

**Legislative Council
Bills Committee on Guardianship of Minors (Amendment) Bill 2011**

**Administration's Response to Issues Raised by Members
at the Bills Committee Meeting held on 6 July 2011**

*Supplementary information in relation to the relevant provisions of the
Children Act 1989 of England and Wales*

As requested by Members of the Bills Committee on Guardianship of Minors (Amendment) Bill 2011 (the Bill) at the meeting held on 6 July 2011, this paper provides for Members' reference, at **Annex**, the list of provisions in the Children Act 1989 of England and Wales to which the Administration had made reference in drafting the Bill and the corresponding provisions in the Bill.

**Labour and Welfare Bureau
July 2011**

**List of provisions in the Children Act 1989 of England and Wales
to which the Administration had made reference in drafting
the Guardianship of Minors (Amendment) Bill 2011 (the Bill)**

Provision in the Bill	Provision in the Children Act 1989 to which the Administration has made reference	Remarks
<p>Section 3, the interpretation of “domestic proceedings”</p> <p><i>domestic proceedings</i> (家事法律程序) means any proceedings under the—</p> <p>(a) Separation and Maintenance Orders Ordinance (Cap. 16);</p> <p>(b) Matrimonial Causes Ordinance (Cap. 179);</p> <p>(c) Domestic and Cohabitation Relationships Violence Ordinance (Cap. 189);</p> <p>(d) Matrimonial Proceedings and Property Ordinance (Cap. 192);</p> <p>(e) Adoption Ordinance (Cap. 290);</p>	<p>Sections 8(3) and 8(4)</p> <p>(3) For the purposes of this Act “family proceedings” means any proceedings —</p> <p style="padding-left: 40px;">(a) under the inherent jurisdiction of the High Court in relation to children; and</p> <p style="padding-left: 40px;">(b) under the enactments mentioned in subsection (4),</p> <p>but does not include proceedings on an application for leave under section 100(3).</p>	<ul style="list-style-type: none"> • The Hong Kong laws which are equivalent / analogous to the legislation / provisions listed out in section 8(4) of the Children Act 1989 are identified for the interpretation of the term “domestic proceedings” in section 3 of the Bill. • The term “domestic proceedings” rather than “family proceedings” is used as advised by the Judiciary to avoid

Provision in the Bill	Provision in the Children Act 1989 to which the Administration has made reference	Remarks
<p>(f) Parent and Child Ordinance (Cap. 429); and</p> <p>(g) inherent jurisdiction of the Court of First Instance in relation to minors;</p>	<p>(4) The enactments are—</p> <p>(a) Parts I, II and IV of this Act;</p> <p>(b) the Matrimonial Causes Act 1973;</p> <p>(ba) Schedule 5 to the Civil Partnership Act 2004;</p> <p>(c) the Domestic Violence and Matrimonial Proceedings Act 1976;</p> <p>(d) the Adoption and Children Act 2002;</p> <p>(e) the Domestic Proceedings and Magistrates' Courts Act 1978;</p> <p>(ea) Schedule 6 to the Civil Partnership Act 2004;</p> <p>(f) sections 1 and 9 of the Matrimonial Homes Act 1983;</p> <p>(g) Part III of the Matrimonial and Family Proceedings Act 1984.</p> <p>(h) the Family Law Act 1996</p> <p>(i) sections 11 and 12 of the Crime and Disorder Act 1998.</p>	<p>confusion with the term “family proceedings” which has a different definition in the Practice Directions 15.12 – Matrimonial Proceedings and Family Proceedings issued by the Chief Justice.</p>

