

Enduring Powers of Attorney (Amendment) Bill 2011

I. Introduction

This paper sets out the Administration's response to the following issues raised at the fourth meeting of the Bills Committee held on 17 November 2011:

- (a) What is the underlying policy reason for enacting the provision in section 15(1) of the Enduring Powers of Attorney Ordinance (Cap. 501) ("the EPA Ordinance") with the mandatory requirement for appointing attorneys to act either jointly or "jointly and severally" and whether the Administration would review and amend the mandatory requirement of section 15 of the EPA Ordinance which might render an enduring power of attorney ("EPA") invalid. Members observed that by the time the donor became mentally incapacitated and it was then found out that the EPA was invalid, nothing could be done to remedy the situation; and
- (b) Whether more emphasis could be made in the presentation of the prescribed form to draw the attention of the donor to the legal consequence of a failure to specify whether the appointment of more than one attorney should act jointly or jointly and severally in paragraph 2 of Part A of Form 2 in Schedule 2.

II. Failure to specify whether joint or joint and several attorneys are appointed

2. Donors of enduring powers of attorney may appoint two or more attorneys to act. The attorneys may be joint attorneys (in which case all of them must together join in a transaction), or they may be joint and several attorneys (in which case each attorney may act by himself or herself, with the same effect as if all the attorneys had joined in the transaction).

3. Section 15(1) of the EPA Ordinance stipulates that “An instrument which appoints more than one attorney cannot create an enduring power unless the attorneys are appointed to act jointly or jointly and severally.” Given the above, it is considered that failure on the part of the donor to specify the appointment of more than one attorney to act jointly or jointly and severally would render the EPA invalid. The EPA Ordinance contains a number of special provisions dealing with these appointments because of the essential difference between joint powers on the one hand and joint and several powers on the other, such as section 15(2) and (3).

4. At the meeting of 17 November 2011, Members would like to obtain more detailed information on the underlying policy reason for section 15(1) of the EPA Ordinance which provided for the mandatory requirement for appointing attorneys to act either jointly or “jointly and severally”. Members observed that the mandatory requirement of section 15 might render an EPA invalid. Moreover, the defect could not be removed by the time the donor lost capacity.

5. In the UK, section 11(1) of the Enduring Powers of Attorney Act 1985 (“the 1985 Act”) similarly provides that “An instrument which appoints more than one person to be an attorney cannot create an enduring power unless the attorneys are appointed to act jointly or jointly and severally”¹.

6. The importance of the difference between acting as joint attorneys and acting as joint and several attorneys is highlighted by the Law Commission of the UK as follows:

‘Any matter affecting the capacity of an attorney under a joint power to operate his power affects all his co-attorneys also since they cannot act without him. Where, however, the power is joint and several the incapacity of one will not generally prejudice the capacity of the other attorneys. This difference creates a measure of complexity for some

¹ Section 11(1) of the 1985 Act is intended to prevent an instrument which provides for one or more attorneys who would replace the original attorneys should he, she or they cease to act from qualifying as an enduring power of attorney (see Cretney & Lush, *Enduring Powers of Attorney* (4th edn, 1996) para 7.2.1).

aspects of our proposed EPA [Enduring Powers of Attorney] scheme since the validity of the power and the attorney's authority under it may differ according to whether the power is joint or joint and several. Furthermore, the very fact that more than one attorney has been appointed raises questions which cannot necessarily be answered by applying to such cases our recommendations as they apply to sole attorneys.²

7. As set out in paragraph 3, there is a crucial difference between these two types of appointment, and it is necessary to consider how the EPA Ordinance applies to each of them. The EPA Ordinance underscores the importance for the donor to indicate his or her wishes to appoint joint attorneys, or whether the donor prefers that they should be able to act severally as well.

8. The Administration acknowledges the concern raised by Members on the consequences which may arise as a result of the rigid mandatory requirement of section 15(1) of the EPA Ordinance. The Administration has therefore proposed the new design of the prescribed form in paragraph 2 of Part A of Form 2 in Schedule 2 and setting the warning words in bold type in this paragraph. The donor's attention is thus specifically drawn to the fundamental consequence of his or her failure to specify whether the attorneys are to act jointly or jointly and severally. The Administration will keep track of developments after the coming into force of the amendment ordinance and will review in future whether there is a need to amend section 15(1) of the EPA Ordinance.

III. Reminder of failure to comply with the requirements in the prescribed forms

9. Given the existing provision in section 15(1) of the EPA Ordinance (see paragraph 3), it is considered that a failure on the part of the donor to specify whether the appointment of more than one attorney should act jointly or jointly and severally would render the EPA invalid. Members asked whether more emphasis could be made in the presentation of the prescribed form to draw the attention of the donor to the serious legal consequence in paragraph 2 of Part A of Form 2 at

² The Law Commission (1983) *The Incapacitated Principal*, (Law Com No 122), para. 4.94

Schedule 2. The Administration has been asked to consider making it clear to the donor that a failure on his or her part to specify the appointment of more than one attorney to act jointly or jointly and severally renders the EPA invalid.

