

**Consultation Paper
on the Domicile Bill 2006**

The object of this paper is to consult relevant parties on the draft legislation at **Annex A** for the purpose of implementing the recommendations of the Law Reform Commission's report on "Rules for Determining Domicile" published in April 2005 ("the Report").

The Purpose of the Bill

2. The purpose of the Bill is to simplify the complex and confusing common law rules for determining a person's domicile, and to make it easier to ascertain a person's domicile. A summary of the recommendations in the Report is at **Annex B**. The full Report can be found at <http://www.hkreform.gov.hk>.

3. The Law Reform Commission ("the Commission") considers that, for practical purposes, the recommendations would not change the domicile of many people, with the exception of a married woman's domicile which will no longer depend on that of her husband.

4. The Bill also proposes a major change in the law relating to the domicile of children so that this will no longer be tied to the parents' domicile. This proposal will ensure that the domicile of children more closely reflects modern realities. The Bill also proposes to abolish the concept of domicile of origin so that the domiciliary rule will be better tuned to modern conditions.

Background

5. Domicile has been defined as "the place or country which is considered by law to be a person's permanent home". The central notion of domicile is that of a long-term relationship between person and place. The concept of domicile is used in various areas of both common law and statute law to determine the system of law which should govern a person's civil status and certain aspects of the administration of his or her property, including:

- (a) legal capacity to marry;
- (b) succession to an intestate's movables;
- (c) personal capacity to make a will;
- (d) formal validity of a will (section 24 of the Wills Ordinance (Cap 30));
- (e) jurisdiction of the courts in proceedings for divorce, etc (sections 3 and 4 of the Matrimonial Causes Ordinance (Cap 179)); and
- (f) recognition of overseas divorces or legal separations (section 56 of Cap 179).

6. Despite their importance, the rules for determining a person's domicile are unnecessarily complicated and technical, and sometimes lead to absurd results. The following are examples of anomalies under the current rules.

- (a) A domicile of origin is given to every person at birth by operation of law. It reflects the domicile of the relevant parent at the time of the child's birth. Where a child is born or where his parents live is irrelevant. As a consequence, the same domicile of origin can be passed on from generation to generation even though few members of the family have actually lived in the country of their domicile.
- (b) The rules determining the domicile of dependency of children differ between legitimate and illegitimate children. In general terms, a legitimate child's domicile of dependency follows that of his father, while an illegitimate child's follows that of his mother. This is a well-settled rule, but it can lead to some strange results. For instance, where the parents of a legitimate child live apart, and the child lives with the mother in England and has no home with the father in Hong Kong, the child's domicile still follows that of his father. It is also difficult to justify in principle why the domicile of a child depends on whether or not his parents are married.

- (c) A married woman's domicile is the same as, and changes with, her husband's domicile. This rule applies even where the spouses live apart in different countries, whether or not this is according to a formal separation agreement. The rule applies even where a wife has obtained a decree of judicial separation.

Major provisions of the Bill

Clause 3 – General rules

7. The following general principles governing domicile are set out in clause 3 of the Bill (Recommendation 14(b) of the Report):

- (a) no person can be without a domicile;
- (b) no person can at the same time and for the same purpose have more than one domicile; and
- (c) for the purposes of a Hong Kong rule of the conflict of laws, the question where a person is domiciled is determined according to Hong Kong law.

Clause 4 - Domicile of children

8. To replace the existing concepts of domicile of origin and domicile of dependency, the Commission recommends a single test, which ties the child's domicile to the jurisdiction with which he is most closely connected, as well as two presumptions so as to simplify the law (Recommendation 4 of the Report). The first presumption is that, where a child's parents have their domicile in the same country and the child has his home with either or both of them, he is presumed to be domiciled in that country, unless he is proved to be most closely connected with another country. The second presumption is that, where a child's parents are not domiciled in the same country and the child has his home with only one of them, he is presumed to be domiciled in the country where the parent with whom he has his home is domiciled, unless he is proved to be most closely connected with another country.

9. Clause 4 implements Recommendation 4 of the Report –
- (a) by providing that a child is domiciled in the country or territory with which he is most closely connected;
 - (b) by introducing 2 rebuttable presumptions to assist in the determination of the country or territory of closest connection, that is to say –
 - (i) where the child's parents are domiciled in the same country or territory and the child has his home with either or both of them, it shall be presumed, unless the contrary is proved, that the child is most closely connected with that country or territory; and
 - (ii) where the child's parents are not domiciled in the same country or territory and the child has his home with one of them, but not with the other, it shall be presumed, unless the contrary is proved, that the child is most closely connected with the country or territory in which the parent with whom he has his home is domiciled.

