

The Law Reform Commission of Hong Kong

Consultation paper *Enduring Powers of Attorney: Personal Care*

Executive Summary

Preface

1. A power of attorney is a legal instrument that enables a person (the donor) to delegate legal authority to another person (the attorney, or agent) or persons to make property, financial and other legal decisions on his behalf. A power of attorney can be general, so that the attorney can conduct any sort of business on behalf of the donor, or it may be limited to the specific transactions expressly provided for in the document.

2. A conventional power of attorney can only be made by a person who is mentally competent, and any such power of attorney will lapse if the donor subsequently becomes mentally incompetent. A special type of power of attorney called an “enduring power of attorney” (EPA) can be executed while the donor of the power is mentally capable but continues to have effect after the donor becomes incapable. At present, the powers which may be delegated under an EPA in Hong Kong extend only to decisions relating to the property and financial affairs of the donor.¹ In the process of consulting in April 2007 on an earlier review of the execution requirements for an EPA, the Commission sought preliminary views on whether the powers delegated under an EPA should be extended to include decisions on the donor’s personal care, as is the case in a number of other jurisdictions. The majority of those who responded to this question were in favour of consideration of such an extension, including both the Bar and the Law Society. The Commission concluded that the completion of the review of the execution requirements for an EPA should not be delayed by expanding that study to include the question of personal care. Instead, the Commission agreed that this should be considered as a separate research project and this consultation paper is the result.

3. A supplementary issue raised by a solicitor who responded to the Commission’s April 2007 consultation paper was the difficulty which can arise in respect of EPAs executed overseas. The solicitor cited the example of married clients who had drafted EPAs in Hong Kong but had moved to Scotland before executing them to enable the wife to undergo extended medical treatment. The wife subsequently died in Scotland. The husband executed his EPA before a Scottish solicitor and a Scottish doctor. Some years later, he returned to Hong Kong where the family wished to register the EPA at the onset of the husband’s Alzheimer’s disease. Registration was refused because the EPA had not been executed before a Hong Kong

¹ See section 8(1) of the Enduring Powers of Attorney Ordinance (Cap 501).

solicitor and doctor. The family were left without a remedy, as the husband was no longer competent to execute an EPA.

4. In the light of this practical difficulty with the existing provisions, the solicitor concerned suggested in his response to the Commission's consultation paper that consideration should be given to acceptance in Hong Kong of an EPA executed outside Hong Kong if the EPA were executed before a solicitor and a medical practitioner qualified in the place of execution.

Chapter 1: the existing law in Hong Kong and the case for change

5. Section 7 of the Powers of Attorney Ordinance (Cap 31) provides that a general power of attorney confers on the attorney "*authority to do on behalf of the donor anything which he can lawfully do by an attorney.*" A general power of attorney can only be made by a person who is mentally competent and will lapse if the donor subsequently becomes mentally incompetent. In contrast, an EPA continues to have effect after the donor becomes incapable.² Its scope is more limited than that of a conventional power of attorney, however, and section 8(1) of the EPA Ordinance provides that an EPA "*must not confer on the attorney any authority other than authority to act in relation to the property of the donor and his financial affairs.*" Matters excluded from the scope of an EPA would include decisions relating to the donor's medical treatment and general welfare. There is, in other words, no scope under the existing Hong Kong provisions for what may for simplicity's sake be termed a "*personal care*" EPA.

6. In a number of other jurisdictions the law allows an individual to delegate decisions as to his personal care to an attorney by way of an enduring form of attorney, whether this be an expanded EPA or a specific form of power of attorney which is limited to personal care decisions but which survives the onset of the donor's mental incapacity. What falls within the scope of a personal care EPA differs from one jurisdiction to another, but a typical example might be section 11 of the Powers of Attorney Act 2006 in the Australian Capital Territory. That section provides that for the purposes of the Act, the following are examples of "*personal care matters*":

- (a) where the donor lives;
- (b) who the donor lives with;
- (c) whether the donor works and, if he does so, where and how the donor works;
- (d) what education or training the donor gets;
- (e) whether the donor applies for a licence or permit;
- (f) the donor's daily dress and diet;
- (g) whether to consent to a forensic examination of the donor;
- (h) whether the donor will go on holiday and where; and
- (i) legal matters relating to the donor's personal care.

² See section 4(1) of Cap 501, cited above.

7. There may be circumstances in which it would be difficult to make decisions as to the donor's property and financial affairs which are in his best interests without also becoming involved in personal care matters such as these. The absence of provision for "personal care" EPAs in Hong Kong means that resort may have to be had to the more cumbersome guardianship procedure under the Mental Health Ordinance (Cap 136). There are clearly a number of issues which fall to be considered if personal care EPAs are introduced here (such as whether the same execution requirements should apply for all types of EPA and whether it should be possible to appoint separate attorneys for different EPAs) but we think that there would be distinct benefits in establishing a mechanism for "personal care" EPAs in Hong Kong.