10. In view of the above, the Administration proposes to further highlight the legal consequence of a failure in paragraph 2 of Part A of Form 2 by setting the relevant phrase in bold type. To maintain consistency, the same style will be applied to the relevant sentences in paragraph 2 of Part A of Form 1 and paragraph 3 of Part A of Form 2 on the failure to specify the authority of the attorney(s).

11. To conclude, having carefully considered the views expressed by Members at the fourth meeting of the Bills Committee held on 17 November 2011 and given the considerations set out in Part III of this paper, the Administration would like to propose the CSAs as explained in paragraph 10 in order to address the concerns raised by Members. Attached at **Annex A** is a draft of the complete set of CSAs in English and Chinese that the Administration proposes to move in connection with the assumption of the Second Reading debate of the Bill.

Department of Justice

November 2011

#367555v.4

Enduring Powers of Attorney (Amendment) Bill 2011

COMMITTEE STAGE

Amendments to be moved by the Secretary for Justice

<u>Clause</u>	<u>Amendment Proposed</u>
2	By deleting “3” and substituting “3, 3A”.
3(5)	In the proposed section 5(2)(d)(iii), in the Chinese text, by deleting “確認該文書是在授權人在場並在其指示下由他人” and substituting “該文書是在授權人在場並在其指示下由他人代其”.
3(7)	In the proposed section 5(2)(e)(iii), in the Chinese text, by deleting “確認該文書是在授權人在場並在其指示下由他人” and substituting “該文書是在授權人在場並在其指示下由他人代其”.
New	By adding— “3A. Section 10 amended (Commencement) (1) Section 10— Renumber the section as section 10(1). (2) After section 10(1)— Add “(2) To avoid doubt, an enduring power does not commence as a power of attorney before it is executed. (3) For the purposes of subsections (1)(b) and (2), an enduring power is executed when it is duly signed before the solicitor in compliance with the requirements in

section 5.

- (4) Subsections (2) and (3) do not affect any enduring power executed before the commencement date of the Enduring Powers of Attorney (Amendment) Ordinance 2011 (of 2011).”.

9 In the proposed section 4(2), by deleting “donor becoming mentally incapable” and substituting “donor’s mental incapacity”.

10(1) In the proposed section 5(2A), in the Chinese text, by deleting “事預” and substituting “事項”.

12 (a) In the proposed Schedule 1, under the heading “**Information you must read**”, by adding—

“13. This form takes effect as an EPA in accordance with section 10 of the Enduring Powers of Attorney Ordinance (Cap. 501) when it is signed by you or the person signing on your behalf and under your direction before the solicitor. You should note that unless and until this form is so signed, it has no effect either as an EPA or an ordinary power of attorney. However, if you wish, you may choose a later date or later event, on which the EPA will take effect. In such case you must specify this later date or event in paragraph 4A of Part A.”

(b) In the proposed Schedule 1, under the heading “**Form of enduring power of attorney (for appointment of only one attorney)**”, in Part A—

(i) in paragraph 2, by deleting “*If you do, your EPA will not be valid.*” and substituting “*If you do, your EPA will not be valid.*”;

(ii) by adding—

“4A. **Commencement of EPA**

[This EPA takes effect on the date it is signed before the solicitor in paragraph 6 or 7 below. If you want to specify a later date or later event on which this EPA will take effect, please fill in the gap in the sentence marked with an asterisk below. Delete that sentence if you wish this EPA to take effect on the date it is signed before the solicitor.]

*This EPA takes effect on
 (insert a later date or event).”.

13

(a) In the proposed Schedule 2, under the heading “**Information you must read**”—

- (i) in paragraph 3, in the Chinese text, by deleting “個” and substituting “各”;
- (ii) by adding—

“14. This form takes effect as an EPA in accordance with section 10 of the Enduring Powers of Attorney Ordinance (Cap. 501) when it is signed by you or the person signing on your behalf and under your direction before the solicitor. You should note that unless and until this form is so signed, it has no effect either as an EPA or an ordinary power of attorney. However, if you wish, you may choose a later date or later event, on which the EPA will take effect. In such case you must specify this later date or event in paragraph 5A of Part A.”.

(b) In the proposed Schedule 2, under the heading “**Form of enduring power of attorney (for appointment of more than one attorney)**”, in Part A—

- (i) by deleting paragraph 2 and substituting—

“2. **Whether attorneys must act jointly**

*[You must decide whether your attorneys are to act (a) jointly; or (b) jointly and severally. See paragraph 3 under the heading “**Information you must read**” and delete either (a) or (b) from the statement below. **If you do not, your EPA will***

not be valid.]

My attorneys appointed under paragraph 1 are to act—

(a) jointly.

or

(b) jointly and severally.”;

(ii) in paragraph 3, by deleting “*If you do, your EPA will not be valid.*” and substituting “*If you do, your EPA will not be valid.*”;

(iii) by adding—

“5A. Commencement of EPA

[This EPA takes effect on the date it is signed before the solicitor in paragraph 7 or 8 below. If you want to specify a later date or later event on which this EPA will take effect, please fill in the gap in the sentence marked with an asterisk below. Delete that sentence if you wish this EPA to take effect on the date it is signed before the solicitor.]

*This EPA takes effect on
..... (insert a later date or event).”.