

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

ENDURING POWERS OF ATTORNEY

This report can be found on the internet at:
<<http://www.hkreform.gov.hk>>

March 2008

The Law Reform Commission of Hong Kong was established by the Executive Council in January 1980. The Commission considers for reform such aspects of the law as may be referred to it by the Secretary for Justice or the Chief Justice.

The members of the Commission at present are:

Chairman: *Mr Wong Yan-lung, SC, JP, Secretary for Justice*

Members: *The Hon Mr Justice Andrew Li, Chief Justice
Mr Eamonn Moran, Law Draftsman
Dr John Bacon-Shone
The Hon Mr Justice Chan, PJ
Mrs Pamela Chan, BBS, JP
Professor Albert Chen, JP
Mr Andrew Jeffries
Professor Mike McConville
Mr Paul Shieh, SC
Ms Anna Wu, SBS, JP
Mr Benjamin Yu, SC, JP*

The Secretary of the Commission is **Mr Stuart M I Stoker** and its offices are at:

*20/F Harcourt House
39 Gloucester Road
Wanchai
Hong Kong*

Telephone: 2528 0472
Fax: 2865 2902
E-mail: hklrc@hkreform.gov.hk
Website: <http://www.hkreform.gov.hk>

THE LAW REFORM COMMISSION OF HONG KONG

REPORT

ENDURING POWERS OF ATTORNEY

CONTENTS

<i>Chapter</i>	<i>Page</i>
Preface	1
1 The existing law in Hong Kong	3
Background to the existing law	5
The 2003 consultation	8
2 The approach in other jurisdictions	10
Australia	10
Canada	14
England and Wales	18
Ireland	23
New Zealand	24
Scotland	27
3 Our conclusions and recommendations	29
The case for change	29
Abolition of the requirement for a medical witness	30
Relaxation of the requirement for a medical witness	33
Publicity and education	34
Simplification of forms	36
EPAs and personal care decisions	37
4 Summary of recommendations	39
Annex A List of organisations and individuals who responded to the Law Reform Commission's April 2007 consultation paper on <i>Enduring Powers of Attorney</i>	41
Annex B Schedule to the Enduring Powers of Attorney (Prescribed Form) Regulation	42

Annex C	Suggested revised form of enduring power of attorney to reflect the existing law	49
Annex D	Suggested revised form of enduring power of attorney to reflect Recommendation 1	55

Preface

1. 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 (or principal) gives legal authority to another person (the attorney, or agent) to make property, financial and other legal decisions on his behalf. A power of attorney can be general, so that the agent can conduct any sort of business on behalf of the principal, or it may be specific, limited to the 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. 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) was enacted in 1997 to create a special type of power of attorney, an “enduring power of attorney” (EPA), which would be executed while the donor of the power was mentally capable but would continue to have effect after the donor became incapable.

3. 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 EPA Ordinance requires that an enduring power of attorney 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.

4. Concern has 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.

5. Accordingly, in November 2006, the Secretary for Justice and the Chief Justice gave the following terms of reference to the Law Reform Commission:

“To review the requirements for the execution of an enduring power of attorney 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.”

6. In April 2007, the Commission issued a consultation paper which examined the existing provisions in the EPA Ordinance and made proposals for change. A list of the organisations and individuals who responded to the consultation paper is set out at Annex A to this report. We wish to thank all those individuals and organisations for their views and for their contribution to this law reform project. The input they provided was invaluable to us in formulating the conclusions and recommendations set out in this report.

Chapter 1

The existing law in Hong Kong

1.1 A power of attorney is a mechanism by which one person (the donor) appoints and empowers another person (the attorney) to act on his behalf and in his name. The power of attorney effectively creates a type of agency, and an act done by the attorney is in general treated as one done by the donor himself. The capacity to create a power of attorney is generally coincident with the capacity to contract. If the donor lacks the mental capacity to create a power of attorney, any purported grant is void. Similarly, if the donor loses mental capacity at some stage after granting a power of attorney, the general rule at common law is that the power of attorney is revoked and the attorney no longer has power to act on the donor's behalf from the onset of the donor's mental incapacity.¹ The rationale behind this rule is that a person's agent is treated as having capacity only to do those legal acts which that person can do. An agent (in this case, an attorney) appointed by a person who subsequently becomes mentally incapacitated will accordingly lose his powers to undertake legal acts on that person's behalf.

1.2 The problem with this rule is that it defeats the reasonable expectations of many who would wish to use a power of attorney. The Law Reform Commission of British Columbia has pointed out:

*“There are probably very few solicitors in practice who have not, at one time or another, been approached by an elderly client requesting that a power of attorney be prepared appointing a close friend or relative to conduct his affairs because the client fears or feels that his mental powers are weakening. It is not easy to explain that ... at the very moment he would wish such a power to become operative, it would in law be terminated.”²
[Emphasis added]*

1.3 To answer the difficulties caused by the lapse of a power of attorney due to the donor's mental incapacity, the Enduring Powers of Attorney Ordinance (Cap 501) was enacted in 1997. The Ordinance enables a power of attorney to survive the onset of the donor's mental incapacity provided it is in the prescribed form and executed in the prescribed manner.

1.4 The scope of what is termed an “enduring power of attorney” is restricted to the donor's property and financial affairs.³ It cannot, for instance,

¹ Section 4 of the Powers of Attorney Ordinance (Cap31) sets out exceptions to this general rule.

² *Powers of Attorney and Mental Incapacity*, Report No 22, Law Reform Commission of British Columbia, 1975, at 10.

³ Section 8(1) of Cap 501.

empower the attorney to make decisions relating to the donor's health care.⁴ Section 5(1) of Cap 501 requires that the donor of an enduring power of attorney must have the requisite mental capacity at the time the power is created. Mental capacity is defined by reference to section 1A of the Powers of Attorney Ordinance (Cap 31). That section provides that a person is mentally incapable for any purpose relating to a power of attorney if:

- “(a) he is suffering from mental disorder or mental handicap and –*
 - (i) is unable to understand the effect of the power of attorney; or*
 - (ii) is unable by reason of his mental disorder or mental handicap to make a decision to grant a power of attorney; or*
- (b) he is unable to communicate to any other person who has made a reasonable effort to understand him, any intention or wish to grant a power of attorney.”*

1.5 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”.

1.6 Section 5(2)(d) requires the solicitor to certify:

- “(i) that the donor attended before him at the time of the execution of the enduring power of attorney;*
- (ii) that 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) that 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*

⁴ The subject of “advance directives” as to health care was considered by the Law Reform Commission in its report on *Substitute Decision-making and Advance Directives in relation to Medical Treatment*, published in August 2006.

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)”⁵

1.7 An enduring power of attorney is not revoked by the subsequent mental incapacity of the donor.⁶ 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.⁷ 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.⁸ 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.⁹

1.8 Section 11(1) of Cap 501 empowers the court, on the application of an interested party, to revoke or vary an enduring power of attorney, to remove the attorney or to require the attorney to produce records and accounts and to make an order for their auditing. The donor himself can revoke an enduring power of attorney at any time when he is mentally capable, and the power is automatically revoked by the death of the donor or the attorney, or the bankruptcy of the attorney.¹⁰

Background to the existing law

1.9 In December 1993 the then Attorney General’s Chambers issued a consultation paper¹¹ which proposed the creation of a new type of power of attorney, the enduring power of attorney. The suggested scheme incorporated elements from a variety of models proposed or adopted in a number of other jurisdictions. The approach followed by the Enduring Powers of Attorney Act 1985 in England and Wales was rejected, however, in the light of criticisms of that legislation which had been voiced, *inter alia*, by the English Law Commission.

1.10 The consultation paper emphasised the importance of safeguards at the execution stage of the enduring power of attorney, rather than relying on a system of registration with the court at a later stage as had been favoured by the 1985 Act in England. To that end, the consultation paper proposed that there should be a prescribed form for the enduring power of attorney instrument itself, the obligatory statements by the donor, the attorney and the certifying lawyer within the enduring power of attorney, and the explanatory notes. The consultation paper did *not* propose certification by a medical

⁵ See section 5(2)(e) of Cap 501.

⁶ Section 4(1) of Cap 501.

⁷ Section 4(2) of Cap 501.

⁸ Section 4(3) of Cap 501.

⁹ Section 9(2) of Cap 501. This is not to be construed, however, as requiring the Registrar to determine the validity of any instrument presented to him for registration, and registration does not validate an invalid enduring power of attorney: see section 9(7).

¹⁰ Section 13 of Cap 501.

¹¹ *Enduring Powers of Attorney: Consultation Document*, Attorney General’s Chambers, December 1993.

practitioner in addition to a lawyer. The lawyer would be required to certify that:

- the donor had attended before the lawyer;
- the donor appeared competent to grant the enduring power of attorney;
- the lawyer had satisfied himself that the donor understood the explanatory notes; and
- the donor had signed the enduring power of attorney in the presence of the lawyer and acknowledged he was signing voluntarily.¹²

1.11 The consultation paper noted that the English Law Commission, in reviewing the 1985 Act in 1993, had suggested that the donor's capacity to execute an enduring power of attorney should be certified by a solicitor *and* a registered medical practitioner at the time of execution.¹³ The English Law Commission explained its thinking thus:

*"If the existing notification and registration requirements are felt unnecessary or ineffective, we would propose that a certificate at the time of execution (together with a more complicated standard form) would be one way of replacing them. However, although capacity is a legal rather than a strictly medical concept, it appears that most EPAs are drafted by solicitors acting for the donor; we would therefore prefer to combine the requirements for legal and medical certification of capacity. We therefore suggest that there should be certificates from both the solicitor and from a registered medical practitioner, that each has seen the donor recently, and explained the nature and effect of the document, and that he or she appears to understand it."*¹⁴

1.12 Two of the seven respondents to the consultation paper issued by the Attorney General's Chambers picked up this point.¹⁵ The then Secretary for Health and Welfare remarked that:

*"At the execution stage, there is a need to provide for certification by registered medical practitioners of a donor's mental state."*¹⁶

¹² See para 5.14 of *"Enduring Powers of Attorney: Consultation Document"*, above.

¹³ See para 3.26.5 of *"Enduring Powers of Attorney: Consultation Document"*, above.

¹⁴ *"Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction"*, Law Commission Consultation Paper No.128, at para 7.15.

¹⁵ The paper was sent to nine individuals or organisations: the Director of the Hong Kong Council of Social Service; the Chairman of the Hong Kong Association for the Mentally Handicapped; the Registrar of the Supreme Court; the Secretary for Health and Welfare; the Dean of the Faculty of Law of the University of Hong Kong; the Dean of the Faculty (sic) of Law at the City Polytechnic of Hong Kong; the Chairman of the Hong Kong Bar Association; the President of the Law Society of Hong Kong; and the Registrar of the Hong Kong Society of Accountants.

¹⁶ Letter of 14 February 1994 to the Solicitor General from the Secretary for Health and Welfare.

The Secretary did not elaborate on her justification for this view. The Hong Kong Council of Social Service also argued for certification by a medical practitioner, on the following basis:

“It is expected that the most common users of EPA are people whose mental states begin to deteriorate, such as elderly people and persons with mental illness. Hence, the danger of possible undue influence and errors of judgment are the greatest. We support the proposal of requiring the presence of a lawyer to acknowledge that the donor is voluntary and understands the effect of his granting of the power. However, the lawyer is by no means in a position to judge whether the donor is competent to grant the EPA. Certification of soundness of the donor’s mental state by a medical practitioner is therefore recommended.”¹⁷

The remaining five respondents to the consultation paper gave general support to the paper’s proposals and did not refer to the question of certification.¹⁸

1.13 A Bill was subsequently presented to the Legislative Council in early 1997 which amended the proposal in the consultation paper by incorporating a requirement of certification by both a solicitor *and* a medical practitioner. The views expressed by the Secretary for Health and Welfare and the Hong Kong Council of Social Service appear to have been the only factors persuading the then Attorney General’s Chambers to adopt this approach. However, neither the Legal Affairs Policy Group paper nor the Executive Council Memorandum (in July 1996 and December 1996 respectively) referred to the final report of the English Law Commission, published in February 1995, which had reversed the Commission’s earlier thinking and rejected the idea of certification by a medical practitioner. The Commission had said:

“Our provisional proposal that the donor’s capacity to execute should be certified by a solicitor and a doctor at the time of execution did not commend itself to the majority of our consultees. Numerous respondents said that any such requirement would present practical difficulties and force donors to incur extra costs. Concern focused on the idea that both a doctor and a lawyer need be involved in every case. It should in any event be a matter of good practice for all health professionals not to witness a signature without considering the question of the person’s capacity to execute the document. Lawyers involved in drawing up powers of attorney should also, as a matter of good practice, be very clear that the client to whom the duty of care is owed is the donor of the power and no

¹⁷ Letter of 14 February 1994 to the Acting Solicitor General from the Director of the Hong Kong Council of Social Service.

