

EXECUTIVE COUNCIL

PUBLIC

Title:	Family Law Review – Special Guardianship Orders
Paper Number:	141/17
Date:	30 th August 2017
Responsible Director:	Attorney General
Report Author:	Crown Counsel Civil and Safeguarding
Portfolio Holder:	MLA Roger Edwards
Reason for paper:	This paper is submitted to Executive Council: For Bill approval
Publication:	Yes
Previous papers:	12/16 – Family Law Review – Policy, proposals and further legislative drafting 32/17 – Family Law Reform (Marriage Reform)
List of Documents:	Appendix A - Children (Amendment) Bill 2017

1. Recommendations

- (a) Honourable Members are recommended to approve the draft Children (Amendment) Bill 2017 attached as Appendix A and to instruct the Attorney General to publish the Bill in the Gazette thereby commencing the legislative process as first reading to introduce Special Guardianship Orders and to enable the Director of Health and Social Services to publish statutory guidance.
- (b) Honourable Members are recommended to authorise the Attorney General to correct any typographical and minor drafting errors found in the Bill prior to the publication in the Gazette.
- (c) Honourable Members are recommended to give further instructions to the Health and Social Services Department to identify further statutory Guidance that should be drafted under the Children Ordinance 2014, to draft such Guidance and to propose further amendments, if appropriate, to the Children Ordinance.

EXECUTIVE COUNCIL AGREED THE RECOMMENDATIONS ABOVE AND RESOLVED THAT (d) any new policy or financial implications relating to the Orders would require Executive Council approval.

2. Additional Budgetary Implications

None.

3. Executive Summary

3.1 Honourable members are asked to approve the draft legislative amendments which provide for the introduction of Special Guardianship Orders.

3.2 Honourable Members are asked to approve such changes so as to give effect to one of the areas highlighted as being important following the Family Law consultation that took place at the end of 2015.

3.3 No additional funding is required to implement and give effect to these legislative amendments.

3.4 These amendments are intended to create Special Guardianship Orders to be used in family proceedings to give permanence to a child's placement away from their immediate parents but falling short of a complete separation from their natural family.

3.5 These proposed amendments will also provide for the Director of Health and Social Services to publish statutory guidance as a precursor to regulations.

4. Background [and Links to Islands Plan and Directorate Business Plan/s]

4.1 Honourable members considered the Family Law Review on 13th January 2016 under ExCo Paper 12/16 and directed Government Legal Services to provide a detailed policy and where appropriate draft legislation in a number of areas, including Special Guardianship Orders, specifically: “[The] introduction of special guardianship concept into our legislation as an alternative to adoption.”

5. Proposals, Options and Reasons for Recommending Relevant Option

SPECIAL GUARDIANSHIP ORDERS

5.1 The proposed amendment Bill is appended to this document (Appendix A) and sets out the suggested legislative changes to introduce Special Guardianship Orders (SGOs). It is not anticipated that the matter will need to be discussed in Select Committee given the previous indication that has been given by Honourable Members that this legislation is necessary.

The overall aim of these changes would be to amend the Children Ordinance 2014 so as to create the option of an SGO within child protection proceedings and it would also facilitate further regulations.

The Family Law Review public consultation¹ in 2016 found that:

¹ In total 99 people responded to the consultation

- Three times as many people considered special guardianship to be a better option for the Falkland Islands than adoption

5.2 SGOs as an alternative to Adoption and fostering

Adoption permanently removes parental responsibility (PR) from birth parents which has the advantage of providing a child with permanence. However, an adoptive placement does not always produce the best solution for a child. If the child is necessarily going to continue having contact with their birth parents (i.e. an open adoption as opposed to a closed adoption), it can cause intra-familial stress and put pressure on a placement. It is also likely to create a false reality that is not met through the child's day to day experience.

With an SGO, PR can be shared and is retained by the birth parent(s) as well as being given to special guardians. In this way, SGOs are effectively a mid-way solution between long-term fostering and adoption; SGOs do not sever family ties like adoption, but they can give more stability than foster placements. Fostering requires the making of a care order and foster carers do not obtain PR. A child in a foster placement is subject to on-going social services involvement, which in many situations is not ideal and prevents the child from experiencing as regular a childhood as possible.

