

LEGISLATIVE COUNCIL BRIEF

**Guardianship of Minors Ordinance
(Chapter 13)**

GUARDIANSHIP OF MINORS (AMENDMENT) BILL 2011

INTRODUCTION

At the meeting of the Executive Council on 24 May 2011, the Council ADVISED and the Chief Executive ORDERED that the Guardianship of Minors (Amendment) Bill 2011 (the Bill) at **Annex A** should be introduced into the Legislative Council (LegCo).

JUSTIFICATIONS

The concept of guardianship

2. The Bill seeks to amend the Guardianship of Minors Ordinance (Cap. 13) (the GMO) for implementing the recommendations of the Report on Guardianship of Children (the Report) published by the Law Reform Commission of Hong Kong (LRC), which aim at facilitating parents in making guardianship arrangements for their children in the event of their deaths. 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”. Accordingly, the Report focuses on the legal arrangements in relation to the appointment, removal and power of guardians for minors⁽¹⁾ under the GMO. Under the GMO, a parent may by will or deed 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

Note⁽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.

which does not require 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 number of children subject to testamentary or court appointed guardianship in Hong Kong.

The LRC's review of the existing law

3. The LRC's review focused on the provisions under the GMO which govern the appointment, removal and powers of guardians for minors. The review was 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 progress from infancy 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 made reference to the relevant provisions in the Children Act 1989 (England and Wales) and the Children (Scotland) Act 1995 (Scotland).

4. 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 preparation, execution and operation of a deed or will involve many technicalities which may discourage parents from appointing guardians for their children;
- (b) there is currently no requirement that the consent of the person appointed as guardian be obtained, or even that he/she be notified of the appointment;
- (c) there is no provision in the law for a guardian to disclaim the appointment;
- (d) under section 6(2) of the GMO, the surviving parent has a right to veto the testamentary guardian taking up the appointment by raising objection. This renders the guardian appointment made by the deceased parent nugatory, unless the testamentary

guardian takes the matter to court⁽²⁾;

- (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) section 7 of the GMO provides for the court to appoint a guardian on the application of any person if the child has no parent, no guardian **and** no other person having parental rights with respect to him. 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) there is no statutory provision allowing a guardian to appoint a guardian to act for him/her in the event of his/her death.

The law reform recommendations made by the LRC

5. To address the issues listed in paragraph 4 above, the LRC made the following law reform recommendations in the Report –

- (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 notified to the

Note⁽²⁾ Under section 6(3) of the GMO, if the guardian takes the matter to the court after the surviving parent exercises the veto power, the court can refuse to make an order, which results in the surviving parent remaining sole guardian, or it can order that the guardian shall act jointly with the surviving parent, or to the exclusion of the surviving parent.

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 broaden the scope of the power of the court to appoint guardians for minors on applications of interested parties. In this connection, the LRC recommended the adoption of a provision which provides for the court to appoint a person to be the guardian of a minor on application of that person if –
 - (i) the child has no parent with parental rights for him/her;
or
 - (ii) 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 District Court.

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

Proposed legislative amendments

6. The Administration completed examination of the Report and issued its response to the Report (at **Annex C**) to the Chairman of the LRC in October 2009. As stated in the public response, the Administration accepted all the recommendations of the Report. We therefore propose to amend the GMO to implement all the law reform recommendations of the Report as set out in paragraph 5 above. Besides, we also propose to adopt, with modifications, a few other provisions in the English Children Act 1989 (England and Wales) 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 that he/she made under the GMO before it takes effect. We also propose to provide the court with the power to appoint guardians for minors under specified circumstances in any domestic proceedings even if no application has been made, and to make it clear that a guardian appointed under the GMO is to have parental rights with respect to the minor.

Implementation of other recommendations of the Report

7. 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 on the internet. This recommendation will be implemented by administrative means.

8. 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 that Official Solicitor's powers under the existing legislation are wide enough to facilitate him in undertaking appointments to protect minors' property and that our recommendation that the status quo should be maintained is acceptable.