Clause 5 - Domicile of adults

10. Under the existing law, the act required to acquire domicile is "residence" which "means very little more than physical presence".¹ It means physical presence as an inhabitant of the country concerned², and it excludes those who are present "casually or as a traveller". The word "residence", however, gives the impression of connoting something more than mere physical presence. The Commission is of the view that "presence" in the country concerned can best bring out the essence of the act required to acquire a domicile.

11. According to some older authorities, the existing law also requires an intention to reside permanently in a place before a person can acquire a new domicile. This stringent requirement has been criticised as unrealistic since it may well mean that "no man would ever have a

¹ *Dicey and Morris on the Conflict of Laws*, 13th Ed, Sweet and Maxwell, 2000 at paras 6-034.

² *IRC v Duchess of Portland* [1982] Ch 314, at 318-9.

domicile at all, except his domicile of origin". The Commission favours the Australian approach: an intention to make a home in the country concerned indefinitely, because the concept of domicile is related to a person's home (Recommendation 7 of the Report). This approach better captures the essence of the concept, can be more readily understood and is simpler to operate. The test of "indefinitely" would make the residence requirement more realistic.

12. Clause 5 implements Recommendations 6(a) and 7 of the Report.

13. Under clause 5(1), an individual will retain his last childhood domicile on becoming an adult, i.e. on reaching the age of 18, unless he acquires a new domicile.

14. Two requirements are set out in Clause 5(2) for the acquisition of a new domicile by an adult, namely –

- (a) he is present in another country or territory; and
- (b) he intends to make a home in that country or territory for an indefinite period.

Clauses 6 and 7 – Acquiring a domicile in Hong Kong and another country or territory

15. The existing rules on domicile of choice have long been criticised as artificial and uncertain. They are artificial because a person's domicile persists long after any connection with the country concerned has ended, making it difficult to establish a new domicile. They lead to uncertainty because of difficulties in determining a person's intention. The Commission's recommendations aim to deal with these anomalies.

16. Clauses 6 and 7 implement Recommendation 6(b) and (c) of the Report.

17. Clause 6(1) sets out a general rule that lawful presence in Hong Kong is required for an adult to acquire a domicile in Hong Kong. Clause 6(2) states that an adult's presence in Hong Kong is to be

presumed to be lawful unless the contrary is proved. Under clause 6(3), in exceptional circumstances where strict adherence to the general rule would result in injustice, an adult may acquire a domicile in Hong Kong even when his presence in Hong Kong is unlawful.

18. The Commission is of the view that, “as a general rule, lawful presence in Hong Kong should be required to acquire a domicile in Hong Kong”. However, having considered the recent English Court of Appeal decision in *Mark v Mark* [2004] 1 FLR 1069, it recommended that, where strict adherence to that rule would lead to injustice, the court should have discretion to depart from that rule. Subsequently, the House of Lords affirmed the decision of the Court of Appeal (see *Mark v Mark* [2004] 1 FLR 1069).

19. Clause 7 provides that, in deciding whether an adult acquires a domicile in a country or territory other than Hong Kong, one of the factors to be considered is whether his presence in that country or territory is lawful by the laws of that country or territory.

Clause 8 – Domicile of adults under disability

20. Two aspects of the existing law on domicile of the mentally incapacitated lead to artificiality. First, the domicile of a mentally incapacitated person freezes at the onset of his incapacity. Second, if his incapacity commences before the age of majority, his domicile will be determined as if he were a child as long as he remains incapacitated. The Commission recommends that:

- (a) a mentally incapacitated adult should be domiciled in the country with which he is most closely connected;
- (b) a mentally incapacitated adult, on recovery of his capacity, should retain the domicile which he last held before his recovery, and he may then acquire a domicile of his choice; and
- (c) the relevant provision should be phrased so as to cover not only the mentally incapacitated, but also persons in a comatose, vegetative or semi-vegetative state, and any other person who for one reason or another is not able to form the required intention.

(Recommendation 10 of the Report)

21. Clause 8 implements Recommendation 10 of the Report, and provides that a person lacking the capacity to form the intention necessary for acquiring a new domicile is domiciled in the country or territory with which he is most closely connected. The reference to a person who lacks that capacity will cover a mentally incapacitated adult or an adult in a comatose, vegetative or semi-vegetative state.

Clause 9 – Continuity of domicile

22. The Commission recommends abolishing the doctrine of domicile of origin and, consequentially, its revival. Consistently with other jurisdictions, the Commission recommends adopting the continuance rule: a person's domicile will continue until he acquires a new one. (Recommendation 8 of the Report).

