

**Administration's detailed response to  
the Law Reform Commission report  
on Guardianship of Children**

**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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