5.3 SGOs as an alternative to residence orders

Currently families tend to rely on residence orders to give stability to private family arrangements whereby a family member (other than the parents) cares for a child. This has the benefit of granting PR to the person in whose favour a residence order is made, but such orders are really designed for separated parents and address with whom a child should live and what contact arrangements should be put in place. An SGO goes further than a residence order by giving priority to special guardian's PR over anyone else holding PR. These types of orders tend to be more suited for cases where it is proposed a child will live permanently with extended family.

For example, if a parent leaves the Falkland Islands, e.g. to move overseas for work, and their child remains in the Falkland Islands to be cared for by a relative, an SGO would give those caring for the child an enhanced ability to act. This could be useful for a number of reasons, including if a medical decision needs to be made. With an SGO the person caring for the child in the Falkland Islands would be able to make decisions unilaterally as their PR takes priority. If the child is placed under a residence order then the parent maintains equal parental responsibility and in the event of a disagreement or communication difficulties it could be harder to manage.

5.4 The Children Ordinance 2014 in contrast to the Children Act 1989 (England & Wales)

Whilst SGOs can provide the best and most appropriate outcome in many child protection cases, there has been criticism of their use in England and Wales under the Children Act 1989. To avoid the same issues as far as possible it is useful to set these out and to stress that any guidance or regulation formulated around the use of SGOs in the Falkland Islands should consider these potential problems and so ameliorate the risk of the same

being repeated here. Following the high profile murder of Keegan Downer, an 18 month old baby killed by her special guardian² a number of questions have been raised about the appropriateness of SGOs, specifically³;

- Their potential inappropriate use as a cost saving exercise – in England and Wales SGO financial support tends to be means tested whereas foster carers receive a fixed allowance which can mean SGOs are often the cheaper, but not necessarily better, alternative to foster placements;
- The lack of rigour in SGO assessments – the 26 week time frame for completion of care cases under the Public Law Outline in England and Wales can pressure a case to conclude before all the assessments have been fully carried out. As the PLO does not apply in the Falkland Islands the time pressure consideration should not be an issue; and
- The frequent use of Supervision Orders alongside SGOs⁴ – a supervision order should only be used if a child is deemed to be at risk of significant harm. If this is the potential level of risk under an SGO then it raises the question as to why an SGO is being made. The reason for this development seems to be twofold; (a) because this is a way to ensure there is post-order support for special guardians as a supervision order is used to increase local authority input, (b) because there has not been sufficient assessment or safeguarding prior to a decision being made to fully evaluate risk. This again goes to the SGO funding/support issue and the time pressures created by the PLO.

Unlike the Children Act 1989, it is proposed that the Children Ordinance has a discretionary (rather than mandatory) requirement for a parent to have leave of the court to make an application to vary or discharge an SGO. This is to allow greater flexibility when considering the level of intervention or interference with the right to family life. In some cases the requirement for leave will be perfectly proper particularly if the order is issued as an alternative to state care. In other cases where the long term arrangement arises through what is effectively a ‘no fault issue’ such as family breakdown where a parent is working abroad, the need to restrict an application may not be appropriate. It is also worth considering what this step would achieve as it is likely any application for permission to vary or discharge an SGO would be known about within the community and be discovered by the special guardian, and so not prevent the anxiety or disruption this provision would otherwise ensure was avoided. This is something upon which the Honourable Members are asked to consider and to determine whether section 18D(3) of the draft legislation should be mandatory or discretionary.

5.5 Guidance before Regulations

²<http://www.bbc.com/news/uk-england-36131630>

³<http://www.communitycare.co.uk/2017/04/27/special-guardianship-orders-used-safely/>

⁴<http://www.communitycare.co.uk/2015/12/03/concern-special-guardianship-support-figures-show-1-4-new-orders-supervision-orders-attached/>

The Children Ordinance 2014 provides for regulations to be made underneath it as secondary legislation. So far only two sets of regulations have been introduced⁵ and there is case by case and ad hoc decision making around the management of the processes provided for. This makes it difficult for practitioners to ensure they are being consistent and using their discretion fairly, and it creates a lack of transparency for the public as they do not know what to expect or how certain matters should be dealt with. There is no doubt that under the Children Ordinance it was expected that regulations would be developed and this should still be the long-term aim of the relevant department to develop policy and drafting instructions to create secondary legislation. Rather than adding to the list of regulations that need to be developed, at this stage it is proposed that in the first instance power be given to the Director of Health and Social Services to publish statutory guidance. It is anticipated that this guidance would include things such as what factors SGO assessments should consider and which services should be provided and in which circumstances. This allows for a slower and more gradual introduction of these requirements and avoids the creation of a sudden new burden overnight. It enables practices and procedures to be road tested first and once these have bedded down and best practice established, secondary legislation can follow as and when appropriate.

