

Law Reform Commission

Report on *Enduring Powers of Attorney*

Press release

The Law Reform Commission today [26 March 2008] published a report containing proposals to simplify the requirements for executing an enduring power of attorney. The report follows an earlier consultation paper on this subject issued by the Commission in April 2007.

The report explains that a power of attorney is a legal instrument that is used to delegate legal authority to another. By executing a power of attorney, the donor of the power gives legal authority to another person (the attorney) to make property, financial and other legal decisions on his behalf.

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. It may be in just such circumstances, however, that the donor of the power would want his attorney to be able to act for him. To meet that difficulty, the Enduring Powers of Attorney Ordinance (Cap 501) allows a special type of power of attorney, called an “enduring power of attorney” (EPA), to be executed while the donor of the power is mentally capable but which continues to have effect after the donor becomes incapable. An EPA can apply only to decisions about the donor’s property and financial affairs and cannot be used to delegate decisions about the donor’s health care.

The report points out that there is no requirement that a conventional power of attorney must be witnessed by a solicitor or a doctor, or, indeed, by anyone at all. In contrast, section 5(2)(a) of the EPA Ordinance requires that an enduring power of attorney must be signed in the presence of a solicitor and a medical practitioner. The report notes that no other jurisdiction except Ireland requires a medical witness to an EPA.

Since the Ordinance came into effect on 1 July 1997, only a handful of EPAs have been registered. This contrasts with the position in other jurisdictions, where EPAs are widely used, and the Commission considers that the low take-up rate in Hong Kong is caused at least in part by the cumbersome requirement that an EPA be executed in the simultaneous presence of a medical practitioner and a solicitor.

The Commission has therefore concluded that the requirement for a medical witness to an EPA should be abolished but that at the same time the Law Society should be encouraged to issue practice directions to its members on the execution of EPAs, making clear that where a solicitor has grounds for doubting the mental competence of his client to execute an EPA, the solicitor must obtain an assessment of his client’s mental capacity from a medical practitioner before the EPA is executed.

The Commission also considers that greater publicity should be given to the concept of EPAs, both within the legal profession itself and the wider community, and the report makes a number of proposals as to ways in which awareness and understanding of EPAs can be increased. In addition, the report puts forward a suggested simplified version of the existing statutory form of EPA as a further measure to encourage wider use of EPAs

Copies of the report are available on request from the Secretariat of the Law Reform Commission at 20/F Harcourt House, 39 Gloucester Road, Wanchai, Hong Kong. The report can also be accessed on the Commission's website at <www.hkreform.gov.hk>.

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