¹⁸ The five remaining respondents were the Salvation Army, the Bar Association, the Hospital Authority, the Hong Kong Society of Accountants and the Chairman of the Hong Kong Association for the Mentally Handicapped.

one else. In appropriate cases good practice already demands that an appropriate medical certificate should be obtained and/or appropriate records kept on file. The provisional proposal for a certification procedure was a corollary to the proposed abolition of any form of registration, which ... we are no longer pursuing. In those circumstances, the draft Bill simply provides that a CPA (like an EPA) must be executed in the prescribed manner by both donor and donee.”¹⁹

The 2003 consultation

1.14 In May 2003, in the light of the extremely low take-up rate of EPAs in Hong Kong, the Law Society wrote to the Secretary for Justice, suggesting that the requirement that an EPA be signed before a medical practitioner and a solicitor was “*a major deterrent and is probably one of the reasons why the Ordinance is ignored.*”

1.15 In response to the Law Society’s concern, in November 2003 the Department of Justice issued a short consultation paper which proposed to remove the requirement for certification by a medical practitioner. The paper was sent to a number of medical, legal and social welfare organisations, including the Legislative Council Panels on Administration of Justice and Legal Affairs and Health Services.

1.16 Of the 20 organisations or individuals who responded to the consultation paper, seven were in favour of the proposed change, while eight were against. The remaining respondents made no comment or had no concluded view. Five of those who opposed the removal of a requirement for medical certification supported relaxation of the rule to allow certification by a medical practitioner within a short period before the EPA was executed, rather than requiring the doctor and the lawyer both to be present at the time of execution. These five were the Bar Association, the HK Doctors Union, the HK Society of Accountants, the Health, Welfare and Food Bureau and the HK Council of Social Service.

1.17 The time limits suggested between medical certification and execution were “*within a reasonably short period of time*” (Bar Association), “*no more than, say, one week*” (HK Society of Accountants), “*within 28 days*” (Hong Kong Doctors Union) and “*say within one month or a specific time period*” (HK Council of Social Service). The Health, Welfare & Food Bureau made no suggestion as to the appropriate time limit.

1.18 The removal of the requirement that the certifying doctor be present at the time of execution of the EPA was not an option presented in the consultation paper, and the views of those respondents who did not

¹⁹ “*Mental Incapacity: Item 9 of the Fourth Programme of Law Reform: Mentally Incapacitated Adults*”, English Law Commission (1995, Law Com No 231), at para 7.27

specifically refer to this alternative in their responses cannot therefore be inferred on this point.

1.19 The opponents of the original proposal to remove the requirement of certification by a medical practitioner argued that medical certification was important because the Hong Kong system did not impose any significant formalities at the time of registration. They noted that, although in England and Wales there is no requirement for the presence of either a solicitor or medical practitioner at the time an EPA is executed, at the time of onset of mental incapacity the attorney must give notice in the prescribed form to the donor and a specified number of prescribed classes of relatives before applying to the Court for registration (without which the attorney's power is suspended by the donor's incapacity). The notification requirement not infrequently results in applications being made for dispensation before the actual applications for registration.

1.20 There is then a period of five weeks beginning with the latest date on which the attorney gave notice to a relative for the latter to lodge a notice of objection to registration. One ground upon which objection can be made is that the donor already lacked capacity at the date when the power was purportedly created. Upon receipt of a valid notice of objection to registration, the Court must make further inquiries which would usually entail the filing of particulars of objection, affidavit evidence, the discovery and inspection of documents, and a hearing or hearings.

1.21 In contrast, registration of an EPA in Hong Kong can be achieved in a short time at relatively minor legal cost. An attorney only needs to notify the donor and other persons if so required by the power. Under regulation 6 of the Enduring Powers of Attorney (Prescribed Form) Regulations (Cap. 501), the number of persons other than the donor himself whom the donor may nominate for such purpose is limited to two.

1.22 As there is no statutorily prescribed notification requirement in Hong Kong, there is no formal objection procedure. Under section 9(2) of the EPA Ordinance, the Registrar of the High Court must register the EPA if he is satisfied that the instrument purports to create an enduring power, the requirements of the Ordinance have been complied with, and the fee payable for such registration has been paid. Opponents of the proposal to do away with the need for medical certification argued that the formal and simple registration procedure in Hong Kong is justifiable only by the early safeguards of the donor's interests at the time when an EPA is executed, one of which is the requirement for certification of mental capacity by a medical practitioner. The opponents of the original proposal further considered that the involvement of a medical practitioner at the execution stage is also likely to discourage speculative challenges to an EPA by the donor's next-of-kin on the ground that the donor was already incapable at the time of execution.

Chapter 2

The approach in other jurisdictions

2.1 The execution requirements adopted or proposed in a number of other jurisdictions in relation to enduring powers of attorney were referred to in the Attorney General's Chambers' consultation paper of December 1993. Of those jurisdictions referred to, none had legislation requiring certification by a medical practitioner.¹ A recent review by the Alberta Law Reform Institute of the safeguards provided in relation to enduring powers of attorney found that that situation remained essentially unchanged.² The sole exception appears to be the Republic of Ireland, which requires the inclusion in the document creating the power of attorney of a statement by a registered medical practitioner that, in his opinion, at the time the document was executed the donor had the mental capacity, with the assistance of such explanations as may have been given to the donor, to understand the effect of creating the power.³ Unlike the provision in Hong Kong, however, there is no specific requirement in the Irish provisions that the medical practitioner must be present at the same time as the solicitor when the power of attorney is executed.

2.2 This chapter looks at the provisions on EPAs in a number of overseas jurisdictions, and at proposals for reform. The terminology used differs from jurisdiction to jurisdiction, but for the sake of clarity the term "donor" is used throughout this chapter to refer to the person granting a power of attorney and "attorney" to refer to the person appointed. The comparative review in this chapter restricts itself to those aspects of the legislation in other jurisdictions which deal with the execution requirements for an EPA.

Australia

Australian Capital Territory

2.3 An enduring power of attorney in the Australian Capital Territory can delegate the donor's powers in relation to his property, personal care or health care matters. An EPA must be signed by the donor in the presence of two

¹ The jurisdictions referred to were England and Wales, Scotland, Australia (Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria) and Canada (Alberta, British Columbia, Manitoba, Newfoundland and Ontario).

² *Enduring Powers of Attorney*, Issues Paper No 5, Alberta Law Reform Institute, February 2002. The jurisdictions reviewed were England and Wales, Scotland, Northern Ireland, Ireland, California, Australia (all six states and the two territories) and Canada (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and Saskatchewan).

³ See section 5(2) of the Powers of Attorney Act 1996 and the First Schedule to the Enduring Powers of Attorney Regulations 1996.

adult witnesses,⁴ one of whom must be a person authorised to witness the signing of a statutory declaration.⁵ The EPA must include a certificate signed by each of the witnesses stating that:

- the donor signed the EPA voluntarily in the presence of the witness; and
- at the time the donor signed the EPA, the donor appeared to the witness to understand the nature and effect of making the EPA.⁶

Section 18 of the Powers of Attorney Act 2006 provides that, in the absence of evidence to the contrary, the donor is taken to understand the nature and effect of making the EPA.

2.4 An EPA can operate from any time specified by the donor in the EPA. It operates as a general power of attorney while the donor has decision-making capacity⁷ and is not revoked by the donor becoming a person with impaired decision-making capacity.⁸ There is no requirement for registration of an EPA or other formality to allow the attorney to continue to act after the donor's incapacity. Section 87 of the 2006 Act provides that if a question arises in any proceedings about whether the donor had impaired decision-making capacity, a certificate by a doctor stating that the donor had, or did not have, impaired decision-making capacity is evidence of that fact.

New South Wales

2.5 Section 19 of the Powers of Attorney Act 2003 requires an EPA to be witnessed by a "prescribed witness", which is defined in subsection (2) to mean:

- a registrar of a Local Court;
- a barrister or solicitor of a court of any Australian State or Territory;
- a licensee under the Conveyancing Licensing Act 1995 or an employee of the Public Trustee or of a trustee company;
- a legal practitioner qualified in a country other than Australia; or
- any other person prescribed by the regulations for these purposes.

⁴ Section 19(2), Powers of Attorney Act 2006.

⁵ Section 21(3), Powers of Attorney Act 2006.

⁶ Section 22(1), Powers of Attorney Act 2006.

⁷ Section 31(2), Powers of Attorney Act 2006.

⁸ Section 32, Powers of Attorney Act 2006.

2.6 The instrument creating the EPA must incorporate a certificate by the prescribed witness stating that:

- he explained the effect of the EPA to the donor before it was signed;
- he is a prescribed witness;
- he is not an attorney under the EPA;
- he witnessed the signing of the EPA by the donor; and
- the donor appeared to understand the effect of the EPA.⁹

2.7 An EPA may be registered by the Registrar-General in the General Register of Deeds, but there is no requirement to do so unless the attorney uses the EPA for dealings affecting land.¹⁰

Northern Territory

2.8 Section 14 of the Powers of Attorney Act 2000 provides that an instrument creating an EPA shall be executed in the presence of a witness who is not the attorney or a near relative of the attorney.¹¹ Neither the Act nor the Powers of Attorney Regulations 2000 impose any requirement that the witness be a member of any prescribed class of persons.

2.9 Section 13 of the 2000 Act requires an EPA to be registered with the Registrar-General.

Queensland

2.10 In Queensland, an EPA can authorise the attorney to do anything in relation to the donor's financial or property matters or the donor's "personal matters." "Personal matters" is defined in section 2 of Schedule 2 to the Powers of Attorney Act 1998 to mean "*a matter, other than a special personal matter or special health matter, relating to the principal's care, including the principal's health care, or welfare.*" The term would include decisions as to where the donor lives or works, what education or training he undertakes and day-to-day issues such as the donor's diet and dress.

2.11 The donor can specify in the EPA when the power is to be exercisable, though in the case of a personal matter the EPA will only be exercisable when the donor has impaired capacity.¹² If the EPA does not specify when the power for a financial or property matter is to be exercisable, the power becomes exercisable as soon as the EPA is made.¹³

⁹ Section 19(1)(c), Powers of Attorney Act 2003.

¹⁰ Sections 51 and 52, Powers of Attorney Act 2003.

¹¹ There is no witness requirement for an ordinary power of attorney: see section 6.

¹² Section 33(1) and (4), Powers of Attorney Act 1998.

¹³ Section 33(2), Powers of Attorney Act 1998.

2.12 An EPA must be in an approved form. It must be signed by the donor and by an “eligible witness”¹⁴ and must include a certificate by the witness stating that the donor:

- signed the EPA in his presence; and
- appeared to him to have the capacity necessary to make the EPA.¹⁵

An “eligible witness” for the purposes of an EPA relating to financial and property matters is defined in section 31 to mean a person who:

- is a justice of the peace, commissioner for declarations, notary public or lawyer; and
- is not an attorney of the donor; and
- is not a relation of the donor or of an attorney of the donor.