Given this suggestion in the context of SGOs it is further proposed that the Director of Health and Social Services be given a wider power to publish statutory guidance under the Children Ordinance 2014 to cover such things as fostering and care planning. In developing such guidance the entire Children Ordinance will no doubt be reviewed and it is anticipated that it may be prudent to make amendments to the legislation if suggested by the Health and Social Services Department. It is proposed that Honourable Members give instructions to the Health and Social Services Department to formulate policy in respect of what guidance is required, to draft such guidance and to make suggested amendments to the Children Ordinance 2014 if appropriate. One area identified as potentially being in need of amendment is “Independent Visitors” (section 33) – the Social Services Department need to consider how and if this can be implemented given the available resources and this is one section that may be subject to a recommended amendment.

Proposed option:

The proposed legislative amendments are appended (Appendix A). The preferred option is to amend the Children Ordinance 2014 to include the provision for a Special Guardianship Order to provide an alternative to adoption, fostering or a residence order, and to provide for statutory guidance to be made by the Director of Health and Social Services. Further instructions should be given to the Social Services Department to draft guidance and suggest where appropriate further amendments to the Children Ordinance.

Alternatives:

Do nothing – this is not the recommended option because current legislation does not adequately provide for all the possible outcomes in a care case. More choice in this area of law can only be a useful tool that widens the possible options for children. It would also make it more practically viable to develop cross border agreements with the UK and other

⁵ Children (Hosting and Private Boarding) Regulations 2014 and Children (Safeguarding Children Board) Regulations 2015

overseas territories as the legislative frameworks would be brought together making it easier to operate across jurisdictions.

6. Resource Implications

6.1 Financial Implications

NONE

6.2 Human Resource Implications

NONE – this can be achieved using current staff resources and does not require hiring additional staff.

6.3 Other Resource Implications

NONE

7. Legal Implications

7.1 This would require amendments to the current legislation as appended to this document.

8. Environmental & Sustainability Implications

8.1 NONE

9. Significant Risks

9.1 NONE

10. Consultation

10.1 Family Law Review – public consultation requested 13th May 2015.

11. Communication

This has been communicated to the Director of Health and Social Services Department, the Social Services Team and the Court. Special Guardianship Orders will give Social Workers more options to consider when formulating care plans and outcomes in care cases. Social workers will need to be aware of the legislative changes so that as soon as the law comes into force their practice will be up to date and accordingly the Head of Social Services has been consulted during the drafting of this paper. The Director of Social Services is aware of the responsibility that this amendment would bring and their role in publishing statutory guidance. The Court has also been made aware of this new power to grant such an order. The Department for Health and Social Services have arrangements in place to start work on its project to develop guidance and to review the Children Ordinance for further amendment. It is planned that this guidance will be complete by the end of 2017. Guidance would not need to be reviewed by ExCo as this would have effect upon publication by the Director of

Health and Social Services. Any proposed legislative amendments will follow in an ExCo paper planned to be complete and submitted before the end of 2017.

Schedule of suggested deletions to enable publication of paper []
No suggested deletions

APPENDIX A

23.06.2017

CHILDREN (AMENDMENT) BILL 2017

(No: of 2017)

ARRANGEMENTS OF PROVISIONS

Clause

Part 1 — Introductory

1. Title
2. Commencement

Part 2 — Amendment of Children Ordinance

3. Amendment of Children Ordinance
4. Part 2 amended — Insertion of new sections
5. Part 9 amended — insertion of new section
6. Heading to Part 9 amended

CHILDREN (AMENDMENT) BILL 2017

(assented to: 2017)
(commencement: 2017)
(published: 2017)

A BILL

for

AN ORDINANCE

To amend the Children Ordinance 2014 to provide for the making of special guardianship orders by the court and to confer power on the Director of Health and Social Services to give general guidance in the exercise of functions arising out of support to be given by the Crown to children and families.

