

**HONG KONG BAR ASSOCIATION'S COMMENTS ON
ENDURING POWERS OF ATTORNEY (AMENDMENT) BILL 2011**

The comments of the Hong Kong Bar Association ("the Bar") in respect of the Consultation Paper on the Enduring Powers of Attorney (Amendment) Bill 2011 published by the Department of Justice are set out below.

1. As set out in the Bar's comments in response to consultation papers prepared by the Law Reform Commission of Hong Kong ("LRC") relating to Enduring Powers of Attorney ("EPAs"), the Bar has concerns about and does not support the abolition of the existing requirement that an EPA be certified by a medical practitioner. In summary that is because:
 - (1) An EPA is a document of considerable importance, which can confer extensive powers on a third party in respect of the donor's affairs, which powers survive the mental incapacity of the donor, and in the ordinary course of events would operate for the remainder of the donor's life (unless revoked prior to mental incapacity).
 - (2) The circumstances in which an EPA is likely to be executed are those in which it is anticipated that mental incapacity is likely to occur in the (near) future.
 - (3) The requirement of medical certification at the time of creation of an EPA is a useful and important additional safeguard, which helps to ensure that EPAs are only executed with the valid consent of the donor.
 - (4) In the absence of medical certification at the time of execution of the EPA, any issue which arises after the donor has become mentally incapable as to the donor's mental capacity at the time of execution, is likely to be difficult to resolve; it will be too late to obtain reliable medical evidence as to the donor's mental state at the time of execution.
 - (5) The Bar takes the view that certification of mental capacity by a legal practitioner provides insufficient protection to the donor, since mental capacity is a matter which ought properly to be assessed by a medical practitioner, and does not fall within the province of a legal practitioner.
 - (6) A rational distinction can be drawn between the certification requirements for a will and an EPA, since an EPA (unlike a will) is an instrument which is specifically designed for use in a situation where mental incapacity is contemplated in the future.
 - (7) The Bar appreciates the concerns of the LRC as to the cumbersome nature of existing requirements for the execution of EPAs, and the scarcity of their use. However, the Bar takes the view that this consideration must be balanced against the risk of mis-use of EPA's, which is exacerbated by the proposed removal of the requirement for medical certification.

2. The Bar prefers and supports a less dramatic solution to the problems identified by the LRC, namely a relaxation of the existing requirement that both legal and medical certification be obtained at the same time, along the lines of Recommendation 2 under the LRC's Report dated March 2008.

3. The Bar notes that the currently proposed legislative changes do not include recommendations 9 and 10 under the LRC's Consultation Paper dated June 2009, on Enduring Powers of Attorney: Personal Care, namely the imposition of certain express statutory duties on attorneys, and the expansion of the Court's supervisory powers, respectively, which provisions would assist to a certain degree in alleviating the Bar's concerns outlined above.

4. The Bar further notes that the Law Society proposes to issue a Practice Note providing detailed guidelines on matters of which solicitors must be aware when dealing with EPAs, which would presumably include a provision that medical advice be sought in cases where there is doubt as to a donor's mental capacity. This is welcomed, although for the reasons set out at paragraph 1(5) above, the Bar does not consider that this of itself provides sufficient protection to the donor.

5. Other than the above, the Bar does not have any further comment on the Consultation Paper or the Bill annexed to it.

Hong Kong Bar Association

10th September 2010