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LEGISLATIVE COUNCIL SECRETARIAT
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13 July 2011

Ms Karyn CHAN
PAS for Labour & Welfare (Welfare) 1
Labour and Welfare Bureau
8/F, West Wing, Central Government Offices,
Lower Albert Road,
Central,
Hong Kong

Dear Ms CHAN,

Guardianship of Minors (Amendment) Bill 2011

I am scrutinizing the Guardianship of Minors (Amendment) Bill 2011 (the Bill) and would be grateful for your response to the following matters -

Clause 4

Clause 4 seeks to substitute the existing sections 5 to 8 under Part III of the Guardianship of Minors Ordinance (Cap. 13) (the Ordinance) with the proposed sections 5 to 8H.

Proposed section 5

- (a) The proposed section 5 provides that, "[on] the death of a parent of a minor, the surviving parent (if any) is the guardian of the minor either alone or jointly with any guardian appointed this Part". It is noted that under the existing section 19(4) of the Matrimonial Proceedings and Property Ordinance (Cap. 192), the surviving parent shall not be entitled as of right to the custody or the

guardianship of the child of the family upon the death of custodial parent if the court has made an order in the decree of divorce or judicial separation that he/she was unfit to have custody of the child. It follows that the rights of surviving parents as to guardianship under proposed section 5 should be made subject to section 19(4) of Cap. 192. Please clarify.

Proposed section 6

- (b) The proposed section 6(3) provides that an appointment of guardian must be made by a document in writing. While setting out the formal requirements that such document must be dated, signed and attested, the proposed section 6(3) does not prescribe any formulation that would express the parent's intention of appointing a guardian. To facilitate parents to make a valid appointment, would it be convenient to prescribe in the proposed section 6 the necessary wording which will be regarded as sufficient for expressing an intention of appointing a guardian?
- (c) The proposed section 6(5) provides that in appointing a guardian of a minor under section 6, a parent or guardian of a minor must take into account the views of the minor as far as practicable having regard to the minor's age and understanding. In the Chinese text, "意願" is used for the "views" of the minor. However, it is noted that in the existing section 3(1)(a)(i)(A) of the Ordinance, which states the general principles to which the court shall give regard in the proceedings concerning minors, "意願" is used for the "wishes" of the minor in the English text. Please explain the reason(s) for not adopting the same English expression "wishes" for "意願" in the proposed section 6(5).

Proposed section 7

- (d) The proposed section 7(a) provides that a person appointed by a parent who has a custody order over the minor immediately before he/she dies may assume guardianship automatically without the need to apply to the court. This provision is added in response to the Law Reform Commission's recommendation that a testamentary guardian should be able to act on the death of the appointing parent if the child was residing with that parent prior to his/her death. When applying the proposed section 7(a) to cases where a joint custody order is granted to the divorced parents (i.e.

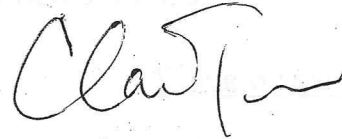
the decisions on the upbringing of the child will be made jointly by both parents) but the child is living with only one of the parents, the guardian appointed by the deceased parent who did not live with the minor may nevertheless automatically assume guardianship of the minor. Please confirm whether this is intended by the proposed section 7(a). If the answer is in affirmative, please explain the effect of the automatic assumption on the existing rights of the surviving parent over the minor, if any.

Clauses 6 and 7

- (e) Consequential upon the proposed amendments under clause 4, clause 6 amends the existing section 11 of the Ordinance by substituting the reference "section 6(3)(b)(ii)" with the references "section 8(e), 8A(2)(c) or section 9". The existing section 11 provides for the types of custody and maintenance orders the court may make when it appoints a sole guardian to the exclusion of the surviving parent. While the proposed section 8(e) and 8A(2)(c) are provisions under which the court may order a guardian to act to the exclusion of the surviving parent, the existing section 9 deals with the court's power in resolving differences between joint guardians on matters affecting the welfare of the minor. Please explain the reason(s) for adding the reference "section 9" to the existing section 11.
- (f) Clause 6(2) and 7(2) respectively propose to substitute "his" with "his or her" in the English text of the existing section 11(1)(a)(ii) and 12(a)(ii). However, 'his' is still used to include feminine gender in other existing sections of the Ordinance such as section 18 (Powers of guardians). The co-existence of masculine pronouns that intends to include the feminine and expressions that spell out both genders together with the presence of certain gender-sensitive provisions (e.g. section 21 on rights of the natural father of illegitimate children) may have an unintended impact on the interpretation of the existing provisions of the Ordinance. Please consider whether it is appropriate to also amend the other inclusive masculine expressions to achieve consistency in the text of the Ordinance.

I shall be most grateful if you could let me have your response in both Chinese and English at your earliest convenience to enable members of the Bills Committee to consider the matters before its next meeting on 27 July 2011.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Clara TAM', with a stylized flourish at the end.

(Clara TAM)
Assistant Legal Adviser

c.c. DoJ (Attn.: Karmen KWOK, GC (By Fax: 2869 1302))
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