23. Clause 9 provides for continuity of domicile in accordance with Recommendation 8 of the Report.

Clause 10 – Domicile in country comprising two or more territories

24. Under existing Hong Kong law, where a person lives in a federal or composite state without deciding in which country of that state to settle permanently or indefinitely, his domicile of origin will revive and he will not acquire a new domicile in any country of that state. With the abolition of the domicile of origin and its revival, the continuance rule would link a person to a country which he wishes to abandon where he goes to a federal state but remains undecided in which country of the federation to settle down.

25. Clause 10 implements Recommendation 12 of the Report by providing that an adult who is present in a country comprising two or more territories and intends to make a home somewhere in that country for an indefinite period, but has not formed an intention to make a home in any particular territory in that country, will be domiciled in whichever of the constituent territories with which he is most closely connected.

Clause 11 – Standard of proof

26. Under existing law, the standard of proof may be higher than a mere balance of probabilities where the domicile to be displaced is a

domicile of origin.

27. Clause 11 implements Recommendation 11 of the Report by providing that the normal civil standard of proof on a balance of probabilities applies in all disputes about domicile.

Clauses 12 and 13 – Domicile before and after commencement date

28. If the rules for determining domicile are reformed, it is likely that the existing domicile of some persons may be affected. It is therefore necessary to consider the transition from the existing rules to the new rules. The Commission recommends that:

- (a) the new legislation should not have retrospective effect;
- (b) a person's domicile at any time before the commencement date of the new legislation should be determined as if the legislation had not been passed; and
- (c) his domicile at any time after that date should be determined as if the new legislation had always been in force.

(Recommendation 13 of the Report)

29. Clauses 12 and 13 implement Recommendation 13 of the Report.

- (a) The rules in clauses 3 to 11 do not apply in determining the domicile that an individual had before the commencement date.
- (b) In determining the domicile that an individual has on or after the commencement date, the rules in clauses 3 to 11 apply as if they had always been in force, in place of the rules of common law for determining the domicile of an individual that are inconsistent with the Bill and the enactment repealed by clause 14. In particular, the common law rules on domicile of origin, domicile of dependency of children and the differentiation between the case of a legitimate child and that of an illegitimate child, the domicile of dependency of married women, the revival of domicile of origin as well as the common law rule that a mentally incapacitated person

retains his domicile immediately before incapacitation are abolished (Recommendations 2, 3, 8, 9 of the Report). The rule that the standard of proof required to prove that an individual's domicile changes from a domicile of origin to a domicile of choice is more onerous than that required to prove a change from a domicile of choice to another will also not apply since the normal civil standard of proof will apply under clause 11.

30. Clauses 13(3) provides that nothing in the Bill will affect any other rules of the common law (Recommendation 14(C) of the Report).

Clauses 14 and 15 – Consequential Amendments

31. Clauses 14 and 15 contain consequential amendments to the Matrimonial Causes Ordinance (Cap. 179) (“MCO”) –

- (a) Clause 14 repeals section 11C(2) of the MCO which allows a married woman to have her own independent domicile for certain limited purposes (e.g., the jurisdiction of the court in respect of divorce, nullity, or judicial separation). This provision is an exception to the common law rule of the domicile of dependency of a married woman. With the abolition of that rule, such provision will no longer be necessary.
- (b) Under section 59 of MCO, a divorce or legal separation obtained, or recognized as valid, in the country of a married couple's domicile is recognized as valid. With the abolition of the domicile of dependency of a married woman, the husband and the wife may have different domiciles. Clause 15, therefore, amends section 59 of MCO so that a divorce or legal separation obtained in, or is recognized as valid in, the country of either spouse's domicile is recognized as valid.

Consultation

32. Your views in relation to the provisions of the Bill should be addressed to the following by **15 June 2006** –

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Chapter 5

Summary and practical effects of recommendations

Summary of recommendations

Chapter 3 - Should domicile be retained as a general connecting factor?

5.1 Domicile should be retained as a general connecting factor, but the existing rules for determining a person's domicile should be modified as recommended in this Report. (*Recommendation 1*)

Chapter 4 - The law in other jurisdictions, options for reform and recommendations

5.2 We recommend that the concept of domicile of origin and that of domicile of dependency should be discarded. (*Recommendation 2*)

5.3 We recommend that there should be no differentiation between legitimate and illegitimate children in determining their domicile. (*Recommendation 3*)

5.4 We recommend the following rules for determining a child's domicile:

- (a) a child's domicile should be in the country with which he is most closely connected;
- (b) where a child's parents have their domicile in the same country and the child has his home with either or both of them, he is presumed to be domiciled in that country, unless he is proved to be most closely connected with another country; and
- (c) where a child's parents are not domiciled in the same country and the child has his home with only one of them, he is presumed to be domiciled in the country where the parent with whom he has his home is domiciled, unless he is proved to be most closely connected with another country.