BE IT ENACTED by the Legislature of the Falkland Islands —

Part 1 — Introductory

1. Title

This Ordinance may be cited as the Children (Amendment) Ordinance 2017.

2. Commencement

This Ordinance comes into force on a day appointed by the Governor by notice in the *Gazette*.

Part 2 — Amendment of Children Ordinance

3. Amendment of Children Ordinance

This Ordinance amends the Children Ordinance.

4. Part 2 amended — Insertion of new sections

Part 2 of the Children Ordinance is amended by inserting the following new sections immediately after section 18 —

“18A. Special guardianship orders: general

(1) A “special guardianship order” is an order appointing one or more individuals to be a child’s “special guardian” (or special guardians).

(2) A special guardian —

(a) must be aged eighteen or over; and

(b) must not be a parent of the child in question,

and subsections (3) to (6) are to be read in that light.

(3) The court may make a special guardianship order with respect to any child on the application of an individual who —

(a) is entitled to make such an application with respect to the child; or

(b) has obtained the leave of the court to make the application,

or on the joint application of more than one such individual.

(4) Section 13(3) applies in relation to an application for leave to apply for a special guardianship order as it applies in relation to an application for leave to apply for a section 12 order.

(5) The individuals who are entitled to apply for a special guardianship order with respect to a child are —

(a) any guardian of the child;

(b) any individual in whose favour a residence order has been made;

(c) any individual listed in subsection (5)(b) or (c) of section 14 (as read with subsection (12) of that section);

(d) a foster carer with whom the child has lived for a period of at least one year immediately preceding the application;

(e) a relative with whom the child has lived for a period of at least one year immediately preceding the application.

(6) The court may also make a special guardianship order with respect to a child in any family proceedings in which a question arises with respect to the welfare of the child if —

(a) an application for the order has been made by an individual who falls within subsection (3)(a) or (b) (or more than one such individual jointly); or

(b) the court considers that a special guardianship order should be made even though no such application has been made.

(7) No individual may make an application under subsection (3) or (6)(a) unless, before the beginning of the period of three months ending with the date of the application, the person has given written notice of his or her intention to make the application if the child in question is being looked after by the Crown, to the Crown.

(8) On receipt of such a notice, the Crown must investigate the matter and prepare a report for the court dealing with —

(a) the suitability of the applicant to be a special guardian;

(b) such matters (if any) as may be prescribed by the Governor; and

(c) any other matter which the Crown consider to be relevant.

(9) The court may itself ask the Crown to conduct such an investigation and prepare such a report, and the Crown must do so.

(10) The Crown may make such arrangements as it sees fit for any person to act on its behalf in connection with conducting an investigation or preparing a report referred to in subsection (8) or (9).

(11) The court may not make a special guardianship order unless —

(a) it has received a report dealing with the matters referred to in subsection (8); or

(b) if after exercising its powers under subsection 6(b), it is satisfied that it has sufficient information equivalent to that required under subsection (8).

(12) Subsections (10) and (11) of section 14 apply in relation to special guardianship orders as they apply in relation to section 12 orders.

18B. Special guardianship orders: making

(1) Before making a special guardianship order, the court must consider whether, if the order were made —

(a) a contact order should also be made with respect to the child;

(b) any section 12 order in force with respect to the child should be varied or discharged;

(c) where a provision contained in a residence order or contact order made with respect to the child is not discharged, any enforcement order relating to that provision should be revoked, and

(d) where an activity direction has been made —

(i) in proceedings for the making, variation or discharge of a residence order or contact order with respect to the child, or

(ii) in other proceedings that relate to such an order,

that direction should be discharged.

(2) On making a special guardianship order, the court may also —

(a) give leave for the child to be known by a new surname;

(b) grant the leave required by section 18C(3)(b), either generally or for specified purposes.

18C. Special guardianship orders: effect

(1) The effect of a special guardianship order is that while the order remains in force —

(a) a special guardian appointed by the order has parental responsibility for the child in respect of whom it is made; and

(b) subject to any other order in force with respect to the child under this Ordinance, a special guardian is entitled to exercise parental responsibility to the exclusion of any other person with parental responsibility for the child (apart from another special guardian).

(2) Subsection (1) does not affect —

(a) the operation of any enactment or rule of law which requires the consent of more than one person with parental responsibility in a matter affecting the child; or

(b) any rights which a parent of the child has in relation to the child's adoption or freeing for adoption.