2.13 Section 60 of the 1998 Act provides that an EPA may be registered, but there is no requirement to do so.

South Australia

2.14 Section 6(2) of the Powers of Attorney and Agency Act 1984 provides that a deed is not effective to create an EPA unless the attesting witness is “a person authorised by law to take affidavits”. An EPA may specify that the authority conferred is to be exercised:

- notwithstanding the donor’s subsequent legal incapacity; or
- in the event of the donor’s subsequent legal incapacity.¹⁶

Tasmania

2.15 In Tasmania, an EPA must be witnessed by “at least” two persons, “neither of whom is a party to it nor a relation of a party to it, and each of whom has witnessed it in the presence of the donor and each other.”¹⁷ There is no requirement that the witnesses belong to any class of persons, such as lawyers or medical practitioners.

2.16 An EPA must be registered with the Recorder of Titles and any act done under an EPA has no legal effect unless it is registered.¹⁸ The Recorder’s only obligation in considering an application for registration is to

¹⁴ Section 44(1) and (3), Powers of Attorney Act 1998.

¹⁵ Section 44(4), Powers of Attorney Act 1998.

¹⁶ Section 6(1)(b), Powers of Attorney and Agency Act 1984

¹⁷ Section 30(2)(b), Powers of Attorney Act 2000.

¹⁸ Section 16, Powers of Attorney Act 2000.

ensure that the EPA is in accordance with the forms and procedures provided by the Powers of Attorney Act 2000.¹⁹ If the EPA does not comply with the Act, the Recorder must refuse to register it.

Victoria

2.17 Section 117 of the Instruments Act 1958²⁰ provides that the donor may specify in an EPA when the EPA is to take effect. If no time is specified, the EPA will take effect from the time of its execution. The EPA is not revoked by the subsequent legal incapacity of the donor of the power.²¹

2.18 An EPA must be in the approved written form and needs to be signed by the donor and signed and dated by two adult witnesses in the presence of the donor and each other.²² Only one witness can be a relative of the donor or of the attorney.²³ One witness must be authorised to witness the signing of a statutory declaration.²⁴ The EPA must include certificates signed by each of the witnesses stating that:

- the donor signed the EPA freely and voluntarily in the presence of the witness; and
- at the time, the donor appeared to the witness to have the capacity necessary to understand and sign the EPA.²⁵

Canada

Alberta

2.19 In Alberta, an EPA may provide that it comes into effect at a specified future time or on the occurrence of a specified contingency, “*including, but not limited to, the mental incapacity or infirmity of the donor.*”²⁶ The EPA may name one or more persons (which may include the attorney) on whose written declaration the specified contingency is conclusively deemed to have occurred.²⁷ Where the specified contingency relates to the donor’s mental incapacity and the EPA does not name a person for the purpose of bringing the EPA into effect, the specified contingency shall be conclusively deemed to have occurred when two medical practitioners declare in writing that it has occurred.²⁸

¹⁹ Section 11(2), Powers of Attorney Act 2000.

²⁰ Part XIA of the Instruments Act 1958, which deals with enduring powers of attorney, was added in its entirety by section 4 of the Instruments (Enduring Powers of Attorney) Act 2003.

²¹ Section 115(2), Instruments Act 1958.

²² Section 123(1), (2) and (3), Instruments Act 1958.

²³ Section 125(2), Instruments Act 1958.

²⁴ Section 125(3), Instruments Act 1958.

²⁵ Section 125A(1), Instruments Act 1958.

²⁶ Section 5(1), Powers of Attorney Act.

²⁷ Section 5(2), Powers of Attorney Act.

²⁸ Section 5(4), Powers of Attorney Act.

2.20 Section 2(1) of the Powers of Attorney Act requires that an EPA be in writing and be dated and signed by the donor in the presence of a witness, who must also sign in the presence of the donor. The EPA must contain a statement that it is to continue notwithstanding the donor's subsequent mental incapacity, or that it is to take effect on his mental incapacity. Rather than specifying who may witness an EPA, section 2(4) lists those who may not. Where the donor has signed the EPA himself, these persons are:

- an attorney designated in the EPA, or the attorney's spouse or adult interdependent partner;
- the donor's spouse or adult interdependent partner.

2.21 In 2003, the Alberta Law Reform Institute made a series of recommendations for reform of the existing law relating to enduring powers of attorney. These included the following proposals:

- Either a lawyer must sign a certificate that an EPA was signed by the donor on a specified date in the lawyer's presence separate and apart from the attorney and that the donor appeared to understand the EPA, or a witness must swear an affidavit containing the same statements.
- When the donor becomes mentally incapable and the attorney intends to act under an EPA, the attorney must give notice of intention to act to specified family members whose whereabouts are, or ought reasonably to be, known to the attorney and to any person designated by the EPA to receive notice.²⁹

2.22 The Institute believed that these additional safeguards against abuse would:

*"strike a proper balance between the interests of individuals in being able to appoint a trusted person of their own choice to administer their affairs on mental incapacity with the least cost and embarrassment, and in having reasonable safeguards against abuse of the powers given to attorneys."*³⁰

To date, the Institute's proposals have not been implemented.

British Columbia

2.23 Section 8 of the Power of Attorney Act 1996 requires an EPA in British Columbia to be signed by the donor and by a witness to the donor's signature.

²⁹ *Enduring Powers of Attorney: Safeguards against Abuse*, Alberta Law Reform Institute, Report No 88 (February 2003), at page x.

³⁰ Report No 88, cited above, at pages x to xi.

The witness cannot be the attorney or the attorney's spouse. The forms³¹ of EPA set out at the Schedule to the 1996 Act do not require the attorney to sign, nor is there any requirement for certification as to the donor's competence at the time of execution.

Manitoba

2.24 The Manitoba legislation uses the term "springing power of attorney" to refer to a power of attorney which comes into force at a specified future date on the occurrence of a specified contingency.³² The donor may name one or more persons (including the attorney) in the power of attorney from whom the attorney may request a written declaration that the date or contingency has occurred. If the power of attorney comes into force on the mental incompetence of the donor, and the donor has not named the declarant in the power of attorney, section 6(4) of the Powers of Attorney Act 1996 provides that two medical practitioners may act as the declarant. Section 7 of the Act provides that, upon application by the attorney, the Public Trustee, a declarant or an interested person, the court may determine whether the date or contingency specified in a springing power of attorney has occurred.

2.25 An EPA must be in writing and signed by the donor (or his signature acknowledged by the donor) in the presence of a witness, who must himself sign in the presence of the donor.³³ Section 11(1) of the 1996 Act provides that the witness to an EPA must be:

- an individual registered, or qualified to be registered to solemnize marriages;
- the judge of a superior court of Manitoba;
- a justice of the peace or a provincial judge;
- a qualified medical practitioner;
- a lawyer or a notary public in Manitoba;
- a member of the Royal Canadian Mounted Police; or
- a member of Manitoba municipal police force who exercises the powers of a peace officer.

Neither the attorney appointed under the EPA nor his spouse or common-law partner may act as a witness.³⁴

³¹ Two forms are provided, the first for the appointment of a single attorney and the second for the appointment of more than one attorney.

³² Section 6, Powers of Attorney Act 1996.

³³ Section 10, Powers of Attorney Act 1996.

³⁴ Section 11(2), Powers of Attorney Act 1996.

2.26 The donor or the attorney may file a copy of the EPA with the Public Trustee but there does not appear to be an obligation to do so.³⁵

Newfoundland

2.27 Section 3(1) of the Enduring Powers of Attorney Act 2001 requires that an EPA be signed by the donor and witnessed by a person other than the attorney appointed by the EPA or the attorney's spouse or cohabiting partner. "Cohabiting partner" is defined in section 2(1) to mean either of two persons who have cohabited "*in a conjugal relationship outside of marriage for at least one year.*"

Northwest Territories

2.28 Like the Manitoba legislation, the Northwest Territories' Powers of Attorney Act 2001 uses the term "springing power of attorney" and the relevant terms of the 2001 Act are to the same effect as those in Manitoba's Powers of Attorney Act 1996.

2.29 Section 13 of the 2001 Act stipulates that an EPA must be in writing, dated, and signed (or his signature acknowledged) by the donor in the presence of a witness, who must himself sign in the presence of the donor. The EPA must also state that it is to come into force at a specified future date or on the occurrence of a specified contingency, or that it is to continue in force notwithstanding the donor's mental incapacity subsequent to the EPA's execution. There appear to be no restrictions on who may witness an EPA.

Saskatchewan

2.30 An EPA in Saskatchewan may be made in relation to the donor's property and financial affairs or in relation to his personal affairs. An EPA can come into effect immediately on execution or on a specified future date or on the occurrence of a specified contingency, including the lack of capacity of the donor.³⁶ The Saskatchewan legislation uses the term "contingent appointment" to refer to the latter delayed appointment of the attorney. An EPA containing a contingent appointment may name one or more adults, other than the attorney or a family member of the attorney on whose written declaration the specified contingency (including the donor's lack of capacity) is deemed to have occurred for the purposes of bringing the contingent appointment into effect.³⁷

2.31 If a contingent appointment under an EPA comes into effect on the donor's loss of capacity and the EPA does not name any declarant, or the named declarant or declarants lack capacity, are unwilling or unavailable to act, or are dead, then the donor is deemed to have lost capacity if two

³⁵ Section 12, Powers of Attorney Act 1996.

³⁶ Section 9, Powers of Attorney Act 2002.

³⁷ Section 9.1, Powers of Attorney Act 2002.

members of “a prescribed professional group” declare in writing that the donor lacks capacity.³⁸

2.32 An EPA must be in writing and dated and signed by the donor.³⁹ Section 12(1) of the Powers of Attorney Act 2002 requires that an EPA be:

- witnessed by a lawyer and accompanied by a legal advice and witness certificate in the prescribed form; or
- witnessed by two adults with capacity (other than the attorney or family members of either the donor or the attorney) and accompanied by witness certificates in the prescribed form.

England and Wales

2.33 The Mental Capacity Act 2005 introduced to England and Wales a new regime in respect of EPAs, including a change in terminology. The Act received Royal Assent on 7 April 2005. Parts of the Act were implemented in April 2007 and the remainder in October 2007. Instead of EPAs, the 2005 Act refers to “lasting powers of attorney” (LPAs). Unlike an EPA in Hong Kong, an LPA under the new English provisions allows the donor to delegate authority not only in respect of his property and affairs but also in respect of his personal welfare. Like an EPA, an LPA continues to have effect after the donor has lost capacity.⁴⁰

2.34 Section 9(2) of the 2005 Act requires an LPA to be made and registered in accordance with Schedule 1 to the Act. That Schedule provides that an LPA must be “*in the prescribed form*”⁴¹ and must include “*the prescribed information*”.⁴² The LPA must include a statement by the donor to the effect that he has read the prescribed information and intends the authority conferred by the LPA to include authority to make decisions on the donor’s behalf when he no longer has capacity.⁴³ The LPA must also include the names of a person or persons (not including the attorney) whom the donor wishes to be notified of any application for registration of the LPA, or a statement by the donor that there are no persons whom he wishes to be notified.⁴⁴

2.35 Paragraph 2(1)(e) of Schedule 1 to the Act requires the LPA to include a certificate “*by a person of a prescribed description*” that, in his opinion, at the time when the donor executes the LPA:

³⁸ Section 9.2, Powers of Attorney Act 2002.

³⁹ Section 11(1), Powers of Attorney Act 2002.

⁴⁰ Section 9(1), Mental Capacity Act 2005.

⁴¹ Paragraph 1(1), Schedule 1 to the Mental Capacity Act 2005.

⁴² Paragraph 2(1), Schedule 1, cited above.

⁴³ Paragraph 2(1), cited above.

⁴⁴ Paragraph 2(1), cited above.

- the donor understands the purpose of the LPA and the scope of its authority;
- no fraud or undue pressure is being used to induce the donor to create the LPA; and
- there is nothing else which would prevent an LPA being created by the instrument.