Recommendation 1

We recommend that the scope of an EPA in Hong Kong be extended to include decisions as to the donor's personal care.

8. The Enduring Powers of Attorney Ordinance (Cap 501) makes no provision for recognition of EPAs (conventional or otherwise) executed outside Hong Kong, even if the execution requirements stipulated in the Ordinance have been met. This contrasts with the situation in a number of other jurisdictions, where specific legislative provision is made for recognition. Unlike the donor of a non-enduring power of attorney, a donor who is incapacitated cannot cure the defect by making a new EPA.

Recommendation 2

We recommend that provision should be made for the recognition in Hong Kong of EPAs executed outside Hong Kong in specific circumstances.

Chapter 2: Personal care EPAs, supervision and discharge of EPA attorneys and provision for recognition in other jurisdictions

9. Chapter 2 looks at the law in relation to EPAs (or their equivalents) in a number of other jurisdictions, including Australia, Canada, England and Wales, Ireland, New Zealand and Scotland.

Chapter 3: Options for change

10. Chapter 3 considers a number of issues. The first is what decisions "personal care" should cover, and whether these should include health care matters. In favour of restricting the scope of an EPA to non-health care matters it could be argued that decisions as to the donor's health care are of a particularly sensitive nature and an attorney charged with decisions on the donor's everyday life may not be the most appropriate person to deal with health care matters. The counter-argument is that health care is so intimately

bound up with the way an individual orders his affairs that it would be artificial and impractical to exclude it from the scope of an expanded EPA. We accept the force of this argument and take the view that if health care decisions were to be excluded the efficacy of personal care EPAs would be limited. At the same time, we acknowledge that an attorney appointed to manage a donor's financial affairs may not always be the most appropriate person to make decisions as to his health care. In our view, it should therefore be open to a donor, if he chooses, to delegate decisions as to his financial affairs and personal care to different attorneys under an EPA.

Recommendation 3

We recommend that, for the purposes of the proposed expanded EPA, "personal care" should include everyday decisions as to the donor's health care, but not decisions involving the giving or refusing of life-sustaining treatment.

11. The permissible range of decisions which may be delegated under an EPA could be defined either by reference to a statutory list of specific decisions or to a general power to make decisions, perhaps with certain proscribed decisions listed. Setting out in the legislation specific decisions which an attorney may make on the donor's behalf under an EPA has the advantage of providing certainty and clear guidance. A more general statement of the attorney's powers, however, would offer flexibility and enable decisions to be made for the donor's benefit in areas which a legislative list might have overlooked. We favour an approach similar to that adopted by the Australian Capital Territory, in which the legislation provides a general power to delegate personal care decisions through an EPA and includes a non-exhaustive list of such decisions.

Recommendation 4

We recommend that legislative provision should be made to allow personal care decisions to be included in the scope of an EPA. The legislation should provide that such decisions may include:

- (a) where the donor lives;**
- (b) who the donor lives with;**
- (c) whether the donor works and, if he does so, where and how the donor works;**
- (d) what education or training the donor gets;**
- (e) whether the donor applies for a licence or permit;**
- (f) the donor's daily dress and diet;**
- (g) whether to consent to a forensic examination of the donor;**
- (h) whether the donor will go on holiday and where; and**
- (i) legal matters relating to the donor's personal care.**

12. If the amended legislation in Hong Kong were to include an exhaustive list of decisions which an attorney may make, there would clearly be no need to specify separately what decisions are precluded. Our recommendation, however, is that a broad decision-making power should be given, along with a non-exhaustive list of decisions. It is therefore necessary to specify in the legislation those decisions which an attorney may not make.

Recommendation 5

We recommend that the following decisions should be statutorily excluded from the scope of an EPA:

- (a) making, varying or revoking the donor's will**
- (b) making an EPA for the donor**
- (c) exercising the donor's right to vote in an election or referendum**
- (d) consenting to the adoption of a child of the donor who is under 18**
- (e) consenting to the marriage of the donor**
- (f) removal of non-regenerative tissue from the donor while alive for donation to someone else**
- (g) sterilisation of the donor if the donor is, or is reasonably likely to be, fertile.**

13. Some jurisdictions require the execution of separate EPAs for financial matters and personal care. Our preference is to offer the maximum flexibility, so that a donor may choose either to appoint separate attorneys for financial matters and personal care, or, if he prefers, to appoint a single attorney to make both categories of decisions for him. The use of separate attorneys may in some circumstances lead to difficulties where health care and finance matters overlap, as, for instance, where there is a dispute between the attorneys as to the appropriate level of health care having regard to the cost implications.