(3) While a special guardianship order is in force with respect to a child, no person may —

(a) cause the child to be known by a new surname; or

(b) remove the child from the Falkland Islands,

without either the written consent of every person who has parental responsibility for the child or the leave of the court.

(4) Subsection (3)(b) does not prevent the removal of a child, for a period of less than three months, by a special guardian of the child, or the removal of a child for any period whatsoever if it is for a medical purpose advised by a medical practitioner.

(5) If the child with respect to whom a special guardianship order is in force dies, the child's special guardian must take reasonable steps to give notice of that fact to —

(a) each parent of the child with parental responsibility; and

(b) each guardian of the child,

but if the child has more than one special guardian, and one of them has taken such steps in relation to a particular parent or guardian, any other special guardian need not do so as respects that parent or guardian.

18D. Special guardianships orders: variation and discharge

(1) The court may vary or discharge a special guardianship order on the application of —

(a) the special guardian (or any of them, if there are more than one);

(b) any parent or guardian of the child concerned;

(c) any individual who is named in a residence order or a contact order as a person with whom the child is to live;

(d) any individual not falling within any of paragraphs (a) to (c) who has, or immediately before the making of the special guardianship order had, parental responsibility for the child;

(e) the child; or

(f) the Crown where there is a care order with respect to the child.

(2) In any family proceedings in which a question arises with respect to the welfare of a child with respect to whom a special guardianship order is in force, the court may also vary or discharge the special guardianship order if it considers that the order should be varied or discharged, even though no application has been made under subsection (1).

(3) Where it is reasonably required to secure the child's long term placement, the court may make an order that the following must obtain the leave of the court before making an application under subsection (1) —

(a) the child;

(b) any parent or guardian of the child;

(c) any step-parent of the child who has acquired, and has not lost, parental responsibility for the child by virtue of section 8;

(d) any individual falling within subsection (1)(d) who immediately before the making of the special guardianship order had, but no longer has, parental responsibility for the child.

(4) Where the person applying for leave to make an application under subsection (1) is the child, the court may only grant leave if it is satisfied that the child has sufficient understanding to make the proposed application under subsection (1).

(5) The court may not grant leave to a person falling within subsection (3)(b)(c) or (d) unless it is satisfied that there has been a significant change in circumstances since the making of the special guardianship order.

18E. Special guardianship orders: supplementary

(1) In proceedings in which any question of making, varying or discharging a special guardianship order arises, the court must (in the light of any provision in rules of court that is of the kind mentioned in section 15(2)(a) or (b)) —

(a) draw up a timetable with a view to determining the question without delay; and

(b) give such directions as it considers appropriate for the purpose of ensuring, so far as is reasonably practicable, that the timetable is adhered to.

(2) Subsection (1) applies also in relation to proceedings in which any other question with respect to a special guardianship order arises.

(3) The power to make rules in subsection (2) of section 15 applies for the purposes of this section as it applies for the purposes of that.

(4) A special guardianship order, or an order varying one, may contain provisions which are to have effect for a specified period.

(5) Section 15(7) (apart from paragraph (c)) applies in relation to special guardianship orders and orders varying them as it applies in relation to section 12 orders.

18F. Special guardianship support services

(1) The Crown must consider whether it is feasible and appropriate to provide special guardianship support services to a child in respect of whom a special guardianship order application has been made and any person who has made a special guardian application. Any service that is considered to be feasible and appropriate in the circumstances will be made available only in so far as is reasonably practical within the Falkland Islands. This may include counselling, advice or information in relation to special guardianship.

(2) At the request of any of the following persons—

(a) a child with respect to whom a special guardianship order is in force;

(b) a special guardian;

(c) a parent;

(d) any other person who falls within a prescribed description,

the Crown may carry out an assessment of that person's needs for special guardianship support services if the Crown considers this to be feasible and appropriate. If the Crown concludes that there are any such available services these will be provided only in so far as this is reasonably practical in the Falkland Islands.

(3) The Crown may, at the request of any other person, carry out an assessment of that person's needs for special guardianship support services.

(4) Where, as a result of an assessment, the Crown decides that a person has needs for special guardianship support services, the Crown must then decide whether to provide any of those services to that person.

(5) If —

(a) the Crown decides to provide any special guardianship support services to a person, and

(b) the circumstances fall within a prescribed description ,

the Crown may prepare a plan in accordance with which special guardianship support services are to be provided to the person, and keep the plan under review.

