

Law Reform Commission
Report on Enduring Powers of Attorney
Executive Summary

Preface

1. There are no requirements that a conventional power of attorney should be witnessed by a solicitor or a doctor, or, indeed, by anyone at all. In contrast, section 5(2)(a) of the Enduring Powers of Attorney Ordinance (Cap 501) requires that an enduring power of attorney (EPA) must be signed in the presence of a solicitor and a medical practitioner, and it must be in the form prescribed in the Schedule to the Enduring Powers of Attorney (Prescribed Form) Regulation.

2. Concerns have been expressed that the requirement that a solicitor and a doctor be present together at the time an EPA is signed is unduly onerous and may be one reason why only a small number of EPAs have been registered in Hong Kong. As at 1 December 2007, only 21 EPAs had been registered in Hong Kong in the 10 years since the Ordinance was enacted. In contrast, 19,480 were registered in England and Wales in 2006 alone. Accordingly, in the light of these concerns, in November 2006 the Secretary for Justice and the Chief Justice asked the Law Reform Commission to review the requirements for the execution of an EPA prescribed in section 5(2) of the Enduring Powers of Attorney Ordinance (Cap 501), and the terms of the forms at the Schedule to that Ordinance, and to recommend such changes as may be thought appropriate.

3. In April 2007, the Commission issued a consultation paper which examined the existing provisions in the EPA Ordinance and made proposals for change. The input provided by those who responded to the consultation paper was invaluable to the Commission in formulating the conclusions and recommendations set out in this report.

Chapter 1: the existing law in Hong Kong

4. 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.

5. 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.

6. To meet that difficulty, the Enduring Powers of Attorney Ordinance (Cap 501) was enacted in 1997 to create a special type of power of attorney which would be executed while the donor of the power was mentally capable but would take effect after the donor became incapable. This contrasts with a conventional power of attorney, which automatically lapses once the donor becomes mentally incapable.

7. Section 5(2)(a) of Cap 501 imposes a strict requirement for the execution of an enduring power of attorney. Unless he is physically incapable of signing, the donor must sign the prescribed form before a solicitor and a registered medical practitioner who must both be present at the same time and each of whom must be a person other than the person being appointed as the attorney, the spouse of such person or a person related by blood or marriage to the donor or the attorney.

8. Section 5(2)(d) requires the solicitor to certify that:

(i) the donor attended before him at the time of the execution of the enduring power of attorney;

(ii) the donor appeared to be mentally capable (specifying in the certification that the donor appeared to be mentally capable in terms of section 2); and

(iii) the instrument was signed in his presence and, where it is signed by the donor, that the donor acknowledged that he was signing it voluntarily and, where it is signed on the donor's behalf, that it was so signed under the direction of the donor.

The medical practitioner must also certify in identical terms to paragraphs (i) and (iii), but instead of paragraph (ii) he must certify that he satisfied himself that the donor was mentally capable (specifying in the certification that he satisfied himself that the donor was mentally capable in terms of section 2).

9. An enduring power of attorney is not revoked by the subsequent mental incapacity of the donor. However, if the attorney has reason to believe the donor is, or is becoming, mentally incapable he must apply to the Registrar of the High Court as soon as is practicable to register the instrument creating the power of attorney. In the event of the donor's mental incapacity, the attorney's power to act on his behalf will be suspended until the power of attorney is registered. The Registrar will register the power of attorney if he is satisfied that the instrument purports to create an enduring power of attorney and the requirements of Cap 501 have been complied with.

10. Chapter 1 goes on to outline the background to the existing law in Hong Kong and the previous consultation carried out by the Department of Justice in 2003 in relation to a proposal from the Law Society to abolish the requirement for a medical witness to an EPA.

Chapter 2: the approach in other jurisdictions

11. 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. Only Ireland requires a medical witness, and even in Ireland the medical witness does not have to sign at the same time as the lawyer.

Chapter 3: conclusions and recommendations

12. Chapter 3 identifies the advantages of an EPA as being that:

- (a) it allows an individual to choose the person or persons who will look after the individual's affairs if he becomes incapable of doing so;
- (b) it avoids expensive and potentially distressing court proceedings for the appointment of a trustee to look after the individual's affairs;
- (c) it provides an efficient and cost-effective way of administering the individual's property.

13 The use of an EPA has benefits not only for the donor, but also for the donor's family who might otherwise be faced with considerable difficulties and distress in managing his affairs. From the wider community's point of view, an EPA can avoid the need to apply scarce court resources unnecessarily to the management of an individual's affairs. Given these benefits, both general and individual, it is clearly undesirable that the existing provisions in the Enduring Powers of Attorney Ordinance (Cap 501) have so rarely been used. As at 1 December 2007, only 21 EPAs had been registered in the ten years since the Ordinance was enacted.