This certificate must be “*in the prescribed form*”. Paragraph 2(2) of Schedule 1 provides that if the donor has not included in the LPA the names of persons to be notified of any application for registration, then two persons “*of a prescribed description*” must each give a certificate.

2.36 The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations⁴⁵ made under the 2005 Act were laid before Parliament in April 2007 and came into effect on 1 October 2007. The Regulations prescribe *inter alia* the form for making an LPA and the persons who may give the requisite certificate referred to above. Certificate providers may be “knowledge based” (that is, they have known the donor personally for the last two years) or “skills based”. Regulation 8(1)(b) defines the latter category as persons “*chosen by the donor who, on account of [their] professional skills and expertise, reasonably [consider] that [they are] competent to make the judgments necessary to certify the matters set out in paragraph (2)(1)(e) of Schedule 1 to the Act*” Regulation 8(2) gives as examples of such persons:

- (a) a registered health care professional;
- (b) a barrister, solicitor or advocate called or admitted in any part of the United Kingdom;
- (c) a registered social worker; or
- (d) an independent mental capacity advocate.

2.37 The certificate provider is required to discuss the contents of the LPA with the donor outwith the presence of the attorney. He must also “make efforts” to discuss the LPA with the donor with no one else present and must give the name of anyone who is present and the reasons for their presence (such as when someone is needed to assist the certificate provider communicate with the donor).

2.38 The certificate provider cannot be:

- (a) a family member of the donor;
- (b) a donee of that power;

⁴⁵ SI 1253 of 2007.

- (c) a donee of—
 - (i) any other lasting power of attorney, or
 - (ii) an enduring power of attorney,
 which has been executed by the donor (whether or not it has been revoked);
- (d) a family member of a donee within sub-paragraph (b);
- (e) a director or employee of a trust corporation acting as a donee within sub-paragraph (b);
- (f) a business partner or employee of—
 - (i) the donor, or
 - (ii) a donee within sub-paragraph (b);
- (g) an owner, director, manager or employee of any care home in which the donor is living when the instrument is executed; or
- (h) a family member of a person within sub-paragraph (g).⁴⁶

2.39 Section 9(2) of the Mental Capacity Act 2005 provides that an LPA (unlike an EPA) is not created unless, *inter alia*, it is registered in accordance with Schedule 1. An LPA can be registered (and take effect) immediately it is completed, or registration can be left until the donor becomes incapable. An application for registration must be made to the Public Guardian and any persons named in the LPA must be notified.⁴⁷ If the Public Guardian receives an objection to the registration “*on a prescribed ground*” from a named person or the attorney before the end of “*the prescribed period*”, and the Public Guardian is satisfied that the ground of objection is established, he must not register the LPA.⁴⁸ Where an objection is received from the donor, the Public Guardian must not register the LPA unless the court, on the application of the attorney, is satisfied that the donor lacks capacity to object to the registration and directs the Public Guardian to register the LPA.⁴⁹

2.40 Regulations 14 and 15 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations provide that any objection to registration by a person entitled to be notified of the intention to register an LPA must be made to, respectively, the Public Guardian or the Court of Protection within five weeks of the receipt of that notice from the Public Guardian. An objection to the Public Guardian can be made by the

⁴⁶ Regulation 8(3) of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations.

⁴⁷ Paragraphs 4 and 6, Schedule 1 to the Mental Capacity Act 2005. Regulation 6 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations provides that the maximum number of persons to be named by the donor in an LPA is five.

⁴⁸ Paragraph 13, Schedule 1, cited above.

⁴⁹ Paragraph 14, Schedule 1, cited above.

donor or a person named in the LPA as requiring notification on one of the grounds set out in paragraph 13(1) of Schedule 1 to the 2005 Act. Paragraph 13(1) of Schedule 1 refers to revocation of the LPA on the basis of section 13(3) (the donor's bankruptcy) or section 13(6)(a) to (d) of the Act (disclaimer of appointment by the attorney, death or bankruptcy of the attorney, dissolution or annulment of a marriage or civil partnership between the donor and the attorney, lack of capacity of the attorney). Regulation 15 provides that objection must be made to the Court of Protection (rather than the Public Guardian) where the ground of objection is that:

- (a) one or more of the requirements for the creation of a lasting power of attorney have not been met;
- (b) the power has been revoked, or has otherwise come to an end, on a ground other than the grounds set out in paragraph 13(1) of Schedule 1 to the Act; or
- (c) any of the grounds set out in paragraph (a) or (b) of section 22(3) of the Act apply (fraud or undue pressure induced the donor to make the LPA, or the attorney is behaving, has behaved, or is proposing to behave in a way which contravenes his authority or is not in the donor's best interests).

2.41 Section 42 of the 2005 Act requires the Lord Chancellor to prepare and issue a code or codes of practice covering a range of matters, including guidance for persons assessing whether or not an individual has capacity. Section 43 imposes various requirements as to consultation before a code of practice is issued. A code of practice satisfying these requirements was issued by the Lord Chancellor's department in 2007. The Code explains that:

"The Act does not impose a legal duty on anyone to 'comply' with the Code – it should be viewed as guidance rather than instruction. But if they have not followed relevant guidance contained in the Code then they will be expected to give good reasons why they have departed from it.

... Certain categories of people are legally required to 'have regard to' relevant guidance in the Code of Practice. That means they must be aware of the Code of Practice when acting or making decisions on behalf of someone who lacks capacity to make a decision for themselves, and they should be able to explain how they have had regard to the Code when acting or making decisions.

The categories of people that are required to have regard to the Code of Practice include anyone who is:

- *an attorney under [an LPA]*
- *a deputy appointed by the new Court of Protection ...*

- *acting as an Independent Mental Capacity Advocate ...*
- *carrying out research approved in accordance with the Act ...*
- *acting in a professional capacity for, or in relation to, a person who lacks capacity working*
- *being paid for acts for or in relation to a person who lacks capacity.*

The last two categories cover a wide range of people. People acting in a professional capacity may include:

- *a variety of healthcare staff (doctors, dentists, nurses, therapists, radiologists, paramedics etc)*
- *social care staff (social workers, care managers, etc)*
- *others who may occasionally be involved in the care of people who lack capacity to make the decision in question, such as ambulance crew, housing workers, or police officers.*

People who are being paid for acts for or in relation to a person who lacks capacity may include:

- *care assistants in a care home*
- *care workers providing domiciliary care services, and*
- *others who have been contracted to provide a service to people who lack capacity to consent to that service.*

However, the Act applies more generally to everyone who looks after, or cares for, someone who lacks capacity to make particular decisions for themselves. This includes family carers or other carers. Although these carers are not legally required to have regard to the Code of Practice, the guidance given in the Code will help them to understand the Act and apply it. They should follow the guidance in the Code as far as they are aware of it.”⁵⁰

2.42 Chapter 4 of the Code of Practice provides detailed guidance on the assessment of mental capacity. It includes the fundamental principle that “*the starting assumption must always be that a person has the capacity to make a decision, unless it can be established that they lack capacity.*”⁵¹ Comprehensive guidance for practitioners on LPAs is also to be found in a practice note issued by the Law Society of England and Wales in September 2007.⁵² In addition, a joint publication of the British Medical Association and the Law Society offers guidance on the assessment of mental capacity. That

⁵⁰ Code of Practice, pages 1 to 2.

⁵¹ Code of Practice, Chapter 4, page 40.

⁵² *Lasting Powers of Attorney*, Practice Note, Law Society of England and Wales (24 September 2007)

makes clear that “if there is doubt about a client’s capacity, it is advisable for the lawyer to seek a medical opinion.”⁵³

Ireland

2.43 The Powers of Attorney Act 1996 makes provision for enduring powers of attorney in Ireland. In addition to delegating power to deal with his property and business and financial affairs, the donor of an EPA may grant powers of decision to his attorney in relation to personal care. That would include decisions such as where the donor should live, what training or rehabilitation he should receive and the donor’s diet and dress.⁵⁴

2.44 The instrument creating an EPA must be in the form set out in the First Schedule to the Enduring Powers of Attorney Regulations 1996.⁵⁵ An EPA must be signed by the donor and the attorney, and each of their signatures must be signed by a third party. Part D of the EPA form requires a statement by a solicitor that he is satisfied that the donor understood the effect of creating the enduring power and that the solicitor has no reason to believe that the EPA is being executed as a result of fraud or undue pressure. In addition, Part E of the EPA form must be completed by a registered medical practitioner, stating that in his opinion, at the time the EPA form was executed by the donor, the donor had the capacity to understand the effect of creating the power. Neither the declaration by the solicitor nor by the doctor need be completed at the same time as the donor and the attorney sign the form. There is no time limit specified in the Act or the regulations within which the doctor’s and solicitor’s statements must be completed, but the Law Society of Ireland’s *Guidelines for Solicitors* in relation to EPAs state that:

*“The statement of capacity by a medical practitioner (who should indicate medical qualifications) and the certificate of the solicitor should ideally be completed within 30 days of the signing by the donor.”*⁵⁶

2.45 Notice of the execution of the EPA must be given by the donor to at least two persons named in the EPA by the donor.⁵⁷ One of these must be a spouse or relative of the donor. An EPA will not take effect until it is registered, though section 7(2) of the 1996 Act allows the attorney to take certain action under the power once he has made an application for registration. The attorney must make an application for registration as soon as practicable if he “has reason to believe that the donor is or is becoming mentally incapable.”⁵⁸ At the same time, the attorney must give notice of his

⁵³ *Assessment of Mental Capacity: Guidance for Doctors and Lawyers*, British Medical Association and the Law Society (Second edition, 2004), page 14.

⁵⁴ See the definition of “personal care decision” at section 4(1) of the Powers of Attorney Act 1996.
⁵⁵ See Regulation 3(a) of the Enduring Powers of Attorney Regulations 1996.

⁵⁶ *Enduring Powers of Attorney: Guidelines for Solicitors*, Law Society of Ireland (May 2004), at page 5.

⁵⁷ Regulation 7(a), Enduring Powers of Attorney Regulations 1996.

⁵⁸ Section 9(1) of the Powers of Attorney Act 1996. It is not specifically spelt out in either the Act or the Regulations that an EPA will only take effect on the onset of the donor’s incapacity, but the “*Information for recipient of notice [of execution of an EPA]*” on the form at the Third

application for registration to the donor and to the persons given notice of the execution of the EPA. Any of those given notice may object to the registration on the grounds that:

- the power purportedly created by the instrument was not valid;
- the power created is no longer a valid and subsisting power;
- the donor is not, or is not becoming, mentally incapable;
- having regard to all the circumstances, the attorney is unsuitable as the donor's attorney;
- fraud or undue pressure was used to induce the donor to create the EPA.⁵⁹

The court may refuse the application for registration on any of these grounds, but it must register the EPA in the absence of any valid objection unless the proper notices have not been given or "*there is reason to believe that appropriate enquiries might bring to light evidence on which the court could be satisfied that one of the grounds of objection ... was established.*"⁶⁰

2.46 The Irish legislation has been in place for the same time as that in Hong Kong but has been much more extensively used. Between 1997 and 2003, 312 enduring powers of attorney were registered in Ireland but only three in Hong Kong.⁶¹ A further 609 EPAs have been registered in Ireland between 1 January 2004 and 31 December 2007.⁶² Up to October 2006, only 16 objections to registration had been received since the enactment of the legislation. In nine of these cases, the objection had been over-ruled. The remaining seven cases were either pending or the donor had died.⁶³

New Zealand

2.47 The Protection of Personal and Property Rights Act 1998 makes provision for EPAs in relation to property or personal care and welfare. The execution requirements are the same for both types of EPA. Section 95 of the Act requires that the EPA is in the form set out in Schedule 3 to the Act and that it is signed by the donor and the attorney, each of whose signatures must be witnessed by a third party. There is no requirement that the EPA be witnessed by a medical practitioner. Section 96 provides that an EPA is not

Schedule to the Regulations states at paragraph 1 that: "*The enduring power of attorney will not come into force until the donor is, or is becoming, mentally incapable of managing his or her property and affairs and until it is registered in the High Court.*"

⁵⁹ Section 10(3), Powers of Attorney Act 1996.