(6) The Governor may by regulations make provision about —

(a) assessments;

(b) the preparation and review of plans;

(c) the provision of special guardianship support services in accordance with plans;
and

(d) the review of the provision of special guardian support services.

(7) The regulations may in particular make provision —

(a) about the type of assessment which is to be carried out, or the way in which an assessment is to be carried out;

(b) about the way in which a plan is to be prepared;

(c) about the way in which, and the time at which, a plan or the provision of special guardianship support services is to be reviewed;

(d) about the considerations to which the Crown is to have regard in carrying out an assessment or review or preparing a plan;

(e) as to the circumstances in which the Crown may provide special guardianship support services subject to conditions (including conditions as to payment for the support or the repayment of financial support); and

(f) as to the consequences of conditions imposed by virtue of paragraph (e) not being met (including the recovery of any financial support provided).

(8) The Crown may provide special guardianship support services (or any part of them) by securing their provision by an external provider approved by the Director of Health and Social Services where it is reasonably practical to do so.

(9) The Crown may carry out an assessment of the needs of any person for the purposes of this section at the same time as an assessment of the person's needs is made under any other provision of this Ordinance or under any other enactment.”

5. Part 9 amended — Insertion of new section

Part 9 of the Children Ordinance is amended by inserting the following new section immediately after section 100 —

“100A. Director of Health and Social Services to make guidance

(1) The Director of Health and Social Services may prepare any guidance in relation to any matter which is to be prescribed under a provision of this Ordinance if the matter has not been prescribed.

(2) The Crown must, in the exercise of its functions under this Ordinance, including the exercise of any discretion conferred on it by any relevant enactment, act under the general guidance of the Director of Health and Social Services.

(3) The Director of Health and Social Services must make arrangements for any guidance made under subsection (1) to be made available to all relevant parties. (*electronically or in hard copy*).”

6. Heading to Part 9 amended

The heading to Part 9 of the Children Ordinance is deleted and substituted with the following—

“PART 9 SUBSIDIARY LEGISLATION AND GUIDANCE”

OBJECTS AND REASONS

This Ordinance amends the Children Ordinance 2014 to provide for the making of special guardianship orders and gives the Director of Social Services the power to make guidance in relation to functions conferred on the Crown under the Children Ordinance 2014.

Part 1 provides for introductory matters. Clause 2 provides for the amendment to come into effect on a day to be appointed by the Governor in the Gazette.

Clause 3 provides for the amendment of the Children Ordinance.

Clause 4 amends Part 2 of the Ordinance to add provisions (sections 18A to 18F) relating to special guardianship orders in the Children Ordinance 2014. Special guardianship orders are intended to meet the needs of children who cannot live with their birth parents, for whom adoption is not appropriate, but who could still benefit from a legally secure placement. They are intended to operate both as an enhanced residence order and also, where appropriate, as an alternative outcome in care proceedings and therefore more similar in nature to a foster placement or open adoption. It is in these cases that the court may consider ordering a provision for leave to apply.

These new sections provide for who may apply for an order, the circumstances in which orders may be made, the nature and effect of special guardianship orders, and for the Crown to support services for special guardians.

The new section 18A provides for who may apply for a special guardianship order and the application process. The person in whose favour a special guardianship order is made is a 'special guardian'. People may apply jointly to become special guardians. They need not be married. Subsection (2) provides that special guardians must be 18 or over and that the parents of a child may not become the child's special guardian. Subsections (3) to (5) make provision about who may apply for an order.

Under subsection (6) the court may also make special guardianship orders in any family proceedings concerning the welfare of a child if they consider an order should be made, even if no application has been made. Family proceedings are defined in section 12(3) of the 2014 Ordinance and include adoption proceedings under the Adoption Act 1976 (as it applies to). When considering making a special guardianship order the child's welfare is the court's paramount consideration, and the welfare checklist in section 4(3) of the 2014 Ordinance applies. The court would be able to dispense with the requirement of a report in circumstances where an order is made without application. This is to enable the court to expedite proceedings where appropriate.

