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**BY FAX: 2509 9055**

8 January 2008

Mrs Eleanor Chow  
Clerk to Bills Committee  
Legislative Council Building  
8 Jackson Road  
Central  
Hong Kong

via Mr Michael Scott, SASG/GLP

Dear Mrs Chow,

### **Bills Committee on Domicile Bill**

I refer to the Bills Committee meeting held on 10 December 2007.  
Our response regarding the matters raised is as follows –

#### **Clause 7 and Clause 10A**

##### Bills Committee's query

The Bills Committee members requested the Administration to review the drafting of the proposed new clause 7 and the newly added clause 10A.

##### The Administration's response

After careful consideration of the views of members, we propose the  
----- Committee Stage Amendments ("CSA") attached at **Annex A**.

## **Clause 13**

### **Bills Committee's query**

Members requested the Administration to consider the need for the inclusion of clause 13(3) in the Bill, having regard to members' concerns that some of the common law rules set out in clause 13(3) and proposed to be abolished might not be inconsistent with the Domicile Bill.

### **The Administration's response**

After considering the views of members, we propose a CSA at Annex A.

## **Publicity**

### **Bills Committee's query**

Members requested the Administration to step up publicity to facilitate the familiarisation of relevant parties with the new rules for determining domicile before the Ordinance comes into force.

### **The Administration's response**

We agree that publicity should be stepped up so that the public would be aware of the new legislation. As a result, we propose that the Bill, if passed, will be brought into force not less than six months from the date of enactment. As domicile is a fairly technical legal concept and of particular interest to legal professionals, we would also seek the cooperation of the two professional bodies to publicize the changes among their members.

## **Clause 2**

### **Bills Committee's queries**

Members requested the Secretary for Justice to consider explaining the following in his speech during the resumption of the Second Reading debate on the Bill –

- (a) the meaning of the definition of "parents" in the Bill and how the definition would apply under the circumstances described in clause

4(3) and (4); and

- (b) in applying the closest connection test in determining the domicile of children, whether one category of parents would have priority over the other categories

We were further requested by members to advise whether the word "parent", where it appeared in other ordinances, was in singular or plural form.

#### The Administration's response

Our present definition of "parents" in the Bill was based on the Domicile Act (No. 3 of 1992) of South Africa which provides in s. 2(3) –

"parents" includes the adoptive parents of a child and the parents of a child who are not married to each other.

In response to the concern raised by members in using the term "parents" in the Bill, we propose to amend the term to singular form by way of CSAs at Annex A.

Regarding members' suggestion that the Secretary for Justice should clarify the priorities of different categories of "parents" in his speech when moving the resumption of second reading, we consider that instead of interpretation of the provisions of the Bill by the Secretary for Justice, members' concern would preferably be dealt with and clarified by way of CSA at Annex A.

The draft CSAs are in line with the law of adoption. The effects of an adoption are: All rights, duties, obligations and liabilities of the parents or guardians of the child in relation to the future custody, maintenance and education of the child ("the relevant matters") shall be extinguished and, in respect of the relevant matters, the child shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock. This rule is slightly modified where a child is adopted by a person married to the child's natural father or mother (i.e. a step-parent), in which case the extinguishment of rights, etc. does not apply to that natural parent and the child shall stand to the adopter and that natural parent exclusively in the position of a child born to them in lawful wedlock. Therefore, the draft CSAs make it clear that in the case of an

adopted child, only the adopter or adopters (or, in the case of a child adopted by a person married to a natural parent of the child, only the adopter and that natural parent) is or are regarded as the child's parent or parents.

Other than the case of parents by adoption, there seem no clear policy reasons for making a general rule to accord priority to one category of parents over another.

In applying the closest connection test in determining the domicile of children, the court will consider all circumstances of the case. This is unlike the case of clause 4(3) and (4) whereby the court will first have to determine who the parent(s) is before adopting the presumption.

As far as local legislation is concerned, the word "parent" appears in the singular in some ordinances and in the plural in other ordinances. Some precedents are set out in **Annex B**.

Yours sincerely,

( Ms Kitty Fung )  
Senior Government Counsel  
Legal Policy Division

Encl.

DOMICILE BILL

COMMITTEE STAGE

Amendments to be moved by the Secretary for Justice

<u>Clause</u>	<u>Amendment Proposed</u>
2(1)	By adding “, unless the context otherwise requires” after “this Ordinance”.
2(1)	By deleting the definition of “parents” and substituting – ““parent” (父母), in relation to a child, means – (a) the natural father or natural mother of the child (whether or not the natural father and natural mother are married to each other); (b) a parent of the child by adoption; or (c) a stepfather or stepmother of the child.”.
2	By adding – “(1A) For the purposes of the definition of “parent” – (a) an adoption means – (i) an adoption under an adoption order made in accordance with the Adoption Ordinance (Cap. 290); or (ii) an adoption recognized as valid by the law of Hong Kong; (b) where a child is so adopted and subject to paragraph (c), the adopter or adopters, and not any other person, is or are treated as the parent or parents of the child; and (c) where –

- (i) a person married to a natural parent of a child has adopted the child under an adoption within the meaning of paragraph (a); and
- (ii) by virtue of paragraph (c)(i) of section 13(1) of the Adoption Ordinance (Cap. 290), the child stands to the adopter and that natural parent exclusively in the position of a child born to them in lawful wedlock in respect of the relevant matters within the meaning of that section 13(1), or by virtue of any law of the country or territory of adoption other than Hong Kong, the child stands to the adopter and that natural parent exclusively in such a position in respect of such matters,

the adopter and that natural parent, and not any other person, are treated as the parents of the child.”.