⁶⁰ Section 10(2)(c), Powers of Attorney Act 1996.

⁶¹ Consultation Paper on *Law and the Elderly*, Law Reform Commission of Ireland (June 2003)

⁶² Emails of 27 October 2006 and 10 January 2008 to the Secretary of the LRC from the Irish Wards of Court Office.

⁶³ Email of 27 October 2006, cited above.

revoked by the donor's subsequent mental incapacity but continues to have effect. There is no requirement for registration such as that in Hong Kong in order for the EPA to retain its validity after the onset of mental incapacity. For that reason, as the New Zealand Law Commission noted, the number of EPAs in existence is "*unknown and unascertainable*."⁶⁴

2.48 There is a difference in treatment between an EPA in relation to property and an EPA in relation to personal care and welfare, with section 98(3) providing that an attorney shall not act in relation to the latter unless the donor is mentally incapable.

2.49 The New Zealand Law Commission considered that, while there was much to be said for the simplicity of the procedure set out in the 1998 Act, the lack of safeguards provided opportunity for misuse. In reviewing the requirements as to the grant of an EPA, the Commission recommended that the signature of the donor to a deed creating an EPA should be witnessed by a solicitor if:

- the attorney is not the donor's spouse or *de facto* partner, and
- the donor is either 68 years or over, or a patient or a resident in any hospital, home or other institution.⁶⁵

The Commission took the view that limiting in this way the circumstances in which a solicitor's input was required would ensure protection was given to those donors in need while avoiding the expense that would otherwise be incurred if the protection were to be imposed on all persons making an EPA.

2.50 The New Zealand Law Commission considered but specifically rejected the option of requiring a certificate of capacity by a medical practitioner at the time the power of attorney is created:

*"The fact is ... that solicitors regularly make the same sorts of judgment as to capacity in relation to the execution of wills, and in practice consult with appropriately qualified medical practitioners if in doubt. They may be expected to approach the execution of enduring powers of attorney with the same caution, and of course they will be financially liable if any negligent breach of their professional obligations in this respect is creative of loss."*⁶⁶

The New Zealand Commission concluded that it was unnecessary "*to go further than to stipulate for legal advice*."⁶⁷

⁶⁴ *Misuse of Enduring Powers of Attorney*, Report No 71, New Zealand Law Commission, April 2001, at para 11.

⁶⁵ *Misuse of Enduring Powers of Attorney*, Report No 71, cited above, at para 27.

⁶⁶ *Misuse of Enduring Powers of Attorney*, Report No 71, cited above, at para 25.

⁶⁷ *Misuse of Enduring Powers of Attorney*, Report No 71, cited above, at para 26. The Commission proposed that the donor's signature should be witnessed by a solicitor, who would be required to certify that he has given the donor appropriate advice.

2.51 As explained earlier, section 98(3) of the 1998 Act provides that an EPA in relation to personal care and welfare (but not one in relation to property) only takes effect once the donor becomes mentally incapable. In determining the point at which the deterioration in the donor's mental state justified the application of the enduring power, the Commission proposed that there should be a requirement that a medical practitioner certify in writing that the donor is mentally incapable.⁶⁸ This they proposed to achieve by adding the words "*and a registered medical practitioner has certified in writing that the donor is mentally incapable*" to the existing section 98(3) of the Protection of Personal and Property Rights Act 1988, which reads:

"The attorney shall not act in relation to the donor's personal care and welfare unless the donor is mentally incapable."

2.52 The Protection of Personal and Property Rights Amendment Bill, proposing various amendments to the EPA provisions in the 1998 Act, was introduced to the New Zealand Parliament in December 2006. The amendments were based on the Law Commission's recommendations "*modified following wide consultation with older people and their organisations.*"⁶⁹ The Bill was enacted in September 2007, though it will not come into force for a further twelve months. New section 94A(4) of the principal Act requires that the donor's signature be witnessed by a lawyer, an officer or employee of a trustee corporation or a legal executive. New section 94A(6) requires the witness to the donor's signature to explain the effects and implications of the EPA to the donor and to advise the donor of a number of other specified matters, including the donor's right to suspend or revoke the EPA. That witness must also certify on the prescribed form that the requirements of subsection (6) have been met; that he has no reason to suspect that the donor was or may have been incapable at the time the donor signed the instrument; and that the witness is independent of the attorney.⁷⁰

2.53 A key provision in the Act is new subsection 97(4) which provides that the donor may authorise an EPA in relation to property to have effect:

- while the donor is mentally capable and to continue to have effect if the donor becomes mentally incapable; or
- only if the donor becomes mentally incapable.

In the latter case, new subsection 97(5) prohibits the attorney from acting in relation to the donor's property "*unless a relevant health practitioner has certified, or the Court has determined, that the donor is mentally incapable.*"

2.54 The Act's provisions therefore continue to impose no requirement for medical certification at the time of execution of an EPA, nor at the onset of mental incapacity if the EPA had had effect before that time. If, however, the

⁶⁸ *Misuse of Enduring Powers of Attorney*, Report No 71, cited above, at para 30.

⁶⁹ See the "General policy statement" in the explanatory note to the Bill.

⁷⁰ New section 94A(7).

EPA is to take effect only at the time the donor became mentally incapable, then medical certification of the donor's incapacity will be required before the attorney can act.

Scotland

2.55 The Adults with Incapacity (Scotland) Act 2000 makes provision for "continuing powers of attorney", which relate to the donor's property and financial affairs, and "welfare powers of attorney", which relate to the donor's personal welfare. The Scottish continuing power of attorney (CPA) is therefore the equivalent of Hong Kong's EPA and this paper will concentrate on the provisions relating to CPAs.

2.56 Section 15(1) provides that a CPA will continue to have effect if the donor becomes incapable. Section 15(3) requires that a CPA:

- be subscribed by the donor;
- incorporates a statement clearly expressing the donor's intention that the power of attorney be a continuing power;
- incorporates a certificate in the prescribed form by a solicitor "*or by a member of another prescribed class*"⁷¹ that:
 - (i) he has interviewed the donor immediately before the donor signed the document;
 - (ii) he is satisfied that at the time the CPA is granted the donor understands its nature and extent;
 - (iii) he has no reason to believe that the donor is acting under undue influence or that any other factor vitiates the granting of the power.

2.57 Section 19 of the 2000 Act provides for a new statutory process under which CPAs are to be recorded in public registers by the Public Guardian, so that information about the powers is openly available. Subsection (1) provides that a CPA is only valid after registration.

2.58 Section 19(3) provides for so called "springing" powers of attorney. It allows documents conferring a CPA to be sent to the Public Guardian, but registration to be postponed until after a specified event has occurred. As the explanatory notes to the Act explain:

⁷¹ Regulation 4 of the Adults with Incapacity (Certificates in Relation to Powers of Attorney) (Scotland) Regulations 2001 prescribes "practising members of the Faculty of Advocates" and "registered medical practitioners" for these purposes.

“This event could be the granter losing the capacity to manage his or her own affairs; however it could also be another trigger, such as moving out of their own home. It will be the Public Guardian's duty to check that the event has occurred before registering the continuing or welfare power of attorney, thus allowing the power to be exercised.”⁷²

Section 19(6) gives a right of appeal to the court against a decision of the Public Guardian as to whether or not the event specified in the CPA has occurred.

⁷² Adults with Incapacity (Scotland) Act 2000, Explanatory Notes, at para 79.

Chapter 3

Our conclusions and recommendations

The case for change

3.1 As was explained in the consultation paper, the enactment of the Enduring Powers of Attorney Ordinance in 1997 was intended to answer an unmet need. While new to Hong Kong, enduring powers of attorney had been in place in a number of jurisdictions overseas for some time and had been widely welcomed there. The Law Institute of Alberta identified 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.¹

3.2 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.

3.3 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. As pointed out in the consultation paper, 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

¹ *Enduring Powers of Attorney: Safeguards Against Abuse*, Alberta Law Reform Institute, Report No 88, February 2003.

would present a costs and logistical problem for most members of the community.

3.4 In the consultation paper, we concluded that the case for change had been made out and that the existing rules for executing an EPA in Hong Kong should be relaxed. That view was endorsed overwhelmingly by those who responded to the consultation paper, with only one commentator disagreeing. The views of consultees were more evenly divided, however, on the question of whether the requirement for a medical witness should be removed altogether, or merely relaxed so that the medical witness and the solicitor could sign at separate times.

Abolition of the requirement for a medical witness

Arguments in favour of abolition

3.5 It is clear from the review in the previous chapter of the law in other jurisdictions that a range of different approaches is adopted as to who *may* witness an EPA. At one end of the spectrum are jurisdictions which do not stipulate that the witness or witnesses belong to any particular class of persons. Jurisdictions adopting this approach include British Columbia, the Northern Territory and Tasmania. An alternative approach adopted in some jurisdictions is to specify particular qualities which a witness must possess. So, for instance, in Victoria one of the two witnesses to an EPA must be authorised to witness the signing of a statutory declaration. Other jurisdictions specify particular categories of person from which the witness or witnesses must be drawn. In Scotland, for instance, a certificate as to the donor's fitness at the time of execution must be provided by a solicitor, an advocate or a medical practitioner. The regulations under the English Mental Capacity Act 2005 require a certificate as to the donor's fitness to be provided either by someone who has known the donor personally for at least two years or by a person who, on account of his professional skills and expertise, reasonably considers that he is competent to make the judgments required by the statute. Examples given in the Act include a solicitor, barrister or advocate, a registered health care professional, a registered social worker and an independent mental capacity advocate.

3.6 Apart from Hong Kong, only Ireland *requires* a medical witness to sign an EPA. In Ireland, however, an EPA is not restricted to matters relating to the donor's property and financial affairs but may also empower the attorney to make decisions relating to the donor's personal care. That is not the case in Hong Kong, where only the donor's property and financial affairs may be the subject of an EPA. It is difficult to see what sets Hong Kong apart from the rest of the common law world, so that only in Hong Kong should an EPA dealing with a donor's property and financial affairs require certification by a doctor. There would seem less need for a medical witness to an EPA where the EPA does not extend to decisions relating to the donor's personal care, or to decisions relating to his health care or medical treatment.

3.7 It is important to stress that the removal of a *requirement* for a medical witness does not mean that a prudent solicitor should not *choose* to seek a medical assessment where he has doubts as to the mental competence of his client. There is no requirement for a medical witness to a will or to a conventional power of attorney. In neither case does the law require a doctor to assess the capacity of the principal at the time the deed is executed and in the majority of cases solicitors make such assessments on a day-to-day basis without any apparent difficulty. Where the solicitor has any doubts, however, it is in both his interests and those of his client to obtain a professional medical opinion before executing a will or power of attorney. We understand that that is the approach generally adopted by solicitors in Hong Kong and it is one which is equally appropriate to the execution of an EPA.

3.8 The present requirement for a medical witness imposes both financial and emotional costs on the donor. The financial costs (not to mention the practical difficulties) of arranging for a doctor to attend a solicitor's office, or for a solicitor to go to a doctor's surgery, are obvious. Less so, but equally undesirable, is the trauma and indignity suffered by an elderly person in having his mental faculties questioned. We found the strength of views expressed to us on this point by solicitors who have executed EPAs in Hong Kong under the existing regime highly persuasive. In addition, those solicitors refuted the suggestion by the HK Medical Association that it would be a simple matter to find a medical practitioner who was available and willing to witness an EPA. On the contrary, the practical experience of those who had executed EPAs was that it was extremely difficult to make the necessary arrangements for attendance by a medical witness.