THE BILL

9. The key provisions of the Bill are set out below –
- (a) clause 1 provides for the short title and commencement of the Bill. The Bill will come into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette;
 - (b) clause 3 adds three new definitions to section 2 of the GMO;
 - (c) clause 4 substitutes the existing sections 5 to 8 of the GMO with the new sections 5 to 8H –
 - (i) the new section 5 states that on the death of a parent of a minor, the surviving parent is the guardian of the minor as of right. This is also provided under section 5 of the GMO at present;
 - (ii) the new section 6 provides for the appointment of a guardian by the parent or guardian of a minor. It sets out, among other things, the requirements for appointing guardians, including that the appointment must be made by a document in writing with the signatures of the appointing parent attested by two witnesses and accepted by the appointee guardian expressly or impliedly, etc.;
 - (iii) the new sections 7 and 8 set out when guardianship takes effect. Section 7 provides for the situations where guardianship takes effect automatically, whereas section 8 sets out that in situations other than those specified under section 7, a person appointed by a parent or guardian as the guardian of a minor under the new section 6 may, after the death of the appointing parent or appointing

guardian, apply to the court to assume guardianship over the minor;

- (iv) the new section 8A provides that the guardian appointed under the new section 6 has to act jointly with the surviving parent or surviving guardian. It also provides that the surviving parent or surviving guardian and the guardian appointed under the new section 6 may apply to the court if they think the other is unfit to have guardianship over the minor;
- (v) the new section 8B sets out how an appointment made under the new section 6 can be revoked before it takes effect;
- (vi) the new section 8C provides for the system for a guardian to disclaim guardianship before assuming guardianship, and the requirement that the disclaimer must be notified to the persons specified in the section;
- (vii) the new section 8D specifies the circumstances where the court has power to appoint a person to be the guardian of a minor;
- (viii) the new section 8E provides that the court may remove any guardian and appoint another guardian in place of the guardian so removed if it is satisfied that it is for the welfare of the minor;
- (ix) the new section 8F provides that the guardian appointed by the court under the new section 8B or 8C has to act jointly with the surviving parent or surviving guardian;
- (x) the new section 8G stipulates, for clarity purpose, that a person appointed as a minor's guardian under Part III of the GMO is to have parental rights with respect to the minor; and
- (xi) the new section 8H provides that the court may authorise a guardian to be remunerated under the circumstances specified in the section;

- (d) clause 5 adds the new section 9A to provide for the transitional and savings provisions; and
- (e) clauses 6 to 8 make consequential amendments to other parts of the GMO.

LEGISLATIVE TIMETABLE

10. The legislative timetable is as follows —

Publication in the Gazette	3 June 2011
First Reading and commencement of Second Reading Debate	15 June 2011
Resumption of Second Reading Debate, Committee Stage and Third Reading	To be notified

IMPLICATIONS OF THE PROPOSAL

11. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It does not affect the current binding effect of the GMO. The proposal has no economic, productivity, environmental or sustainability implications. Since the appointment of guardians is a private arrangement which does not require registration with or involvement of any Government department, there should be minimal financial and manpower implications on the Government. The concerned departments will endeavour to absorb the additional workload, if any, within the existing resources. Any additional resources, if required, will be sought through the established mechanism.

PUBLIC CONSULTATION

12. The LRC has conducted consultation on its reform proposals in relation to guardianship and custody of children before publishing the Report. In coming up with the Administration's public response to the Report in October 2009, we have considered the outcome of the LRC's consultation as reflected in the Report. We also met with some social

workers in the family and child welfare field in early 2009 to collect their views on the recommendations. They were generally supportive of the recommendations.

13. After issuing the public response, we briefed the LegCo Panel on Welfare Services (LegCo WS Panel) on our stance on the Report at its meeting held on 8 February 2010, and consulted the Panel on our legislative proposals at its meeting held on 14 March 2011. The LegCo WS Panel was supportive.

PUBLICITY

14. We will publish the Bill in the Gazette on 3 June 2011. A press release will be issued before the gazettal of the Bill. A spokesperson will be available to handle media and public enquiries.

ENQUIRY

15. Any enquiries on this brief should be addressed to Ms Karyn CHAN, Principal Assistant Secretary for Labour and Welfare (Welfare)1, at 2810 3931.

Labour and Welfare Bureau
30 May 2011

Clause 1

1

Clause 4

2

A BILL TO

Amend the Guardianship of Minors Ordinance to simplify the legal arrangements for the appointment and removal of a guardian, to provide for the revocation and disclaimer of appointment as a guardian, the assumption of guardianship and the resolution of disputes between guardians; and to provide for connected matters.

Enacted by the Legislative Council.

