

# 立法會

## *Legislative Council*

LC Paper No. LS79/10-11

**Paper for the House Committee Meeting  
on 17 June 2011**

### **Legal Service Division Report on Guardianship of Minors (Amendment) Bill 2011**

#### **I. SUMMARY**

- 1. Objects of the Bill** To amend the Guardianship of Minors Ordinance (Cap. 13) in order to implement recommendations of the Report on Guardianship of Children published by the Law Reform Commission of Hong Kong (LRC) in January 2002 (the Report).
- 2. Comments** The Bill implements all of the recommendations in the Report except the proposed introduction of a standard form for the appointment of guardians. The Administration proposes to implement this recommendation by administrative means.
- 3. Public Consultation** According to the Administration, the stakeholders were consulted on the LRC's recommendations before the Report was published. The Administration also sought views on LRC's recommendations from some social workers in the family and child welfare field in early 2009. They were generally supportive of the recommendations.
- 4. Consultation with LegCo** The Panel on Welfare Services was briefed on the Administration's response on the Report on 8 February 2010 and was consulted on the legislative proposals on 14 March 2011. The members were supportive of the proposals and were concerned about the details and implementation of the proposals.
- 5. Conclusion** In view of the concerns expressed by members of the Panel on the legislative proposals, Members may wish to consider setting up a Bills Committee to study the Bill in detail. The scrutiny of legal and drafting aspects of the Bill is still continuing.

## **II. REPORT**

### **Objects of the Bill**

To implement recommendations of the Report on Guardianship of Children published by the Law Reform Commission of Hong Kong (LRC) in January 2002, the Bill proposes to amend the Guardianship of Minors Ordinance (Cap. 13) (the Ordinance) to -

- (a) simplify the legal arrangements for the appointment and removal of a guardian;
- (b) provide for the revocation and disclaimer of appointment as a guardian;
- (c) provide for the assumption of guardianship;
- (d) provide for the resolution of disputes between guardians;

and to provide for connected matters.

### **LegCo Brief Reference**

2. LWB CR 1/4841/02 issued by the Labour and Welfare Bureau on 30 May 2011.

### **Date of First Reading**

3. 15 June 2011.

### **Comments**

#### Background

4. In April 1995, LRC was commissioned to consider the law relating to guardianship and custody of children and to recommend appropriate changes. Premised on its view that appointment of guardians will be beneficial to a child in the event that one or both of the child's parents die(s) as it can help achieve the continuation of the provision for the child's daily care and upbringing, LRC's review focused on the provisions relating to the appointment, removal

and powers of the guardians for minors under the Guardianship of Minors Ordinance (Cap. 13) (the Ordinance)\*.

5. The Ordinance, enacted in 1977, is one of the ordinances which govern court proceedings relating to the custody and upbringing of children, including provision of maintenance to them. The Ordinance provides, among others, for the appointment of guardians in the event of the death of one or both parents of the minors and also the removal and powers of guardians.

6. LRC published its Report on Guardianship of Children in January 2002 (the Report). In the Report, LRC identified various issues relating to the appointment, removal and powers of the guardians in the existing legislation and made nine recommendations to simplify and enhance the existing procedures under the Ordinance so as to encourage more parents to make guardianship arrangements for their children. In arriving at its recommendations, LRC had made reference to the relevant provisions in the Children Act 1989 of England and Wales and the Children (Scotland) Act 1995. In response, the Administration accepted all the recommendations of the Report. Members may wish to refer to Annexes B and C to the LegCo Brief for a summary of LRC's recommendations and the Administration's response.

### The Proposed Amendments

7. The Bill amends Part III of the Ordinance which deals with the appointment, removal and powers of guardians by replacing the existing sections 5 to 8 with the proposed sections 5 to 8H. The Bill also provides for the transitional and savings provisions and consequential amendments.

#### *Appointment and removal of guardians*

8. Under the Ordinance, there are three types of guardianship, namely, the testamentary guardians, surviving parents as guardians and court-appointed guardians. Currently, the appointment of a testamentary guardian requires the making of a deed or a will pursuant to section 6 of the Ordinance. There is no requirement for the appointing parents to take into account the views of the minor concerned in appointing a guardian nor any requirement that the consent of the person appointed be obtained. Also, there is no provision enabling a guardian to appoint another person to take his/her place as the minor's guardian in the event of his/her death.

