

(English Translation)

**Speech by the Secretary for Justice
the Hon Wong Yan Lung, SC, JP
at the Legislative Council on 7 February 2007**

To move the Second Reading of the Domicile Bill

Madam President,

I move that the Domicile Bill be read a second time.

2. This Bill proposes changes relating to the rules in determining domicile. Domicile is a fairly technical legal concept that is unconnected with, and distinct from concepts such as nationality, right of abode and citizenship. The central notion of domicile is that of a long-term relationship between a person and a jurisdiction, on the basis of which the system of law governing certain issues is determined. At law, the concept of domicile only needs to be used when certain issues relating to a person's legal status and property are being dealt with. Such issues include a person's legal capacity to marry or to make a will and succession to certain property. In determining a person's domicile in cases of dispute, it is ultimately a matter for the court to decide.

3. The existing common law rules for determining an individual's domicile are complex and confusing. The purpose of the Bill is to simplify these rules. The Bill deals only with a natural person's domicile, not the domicile of a corporation.

Background

4. This Bill has its origins in a report of the Law Reform Commission entitled "Rules for Determining Domicile", which was published in April 2005. The Report concluded that domicile is a complex and confusing area of common law and made a number of recommendations for legislative improvement. While the Commission acknowledged that, for practical purposes, the recommendations would

not affect the domicile of a great many people, one of the more significant recommendations is the abolition of the outdated common law rule that the domicile of a married woman depends on that of her husband.

5. The Commission also recommended a major change in the law relating to the domicile of children so that this will no longer be directly tied to the parents' domicile. This proposal will ensure that the domicile of children more closely reflects modern realities. The Commission also recommended the abolition of the concept of domicile of origin so that the domiciliary rule will be better tuned to modern conditions. This Bill incorporates the Commission's recommendations.

Domicile of children

6. I will first deal with the proposed changes relating to the domicile of children. Under existing law, the domicile of a child is determined by two sets of rules. One is domicile of origin, which determines domicile at birth. The other is domicile of dependency, which determines domicile during childhood.

7. The domicile of origin is ascribed to every person at birth by operation of law. It reflects the domicile of the relevant parent at the time of birth. Where a child is born or where his parents live may be irrelevant in this regard. 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.

8. The second set of rules for determining a child's domicile is the domicile of dependency of children. These rules differentiate 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 domicile of dependency follows that of his mother.

9. In place of the existing rules 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. The existing law may sometimes lead to some rather absurd results. Let me give Members an example to illustrate the reason behind this recommendation.

10. The father of a 10 year-old boy has a domicile in the United Kingdom. The mother of the boy is an Australian. The whole family is now living in Hong Kong. The boy was born and has since birth received

his education in Hong Kong. Under existing law, the boy's domicile follows that of his father, that is, the United Kingdom. This seems to be an unconvincing and artificial result since the boy has never even visited the United Kingdom nor has he had any connection with the United Kingdom. Under the reformed law, the single test, that is, the most closely connected test, will apply to determine his domicile. Clause 4(2) of the Bill provides that in determining which country or territory a child is for the time being most closely connected with, the court shall take into account all relevant factors, including in which country or territory the child intends to have his home. Based on the facts of the above case, the court is likely to rule, under the reformed law, that the domicile of the boy is Hong Kong rather than the United Kingdom.

11. The existing rules relating to the domicile of children are essentially based on the Victorian idea of the father being the head of the family, and I believe that the proposed change would more closely reflect modern realities.

Domicile of married woman

12. I now turn to the domicile of married women. The common law rule is that the domicile of a married woman is dependent on the domicile of her husband. This domicile of dependency of married women still applies, and a married woman still retains the same domicile as her husband even if they have lived apart for a long time in different countries, whether or not this is according to a formal separation agreement.

13. The Bill abolishes the common law rule that a married woman has at all times the domicile of her husband. This is, I consider, a big step towards modernization of the law relating to the domicile of married women.

Domicile of adults

14. Next, I will turn to the domicile of adults. The existing rules on the acquisition by an adult of a domicile of choice have long been criticised as artificial and uncertain. They are artificial because a person's domicile of origin may persist long after his connection with the country concerned has ended, making it difficult for him to establish a new domicile of choice. They lead to uncertainty because of difficulties in determining a person's intention.

15. The Bill proposes that an adult will acquire a new domicile in a country or territory based on satisfaction of two criteria. First, he or she must be present in that country or territory. Second, he or she must intend to make a home in that country or territory for an indefinite period.

16. The proposed changes to the domicile of an adult, I consider, will bring greater clarity to the existing law.

Domicile of adults under disability

17. I now deal with the domicile of adults under disability. 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 by law as if he were a child as long as he remains incapacitated.

18. The Bill now proposes that a mentally incapacitated adult should be domiciled in the country or territory with which he is most closely connected. 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. The relevant provision contained in the Bill covers 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.

Domicile before and after commencement date

19. I now turn to the commencement of the Bill. With the reform of the rules for determining domicile under the Bill, it is likely that the existing domicile of some persons, though relatively few, may be affected. It is therefore necessary to consider the transition from the existing rules to the new rules. The Bill proposes that the new legislation should not have retrospective effect. However, for people who may be affected by the new legislation, clause 13(1) of the Bill provides that the domicile of a person on or after the commencement date of the new legislation shall be determined as if the new legislation had always been applicable to such person.

20. Since there may be people who need to make arrangements as a result of the reform in the law relating to domicile, I propose that the

changes in the Bill be brought into force not less than six months from the date of enactment. This, I believe, will allow sufficient time for people affected by the Bill to make any arrangements they consider appropriate.

21. Madam President, the common law rules relating to the determination of domicile are complex and confusing. I have just mentioned many technical issues. The Bill seeks to improve the complex situation as far as possible. The proposed changes, I believe, are major steps towards modernization of the law.

22. I commend the Bill to this Council.