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**Bills Committee on
Enduring Powers of Attorney (Amendment) Bill 2011**

Background brief prepared by the Legislative Council Secretariat

Purpose

This paper sets out the background of the Enduring Powers of Attorney (Amendment) Bill 2011 ("the Bill") and gives an account of the discussions by the Panel on Administration of Justice and Legal Services ("the AJLS Panel") and the Panel on Health Services ("the HS Panel") on the proposed legislation which seeks to relax the existing requirements for the execution of an enduring power of attorney ("EPA") under the Enduring Powers of Attorney Ordinance (Cap. 501) ("the EPA Ordinance").

Background

2. A power of attorney is a legal instrument by which one person ("the donor") appoints and empowers another person ("the attorney") to act on the donor's behalf and in the donor's name. A power of attorney can only be made by a mentally capable person. If the donor subsequently becomes mentally incapable, the power of attorney is revoked. An EPA is a special type of power of attorney which survives the onset of the donor's mental incapacity if it is in the form, and executed in the manner, prescribed under the EPA Ordinance.

3. Section 5(2)(a) of the EPA Ordinance imposes a strict requirement for the execution of an EPA. Unless the donor is physically incapable of signing, the prescribed form must be signed by the donor before a solicitor and a registered medical practitioner who must both be present at the same time. Pursuant to section 5(2)(e) of the EPA Ordinance, the medical practitioner must also certify that he "satisfied himself that the donor was mentally capable".

4. According to the Legislative Council ("LegCo") Brief issued by the Department of Justice ("DoJ"), the take-up rate of EPAs in Hong Kong is extremely low. As at the end of 2010, only 40 EPAs have been registered in Hong Kong since the enactment of the EPA Ordinance in 1997. In response to the views and concerns raised by, among others, the Law Society of Hong Kong ("Law Society") that the existing execution requirements were unduly onerous, a reference was made by the Administration to the Law Reform Commission ("LRC") to study the subject.

Recommendations of the Law Reform Commission

5. LRC published its Report on Enduring Powers of Attorney ("the Report") in March 2008 and put forward in the Report the following two alternative recommendations in relation to the execution of EPAs -

- (a) **Recommendation 1** - The requirement under section 5(2) of the EPA Ordinance that an EPA be signed before a registered medical practitioner should be abolished, and 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 registered medical practitioner before the EPA is executed.
- (b) **Recommendation 2** - Alternatively, the existing requirements under section 5(2) of the EPA Ordinance should be relaxed to allow a donor and a solicitor to sign an EPA within 28 days after it has been signed by a registered medical practitioner.

6. LRC also recommended that the existing EPA form and its explanatory notes should be drafted in plain language in a more user-friendly format. To that end, LRC recommended that existing forms specified in the Schedule to the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501 sub. leg. A) ("the Regulation") be replaced by new statutory forms and associated explanatory information.

7. According to the LegCo Brief, DoJ consulted various interested parties, including the legal profession and representatives of the medical and social welfare sectors, between June 2010 and March 2011 after the publication of the Report. According to the Administration, except for the Law Society which considered that the new procedure would create uncertainty and would not encourage end-users to adopt EPAs, all consultees supported the implementation of Recommendation 2. Following the consultation, DoJ prepared the Bill to give effect to Recommendation 2 to relax the existing requirements for the execution of an EPA and to adopt new statutory forms and

associated explanatory information drafted in plain language in a more user-friendly format.

Relevant discussions by LegCo Panels

Discussions by the HS Panel

8. At its meeting on 11 June 2007, the HS Panel discussed the Consultation Paper on Enduring Powers of Attorney published by LRC in April 2007. Members of the Panel in general supported the abolition of the medical certification requirement for EPAs (Recommendation 1). Members noted that concerns had been raised about the cost of enlisting a medical practitioner and the logistical arrangement for both a solicitor and a medical practitioner to be present at the same time to sign an EPA. Some members considered that the main reason for the low take-up rate of EPAs in Hong Kong was due to a lack of public awareness and education about the EPA concept. They stressed that while it was important to simplify the execution process and make the EPA form more user-friendly, the Administration should step up public awareness and understanding of the EPA concept.

Discussions by the AJLS Panel

9. At the meeting of the AJLS Panel on 21 December 2010, members were consulted on the question of whether Recommendation 1 or 2 should be adopted. While members had indicated different preferences on which recommendation should be adopted, no member had expressed objection to the policy intent of relaxing the existing execution requirements proposed under Recommendation 2.

10. Some members queried the need for retaining the requirement for medical certification for the execution of EPAs under Recommendation 2, given that solicitors were generally well aware that where there might be capacity issues, they should be prudent and should obtain a medical assessment to prevent the possibility of the validity of the EPA being challenged. The Administration explained that Recommendation 1 (the abolition of the requirement for a medical practitioner to sign an EPA) was opposed by the medical sector and the social welfare sector in their responses to the consultation paper issued by DoJ in June 2010. They pointed out that as the circumstances in which an EPA was likely to be executed were those in which mental incapacity was anticipated to likely occur in the future, the requirement for a medical certification on the mental state of the donor before the execution of an EPA would help safeguard the donor's interests; and a medical practitioner would be in the best position to assess the donor's mental capacity.

11. In the view of some other members, given that EPA was a document of considerable importance which could not be revoked after the onset of the donor's mental incapacity, it was understandable that some sectors of the community had reservations about the removal of the requirement for medical certification of EPAs. These members were of the opinion that unless there were considerable difficulties in complying with the proposed 28-day time limit between medical certification and execution under Recommendation 2, consideration should be given to adopting Recommendation 2 to allay the concern expressed by some sectors of the community.

Relevant documents

12. A list of the relevant papers available on the LegCo website is in the **Appendix**.

Council Business Division 2
Legislative Council Secretariat
16 June 2011

**Relevant papers on
Proposed amendments to the Enduring Powers of Attorney Ordinance**

Committee	Date of meeting	Paper
Panel on Health Services	11.6.2007 (Item VI)	Agenda Minutes
Panel on Administration of Justice and Legal Services	21.12.2010 (Item VI)	Agenda Minutes

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