Subsections (7) onwards set out the application process. Applicants must give 3 months' written notice to the Crown of their intention to apply for the order. On receipt of notice the Crown must then investigate and prepare a report to the court about the suitability of the applicants to be special guardians and any other relevant matters. The Crown may make arrangements for the investigation and report to be done by someone else. Regulations may prescribe matters to be covered in the report. This is to ensure a proper assessment process is followed for special guardians. The court may not make an order unless it has received a report covering the suitability of applicants.

The new section 18B provides that before making a special guardianship order the court must consider whether or not to vary or discharge any other existing order made under section 12 of the 2014 Ordinance (such as a contact order or residence order) and also whether a contact order (for example, to enable continued contact with the child's birth parents) should be made at the same time as the special guardianship order. The court may also on making the special guardianship order give leave for the child to be known by a

new surname and give permission for the child to be taken out of the Falkland Islands for any period longer than three months.

The new section 18C sets out the effect of special guardianship orders. Subsection (1)(a) gives the special guardian parental responsibility for the child. Subject to any later order made under the Ordinance, the special guardian may exercise parental responsibility to the exclusion of others with parental responsibility apart from another special guardian (subsection (1)(b)). An exception applies in those circumstances where the law provides that the consent of all parties with parental responsibility may be or is required (subsection (2)(a)). Subsections (3) and (4) provide that while an order is in force the child may only be known by a different surname or be removed from the Falkland Islands for longer than three months with the consent of all those who have parental responsibility, or with the leave of the court.

The intention is that the special guardian has clear responsibility for all the day to day decisions about caring for the child and for taking decisions about the child's upbringing. But the order retains the basic legal link with the birth parents, unlike adoption. They remain legally the child's parents, though their ability to exercise their parental responsibility is limited. They retain the right to consent or not to the child's adoption or placement for adoption (subsection 2(b)). Subsection (5) provides that the special guardian must also take reasonable steps to inform the parents or guardian if the child dies.

The new section 18D provides for special guardianship orders to be varied or discharged on the application of:

- the special guardian;
- the child's parents or guardian;
- any step parent who has parental responsibility by virtue of section 8 of the 2014 Ordinance;
- anyone who had parental responsibility immediately before the special guardianship order was made;
- the child;
- if a care order is made in respect of the child, the Crown can apply to discharge the special guardianship order;
- anyone who has a residence order in respect of the child.

Subsection (2) provides that the court may, during any family proceedings in which a question arises about the welfare of a child who is subject to a special guardianship order, vary or discharge the order in the absence of an application.

The new section 18E makes supplemental provisions, including allowing the court to set timescales for proceedings involving special guardianship applications.

The new section 18F makes provision for Crown support services for special guardians, children subject to special guardianship orders and others. The Crown first must consider whether it is feasible and appropriate to provide services where they are in support of a special guardianship order being made. If this is considered to be so then as so far as is reasonably practical these services shall be provided. This support could include things such as counselling, advice and information, and such other services as may be prescribed in regulations.

Regulations will be made prescribing the circumstances where the Crown must, at the request of special guardians, children subject to special guardianship orders, their parents and other prescribed persons, carry out an assessment of that person's needs for special guardianship support services.

It is intended to use the regulations to ensure that the Crown puts in place a range of support services to be available where appropriate for special guardians and children subject to special guardianship orders, their parents, and where appropriate, to others, which could include members of the birth family. In the interim the Director of Health and Social Services will put in place guidance on the support that the Crown may provide until regulations can be made.

Subsection (3) gives the Crown the discretion to carry out an assessment of need for support services at the request of any other person. Subsections (4) to (5) govern the assessment process and, where support services are to be provided, the arrangements for their provision.

The needs assessment may be carried out at the same time as an assessment of that person's needs for any other purpose (subsection (9)). Again, the intention is to facilitate joined up planning and provision of public services support. There is provision for the Crown to delegate assessments and the provision of special guardianship support services to prescribed persons (subsection (8)) where this is reasonably practical to arrange.

Clause 5 amends Part 9 of the Ordinance by inserting a new section 100A after section 100. The new section confers power on the Director of Health and Social Services to prepare any guidance for any matter which is to be prescribed where that matter has not been prescribed. This will enable the department to develop guidance which can then be used as a basis for regulations in the future. The new section 100A will complement the existing section 100(2) which allows that a thing will be treated as having been done in the prescribed way if it is done in a way that is reasonable in all of the circumstances.

Clause 6 amends the heading to Part 9 to reflect the addition of section 100A.