1. Short title and commencement

- (1) This Ordinance may be cited as the Guardianship of Minors (Amendment) Ordinance 2011.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Labour and Welfare by notice published in the Gazette.

2. Guardianship of Minors Ordinance amended

The Guardianship of Minors Ordinance (Cap. 13) is amended as set out in sections 3 to 8.

3. Section 2 amended (Interpretation)

- (1) Section 2, English text, definition of *parent*—
Repeal the full stop
Substitute a semicolon.
- (2) Section 2—
Add in alphabetical order

“*custody order* (管養令) means an order made—

- (a) under section 10(1), 11(1)(a), 12(a) or 13(1)(b);
- (b) under section 5(1)(b) of the Separation and Maintenance Orders Ordinance (Cap. 16);
- (c) under section 19 or 20 of the Matrimonial Proceedings and Property Ordinance (Cap. 192); or
- (d) by the Court of First Instance in the exercise of its jurisdiction relating to wardship so far as it gives the care and control of a minor to any person;

domestic proceedings (家事法律程序) means any proceedings under the—

- (a) Separation and Maintenance Orders Ordinance (Cap. 16);
- (b) Matrimonial Causes Ordinance (Cap. 179);
- (c) Domestic and Cohabitation Relationships Violence Ordinance (Cap. 189);
- (d) Matrimonial Proceedings and Property Ordinance (Cap. 192);
- (e) Adoption Ordinance (Cap. 290);
- (f) Parent and Child Ordinance (Cap. 429); and
- (g) inherent jurisdiction of the Court of First Instance in relation to minors;

will (遺囑) includes a codicil.”.

4. Sections 5 to 8 substituted

Sections 5 to 8—

Repeal the sections

Substitute

“5. Rights of surviving parent as to guardianship

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 under this Part.

6. Power of parent and guardian to appoint guardian

- (1) A parent of a minor may appoint any person to be a guardian of the minor after that parent dies.
- (2) A guardian of a minor may appoint any person to be a guardian of the minor after that guardian dies.
- (3) An appointment made under this section must be in writing, dated and—
 - (a) signed either by the person making the appointment or by another person at the direction, and in the presence, of the person making the appointment; and
 - (b) attested by 2 witnesses.
- (4) Despite subsection (3), a parent or guardian may appoint a guardian by a will executed in accordance with section 5 of the Wills Ordinance (Cap. 30).
- (5) In appointing a guardian of a minor, a parent or guardian of the minor must take into account the views of the minor as far as practicable having regard to the minor's age and understanding.
- (6) An appointment made under this section has no effect unless the appointed person accepts the office either expressly or impliedly by conduct.
- (7) An appointment under this section may be made by 2 or more persons acting jointly.

7. When guardianship takes effect automatically

A person appointed by a parent or guardian as the guardian of a minor under section 6 automatically assumes guardianship

over the minor on the death of the appointing parent or appointing guardian (as the case may be) if—

- (a) the appointing parent or appointing guardian has a custody order over the minor immediately before he or she dies; or
- (b) the appointing parent or appointing guardian lived with the minor immediately before dying and the minor does not have any surviving parent or surviving guardian when the appointing parent or appointing guardian dies.

8. Assumption of guardianship by application

Subject to section 7, a person appointed by a parent or guardian as the guardian of a minor under section 6 may, after the appointing parent or appointing guardian dies, apply to the court to assume guardianship over the minor and the court may order the person—

- (a) to act jointly with the surviving parent or surviving guardian;
- (b) to act as the guardian of the minor after the minor no longer has any parent or guardian;
- (c) to act as the guardian of the minor at a time, or after the occurrence of an event, specified by the court;
- (d) to be removed as a guardian; or
- (e) to act as the guardian of the minor to the exclusion of the surviving parent or surviving guardian.

8A. Guardian appointed under section 6 to act jointly with surviving parent or surviving guardian

- (1) Subject to section 8, any guardian appointed under section 6 must act jointly with the surviving parent or

surviving guardian (if any) of a minor on assuming guardianship over the minor.

- (2) If the surviving parent or surviving guardian and the guardian appointed under section 6 think the other is unfit to have guardianship over the minor, either of them may apply to the court and the court may order—
- (a) the surviving parent or surviving guardian and the guardian appointed under section 6 to continue to act jointly;
 - (b) the surviving parent or surviving guardian to act as the guardian of the minor to the exclusion of the guardian appointed under section 6; or
 - (c) the guardian appointed under section 6 to act as the guardian of the minor to the exclusion of the surviving parent or surviving guardian.