Recommendation 6

We recommend that the donor of an EPA should be able to appoint a single attorney to make decisions on his behalf in relation to both financial matters and health care or to appoint separate attorneys to deal with each of these categories of decisions.

14. There does not appear to be a difference in execution requirements in any other jurisdiction between property EPAs and personal care EPAs but it might be suggested nevertheless that a distinction was appropriate in Hong Kong. In our view, applying a different witness regime for a personal care EPA would needlessly complicate the EPA process, especially where the donor chose to appoint the same attorney for both financial matters and personal care decisions.

Recommendation 7

We recommend that the witness requirements proposed in our March 2008 report on *Enduring Powers of Attorney* for the execution of an EPA should apply to all EPAs, whether or not they extend to personal care decisions.

15. A further issue is whether compliance with a statutory form should be necessary (as with the existing financial and property EPA), or not (as is the case for a conventional power of attorney). So far as can be ascertained, all jurisdictions require completion of a prescribed form. Given the fact that the existing property EPA currently requires compliance with a statutory form, it would seem difficult to argue that a personal care EPA should follow a more relaxed regime.

Recommendation 8

We recommend that the statutory EPA form should be revised so that it provides for an EPA which delegates decisions as to: (a) the donor's financial and property affairs; or (b) the donor's personal care; or (c) both (a) and (b).

16. There is currently no notice requirement stipulated in relation to property EPAs in Hong Kong, though the donor may, if he wishes, nominate himself and up to two other persons to be notified before an application for registration is made. Failure to notify the nominated persons does not invalidate the EPA. A different approach is adopted in some other jurisdictions. The advantage of requiring some kind of pre-registration notification is that it offers a safeguard against possible abuse by the prospective attorney. We have reached no conclusion on this point and would welcome the public's views.

17. There are obvious advantages in providing clear statutory guidelines as to the standards which must be applied by EPA attorneys. Section 12 of the Enduring Powers of Attorney Ordinance (Cap 501) sets out an EPA attorney's duties but, unlike the provisions in some other jurisdictions, imposes no requirement on the attorney to take account of what the donor's own wishes would have been had he been competent, nor is the attorney placed under any obligation to consult others. We consider that an EPA attorney's paramount duty should be to act in the donor's best interests and that the existing obligations in section 12 of Cap 501 should be supplemented by provisions along the lines of the English and Irish legislation.

Recommendation 9

We recommend that an EPA attorney should be under a statutory duty to act in the donor's best interests. In determining the donor's best interests, the attorney should be required to have regard so far as practicable to the

donor's wishes and feelings, to the extent that these are ascertainable. If it is practicable and appropriate, the attorney should be required to consult any person named by the donor as a person to be consulted on matters arising from the EPA and any person caring for the donor or interested in his welfare.

18. The existing provisions in Cap 501 provide the court with some supervisory powers over an EPA attorney but there are no explicit powers to, for instance, direct an attorney to do (or not do) a specified act, to appoint a substitute attorney or to give directions as to the remuneration or expenses of the attorney, nor is there a general discretionary power to make such orders as the supervisory body thinks fit. Taking cognisance of the powers available in other jurisdictions, we consider that the existing powers of the court in Hong Kong in relation to EPAs should be extended and that some powers of supervision should be given to the Guardianship Board.

Recommendation 10

- (1) We recommend that the court's existing powers of supervision and discharge of an EPA attorney in the EPA Ordinance (Cap 501) should be supplemented by powers to:**
 - (i) direct an attorney to do, or not to do, a specific act;**
 - (ii) appoint a substitute attorney;**
 - (iii) give directions as to the remuneration and expenses of an attorney; and**
 - (iv) make such other orders as the court thinks are appropriate in the best interests of the donor.**

- (2) We further recommend that the Guardianship Board should be given power in relation to an EPA to:**
 - (i) direct an EPA attorney to do, or not do, a specified act ;**
 - (ii) vary a term of an EPA;**
 - (iii) make a declaration about the interpretation or effect of an EPA;**
 - (iv) remove a power from an attorney and give the removed power to another attorney or a new attorney;**
 - (v) require an attorney to provide accounts and records of transactions carried out for the donor;**
 - (vi) require an attorney to submit a plan of financial management for approval; and**
 - (vii) give directions as to the remuneration or expenses of the attorney.**

- (3) The powers listed at (2) should also be exercisable by the court and the Board should be able to refer matters to the court, and *vice versa*. An appeal should lie to the court from any decision by the Board.**