4 In the Chinese text, by deleting subclause (1) and substituting –

“(1) 未成年人的居籍為他當其時與之有最密切聯繫的國家或地區。”.

4 By deleting subclause (2).

7 By deleting the clause and substituting –

**“7. Acquiring a domicile in another country or territory**

In determining for the purposes of section 5(2) whether an adult has acquired a domicile in a country or territory other than Hong Kong –

- (a) account shall be taken of whether his presence in

that country or territory is lawful by the law of that country or territory; but

- (b) even if his presence in that country or territory is unlawful by the law of that country or territory, that fact does not preclude a determination that he has acquired a domicile in that country or territory.”.

New By adding –

**“10A. Closest connection**

(1) In determining for the purposes of section 4, 8 or 10 the country or territory with which an individual is for the time being most closely connected, account may be taken of any relevant matter.

(2) In determining for the purposes of section 4 the country or territory with which a child is for the time being most closely connected, account shall be taken of any preference that the child may have as to the country or territory in which to have his home.

(3) In determining for the purposes of section 8 the country or territory with which an adult lacking the capacity to form the intention necessary for acquiring a domicile is for the time being most closely connected, account shall be taken of any intention that he might have, immediately before losing that capacity and as an adult, as to the country or territory in which to make a home for an indefinite period.

(4) Any matter taken into account under subsection (1), (2) or (3) may be given such weight as is appropriate in all the circumstances of the case.”.

13(1) By adding “(other than section 12)” after “as if this Ordinance”.

13 By deleting subclauses (2) and (3) and substituting -

“(2) For the purposes of a determination under subsection (1), this Ordinance (other than section 12) applies in place of –

- (a) the rules of common law for determining the domicile of an individual to the extent that those rules are inconsistent with this Ordinance (other than section 12); and
- (b) section 11C(2) of the Matrimonial Causes Ordinance (Cap. 179), which section is repealed by this Ordinance.

(3) For the purposes of subsection (2)(a), the rules of common law for determining the domicile of an individual include (without limitation) –

- (a) the rule that a domicile of origin is given to every individual at birth by operation of law;
- (b) the rule that a child has a domicile of dependency;
- (c) the rule that a married woman has at all times the domicile of her husband;
- (d) the rule on the acquisition of the domicile of choice based on residence and intention of permanent residence;
- (e) the rule on the revival of the domicile of origin;
- (f) the rule that a mentally incapacitated adult retains the domicile that he had when he became mentally incapacitated for so long as he remains in that condition; and
- (g) 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.”.



**Definitions of “parent” and “parents” in various Ordinances**

Guardianship of Minors Ordinance (Cap. 13) section 2	“ <b>parent</b> ” (父母) means father or mother.
Law Amendment and Reform (Consolidation) Ordinance (Cap. 23) section 20C	“ <b>parent</b> ” (父母) includes any person who, during any marriage to which that person was a party, treated the injured person as a son or daughter of the family in relation to that marriage;
Insurance Companies Ordinance (Cap. 41) section 64A	“ <b>parent</b> ” (父母), in relation to a minor, means father or mother.
Employment of Children Regulations (Cap. 57B) regulation 2	“ <b>parent</b> ” (父母), in relation to a child, includes a guardian and the person having actual custody of the child;
Inland Revenue Ordinance (Cap. 112) section 2	“ <b>parent</b> or <b>parent</b> of his or her spouse” (該人的或其配偶的父或母), in relation to any person, means- (a) a parent of whose marriage the person or his or her spouse is the child; (b) the natural father or mother of the person or his or her spouse; (c) a parent by whom the person or his or her spouse was adopted; (d) a step parent of the person or his or her spouse; or (e) in the case of a deceased spouse, a person who would have been the parent of the person's spouse by reason of any of the provisions of paragraphs (a) to (d) if the spouse had not died;

<p>Crimes Ordinance (Cap. 200) section 135(4)</p>	<p>In subsection (3), “<b>parent</b>” (父母) does not include, in relation to any girl or boy, a person deprived of her or his custody by order of a court of competent jurisdiction but, subject to that, in the case of a girl or boy who has been adopted under the Adoption Ordinance (Cap 290) means her or his adopters and in the case of a girl or boy who is illegitimate, and has not been so adopted, means her or his mother and any person who has been adjudged to be her or his putative father.</p>
<p>Prevention of Bribery Ordinance (Cap. 201) section 2</p>	<p>“<b>parents</b>” (父母) includes parents-in-law and step-parents;</p>
<p>Reformatory Schools Ordinance (Cap. 225) section 2</p>	<p>“<b>parent</b>” (父母), when used in relation to a youthful offender, includes a guardian and any other person legally liable to maintain such youthful offender;</p>
<p>Adoption Ordinance (Cap. 290) section 2</p>	<p>“<b>parent</b>” (父母、父或母), in relation to a child who is born out of wedlock, means-</p> <ul style="list-style-type: none"><li>(a) his mother;</li><li>(b) in the case of a child whose father is entitled to exercise any right or authority in relation to the child by virtue of an order of a court under section 3(1)(d) of the Guardianship of Minors Ordinance (Cap 13), his father;</li></ul>
<p>Estate Agents Ordinance (Cap. 511) section 46</p>	<p>“child” (子女) includes a child who is illegitimate or adopted and a step child, and “<b>parent</b>” (父母) shall be construed accordingly;</p>