8B. Revocation of guardian appointment

- (1) An appointment under section 6 revokes an earlier such appointment (including one made in a will) made by the same person in respect of the same minor, unless it is clear that the purpose of the later appointment is to appoint an additional guardian.
- (2) An appointment under section 6 (including one made in a will) is revoked if the person who made the appointment revokes it by a written and dated document that is—
 - (a) signed either by the person who made the appointment or by another person, at the direction, and in the presence, of the person who made the appointment; and
 - (b) attested by 2 witnesses.

- (3) An appointment under section 6 (other than one made in a will) is revoked if, with the intention of revoking the appointment, the person who made it—
 - (a) destroys the document by which it was made; or
 - (b) instructs any other person to destroy the document in the person's presence.
- (4) If an appointment under section 6 is made by 2 or more persons acting jointly—
 - (a) the appointment may be revoked by any of them in accordance with subsection (2) or (3); and
 - (b) the person who revokes the appointment must notify all other persons who jointly made the appointment of the revocation.
- (5) To avoid doubt, an appointment made under section 6 in a will is revoked if the will is revoked.

8C. Guardian may disclaim appointment

- (1) Any guardian who is appointed under section 6 and has accepted the office may at any time before assuming guardianship under section 7 or 8 disclaim the appointment by a written, dated and signed document.
- (2) The guardian must notify the following persons before the disclaimer is to take effect—
 - (a) the executor or administrator of the appointing parent's or appointing guardian's estate under the Probate and Administration Ordinance (Cap. 10);
 - (b) the surviving parent;
 - (c) other guardians.
- (3) If there is no such person as mentioned in subsection (2)(a), (b) and (c) or if they cannot be located, the guardian must notify the Director of Social Welfare of the disclaimer.

8D. Power of court to appoint guardian of minor

- (1) After a parent or guardian of a minor dies, the court may, if it thinks fit, appoint a person to be a guardian of the minor if—
- (a) no guardian has been appointed by the deceased parent or deceased guardian under section 6;
 - (b) the guardian appointed by the deceased parent or deceased guardian under section 6 or by the court under this section or section 8E dies; or
 - (c) the guardian appointed by the deceased parent or deceased guardian under section 6 has disclaimed the appointment.
- (2) On application by any person, the court may, if it thinks fit, appoint the person to be the guardian of a minor if—
- (a) the parent or guardian who has a custody order over the minor dies; or
 - (b) the minor does not have any parent, guardian or other person having parental rights with respect to the minor.
- (3) The power to make an appointment under subsection (2) may also be exercised in any domestic proceedings if the court thinks that the appointment should be made even though no application has been made for it.

8E. Removal of guardian

- On being satisfied that it is for the welfare of the minor, the court may, in its discretion—
- (a) remove any guardian; and
 - (b) appoint another person to replace that guardian.

8F. Guardian appointed by court to act jointly with surviving parent or surviving guardian

- (1) A guardian appointed by the court under section 8D or 8E must act jointly with the surviving parent or surviving guardian (if any) of the minor and must continue to act after the surviving parent or surviving guardian dies.
- (2) If the surviving parent or surviving guardian of a minor has appointed a guardian under section 6, the guardian appointed by the court under section 8D or 8E must act jointly with the guardian appointed by the surviving parent or surviving guardian.

8G. Guardian to have parental rights

A person appointed as the guardian of a minor under this Part has, on assuming guardianship, parental rights with respect to the minor.

8H. Remuneration for guardian

The court may authorize a guardian of a minor to be paid any remuneration for the guardianship service that it thinks fit if—

- (a) the guardian is not a parent of the minor; and
- (b) the minor is a ward of the court.”.

5. Section 9A added

Part III, after section 9—

Add

“9A. Transitional and savings

- (1) In this section—
- commencement date** (生效日期) means the day on which the Guardianship of Minors (Amendment) Ordinance 2011 (of 2011) comes into operation;

pre-amended Ordinance (《未修訂條例》) means this Ordinance as in force immediately before the commencement date.