Provision in the Bill	Provision in the Children Act 1989 to which the Administration has made reference	Remarks
<p>The new section 6(1) under clause 4</p> <p>(1) A parent of a minor may appoint any person to be a guardian of the minor after that parent dies.</p>	<p>Section 5(3)</p> <p>(3) A parent who has parental responsibility for his child may appoint another individual to be the child's guardian in the event of his death.</p>	<p>–</p>
<p>The new section 6(2) under clause 4</p> <p>(2) A guardian of a minor may appoint any person to be a guardian of the minor after that guardian dies.</p>	<p>Section 5(4)</p> <p>(4) A guardian of a child may appoint another individual to take his place as the child's guardian in the event of his death; and a special guardian of a child may appoint another individual to be the child's guardian in the event of his death.</p>	<p>–</p>
<p>The new section 6(3) under clause 4</p> <p>An appointment made under this section must be in writing, dated and—</p> <p>(a) signed either by the person</p>	<p>Section 5(5)</p> <p>(5) An appointment under subsection (3) or (4) shall not have effect unless it is made in writing, is dated and is signed by the person making the appointment or —</p>	<ul style="list-style-type: none"> As recommended by the Report on Guardianship of Minors published by the Law Reform Commission of Hong Kong (LRC), the new section 6(3) requires

Provision in the Bill	Provision in the Children Act 1989 to which the Administration has made reference	Remarks
<p>making the appointment or by another person at the direction, and in the presence, of the person making the appointment; and</p> <p>(b) attested by 2 witnesses.</p>	<p>(a) in the case of an appointment made by a will which is not signed by the testator, is signed at the direction of the testator in accordance with the requirements of section 9 of the Wills Act 1837; or</p> <p>(b) in any other case, is signed at the direction of the person making the appointment, in his presence and in the presence of two witnesses who each attest the signature.</p>	<p>that guardian appointment must be attested by two witnesses in all cases. This requirement is more formal and stringent than the requirement in section 5(5)(b) of the English Children Act 1989 where attestation by two witnesses is only required when the appointment is signed at the direction of the person making the appointment, rather than by that person personally. The LRC Secretariat confirms that this is the intention of the recommendation in the Report.</p>

Provision in the Bill	Provision in the Children Act 1989 to which the Administration has made reference	Remarks
<p>The new section 6(4) under clause 4 Despite subsection (3), a parent or guardian may appoint a guardian by a will executed in accordance with section 5 of the Wills Ordinance (Cap. 30).</p>	<p>Section 5(5) (5) An appointment under subsection (3) or (4) shall not have effect unless it is made in writing, is dated and is signed by the person making the appointment or—</p> <p>(a) in the case of an appointment made by a will which is not signed by the testator, is signed at the direction of the testator in accordance with the requirements of section 9 of the Wills Act 1837; or</p> <p>(b) in any other case, is signed at the direction of the person making the appointment, in his presence and in the presence of two witnesses who each attest the signature.</p>	<ul style="list-style-type: none"> • The new section 6(4) is added with reference to section 5(5)(a) of the Children Act 1989.

Provision in the Bill	Provision in the Children Act 1989 to which the Administration has made reference	Remarks
<p>The new section 6(7) under clause 4</p> <p>An appointment under this section may be made by 2 or more persons acting jointly.</p>	<p>Section 5(10)</p> <p>Nothing in this section shall be taken to prevent an appointment under subsection (3) or (4) being made by two or more persons acting jointly.</p>	<p>–</p>
<p>The new section 8B under clause 4</p> <p>8B. Revocation of guardian appointment</p> <p>(1) An appointment under section 6 revokes an earlier such appointment (including one made in an unrevoked will) made by the same person in respect of the same minor, unless it is clear that the purpose of the later appointment is to appoint an additional guardian.</p> <p>(2) An appointment under section 6 (including one made in an unrevoked will)</p>	<p>Sections 6(1) to 6(4)</p> <p>(1) An appointment under section 5(3) or (4) revokes an earlier such appointment (including one made in an unrevoked will or codicil) made by the same person in respect of the same child, unless it is clear (whether as the result of an express provision in the later appointment or by any necessary implication) that the purpose of the later appointment is to appoint an additional guardian.</p> <p>(2) An appointment under section 5(3) or (4) (including one made in an unrevoked</p>	<ul style="list-style-type: none"> • The new section 8B(4) which does not exist in section 6 of the Children Act 1989 is added to enhance the clarity of the law.