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\* "Minor" is defined as a person who has not yet attained 18 years of age (section 3 of the Interpretation and General Clauses Ordinance (Cap. 1)).

"Guardian" or "guardianship" is not defined in the Ordinance. According to the Report, "guardianship" refers to "the bundle of rights, duties and authority of a parent towards a child" and "the legal status under which a person exercises parental rights and authority for a child following the death of one or both of the child's parents".

9. The proposed section 6 deals with the power of a parent or guardian to appoint guardians. Apart from making an appointment by will under the proposed section 6(4), guardians may be appointed by a document dated and signed by the appointing person or another person in his/her presence and by his/her direction, and attested by two witnesses (proposed section 6(3)). The proposed section 6(5) requires that the views of the child be taken into account as far as practicable in appointing a guardian. Consent of the appointed person to accept office either expressly or impliedly by conduct is required before the appointment takes effect (proposed section 6(6)). Also, the proposed section 6(2) enables a guardian to appoint any person to be a guardian of the minor after the guardian's death.

10. Under section 8 of the Ordinance, only the Court of First Instance has the power to remove a guardian and appoint another guardian to replace him/her for the welfare of the minor. The proposed section 8E extends this power to the District Court.

*Revocation and disclaimer of appointment as a guardian*

11. Under the existing Ordinance, there is no provision providing for revocation of the appointment or withdrawal from the guardianship. The proposed section 8B provides that an appointment made under the proposed section 6 can be revoked in the same way as the making of the appointment. The proposed section 8C provides that a guardian who is appointed and has accepted the office may at any time disclaim the appointment before assuming guardianship by a signed and dated document. The guardian must also notify the executor or administrator of the appointing parent's or appointing guardian's estate, the surviving parent and other guardians. In the absence of such persons or if they could not be located, the guardian must notify the Director of Social Welfare of the disclaimer.

*Assumption of guardianship*

12. Currently, the appointment of testamentary guardian takes effect automatically upon the death of the appointing parents. The proposed section 7 expressly stipulates that the guardian appointment is to take effect automatically if the appointing parent or appointing guardian has obtained a custody order over, or has lived with, the minor prior to his/her death. For cases other than those described in the proposed section 7, the testamentary guardian appointed is required to apply to the court to assume guardianship. The proposed section 8 provides for the types of orders the court may make upon such application.

*Powers of court to appoint guardians and resolve disputes between guardians*

13. Under the existing section 6(2) of the Ordinance, a testamentary guardian must act jointly with the surviving parent unless the surviving parent objects to his/her so acting. The Bill removes this veto power of the surviving parent and let the court decide whether the surviving parent or the testamentary guardian should be excluded from the guardianship over a minor (proposed section 8A).

14. Under the existing section 7 of the Ordinance, the court may appoint a guardian upon an application only where the child has no parent, no guardian and no other person having parental rights over him. The Bill repeals the existing section 7 and provides for more instances where the court may appoint a guardian in any domestic proceedings upon application by other interested parties or even if no such application has been made (proposed section 8D).

**Commencement**

15. If enacted, the Bill shall come into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

**Public Consultation**

16. According to the Administration, LRC has conducted consultation with the stakeholders on its recommendations before the Report was published. In coming up with its response to the Report in October 2009, the Administration had sought views on the LRC's recommendations from some social workers in the family and child welfare field. They were generally supportive of the recommendations.

**Consultation with LegCo**

17. The Administration briefed the Panel on Welfare Services (the Panel) on its response to the Report at its meeting of 8 February 2010 and consulted the Panel on the legislative proposals at its meeting of 14 March 2011. The members were generally supportive of the proposals. Some members were concerned about certain details and implementation of the proposals such as whether the appointed guardians might withdraw from acting as a guardian after taking office and whether the child concerned would be allowed to indicate

his/her preference in the appointment of a guardian. Members may wish to refer to the minutes of the meetings on 8 February 2010 and 14 March 2011 (LC Paper Nos. CB(2)1009/09-10 and CB(2)1644/10-11) for details of the discussion.

## **Conclusion**

18. The Bill implements all of the recommendations in the Report except the proposed introduction of a standard form for the appointment of guardians. The Administration proposes to implement this recommendation by administrative means. The Legal Service Division is still scrutinizing the legal and drafting aspects of the Bill.

19. In view of the concerns expressed by members of the Panel on the legislative proposals, Members may wish to consider setting up a Bills Committee to study the Bill in detail.

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