- (2) The Guardianship of Minors (Amendment) Ordinance 2011 (of 2011) does not affect any proceedings under the pre-amended Ordinance that are pending immediately before the commencement date.
- (3) Any appointment of a person as guardian of a minor that was made under the pre-amended Ordinance, or under the Court of First Instance's inherent jurisdiction with respect to the minor, and is effective immediately before the commencement date is, on and after that date, taken to be an appointment made and having effect under this Ordinance.
- (4) Any appointment of a person as guardian of a minor that was made under the pre-amended Ordinance and has not taken effect immediately before the commencement date is, on and after that date, to be governed by this Ordinance.
- (5) To avoid doubt, any guardian appointed under the pre-amended Ordinance has the same rights and duties as a guardian appointed under this Ordinance."

6. Section 11 amended (Orders for custody and maintenance where person is guardian to exclusion of surviving parent)

- (1) Section 11(1)—

Repeal

"section 6(3)(b)(i) that a person shall be the sole guardian of a minor to the exclusion of his surviving parent"

Substitute

"section 8(e), 8A(2)(c) or 9 that a person is to act as the guardian of a minor to the exclusion of the minor's surviving parent".

- (2) Section 11(1)(a)(ii), English text—

Repeal

"his"

Substitute

"his or her".

7. Section 12 amended (Orders for custody and maintenance where joint guardians disagree)

- (1) Section 12—

Repeal

"section 9"

Substitute

"section 8(a) or (c), 8A(2)(a) or 9".

- (2) Section 12(a)(ii), English text—

Repeal

"his"

Substitute

"his or her".

8. Section 21 amended (Application to illegitimate children)
Section 21, after "7"—

Add

" 8D".

Explanatory Memorandum

The object of this Bill is to amend the Guardianship of Minors Ordinance (Cap. 13) (*principal Ordinance*) to implement certain recommendations of the Report on Guardianship of Children published by the Law Reform Commission of Hong Kong.

2. Clause 1 provides for the short title and commencement. Clause 3 adds 3 new definitions to section 2 of the principal Ordinance.
3. Clause 4 substitutes sections 5 to 8 of the principal Ordinance with the new sections 5 to 8H.
 - (a) The new section 5 states that on the death of a parent of a minor, the surviving parent is the guardian of the minor as of right.
 - (b) The new section 6 provides for the parent or guardian of a minor to appoint a guardian.
 - (c) The new section 7 sets out when guardianship is to take effect automatically.
 - (d) The new section 8 provides that a guardian may apply to the court to assume guardianship over a minor after the appointing parent or appointing guardian dies.
 - (e) The new section 8A provides that the guardian appointed under the new section 6 has to act jointly with the surviving parent or surviving guardian. It also provides that the surviving parent or surviving guardian and the guardian appointed under the new section 6 may apply to the court if they think the other is unfit to have guardianship over the minor.
 - (f) The new section 8B sets out how an appointment made under the new section 6 can be revoked.
 - (g) The new section 8C provides that a guardian may at any time before assuming guardianship over a minor,

disclaim the appointment by a written, dated and signed document.

- (h) The new section 8D specifies the circumstances where the court may appoint a guardian of a minor.
 - (i) The new section 8E provides that the court may remove any guardian and appoint another guardian in his or her place if it is satisfied that it is for the minor's welfare.
 - (j) The new section 8F provides that the guardian appointed by the court under the new section 8D or 8E has to act jointly with the surviving parent or surviving guardian.
 - (k) The new section 8G stipulates that a guardian is to have parental rights with respect to the minor.
 - (l) The new section 8H specifies the circumstances where a guardian may be authorized by the court to be remunerated.
4. Clause 5 adds the new section 9A of the principal Ordinance to provide for transitional and savings provisions.
 5. Clause 6 amends section 11 of the principal Ordinance to provide for the supplementary powers of the court when it makes an order under the new section 8(e), 8A(2)(c) or 9 that a person is to act as the guardian of a minor to the exclusion of the surviving parent.
 6. Clause 7 amends section 12 of the principal Ordinance to provide for the supplementary powers of the court when it makes an order under the new section 8(a) or (c), 8A(2)(a) or 9 that the surviving parent is to act jointly with the guardian appointed under the new section 6 or appointed by the court.
 7. Clause 8 amends section 21 of the principal Ordinance so that it is applicable to the new section 8D.

**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); 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.*

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; 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.

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 of Hong Kong (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
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