Provision in the Bill	Provision in the Children Act 1989 to which the Administration has made reference	Remarks
<p>is revoked if the person who made the appointment revokes it by a written and dated document that is —</p> <p>(a) signed either by the person who made the appointment or by another person, at the direction, and in the presence, of the person who made the appointment; and</p> <p>(b) attested by 2 witnesses.</p> <p>(3) An appointment under section 6 (other than one made in a will) is revoked if, with the intention of revoking the appointment, the person who made it—</p> <p>(a) destroys the document by which it was made; or</p> <p>(b) instructs any other person to destroy the document in the person’s presence.</p>	<p>will or codicil) is revoked if the person who made the appointment revokes it by a written and dated instrument which is signed—</p> <p>(a) by him; or</p> <p>(b) at his direction, in his presence and in the presence of two witnesses who each attest the signature.</p> <p>(3) An appointment under section 5(3) or (4) (other than one made in a will or codicil) is revoked if, with the intention of revoking the appointment, the person who made it—</p> <p>(a) destroys the instrument by which it was made; or</p> <p>(b) has some other person destroy</p>	

Provision in the Bill	Provision in the Children Act 1989 to which the Administration has made reference	Remarks
<p>(4) If an appointment under section 6 is made by 2 or more persons acting jointly—</p> <p>(a) the appointment may be revoked by any of them in accordance with subsection (2) or (3); and</p> <p>(b) the person who revokes the appointment must notify all other persons who jointly made the appointment of the revocation.</p> <p>(5) To avoid doubt, an appointment made under section 6 in a will is revoked if the will is revoked.</p>	<p>that instrument in his presence.</p> <p>(3A) An appointment under section 5(3) or (4) (including one made in an unrevoked will or codicil) is revoked if the person appointed is the spouse of the person who made the appointment and either—</p> <p>(a) a decree of a court of civil jurisdiction in England and Wales dissolves or annuls the marriage, or</p> <p>(b) the marriage is dissolved or annulled and the divorce or annulment is entitled to recognition in England and Wales by virtue of Part II of the Family Law Act 1986,</p> <p>unless a contrary intention appears by the</p>	

Provision in the Bill	Provision in the Children Act 1989 to which the Administration has made reference	Remarks
	<p>appointment.</p> <p>(3B) An appointment under section 5(3) or (4)(including one made in an unrevoked will or codicil) is revoked if the person appointed is the civil partner of the person who made the appointment and either—</p> <ul style="list-style-type: none"> (a) an order of a court of civil jurisdiction in England and Wales dissolves or annuls the civil partnership, or (b) the civil partnership is dissolved or annulled and the dissolution or annulment is entitled to recognition in England and Wales by virtue of Chapter 3 of Part 5 of the Civil Partnership Act 2004, 	

Provision in the Bill	Provision in the Children Act 1989 to which the Administration has made reference	Remarks
	<p>unless a contrary intention appears by the appointment.</p> <p>(4) For the avoidance of doubt, an appointment under section 5(3) or (4) made in a will or codicil is revoked if the will or codicil is revoked.</p>	
<p>The new sections 8D(2) and 8D(3) under clause 4</p> <p>(2) On application by any person, the court may, if it thinks fit, appoint the person to be the guardian of a minor if —</p> <p>(a) the parent or guardian who has a custody order over the minor dies; or</p> <p>(b) the minor does not have any parent, guardian or other person having parental rights with</p>	<p>Sections 5(1) and 5(2)</p> <p>(1) Where an application with respect to a child is made to the court by any individual, the court may by order appoint that individual to be the child’s guardian if —</p> <p>(a) the child has no parent with parental responsibility for him; or</p> <p>(b) a residence order has been made with respect to the child</p>	<ul style="list-style-type: none"> • The term “custody order” in the new section 8D(2)(a) is analogous to the term “residence order” in section 5(1)(b) of the Children Act 1989.