Arguments against abolition

3.9 It is argued in favour of retaining the requirement of a medical witness that it provides an additional assurance that the donor is fully aware of the consequences of executing an EPA. The requirement of a medical witness at the time of execution also means that there is less need for formality at the time the EPA is registered and comes into effect. Hong Kong's procedure for registration does not require that notice be given to named third parties, nor does it involve inquiry by the Registrar as to the validity of the EPA. While that means that registration is straightforward, it necessitates greater care at the time of execution.

3.10 It should be noted, however, that none of the jurisdictions reviewed in the previous chapter which impose no formalities at the time of registration (or have no system of registration) require a medical witness at the time of execution. In addition, while it is true that there is no requirement under the Hong Kong provisions to notify named third parties when an application is made to register an EPA, section 3(1) of the Enduring Powers of Attorney (Registration) Rules² requires the Registrar to inform the donor in writing of the EPA's registration "*as soon as practicable*" after the registration. Section 13 of the Enduring Powers of Attorney Ordinance (Cap 501) provides that the

² Made under section 54 of the High Court Ordinance (Cap 4).

donor may revoke an EPA, even if it has been registered, if he is mentally capable.

3.11 It was pointed out by the Bar Association in their response to the consultation paper that a distinction could be drawn between the certification requirements for a will and an EPA, as an EPA (unlike a will) was an instrument specifically designed for use in a situation where mental incapacity was contemplated in the future. An EPA, it was argued, is therefore particularly likely to be executed at a time when there is doubt as to the donor's current mental capacity, and is particularly likely to be the subject of a subsequent challenge on the basis of mental incapacity at the time of execution. While we accept that many EPAs are executed when the donor's mental acuity is declining, it is by no means certain that that is so in the majority of cases. We understand, for instance, that in England it is common practice for a solicitor making a will (which is frequently done long before the client reaches old age) to encourage his client at the same time to execute an EPA as part of the sensible organisation of his future affairs. Rather than continue to impose a blanket requirement for a medical witness on all donors, regardless of their circumstances and mental fitness, we believe the better alternative is to leave it to the professional judgment of the solicitor in each case to decide whether or not a medical assessment of the donor of an EPA is necessary before execution.

Our conclusion

3.12 As was pointed out earlier in this chapter, 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, as the Legal Aid Department pointed out in its response to the consultation paper, 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.

3.13 None of the common law jurisdictions reviewed in the previous chapter 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:

*"While such a requirement would no doubt be a safeguard against the execution of EPAs by incapacitated donors, we think that it would be regarded as an unwarranted intrusion into private affairs, as well as adding cost to the adoption of EPAs and inhibiting their use."*³

3.14 We note the significant difficulties of executing an EPA under the existing provisions as described to us by solicitors with actual experience of the process. There is clearly a tension between enhancing the convenience

³ *Enduring Powers of Attorney: Safeguards against Abuse*, Alberta Law Reform Institute, Report No 88 (February 2003), at Part IV, para 53.

of EPA execution and the need to ensure that donors are fully cognisant of the consequences of execution, but we believe that the latter concern can be adequately met without retaining the existing requirement for a medical witness in every case. In particular, we think 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 doubts as to 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.

3.15 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. We referred in the previous chapter to the detailed practice direction issued by the Law Society in England and Wales. That practice direction serves the dual purpose of bringing LPAs to the attention of the profession and providing guidance on their use. We would hope 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.**

Relaxation of the requirement for a medical witness

3.16 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 we favour outright abolition rather than relaxation. Nevertheless, for the sake of completeness we outline here the results of the consultation on this option.

3.17 All the eight respondents who were against abolition of the requirement for a medical witness were in favour of allowing the doctor and the solicitor to sign at different times. Views varied as to the maximum period which should be allowed between the time the medical witness signs and the time the donor and the solicitor sign. At one end of the spectrum, the Hong Kong Medical Association suggested 24 hours, while at the other the Hong Kong Geriatrics Society favoured 28 days. Other responses included 7 days, 14 days and “as soon as is practicable and reasonable.” While we have already stated our preference for abolition of the medical witness requirement altogether, if it is decided instead merely to relax the requirement we consider 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.

Publicity and education

3.18 The consultation paper suggested 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. We considered 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.

3.19 The consultation paper pointed out that that kind of guidance on EPAs is freely available to the public in a number of other jurisdictions. In England, for instance, the Public Guardianship Office produces a booklet offering guidance on the making of an EPA and on taking on the role of attorney. The booklet is available both in hard copy and on the Public Guardianship’s website and in various formats, including “*easy to understand*”.⁴ In addition, information on EPAs is provided by a number of non-governmental organisations, including the Alzheimer’s Society⁵, and there are commercial law-related websites which include sections on making EPAs in the United

⁴ *Enduring power of attorney: a guide to making an enduring power of attorney or taking on the role of attorney*, Public Guardianship Office, UK, at <http://www.guardianship.gov.uk/downloads/EPA.web.pdf>

⁵ At http://www.alzheimers.org.uk/After_diagnosis/Sorting_out_your_money/info_EPA.htm

Kingdom.⁶ In Scotland, similar information is provided on the Office of the Public Guardian's website.⁷

3.20 The provision of information to the public on the working of EPAs is, of course, not only confined to the United Kingdom. Other examples of organisations offering such information include the Office of the Public Trustee in Alberta⁸ and the Department of Justice in Queensland.⁹

3.21 The proposal for greater publicity for, and explanation of, the concept of EPAs was strongly supported by those who responded to the consultation paper. A number of useful suggestions and observations were made. The Law Society stressed that any publicity material should be in plain English and clear Chinese and that it was important to remember that many of the elderly did not have access to computers, let alone the ability to search the internet for information. Solicitors who had practical experience of executing EPAs said that too few solicitors were even aware of the EPA legislation and suggested that extensive education was required, including more Continuing Professional Development courses on this subject for solicitors.

3.22 Other suggestions included using TV and radio briefing programmes and public seminars to increase awareness of EPAs. A member of the Elderly Commission said that the possible public misconception that an attorney under an EPA must be a lawyer should be corrected. The Social Welfare Department suggested that publicity should also be given to safeguards against abuse of power, such as how an EPA can be revoked and the role of the Guardianship Board in taking over an attorney's powers. The Guardianship Board itself expressed the view that to maximise the effectiveness of any publicity measures, it would be essential to establish a lead body to steer, lead and plan strategically the publicity efforts.

3.23 We have taken account of the various responses to the consultation paper on the question of publicity in formulating Recommendation 3.

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**

⁶ See, for instance, <http://www.clickdocs.co.uk/enduring-power-of-attorney.htm> and <http://www.lawontheweb.co.uk/epa.htm>

⁷ See http://www.publicguardian-scotland.gov.uk/forms/power_of_attorney.asp

⁸ http://www.justice.gov.ab.ca/dependent_adults/enduring_powers_of_attorney.aspx

⁹ <http://www.justice.qld.gov.au/guardian/poa/epa.htm>

- **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.**

Simplification of forms

3.24 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.¹⁰

3.25 We expressed the view in the consultation paper that there was no reason why the requirements for completion of an EPA could not be explained in clear and easily understood terms, and we highlighted a number of such examples from other jurisdictions. We pointed out that in some jurisdictions the principal legislation itself is presented in a more user-friendly form than the “*explanatory information*” in Hong Kong. In the Australian Capital Territory, for example, the Powers of Attorney Act 2006 is drafted in plain English and adopts a number of features which help the reader to understand the statute. Section headings are in everyday language (“*What the principal needs to do*”, “*Who can be a witness?*”, etc) and where appropriate the legislation incorporates examples of the effect of a particular provision. So, for instance,

¹⁰ Schedule to the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap 501). A copy of the form is at Annex B to this paper.

section 16, which provides that the donor may state in an EPA when and how the power is to be exercisable, includes the following:

“Examples of when power may be exercisable

1. *if I am outside Australia for more than 1 month*
2. *if the property at 13 Mae West Drive is sold*
3. *starting on 14 February 2007.”*

As further aids to comprehension, sections of the Act are cross-referenced or incorporate notes where this is relevant. Finally, definitions are listed at the end of the Act under the heading “Dictionary”, and this includes a reference to relevant definitions of general application in the Legislation Act.

3.26 We proposed that the existing EPA form and its explanatory information should be drafted in plain language and in a more user-friendly format and we annexed to the consultation paper a suggested formulation. An overwhelming majority of those who responded to the consultation paper on this issue agreed that the statutory form and its explanatory information should be expressed more clearly, and favoured adopting the draft attached to the consultation paper. Some suggestions for improvements to that draft were made, and these have been incorporated into the revised version which is at Annex C to this report. Annex C has been prepared on the basis of the law as it currently stands, and it would, of course, require further revision if the legislation were amended to remove or relax the requirement for a medical witness. Annex D has been drafted to reflect such possible changes.

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 this report, depending on whether or not the reforms we propose in Recommendation 1 are adopted.

EPAs and personal care decisions

3.27 The terms of reference of the present study are restricted to the execution requirements of an EPA and it is not therefore within its scope to carry out a general review of the operation of EPAs. There is one aspect on which the consultation paper sought preliminary views, however. That is the question of whether the powers delegated under an EPA should be extended to include decisions as to the donor’s personal care. At present, an EPA in Hong Kong extends only to decisions relating to the property and financial affairs of the donor but in a number of other jurisdictions, including England

and Wales, EPAs or their equivalents are wider in scope and allow the attorney to make personal care decisions for the donor. Such decisions might include matters such as where the donor should live, and with whom, and his dress and diet. Section 11 of the Powers of Attorney Act 2006 in the Australian Capital Territory (ACT) offers the following examples of what may constitute a “personal care matter” for the purposes of that Act:

- (1) where the donor lives
- (2) who the donor lives with
- (3) whether the donor works and, if the donor works, where and how the donor works
- (4) what education or training the donor gets
- (5) whether the donor applies for a licence or permit
- (6) the donor’s daily dress and diet
- (7) whether to consent to forensic examination of the donor
- (8) whether the donor will go on holiday and where
- (9) legal matters relating to the donor’s personal care.

3.28 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. An EPA will most often apply where the donor is elderly and has gradually lost capacity to make decisions for himself. There is much to be said for allowing an attorney to make the kind of day-to-day decisions for the donor which are described in the ACT Act.

3.29 A distinction should be drawn, however, between personal care matters and those relating to the giving or refusing of medical treatment. In our report on *Substitute Decision-making and Advance Directives in relation to Medical Treatment*, we considered and rejected the option of extending the scope of EPAs to incorporate within it the concept of a living will or advance directive. There was little support for such a move when it was presented as an option in the consultation paper which preceded the report and we considered that the problems associated with this option outweighed any advantages. Decisions as to the giving or refusing of medical treatment are of a different character to those relating to personal care and it is possible that an attorney appointed to make decisions as to the one may not be the most appropriate person to make decisions as to the other.

3.30 The majority of those who responded to our question whether consideration should be given to extending EPAs to include decisions as to the donor’s personal care were in favour, including both the Bar and the Law Society. In line with the views of a number of those who commented on this issue, we do not propose to delay the completion of our review of the execution requirements for an EPA by expanding the present study to include the question of personal care. Instead, we intend to consider as a separate research project the possible extension of EPAs to include personal care decisions.

Chapter 4

Summary of Recommendations

Recommendation 1 *[following paragraph 3.15]*

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.

Recommendation 2 *[following paragraph 3.17]*

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.

Recommendation 3 *[following paragraph 3.23]*

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; and
- 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, coordinate and lead publicity efforts

Recommendation 4 *[after paragraph 3.26]*

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 this report, depending on whether or not the reforms we propose in Recommendation 1 are adopted.