14 There may be a variety of reasons for this exceptionally low take-up rate. There may, for instance, be cultural factors which discourage the use of EPAs. A lack of public awareness and education as to the concept of EPAs and their benefits may also contribute. It seems reasonable to suppose, however, that one factor discouraging use is likely to be the requirement in section 5(2)(a) that the deed creating the enduring power of attorney must be signed by the donor before a solicitor and a registered medical practitioner, who must both be present at the same time. Arranging for a solicitor and a doctor to convene at the same time and place would present a costs and logistical problem for most members of the community.

15 EPAs offer significant benefits for the donor, the donor's family and the community at large. It is in everyone's interests to ensure that they are used widely. But the costs and logistical difficulties of arranging for a medical witness to sign at the same time as the solicitor are a major deterrent to an

efficient and cost effective way of administering a mentally incapacitated person's property.

16 None of the common law jurisdictions reviewed in chapter 2 (except Ireland) requires an EPA to be witnessed by a doctor and solicitor. The requirement of certification by a medical practitioner has been specifically considered and rejected by the Law Commissions of England and New Zealand. The Alberta Law Reform Institute noted the requirement in Ireland for a medical practitioner's statement that the donor was capable of understanding the effect of creating an EPA but rejected that approach as being an unwarranted intrusion into private affairs, and an added cost which would inhibit the use of EPAs.

17 The Commission notes the significant difficulties of executing an EPA under the existing provisions as described by solicitors with actual experience of the process. There is clearly a tension between enhancing the convenience of EPA execution and the need to ensure that donors are fully cognisant of the consequences of execution, but the Commission believes that the latter concern can be adequately met without retaining the existing requirement for a medical witness in every case. In particular, the Commission thinks that 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.

18. A number of those who responded to the consultation paper observed that there was widespread ignorance of the existence and scope of EPAs, even within the legal profession. The Commission hopes that the promulgation of a practice direction on EPAs by the Law Society of Hong Kong, coupled with increased publicity and the adoption of a more user-friendly and informative EPA form, would encourage the wider use of EPAs here.

Recommendation 1

We recommend that:

(a) the existing requirement in section 5(2) of the Enduring Powers of Attorney Ordinance (Cap 501) that an EPA be signed before a registered medical practitioner should be abolished; and

(b) 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.

19 A second option canvassed in the consultation paper was to retain the requirement for a medical witness but to relax it somewhat by allowing the doctor and the solicitor to sign at different times. It follows from the foregoing discussion in this report that the Commission favours outright abolition rather than relaxation. Nevertheless, if it is decided instead merely to relax the requirement the Commission considers that a period of 28 days should be allowed as the maximum period between the medical witness signing and the donor and solicitor signing. That provides a reasonable level of flexibility while not being so long as to render the medical assessment no longer current.

Recommendation 2

We recommend that if, contrary to Recommendation 1 above, it is decided to retain the existing requirement in section 5(2) of the Enduring Powers of Attorney Ordinance (Cap 501) that an EPA be signed before a registered medical practitioner, the donor and the solicitor should be permitted to sign the EPA within 28 days after it has been signed by the registered medical practitioner.

20. The report considers that, while the existing execution requirements undoubtedly contribute to the low take-up rate of EPAs in Hong Kong, an additional factor may be a lack of awareness or understanding of the concept. The Commission considers that more should be done to publicise and explain EPAs to the community, setting out the benefits for both the donor and his family which an EPA offers and outlining the steps which must be taken to execute and register an EPA.

Recommendation 3

We recommend that the Government, in partnership with relevant professional bodies and non-governmental organisations (NGOs), should take steps to increase awareness and understanding of EPAs. Publicity measures should include:

- **TV and radio messages; and**
- **The preparation of a user-friendly explanatory leaflet in plain English and clear Chinese, to be made available via the websites of relevant Government departments, professional bodies and NGOs, and the various online legal resource websites, and in hard copy via District Offices, community centres, centres for the elderly, public libraries, hospitals and clinics, the offices of the Legal Aid Department, and solicitors' offices.**

We further recommend that:

- **The Law Society should be encouraged to disseminate information about EPAs to its members and to organise more Continuing Professional Development courses on EPAs for solicitors;**
- **Publicity information on EPAs should include information about the duties of an attorney, safeguards against abuse of power, and an explanation that an attorney need not be a lawyer; and**
- **The Government should identify a department or agency to plan, co-ordinate and lead publicity efforts.**

21. Related to the need to disseminate more information to the public in Hong Kong about EPAs is the question of ensuring that the form which must be used is in clear and simple terms. The existing form includes “*explanatory information*”, but that includes references to specific sections of the regulations and the principal Ordinance and cannot be said to be in a form which the lay reader would find easy to digest. The Commission considers that the EPA form should be revised and presented in more “user-friendly” terms.

Recommendation 4

We recommend that the Schedule to the Enduring Powers of Attorney (Prescribed Form) Regulation be replaced with a form and explanatory notes along the lines of those set out at Annex C or D to the report, depending on whether or not the reforms we propose in Recommendation 1 are adopted.

Law Reform Commission Secretariat
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