Provision in the Bill	Provision in the Children Act 1989 to which the Administration has made reference	Remarks
<p>respect to the minor.</p> <p>(3) The power to make an appointment under subsection (2) may also be exercised in any domestic proceedings if the court thinks that the appointment should be made even though no application has been made for it.</p>	<p>in favour of a parent, guardian or special guardian of his who has died while the order was in force; or</p> <p>(c) paragraph (b) does not apply, and the child’s only or last surviving special guardian dies.</p> <p>(2) The power conferred by subsection (1) may also be exercised in any family proceedings if the court considers that the order should be made even though no application has been made for it.</p>	
<p>The new section 8G under clause 4</p> <p>8G. Guardian to have parental rights</p> <p>A person appointed as the guardian of a minor under this Part has, on assuming</p>	<p>Section 5(6)</p> <p>A person appointed as a child’s guardian under this section shall have parental responsibility for the child concerned.</p>	<ul style="list-style-type: none"> • Under the Guardianship of Minors Ordinance (the Ordinance), parent-child relationship is characterised by the term “parental rights”. We thus use the

Provision in the Bill	Provision in the Children Act 1989 to which the Administration has made reference	Remarks
guardianship, parental rights with respect to the minor.		term “parental rights” in the new section 8G to ensure consistency.
<p>The new section 9A under clause 5</p> <p>“9A.Transitional and savings</p> <p>(1) In this section—</p> <p><i>commencement date</i> (生效日期) means the day on which the Guardianship of Minors (Amendment) Ordinance 2011 (of 2011) comes into operation;</p> <p><i>pre-amended Ordinance</i> (未修訂條例) means this Ordinance as in force immediately before the commencement date.</p> <p>(2) The Guardianship of Minors</p>	<p>Sections 12 and 13 of Schedule 14</p> <p><i>Existing guardians to be guardians under this Act</i></p> <p>12(1) Any appointment of a person as guardian of a child which—</p> <p>(a) was made—</p> <p>(i) under sections 3 to 5 of the Guardianship of Minors Act 1971;</p> <p>(ii) under section 38(3) of the Sexual Offences Act 1956; or</p> <p>(iii) under the High Court’s</p>	<ul style="list-style-type: none"> • The transitional and saving clauses are modeled on the corresponding clauses in the Schedule 14 to Children Act 1989. • The new sections 9A(2) and (5) which do not exist in the Schedule 14 to the Children Act 1989 are added for enhancing the clarity of the law.

Provision in the Bill	Provision in the Children Act 1989 to which the Administration has made reference	Remarks
<p>(Amendment) Ordinance 2011 (of 2011) does not affect any proceedings under the pre-amended Ordinance that are pending immediately before the commencement date.</p> <p>(3) Any appointment of a person as guardian of a minor that was made under the pre-amended Ordinance, or under the Court of First Instance’s inherent jurisdiction with respect to the minor, and is effective immediately before the commencement date is, on and after that date, taken to be an appointment made and having effect under this Ordinance.</p> <p>(4) Any appointment of a person as guardian of a minor that was made under the pre-amended Ordinance and has not taken effect immediately before the commencement date is, on and after that date, to be governed by this Ordinance.</p>	<p>inherent jurisdiction with respect to children; and</p> <p>(b) has taken effect before the commencement of section 5,</p> <p>shall (subject to sub-paragraph (2)) be deemed, on and after the commencement of section 5, to be an appointment made and having effect under that section.</p> <p>(2) Where an appointment of a person as guardian of a child has effect under section 5 by virtue of sub-paragraph (1)(a)(ii), the appointment shall not have effect for a period which is longer than any period specified in the order.</p> <p><i>Appointment of guardian not yet in effect</i></p> <p>13 Any appointment of a person to be a guardian of a child—</p>	

Provision in the Bill	Provision in the Children Act 1989 to which the Administration has made reference	Remarks
<p>(5) To avoid doubt, any guardian appointed under the pre-amended Ordinance has the same rights and duties as a guardian appointed under this Ordinance.”.</p>	<p>(a) which was made as mentioned in paragraph 12(1)(a)(i); but</p> <p>(b) which, immediately before the commencement of section 5, had not taken effect,</p> <p>shall take effect in accordance with section 5 (as modified, where it applies, by paragraph 8(2)).</p>	