**List of organisations and individuals who responded to the Law Reform
Commission's April 2007 consultation paper on
*Enduring Powers of Attorney***

1. Mr Melville Boase, Solicitor, Boase, Cohen & Collins
2. Mr Robin Bridge, Solicitor, Oldham, Lie & Nie
3. Mr John Budge, Solicitor, Wilkinson & Grist
4. Department of Health, HKSAR Government
5. Guardianship Board
6. Home Affairs Bureau, HKSAR Government
7. Home Affairs Department, HKSAR Government
8. Hong Kong Alzheimer's Disease Association
9. Hong Kong Bar Association
10. Hong Kong Council of Social Service
11. Hong Kong Geriatrics Society
12. Hong Kong Medical Association
13. Hong Kong Psychogeriatric Association Ltd
14. Hospital Authority
15. Law Society of Hong Kong
16. Legal Aid Department, HKSAR Government
17. Legal Policy Division, Department of Justice, HKSAR Government
18. Medical Council of Hong Kong
19. School of Law, Chinese University of Hong Kong
20. School of Law, City University of Hong Kong
21. Social Welfare Department, HKSAR Government
22. Professor Thomas K S Wong, Faculty of Health & Social Sciences, Hong Kong Polytechnic University
23. Professor Jean Woo, Elderly Commission
24. Dr Loretta Yam Yin-chun, Elderly Commission

**Schedule to the Enduring Powers of Attorney (Prescribed Form)
Regulation**

**ENDURING POWER OF ATTORNEY
Part A**

About using this form

(Explanatory information referred to in section 2(1)(a)(ii))

1. You may choose one attorney or more than one. If you choose one attorney then you must omit or delete everything between and including the pair of square brackets in section A of Part B. If you choose more than one, you must decide whether they are able to act-

- jointly (that is, they must all act together and cannot act separately); or
- jointly and severally (that is, they can all act together but they can also act separately if they wish).

In section A of Part B, show what you have decided by omitting or deleting one of the alternatives.

2. To give a valid enduring power, you must not give your attorney(s) a general power in relation to all your property and financial affairs. You must either specify the matters in which he is given authority to act, with reference to the list set out in section 5(3) of the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap 501 sub. leg.) or the particular property or financial affairs in respect of which he is given authority to act. Failure to do so would mean that the instrument you are about to execute would not take effect as an enduring power of attorney which continues even if you become mentally incapable.

3. You may include any restrictions you like on the powers granted to your attorney. For example, you can include a restriction that your attorney(s) must not act on your behalf until they have reason to believe that you are becoming mentally incapable; or a restriction as to what your attorney(s) may do. Any restrictions you choose must be written or typed in section B of Part B.

4. If you are a trustee, you should seek legal advice if you want your attorney(s) to act as a trustee on your behalf.

5. Unless you put in a restriction preventing it, your attorney(s) will be able to use any of your money or property to make any provision which you yourself might be expected to make for their own needs or the needs of other people. Your attorney(s) will also be able to use your money to make gifts, but only for reasonable amounts in relation to the value of your money and property.

6. Your attorney(s) can recover the out-of-pocket expenses of acting as your attorney(s). If your attorney(s) is or are professional people, for example, solicitor(s) or accountant(s), he or they may be able to charge for his or their professional services as well. You may wish to provide expressly for remuneration of your attorney(s) (although if they are trustees they may not be allowed to accept it).

7. If your attorney(s) has or have reason to believe that you are or are becoming mentally incapable of managing your affairs, your attorney(s) will have to apply to the Registrar of the High Court for registration of this power.

8. You may nominate yourself, any attorney who does not join in the application for registration of the enduring power of attorney and a maximum of 2 other persons to be notified by your attorney(s) before he or they applies or apply to the Registrar of High Court for registration of this power. If you do not make such a nomination, you must make a statement to that effect in this power. If you make such a nomination, the failure (for whatever reason) by your attorney(s) to notify any person so nominated has the following effect-

- it does not preclude the registration of this power;
- this power is not invalidated by reason of that failure;
- in any legal proceedings relating to this power, where it considers it appropriate the court may draw an adverse inference from such failure.

9. This instrument must be signed by you or by another under your direction in the presence of a solicitor and a registered medical practitioner who must certify as to your mental capacity, and by your attorney(s) in the presence of a witness. The person who signs under your direction must not be your attorney, the solicitor who gives the certificate under section 5(2)(d) of the Enduring Powers of Attorney Ordinance (Cap 501) or the medical practitioner who gives the certificate under section 5(2)(e) of that Ordinance or the spouse of the attorney, the solicitor or the medical practitioner.

10. This is a simplified explanation of what the Enduring Powers of Attorney Ordinance (Cap 501) and the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap 501 sub. leg.) say. If you need more guidance, you or your advisers will need to look at that Ordinance and that Regulation.

Note to attorney(s)

You should note the legal effect (outlined in paragraph 8 above) of any failure on your part to notify the person(s) nominated by the donor in this power.

Note to donor

Some of these explanatory notes may not apply to the form you are using if it has already been adapted to suit your particular requirements.

Part B

To be completed by the "donor" (the person appointing the attorney(s))

Don't sign this form unless you understand what it means

Please read the notes in the margin which follow and which are part of the form itself.

Section A of Part B

Donor's name and address.

Donor's date of birth. (See paragraph 1 of Part A). If you are appointing only one attorney you should omit or delete everything between and including the square brackets.

If appointing more than 2 attorneys please give the additional name(s) (that is, of the attorney(s) after the first 2 attorneys) either here or on an attached sheet.

Omit or delete the one which does not apply (see paragraph 1 of Part A).

List either the matters in which you would like to authorize your attorney(s) to act (see paragraph 2 of Part A) or specify the particular property or financial affairs in respect of which he or they is or are given authority to act. If you do not specify the property and affairs to be covered in your authorization, omit or delete these words (see paragraph 2 of Part A).

I,
of
born on.....
appoint
of
• [and
of
• jointly
• jointly and severally]
to be my attorney(s) for the purpose of the Enduring Powers of Attorney Ordinance (Cap 501) with authority to do the following on my behalf:
in relation to the following property and affairs:

Part B: continued

Please read the notes in the margin which follow and which are part of the form itself.

Section B of Part B

If there are restrictions or conditions, insert them here; if not, omit or delete these words if you wish (see paragraph 3 of Part A).

You may nominate yourself, any attorney(s) who does or do not join in the application for registration and a maximum of 2 other persons to be notified by your attorney(s) before he or they applies or apply for the registration of this power.

This applies only where you appoint more than one attorney.

If you do not make such a nomination, you must make a statement to the effect that you do not propose to make such a nomination. Omit or delete the one which does not apply (see paragraph 8 of Part A).

- subject to the following restrictions and conditions:

I intend that this power shall continue even if I become mentally incapable

- I hereby nominate the following person(s) to be notified by my attorney(s) before he or they applies or apply for registration of this power.

Myself

(Address)

Full name and address of attorneys

(Only any attorney(s) who does or do not join in the application for registration need be notified)

Full name and address of other nominee(s)

- I do not propose to nominate any person to be notified by my attorney(s) before he or they applies or apply for registration of this power.

I have read or have had read to me the notes in Part A which are part of, and explain, this form.

If this form is being signed under your direction-

- the person signing must not be an attorney, the solicitor or the registered medical practitioner who gives the certificate under section 5(2)(d) and (e) of the Enduring Powers of Attorney Ordinance (Cap 501), or the spouse of the attorney, solicitor or medical practitioner.
- You must add a statement that this form has been signed under your direction.

Your signature.

Date.

This power must be signed by you or under your direction in the presence of a solicitor and a registered medical practitioner who must both be present at the same time. Neither of them must be your attorney, the spouse of the attorney or be related by blood or marriage to you or to the attorney. The solicitor and the registered medical practitioner must each give a certificate as required by section 5(2)(d) and (e) of the Enduring Powers of Attorney Ordinance (Cap 501) respectively.

Signed by me as a deed.....

and delivered on

in the presence of

Full name and address of solicitor

Certificate by solicitor

In the presence of

Full name and address of registered medical practitioner

Certificate by registered medical practitioner

Part C: to be completed by the attorney(s)

- Note: 1. This form may be adapted to provide for execution by a corporation.
2. If there is more than one attorney, additional sheets in the form as shown below must be added to this Part.

Please read the notes in the margin which follow and which are part of the form itself.

Do not sign this form before the donor has signed Part B or if, in your opinion, the donor was already mentally incapable at the time of signing Part B.

I understand that I have a duty to apply to the Registrar of the High Court for the registration of this form under the Enduring Powers of Attorney Ordinance (Cap 501) when the donor is or is becoming mentally incapable.

I also understand my limited power to use the donor's property to benefit persons other than the donor as provided in section 8(3) and (4) of that Ordinance and also my duties and liabilities under section 12 of that Ordinance.

I am not a minor

Signature of attorney.

Signed by me as a deed.....

Date.

and delivered on.....

Signature of witness.

in the presence of.....

The attorney must sign this form and his signature must be witnessed. The donor may not be the witness and one attorney may not witness the signature of the other.

Full name of witness.....

Address of witness.....

.....

Suggested revised form of enduring power of attorney to reflect the existing law

This draft form and its associated explanatory notes are intended to replace the existing Schedule to the Enduring Powers of Attorney (Prescribed Form) Regulation. The draft form reflects the existing execution requirements, rather than anticipating any changes that may be made in relation to the requirement of certification by a registered medical practitioner. To simplify the form, it has been drafted to accommodate only the appointment of a single attorney, and it is envisaged that a separate form, with appropriately revised wording, would be used for the appointment of multiple attorneys.

“About using this form

1. This form allows you to create an enduring power of attorney (“EPA”). An EPA enables you to authorise another person (called your “attorney”) to act on your behalf in relation to your property and financial affairs. If you become mentally incapable, your attorney will be able to make decisions for you after he has registered this form with the Registrar of the High Court.
2. You should complete Part A of the form, except for paragraphs 8 and 9. Paragraphs 8 and 9 must be completed by a solicitor and a registered medical practitioner, who will have to certify that you are mentally capable. You should ask the solicitor who witnesses the form to explain it to you, and you should not sign the form unless you understand what it means.
3. You should include the name and address of the person you wish to appoint as your attorney at paragraph 1 of Part A. The person you appoint as your attorney must be over 18 years of age and must not be bankrupt or mentally incapable. Your attorney does not have to be a solicitor. Your attorney will need to complete Part B of the form and sign it in the presence of a witness.
4. You cannot give your attorney a general power over all your property and financial affairs. If you do, your EPA will not be valid. Instead, you must specify at paragraph 2 of Part A of the form what you authorise him to do in relation to your property and financial affairs, or the particular property or financial affairs in respect of which you have given him authority to act. For example, you may decide to give your attorney authority only in respect of a particular bank account, or a particular piece of property.

5. You can include any restrictions you like on the powers you grant to your attorney. For example, you can include a restriction that your attorney must not act on your behalf until he has reason to believe that you are becoming mentally incapable. You should set out these restrictions at paragraph 3 of Part A of the form.

6. Unless you include a restriction preventing it, your attorney will be able to use any of your money or property to make any provision which you might be expected to make yourself for his needs or the needs of other people. Your attorney will be able to use your money to make gifts, but only for reasonable amounts in relation to the value of your money and property.

7. Your attorney can recover his out-of-pocket expenses for acting as your attorney. If your attorney is a professional person, such as an accountant or a solicitor, he may be able to charge for his professional services as well.

8. If your attorney has reason to believe that you are, or are becoming, mentally incapable of managing your affairs, he will have to apply to the Registrar of the High Court to register the EPA. Registration will allow your attorney to make decisions for you after you have become mentally incapable.

9. If you would like to be notified if your attorney makes an application to the Registrar of the High Court to register the enduring power of attorney, or if you would like other persons to be notified, you should include the names and addresses of the persons to be notified at paragraph 4 of Part A of the form. You can include up to two persons in addition to yourself. If your attorney does not notify the persons you have nominated, that does not prevent the registration of your EPA or make it invalid, but in any legal proceedings relating to the EPA the court may, where it considers it appropriate, draw an adverse inference from your attorney's failure to notify.

10. You must sign the form at paragraph 6 and fill in the names and addresses of the solicitor and registered medical practitioner who are present when you sign. The solicitor and the registered medical practitioner will need to complete the certificates at paragraphs 8 and 9 of Part A that you are mentally capable when you sign the form.