19. A number of alternative tests have been adopted in jurisdictions elsewhere for the recognition of EPAs made outside the particular jurisdiction. One or more of the following alternatives could be adopted in Hong Kong:

- (a) EPA executed outside Hong Kong but complies with the Hong Kong execution requirements (though witnessed by a solicitor/doctor registered in the other jurisdiction, rather than Hong Kong)
- (b) EPA executed outside Hong Kong and complies with the EPA requirements of that jurisdiction
- (c) EPA executed outside Hong Kong and complies with the EPA requirements of the jurisdiction indicated in the EPA
- (d) EPA executed outside Hong Kong and complies with the EPA requirements of the jurisdiction where, at the time of execution, the donor:
 - (i) was habitually resident;
 - (ii) was ordinarily resident;
 - (iii) was domiciled; or
 - (iv) had a substantial connection.

We favour the adoption in Hong Kong of options (a) and (b), which would appear to be the path followed in most of the jurisdictions surveyed in Chapter 2.

Recommendation 11

We recommend that an EPA made in a jurisdiction other than Hong Kong should be recognised in Hong Kong if:

- (a) it complies with the Hong Kong execution requirements (though witnessed by a solicitor/doctor registered in the other jurisdiction, rather than Hong Kong); or**
- (b) it complies with the EPA requirements of that jurisdiction.**

Invitation to comment

20. This paper is issued by the Law Reform Commission to elicit views and comment from the public on the recommendations for change that it contains. The Commission would welcome responses in particular to the following questions:

- (1) Do you think that the scope of an EPA should be extended to include decisions about the donor's "personal care" (see Recommendation 1)?
- (2) If you have answered "no" to question 1, you should now go to question 3. If you have answered "yes" to question 1, please answer the following questions:
 - (a) Do you think that, for the purposes of an EPA, "personal care" should include decisions as to the donor's day-to-day health care (see Recommendation 3)?
 - (b) Do you agree that there should be a statutory list of decisions which may be included within the scope of an EPA (see Recommendation 4)?
 - (c) If you have answered "yes" to question 2(b) do you agree with the contents of the list of such decisions set out in Recommendation 4? If not, which decisions do you think should be deleted from the list? Are there other decisions which you think should be added to the list?
 - (d) Do you agree that there should be a statutory list of decisions which must be excluded from the scope of an EPA (see Recommendation 5)?
 - (e) If you have answered "yes" to question 2(d) do you agree with the contents of the list of such decisions set out in Recommendation 5? If not, which decisions do you think should be deleted from the list? Are there other decisions which you think should be added to the list?
 - (f) Do you agree that a donor should be allowed, if he wishes, to appoint separate attorneys for personal care decisions and for financial affairs decisions (see Recommendation 6)?
 - (g) Should there be a requirement to give notice of intended registration of a personal care EPA and, if so, to whom should that notice be given?
 - (h) Do you agree that the same witness requirements should apply to all EPAs, whether they include personal care decisions or are restricted to financial and property affairs (see Recommendation 7)?

- (i) Do you agree that there should be a statutory obligation on an attorney to act in the donor's best interests (see Recommendation 9)?
 - (j) Recommendation 9 proposes that, in determining the donor's best interests, the attorney should be required to have regard so far as practicable to the donor's wishes and feelings, to the extent that these are ascertainable. If it is practicable and appropriate, the attorney should be required to consult any person named by the donor as a person to be consulted on matters arising from the EPA and any person caring for the donor or interested in his welfare. Do you agree with this proposal?
 - (k) Do you agree that the court should be given the additional powers to supervise an EPA attorney set out at Recommendation 10(1)? If not, which, if any, additional powers should be given to the court?
 - (l) Do you agree that the Guardianship Board should be given the powers to supervise an EPA attorney set out at Recommendation 10(2)? If not, which, if any, powers do you think should be given to the Guardianship Board?
- (3) Do you agree that EPAs executed in a jurisdiction other than Hong Kong should be recognised in Hong Kong if they satisfy certain criteria (see Recommendation 11)?
- (4) If you have answered "yes" to question 3, do you agree with the proposal in Recommendation 11 that an EPA executed in a jurisdiction other than Hong Kong should be recognised in Hong Kong if:
- (i) it complies with the Hong Kong execution requirements (though witnessed by a solicitor/doctor registered in the other jurisdiction, rather than Hong Kong); or
 - (ii) it complies with the EPA requirements of that jurisdiction?

If you do not agree with this proposal, what criteria do you think an EPA should satisfy to be recognised in Hong Kong?

Law Reform Commission Secretariat
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