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Panel on Welfare Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 14 March 2011**

Report of the Law Reform Commission on Guardianship of Children

Purpose

This paper summarises the discussion of the Panel on Welfare Services ("the Panel") on the report of the Law Reform Commission ("LRC") on Guardianship of Children.

Background

2. The topic 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 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, LRC published four reports on the "Guardianship of Children" (January 2002), "International Parental Child Abduction" (April 2002), "The Family Dispute Resolution Process" (March 2003) and "Child Custody and Access" (March 2005).

LRC Report on Guardianship of Children

4. According to the Administration, the LRC Report mainly focused

on issues relating to guardians appointed by parents and the court for minors¹ pursuant to the Guardianship of Minors Ordinance (Cap. 13) 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 the relevant legislation and made nine recommendations to simplify the law and procedures for appointing guardians.

Deliberation by the Panel

5. At the meeting on 8 February 2010, the Panel was briefed on the Administration's position on the findings of and recommendations made by LRC in its Report on Guardianship of Children. Members were advised that the Administration was prepared to take forward all of the nine recommendations of the Report and had considered further enhancements for some of them. These included –

- (a) simplifying the procedures for appointing guardians and obviating the need to make formal wills and deeds by requiring only a document in writing with signature of the appointed parent attested by two witnesses, and producing a standard form for appointing guardians;
- (b) requiring the appointing parent to seek the consent of the appointed guardian before the appointment could take effect;
- (c) allowing a guardian to withdraw from acting as a guardian after taking office;
- (d) removing the power of the surviving parent to veto the taking office of a guardian appointed by the deceased parent;
- (e) enshrining in law the principle that parents should take into account the views of the child in appointing guardians;
- (f) altering the existing arrangement to cater for situations where it was not preferable for a guardian appointment to take effect automatically upon the death of the appointing parent;

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

- (g) relaxing the restriction on application to be a guardian of a child; and
- (h) empowering a guardian to make guardianship appointment for the child.

6. 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 or whether the child would be allowed to indicate his/her preference for an appointed guardian when he/she had attained a prescribed age limit.

7. The Administration advised that under the proposed arrangement, the appointing parent 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 requirement might dissuade the parent from making such arrangements for the child. This would also depart from the objective of the LRC Report to encourage parents to make guardianship arrangements for their children.

8. On the proposal to remove the power of the surviving parent to veto the taking office of a guardian appointed by the deceased parent, a concern was raised whether the surviving parent would be allowed to 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 parent 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.

9. 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.

Members were advised that 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 while he/she 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.

10. In response to the concern about the measures in place to safeguard the interests of the child in the event that a guardian failed to exercise proper daily care and upbringing of the child after taking office, the Administration advised that appointing a guardian was a private arrangement between the appointing parent and the appointed guardian. Under the existing law, the appointed guardian could decline the appointment only when he/she was notified of the arrangement. Nevertheless, the Director of Social Welfare could apply to the court to be the guardian of the child for safeguarding the well-being of the child when such needs arose.

11. The Administration will brief the Panel on the legislative proposal to amend the Guardianship of Minors Ordinance on 14 March 2011. Members may wish to note that the Guardianship of Minors (Amendment) Bill is included in the Administration's legislative programme for the 2010-2011 session.

Relevant papers

12. Members are invited to access the Legislative Council website at <http://www.legco.gov.hk> to view the Administration's papers and relevant minutes of the meeting of the Panel on 8 February 2010.

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