

**For discussion on
14 March 2011**

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Legislative Council Panel on Welfare Services

Proposed Amendments to the Guardianship of Minors Ordinance

Purpose

This paper consults Members on the Administration's proposal to amend the Guardianship of Minors Ordinance (GMO) (Cap.13) for implementing the recommendations of the Report on Guardianship of Children (the Report) published by the Law Reform Commission of Hong Kong (LRC).

Background

The Report

2. Published in 2002, the Report focuses on the legal arrangements relating to the guardians appointed by parents and the court for minors⁽¹⁾ in the event of the death of one or both parents. It makes law reform recommendations which aim at facilitating parents in making guardianship arrangements for their children and improving the relevant legal arrangements.

The concept of guardianship

3. According to the Report, the term "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". At present, a parent can by deed or will appoint another person to be a guardian of his/her child in place of himself/herself in the event of his/her death. A guardian may also be appointed by the court. Appointment of testamentary guardians is a private arrangement which does not require

⁽¹⁾ For the purpose of the Guardianship of Minors Ordinance (Cap. 13) which governs the appointment, removal and powers of guardians, a minor is a child who has not yet attained 18 years of age.

registration with or involvement of any Government department. The LRC acknowledged that, similar to overseas experience, it is difficult to obtain any information on the numbers of children subject to testamentary or court appointed guardianship in Hong Kong.

LRC's review of the existing law

4. The LRC review focused on the provisions under the GMO governing the appointment, removal and powers of guardians of children. The review is premised on the LRC's belief that children are born dependent, and so provision must be made for their daily care and upbringing as they move from infancy through childhood to adulthood, and in the event that one or both of a child's parents die(s), appointment of guardians will be beneficial to the child as it can help achieve continuation of the provision for the child's daily care and upbringing. In making its recommendations, the LRC has made reference to the relevant provisions in the Children Act 1989 of England and Wales and the Children (Scotland) Act 1995 of Scotland.

5. The LRC made a total of nine recommendations in the Report which seek to address the following issues identified in the existing laws –

- (a) appointment of a guardian currently requires the making of a deed or a will pursuant to section 6(1) of the GMO. The technicalities involved in the process may discourage parents from appointing guardians for their children;
- (b) there is no requirement for a parent who appoints a guardian for his/her child to seek the consent of, or to inform, the appointee;
- (c) there is no provision in the law for a guardian to withdraw from acting as a guardian after taking office;
- (d) the guardian appointment made by a deceased parent can be easily nullified by the surviving parent as the law allows the latter to veto the taking office of a guardian appointed by the former;
- (e) there is no requirement for parents to take into account the views of their children in appointing a guardian for him/her;
- (f) the guardian appointment takes effect automatically in all circumstances once the appointing parent dies, regardless of

whether it is a suitable arrangement (e.g. when the child only lived with the surviving parent and the appointing parent no longer took care of the child before passing away);

- (g) a person may only apply to the court to be a guardian of a child if the child has: (i) no parent; (ii) no guardian; **and** (iii) no other person having parental rights with respect to him/her. In other words, as long as a minor has a parent or a guardian, no other person (including a person who has been taking care of the child, e.g. a grandparent or another relative of the minor) can apply to the court to be the guardian of the child; and
- (h) a guardian cannot appoint another guardian to take care of the child in the event of his/her death.

The law reform recommendations made by the LRC

6. To address the issues listed in paragraph 5 above, the Report made the following law reform recommendations –

- (a) to allow parents to appoint guardians by a document in writing with their signatures attested by two witnesses. This obviates the need to make a formal will or deed, thereby simplifying the appointment procedures;
- (b) to require the appointing parent to seek the consent of the appointed guardian before the appointment can take effect;
- (c) to introduce a system for guardians to withdraw from acting as a guardian similar to the system for appointing guardians. The disclaimer should be formal, in writing and be conveyed 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;
- (d) to remove the right of the surviving parent to veto the taking office of a guardian appointed by the deceased parent under section 6(2) of the GMO;
- (e) to introduce a provision that the views of the child on the appointment of the guardian may, as far as practicable, be taken into account;

- (f) to specify when the appointment of a guardian takes effect, i.e. –
 - (i) if a parent has obtained a custody order prior to his/her passing away, the testamentary guardian appointed by him/her should be able to act automatically on his/her death; and
 - (ii) for cases where there is no custody order, a testamentary guardian should be able to act on the death of the parent who appointed him/her if the child was residing with that parent prior to his/her death. In this situation, the appointment of the testamentary guardian will not take immediate effect on the death of the appointing parent but the testamentary guardian will need to take a pro-active step of obtaining the court's permission.
- (g) to relax the restriction on application to be a guardian of a child by –
 - (i) repealing section 7 of the GMO which provides for the court to appoint a guardian if the child has no parent, no guardian **and** no other person having parental rights with respect to him/her; and
 - (ii) adopting a provision which provides that 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 –
 - (1) the child has no parent with parental responsibility for him/her; **or**
 - (2) a custody order has been made with respect to the child in favour of his/her parent or guardian who has died while the order was in force.
- (h) to allow a guardian to appoint a guardian for the child in the event of the guardian's death; and
- (i) to retain the power of the Court of First Instance to remove a guardian under section 8 of the GMO, and to extend such power to the Family Court.

Details of the recommendations of the Report are extracted at **Annex A**.

Proposed Legislative Amendments

7. The Administration's response to the Report, at **Annex B**, was issued to the Chairman of the LRC in October 2009. As reported to Members at the meeting of this Panel held on 8 February 2010, the Administration has completed the examination of the Report and accepted all its recommendations. We also informed Members that the Administration would proceed to make the necessary legislative amendments to take forward the recommendations.

8. We propose to amend the GMO to implement all the law reform recommendations of the Report as set out in paragraph 6 above. Besides, we also propose to adopt, with modifications, a few other provisions in the English Children Act 1989 with a view to enhancing the clarity of the GMO. For example, we propose to specify how a parent/guardian can revoke or replace a guardian appointment he/she made under the GMO and make it clear that a guardian appointed under GMO shall have the responsibility and authority of a parent in respect of the minor.

Other Recommendations of the Report not to be Implemented by Legislative Amendments

9. To facilitate parents and guardians in appointing guardians for children, the Report recommended that a standard appointment form for appointing guardians be introduced. Parents/guardians who wish to make guardian appointments may simply fill in and sign the appointment form, with their signatures attested by two witnesses. The form should be signed by the proposed guardian as an indication of his/her acceptance of office as the guardian. It should be made available at the Legal Aid Department, the District Offices and the internet. This recommendation will be implemented by administrative means.

10. Section 18 of the GMO preserves the Court of First Instance's power to appoint a person to be the guardian of a minor's estate, either generally or for a particular purpose. In the Report, the LRC stated that it had received no adverse comments on the question as to whether the Official Solicitor has sufficient powers to act as guardian of the estate for

minors and no legislative amendment is recommended. We have confirmed with the Official Solicitor once again that the view of the LRC is agreeable and that the status quo should be maintained as recommended.

Next Step

11. The Administration aims to introduce the amendment bill for amending the GMO into the Legislative Council within the current legislative session.

Advice Sought

12. Members are invited to note and offer comments on the Administration's proposed amendments to the GMO.

Labour and Welfare Bureau
March 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**