In this context, "parents" includes adoptive parents of a child. In applying the closest connection test, the courts should take account of all relevant factors,

including the child's intention. (*Recommendation 4*)

5.5 We recommend that any person who is not mentally incapacitated may acquire a domicile of his choice once he attains the age of 18. (*Recommendation 5*)

5.6 We recommend that :

- (a) the act necessary for a person of full age and capacity to acquire a domicile should be presence in the country concerned;
- (b) as a general rule, lawful presence in Hong Kong should be required to acquire a domicile in Hong Kong, but in exceptional circumstances, where strict adherence to the rule would lead to injustice, the court should have discretion to depart from the rule; and a person's presence should be presumed to be lawful, unless and until the contrary is established; and
- (c) in deciding whether an individual has acquired a domicile in a country other than Hong Kong, one of the factors to be considered by the Hong Kong courts should be whether or not the presence in that country is lawful by the laws of that country. (*Recommendation 6*)

5.7 We recommend that the requisite intention for a person of full age and capacity to acquire a domicile should be that the individual intends to make a home in the country concerned for an indefinite period. (*Recommendation 7*)

5.8 We recommend that the domicile a person has at any time should continue until he acquires a different one, whether by choice or by operation of law. (*Recommendation 8*)

5.9 We recommend that the domicile of dependency of married women should be abolished. (*Recommendation 9*)

5.10 We recommend that:

- (a) a mentally incapacitated adult should be domiciled in the country with which he is most closely connected;
- (b) a mentally incapacitated adult, on recovery of his capacity, should retain the domicile which he last held before his recovery, and he may then acquire a domicile of his choice;
- (c) the relevant provision should be phrased so as to cover not only the mentally incapacitated, but also persons in a comatose, vegetative or semi-vegetative state, and any other person who for one reason or another is not able to form the required intention. (*Recommendation 10*)

5.11 We recommend that the normal civil standard of proof on a balance of probabilities should apply in all disputes about domicile.

(Recommendation 11)

5.12 We recommend that a person who is present in a federal or composite state and intends to make his home there indefinitely should, if not held to be domiciled in any law district within that state under the general rules recommended in this Report, have his domicile in the law district with which he is for the time being most closely connected. *(Recommendation 12)*

5.13 We recommend that:

- (a) the Recommended Legislation should not have retrospective effect;
- (b) a person's domicile at any time before the commencement date of the Recommended Legislation should be determined as if the legislation had not been passed;
- (c) his domicile at any time after that date should be determined as if the Recommended Legislation had always been in force. *(Recommendation 13)*

5.14 We recommend:

- (a) that the Recommended Legislation on the rules for determining natural persons' domicile should be as comprehensive as possible;
- (b) that the Recommended Legislation should set out the following general rules on domicile:
 - no person can be without a domicile;
 - no person can at the same time for the same purpose have more than one domicile;
 - for the purposes of a Hong Kong rule of the conflict of laws, the question of where a person is domiciled is determined according to Hong Kong law;
- (c) that the Recommended Legislation should include a saving provision for the existing common law rules which are not inconsistent with the new statutory rules. *(Recommendation 14)*

Practical effects of recommendations

5.15 We hope that the recommendations in this Report will improve this complex and confusing area of common law by simplifying the concept of domicile and making the ascertainment of a person's domicile easier. Annex 3 tabulates the current rules and the proposed rules for comparison. In practical terms, we do not think that the recommendations would change the domicile of many people, with the exception of the proposed abolition of the married

women's domicile, which would change the domicile of some married or recently divorced women. Those changes may have already taken effect as a consequence of Article 8 of the Basic Law., but we feel it is important to resolve this matter clearly, to remove any uncertainty, to deal with transitional problems expressly, and to eliminate a discriminatory rule from Hong Kong law once and for all.

5.16 Another major change is that relating to the domicile of children. The existing rules are essentially based on the Victorian idea of the father being the *pater familias*, and we believe that our proposals would more closely reflect modern realities. Lastly, the abolition of the concept of domicile of origin may also impact on some people's domicile. It is worth mentioning that the formation of the concept and its special tenacity were influenced by the desire of those resident in colonies overseas at the height of the British Empire more than a century ago to have their private and family life governed by the law of their homeland. In a different age, we question the validity of this special bias in favour of a person's first domicile, especially in the light of greatly increased mobility. We believe that the abolition of domicile of origin would make the domiciliary rules more in tune with the modern world.