11. If you are physically unable to sign the form yourself, you can direct someone else to sign on your behalf. That person will have to sign the form in your presence and in the presence of the solicitor and the registered medical practitioner, and he will need to complete and sign paragraph 7 of the form. The person signing on your behalf must not be your attorney or his spouse, or the spouse of the solicitor or registered medical practitioner.

Form of enduring power of attorney

Part A

[Part A of this form should be completed by the “donor” (the person appointing the attorney), except for paragraphs 8 and 9, which should be completed by a solicitor and a registered medical practitioner. You should read the explanatory information about this form before you fill it in. Don’t sign this form unless you understand what it means.]

1. I, *[your name here]*.....
of *[your address here]*
appoint *[your attorney’s name here]*
of *[your attorney’s address here]*
to be my attorney for the purpose of the Enduring Powers of Attorney Ordinance (Cap 501).

2. *[You must specify what you authorise your attorney to do. You can’t give a general power over all your property and financial affairs. If you do, your EPA won’t be valid. You can either specify at part (1) of this paragraph what you authorise your attorney to do, or you can list at part (2) the particular property or financial affairs in relation to which you authorise him to act. You must give your attorney authority under part (1) or part (2).]*

- (1) My attorney shall have authority to act on my behalf:
 - (a) to collect any income due to me;
 - (b) to collect any capital due to me;
 - (c) to sell any of my movable property;
 - (d) to sell, lease or surrender my home or any of my immovable property;
 - (e) to spend any of my income;
 - (f) to spend any of my capital; or
 - (g) to exercise any of my powers as a trustee,

[If you don’t want your attorney to act for you in relation to one or more of these matters, you should delete them from the list.]

(2) My attorney shall have authority to act on my behalf in respect of the following property or financial affairs:
.....
.....

.....
.....

[If you want your attorney to act for you only in relation to some of your property or financial affairs, you should list these here.]

- 3. This power of attorney is subject to the following restrictions and conditions:

.....
.....
.....

[If you want to put restrictions or conditions on the way your attorney exercises his powers, you should list these here. For example, you can include a restriction that your attorney must not act on your behalf until he has reason to believe that you are becoming mentally incapable. If you don't want to impose any restrictions or conditions, you can delete this paragraph.]

- 4. My attorney must notify (me and) the following persons before he applies for registration of this power of attorney *[you should fill in here the names and addresses of up to two persons other than yourself whom you wish your attorney to notify. If you don't want to be notified, you should cross out the words "(me and)" above, or cross out the whole of this paragraph if you don't want anyone notified.]*:

Name:.....

Address:

Name:

Address:

- 5. I intend this power of attorney to continue even if I become mentally incapable.

6. Signed by me as a deed *[sign here]*.....
on *[fill in the date here]*.....
in the presence of *[name and address of solicitor]*.....
.....
and *[name and address of registered medical practitioner]*.....
.....

7. *[If you are physically incapable of signing the form and you direct someone else to sign on your behalf, that person should sign here and you should delete paragraph 6]*

This power of attorney has been signed by *[name of person signing on your behalf]*.....
of *[address of person signing on your behalf]*

under the direction of the donor.

Signed as a deed *[signature of person signing on your behalf]*

.....

on *[date]*.....

in the presence of *[name and address of solicitor]*

.....

and *[name and address of registered medical practitioner]*.....
.....

8. Certificate by solicitor

I certify that:

- (a) the donor attended before me at the time of the execution of the enduring power of attorney;
- (b) the donor appeared to be mentally capable in terms of section 2 of the Enduring Powers of Attorney Ordinance (Cap 501); and
- (c) this instrument was signed by the donor in my presence and the donor acknowledged that he was signing it voluntarily.

Signed by solicitor

9. Certificate by registered medical practitioner

I certify that:

- (a) the donor attended before me at the time of the execution of the enduring power of attorney;
- (b) I satisfied myself that the donor was mentally capable in terms of section 2 of the Enduring Powers of Attorney Ordinance (Cap 501); and
- (c) this instrument was signed by the donor in my presence and the donor acknowledged that he was signing it voluntarily.

Signed by registered medical practitioner

Part B

[Part B of this form should be completed by the attorney.]

- 1. I understand that I have a duty to apply to the Registrar of the High Court for the registration of this form under the Enduring Powers of Attorney Ordinance (Cap 501) when the donor is, or is becoming, mentally incapable.
- 2. I also understand my limited power to use the donor's property to benefit persons other than the donor as provided in section 8(3) and (4) of that Ordinance and also my duties and liabilities under section 12 of that Ordinance.
- 3. Signed by me as a deed *[attorney should sign here]*
on *[fill in date here]*
in the presence of *[fill in name and address of witness here. The donor cannot be a witness]*
....."

**Suggested revised form of enduring power of attorney to reflect
Recommendation 1**

This draft form and its associated explanatory notes, like that at Annex C, are intended to replace the existing Schedule to the Enduring Powers of Attorney (Prescribed Form) Regulation. Unlike Annex C, however, the draft here reflects the proposal at Recommendation 1 of this report to abolish the requirement of certification by a registered medical practitioner. To simplify the form, it has been drafted to accommodate only the appointment of a single attorney, and it is envisaged that a separate form, with appropriately revised wording, would be used for the appointment of multiple attorneys.

“About using this form

1. This form allows you to create an enduring power of attorney (“EPA”). An EPA enables you to authorise another person (called your “attorney”) to act on your behalf in relation to your property and financial affairs. If you become mentally incapable, your attorney will be able to make decisions for you after he has registered this form with the Registrar of the High Court.
2. You should complete Part A of the form, except for paragraph 8. Paragraph 8 must be completed by a solicitor, who will have to certify that you are mentally capable. You should ask the solicitor who witnesses the form to explain it to you, and you should not sign the form unless you understand what it means.
3. You should include the name and address of the person you wish to appoint as your attorney at paragraph 1 of Part A. The person you appoint as your attorney must be over 18 years of age and must not be bankrupt or mentally incapable. Your attorney does not have to be a solicitor. Your attorney will need to complete Part B of the form and sign it in the presence of a witness.
4. You cannot give your attorney a general power over all your property and financial affairs. If you do, your EPA will not be valid. Instead, you must specify at paragraph 2 of Part A of the form what you authorise him to do in relation to your property and financial affairs, or the particular property or financial affairs in respect of which you have given him authority to act. For example, you may decide to give your attorney authority only in respect of a particular bank account, or a particular piece of property.
5. You can include any restrictions you like on the powers you grant to your attorney. For example, you can include a restriction that your attorney must not act on your behalf until he has reason to believe that you are

becoming mentally incapable. You should set out these restrictions at paragraph 3 of Part A of the form.

6. Unless you include a restriction preventing it, your attorney will be able to use any of your money or property to make any provision which you might be expected to make yourself for his needs or the needs of other people. Your attorney will be able to use your money to make gifts, but only for reasonable amounts in relation to the value of your money and property.

7. Your attorney can recover his out-of-pocket expenses for acting as your attorney. If your attorney is a professional person, such as an accountant or a solicitor, he may be able to charge for his professional services as well.

8. If your attorney has reason to believe that you are, or are becoming, mentally incapable of managing your affairs, he will have to apply to the Registrar of the High Court to register the EPA. Registration will allow your attorney to make decisions for you after you have become mentally incapable.

9. If you would like to be notified if your attorney makes an application to the Registrar of the High Court to register the enduring power of attorney, or if you would like other persons to be notified, you should include the names and addresses of the persons to be notified at paragraph 4 of Part A of the form. You can include up to two persons in addition to yourself. If your attorney does not notify you or the persons you have nominated, that does not prevent the registration of your EPA or make it invalid, but in any legal proceedings relating to the EPA the court may, where it considers it appropriate, draw an adverse inference from your attorney's failure to notify.

10. You must sign the form at paragraph 6 and fill in the name and address of the solicitor who is present when you sign. The solicitor will need to complete the certificate at paragraph 8 of Part A that you are mentally capable when you sign the form.

11. If you are physically unable to sign the form yourself, you can direct someone else to sign on your behalf. That person will have to sign the form in your presence and in the presence of the solicitor, and he will need to complete and sign paragraph 7 of the form. The person signing on your behalf must not be your attorney or his spouse, or the spouse of the solicitor.

Form of enduring power of attorney

Part A

[Part A of this form should be completed by the "donor" (the person appointing the attorney), except for paragraph 8, which should be completed by a solicitor. You should read the explanatory information about this form before you fill it in. Don't sign this form unless you understand what it means.]

1. I, *[your name here]*
of *[your address here]*
appoint *[your attorney's name here]*
of *[your attorney's address here]*
to be my attorney for the purpose of the Enduring Powers of Attorney Ordinance (Cap 501).

2. *[You must specify what you authorise your attorney to do. You can't give a general power over all your property and financial affairs. If you do, your EPA won't be valid. You can either specify at part (1) of this paragraph what you authorise your attorney to do, or you can list at part (2) the particular property or financial affairs in relation to which you authorise him to act. You must give your attorney authority under part (1) or part (2).]*

- (1) My attorney shall have authority to act on my behalf:
 - (a) to collect any income due to me;
 - (b) to collect any capital due to me;
 - (c) to sell any of my movable property;
 - (d) to sell, lease or surrender my home or any of my immovable property;
 - (e) to spend any of my income;
 - (f) to spend any of my capital; or
 - (g) to exercise any of my powers as a trustee,

[If you don't want your attorney to act for you in relation to one or more of these matters, you should delete them from the list.]

(2) My attorney shall have authority to act on my behalf in respect of the following property or financial affairs:

.....
.....
.....
.....

[If you want your attorney to act for you only in relation to some of your property or financial affairs, you should list these here.]

3. This power of attorney is subject to the following restrictions and conditions:

.....
.....
.....

[If you want to put restrictions or conditions on the way your attorney exercises his powers, you should list these here. For example, you can include a restriction that your attorney must not act on your behalf until he has reason to believe that you are becoming mentally incapable. If you don't want to impose any restrictions or conditions, you can delete this paragraph.]

4. My attorney must notify (me and) the following persons before he applies for registration of this power of attorney *[you should fill in here the names and addresses of up to two persons other than yourself whom you wish your attorney to notify. If you don't want to be notified, you should cross out the words "(me and)" above, or cross out the whole of this paragraph if you don't want anyone notified.]*:

Name:.....

Address:

Name:

Address:

5. I intend this power of attorney to continue even if I become mentally incapable.

6. Signed by me as a deed *[sign here]*
on *[fill in the date here]*.....
in the presence of *[name and address of solicitor]*

7. *[If you are physically incapable of signing the form and you direct someone else to sign on your behalf, that person should sign here and you should delete paragraph 6]*

This power of attorney has been signed by *[name of person signing on your behalf]*.....

of *[address of person signing on your behalf]*

.....

under the direction of the donor.

Signed as a deed *[signature of person signing on your behalf]*

.....

on *[date]*.....

in the presence of *[name and address of solicitor]*

.....

8. Certificate by solicitor

I certify that:

- (a) the donor attended before me at the time of the execution of the enduring power of attorney;
- (b) the donor appeared to be mentally capable in terms of section 2 of the Enduring Powers of Attorney Ordinance (Cap 501); and
- (c) this instrument was signed by the donor in my presence and the donor acknowledged that he was signing it voluntarily.

Signed by solicitor

Part B

[Part B of this form should be completed by the attorney.]

1. I understand that I have a duty to apply to the Registrar of the High Court for the registration of this form under the Enduring Powers of Attorney Ordinance (Cap 501) when the donor is, or is becoming, mentally incapable.

- 2 I also understand my limited power to use the donor's property to benefit persons other than the donor as provided in section 8(3) and (4) of that Ordinance and also my duties and liabilities under section 12 of that Ordinance.

- 3 Signed by me as a deed *[attorney should sign here]*.....

on *[fill in date here]*

in the presence of *[fill in name and address of witness here. The donor cannot be a witness]*

....."

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
March 2008

#339934