians for children in the event of the death of one or both parents. It has made a total of nine law reform recommendations.

2. In considering the recommendations, our primary concern is the well-being of the child. We have examined carefully how this objective can best be achieved in an effective and practicable manner, having regard to the advice of various stakeholders. The Administration agrees with the LRC that the legal procedures for parents to appoint guardians for their children should be simplified and that the relevant provisions can be improved to address the shortcomings of the existing regime, so as to encourage more parents to take the positive step of making guardianship arrangements for their children. We are prepared to take forward all the recommendations. Our detailed responses to the individual recommendations are set out in the ensuing sections.

Recommendation 1 – Appointment of guardians

The LRC recommended that:

- (a) the adoption of a provision similar to section 5(5) of the English Children Act 1989 that parents who have parental rights and authority may appoint guardians by a document in writing, with their signature attested by two witnesses, without the need to make a formal will or deed;
- (b) the introduction of a standard form for the appointment of a guardian, which should explain briefly a guardian's responsibilities and be signed by the proposed guardian. (These forms could be made available, for example, at the Legal Aid Department and the District Offices where the Free Legal Advice Scheme of the Duty Lawyer Service operates, and on the Internet); and
- (c) that the guardian should have to accept office as guardian expressly or impliedly if he has not formally consented to act as guardian. This could also be achieved by the completion of a form.

Response from the Administration:

We accept Recommendation 1. We agree that the procedures for appointing guardians can be simplified to facilitate parents who wish to make guardianship arrangements for their children. We also agree with the LRC that it is necessary to seek the consent of the appointed guardian before an appointment takes effect.

In addition, further to the LRC's recommendation, we consider it advisable for the surviving parent to be informed when the guardian takes office / applies to the court to take office.

Details of the legislative amendments and administrative arrangements to implement Recommendation 1 will be worked out in consultation with stakeholders.

Recommendation 2 – Disclaimer

The LRC recommended that:

- (a) there should be a system for withdrawing from acting as a guardian similar to the system for appointing a guardian. If the proposed guardian had already consented to act, by signing the appropriate form, then he would have to formally disclaim if he did not want to act at a later time;
- (b) the disclaimer should be formal, in writing, and notified to the executor or administrator of the estate; and
- (c) the Director of Social Welfare should be notified of the disclaimer if there is no executor, administrator or surviving parent, so that steps can be taken to protect the best interests of the child.

Response from the Administration:

We accept Recommendation 2. On Recommendation 2(b), we consider that the disclaimer should also be notified to the surviving parent as he/she also has an interest in the guardianship arrangement.

In introducing the formal disclaimer system as recommended, there will be a need to put in place legislative and/or administrative measures for ensuring that the interests of the child are well protected following the guardian's withdrawal of his/her appointment. Details of the provisions and measures will be worked out in consultation with stakeholders.

Recommendation 3 – Veto of surviving parent

The LRC recommended that the right to veto of the surviving parent in section 6(2) of the Guardianship of Minors Ordinance (Cap. 13) should be removed. Then, either the surviving parent or the guardian could apply to a court under section 6(3) if there is a dispute between them on the best interests of the child.

Response from the Administration:

We have no objection to removing the veto power of the surviving parent under section 6(2) of Cap. 13 and deferring it to the court to decide on disputes relating to the right of guardianship over a child having regard to what is in the best interests of the child.

Recommendation 4 – Views of child on appointment of guardian

The LRC recommended that a similar provision to section 7(6) of the Children (Scotland) Act 1995 be introduced so that the views of the child on the appointment of the guardian may, so far as practicable, be taken into account.

Response from the Administration:

We agree to enshrine in law the principle that parents should take into account the views of the child in appointing guardians. In the standard form for appointing guardians (as proposed under Recommendation 1), we shall explain to parents / guardians the need to take into account the views of the child and require them to declare whether they have done so. Details of the provisions will be worked out in consultation with stakeholders. Reference will be made to the legislation of other jurisdictions.

Recommendation 5 – When appointment of guardian takes effect

The LRC recommended that:

- (a) a testamentary guardian should be able to act on the death of the parent who appointed the testamentary guardian if the child was residing with that parent prior to his death. The appointment of the testamentary guardian would not take immediate effect on the death of the parent, but a pro-active step of obtaining the court's permission would have to be taken by the guardian; and
- (b) if a parent had obtained a custody order prior to his death, then a testamentary guardian appointed by that parent should be able to act automatically as testamentary guardian on that parent's death.

Response from the Administration:

We agree with the LRC that the existing arrangements would need to be changed to cater for situations where it is not preferable for a guardian appointment to take effect automatically upon the death of the appointing parent (e.g. where the appointing parent is the non-custodial parent).

To cater for these situations, section 5(8) of the English Children Act 1989 provides that the testamentary guardian may only assume parental responsibility after the death of the surviving parent, unless the deceased parent had a residence or custody order. Yet, as the LRC has pointed out, such a provision is undesirable in that the testamentary guardian cannot act if the deceased parent, before his death, had had the child living with him exclusively (by informal agreement, for instance) but had not applied to court for a residence or custody order. We therefore agree with the LRC that direct adoption of the English provision is not preferable.

We shall work out the details of the proposed provisions in consultation with stakeholders and make reference to the legislation of other jurisdictions.

Recommendation 6 – Court appointment of guardian

The LRC recommended that section 7 of the Guardianship of Minors Ordinance be repealed and a similar provision to section 5(1) of the English Children Act 1989, with regard to the appointment of a guardian, be enacted.

Response from the Administration:

Section 7 of the Guardianship of Minors Ordinance empowers the court to appoint an applicant who applies to be the guardian of a minor where the minor has no parent, no guardian of the person **and** no other person having parental rights with respect to him. We accept the LRC's recommendation that the scope of eligible applicants can be extended. Details of the provision will be worked out in consultation with stakeholders. Reference will be made to the legislation of other jurisdictions.

Recommendation 7 – Appointment by guardian

The LRC recommended the adoption of a provision along the lines of section 5(4) of the English Children Act 1989 allowing a guardian to appoint a guardian for the child in the event of the guardian's death.

Response from the Administration:

We accept Recommendation 7. We agree that, as a guardian is expected to assume full parental responsibility of the child, he should have the power to make guardianship arrangement for the benefit of the child and appoint a guardian to act for him in the event of his death. The standard form for appointing guardians (as proposed under Recommendation 1) can also be used for a guardian to make guardian appointment.

Recommendation 8 – Removal or replacement of guardian

The LRC recommended that section 8 of the Guardianship of Minors Ordinance should be retained, but that it should be amended to give similar powers to the District Court.

Response from the Administration:

We accept Recommendation 8 as we agree with the LRC that the court should have the power to remove or replace a guardian in the interests of a child. Having consulted the Judiciary, we also have no objection to extending the powers to the District Court as recommended by the LRC.

Recommendation 9 – Guardian of the estate

The LRC recommended the retention of the status quo in relation to the powers of the Official Solicitor to act as guardian of the estate.

Response from the Administration:

The Official Solicitor is of the view that he has sufficient powers to act as the guardian of the estate of minors and that no change to the Official Solicitor Ordinance (Cap. 416) is necessary. We therefore accept Recommendation 9.

**The Labour and Welfare Bureau
October 2009**

Appendix III

Relevant papers on the Report on Guardianship of Children published by the Law Reform Commission

| Committee | Date of meeting | Paper |
|---------------------------|-----------------------------|---|
| Panel on Welfare Services | 8 February 2010 (Item V) | Agenda Minutes |
| | 14 March 2011 (Item IV) | Agenda Minutes |

Council Business Division 2
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