

For discussion

**LegCo Panel on Administration of Justice and Legal Services
Enduring Powers of Attorney (Amendment) Bill 2011**

Purpose

The Department of Justice proposes to introduce legislative amendments to the Enduring Powers of Attorney Ordinance (Cap. 501) (“the EPA Ordinance”) to implement the recommendations of the report on “Enduring Powers of Attorney” (“the Report”) published by the Law Reform Commission (“the LRC”) in March 2008 so as to:

- (a) abolish the existing requirement in section 5(2) of the EPA Ordinance that an EPA be signed before a medical practitioner (“Recommendation 1”) or, alternatively, to relax the existing requirement in section 5(2) of the EPA Ordinance and allow the donor and the solicitor to sign the EPA within 28 days after it has been signed by the registered medical practitioner (“Recommendation 2”); and
- (b) replace the existing Schedule to the EPA (Prescribed Form) Regulation (Cap. 501 sub. leg. A) (“the Regulation”) by the form and explanatory notes at Annex D to the Report (“Recommendation 4”¹).

The Background

2. An EPA 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. Under the common law, the power of attorney is revoked if the donor loses mental capacity at some stage after granting a power of attorney. To answer the difficulties caused by the lapse of a power of attorney due to the donor’s mental incapacity, the EPA Ordinance was enacted in 1997 to enable 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 This proposal is referred to as “Recommendation 4” in the LRC Report. The same reference is adopted in this paper for the sake of consistency.

3. Section 5(2)(a) of the EPA Ordinance imposes a strict requirement for the execution of an EPA. 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.”

4. Section 5(2)(d) of the EPA Ordinance requires the solicitor to certify:

- “(i) that the donor attended before him at the time of the execution of the enduring power;*
- (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 2²); 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.”*

Pursuant to section 5(2)(e) of the EPA Ordinance, the medical practitioner must also certify in identical terms to paragraphs (i) and (iii) above, but instead of paragraph (ii) he must certify that he *“satisfied himself that the donor was*

² Section 2 of the EPA Ordinance defines mental capacity 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.”*

mentally capable (specifying in the certificate that he satisfied himself that the donor was mentally capable in terms of section 2)”.

5. In November 2006, the Secretary for Justice and the Chief Justice referred to the LRC for review the requirements for the execution of an EPA prescribed in section 5(2) of the EPA Ordinance and the terms of the EPA forms in the Schedule to the Regulation. The LRC reference was made in response to concerns raised by, among others, the Law Society of Hong Kong (“the Law Society”) that the existing execution requirements were unduly onerous and were at least in part to blame for the extremely low take-up rate of EPAs in Hong Kong.³

The Recommendations made by the LRC in the Report

6. The LRC published the Report in March 2008 which states the existing law in Hong Kong in relation to the requirement for execution of an EPA, the approach in other jurisdictions and then presents a number of recommendations for reform.

7. As reviewed by Chapter 2 of the Report, none of the common law jurisdictions 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 England⁴ and New Zealand.⁵ 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, the Institute thought 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.⁶

8. In view of the nearly uniform practice in other common law jurisdictions of dispensing with the requirement for a medical witness, it appears that the arguments for change are cogent. The following observations made by the LRC in the Report are relevant:

³ As in September 2010, only 38 EPAs had been registered in Hong Kong since the EPA Ordinance was enacted in 1997.

⁴ Law Commission of England, *Mental Incapacity*, LC No. 231 (HC189) (1995), para. 7.27.

⁵ New Zealand Law Commission, *Misuse of Enduring Powers of Attorney*, Report No 71, April 2001, para. 25.

⁶ Alberta Law Reform Institute, *Enduring Powers of Attorney: Safeguards against Abuse*, Report No. 88 (February 2003), page 20.

“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.”⁷

9. The Report pointed out that “[a]rranging 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.”⁸ In addition, the requirement for a medical witness imposed undesirable trauma and indignity on an elderly person whose mental faculties were thereby called in question.⁹ The Report added that the practical experience of those solicitors who had executed EPAs was that it was extremely difficult to make the necessary arrangements for attendance by a medical witness.¹⁰

10. The Report therefore recommended that the existing requirement in section 5(2) of the EPA Ordinance that an EPA be signed before a registered medical practitioner should be abolished (see Recommendation 1, following paragraph 3.15 of the Report) or, alternatively, the existing requirement in section 5(2) of the EPA Ordinance be relaxed to allow the donor and the solicitor to sign the EPA within 28 days after it has been signed by the registered medical practitioner (Recommendation 2, following paragraph 3.17 of the Report) .

11. The Schedule to the Regulation made under section 18 of the EPA Ordinance sets out the form which must be used to establish an EPA. The form must include the “explanatory information” included in that Schedule. The LRC report observed that the existing statutory form and its associated explanatory information “cannot be said to be in a form which the lay reader would find easy to digest.”¹¹ The Report therefore recommended that the Schedule to the 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

⁷ The Report, at para. 3.11.

⁸ The Report, at paragraph 3.3.

⁹ The Report, at paragraph 3.8.

¹⁰ The Report, at paragraph 3.8.

¹¹ The Report, at paragraph 3.24.

or not the reform proposed in Recommendation 1 is adopted (see Recommendation 4, following paragraph 3.26 of the Report). The LRC considered that the proposed new statutory form and its associated explanatory information were drafted in plain language and in a more user-friendly format.

Proposed Amendments to the EPA Ordinance

12. The Department of Justice has carefully considered the recommendations contained in the Report and proposes to put forward legislation to implement those recommendations. As an illustration, a preliminary draft Enduring Powers of Attorney (Amendment) Bill 2011 (“draft Bill”) has been prepared along the lines of Recommendation 1 to abolish the existing requirement. Clause 3 of the draft Bill amends section 5(2) of the EPA Ordinance to abolish the requirement that an EPA must be signed before a registered medical practitioner.

13. Clauses 4 to 13 of the draft Bill amend Section 18(3) of the EPA Ordinance and the Regulation along the lines proposed in Recommendation 1 to replace the existing Schedule to the Regulation by the new form and explanatory notes recommended by the LRC. Consequential and related amendments will also be made.

Safeguards for Donors’ Interests

14. The Administration has taken into account the concern raised by some stakeholders that the formal and simple EPA registration procedure in Hong Kong is justified only by the safeguards of the donor’s interests provided at the time when an EPA is executed, one of which is the requirement for certification of mental capacity by a medical practitioner.

15. Ways in which the interests of donors can be safeguarded should be considered when the LRC’s recommendations are implemented. For that reason, the LRC recommended that the Law Society should issue practice directions to its members on the execution of EPAs. The practice directions should make clear that, among other matters, where a solicitor has grounds for doubting the mental competence of his client to execute an EPA, the solicitor should obtain an assessment of his client’s mental capacity from a medical practitioner before the EPA is executed (para 3.14 of the Report).

16. The Administration has consulted the Law Society on the LRC recommendation that the Law Society should issue practice directions to its

members on the execution of EPAs. The Law Society pointed out that according to the *Hong Kong Solicitors' Guide to Professional Conduct*, solicitors are required to keep the issue of “mental capacity” to the forefront when dealing with clients, especially those providing instructions on EPAs and wills before any retainer can be considered. Principle 5.01 of the *Hong Kong Solicitors' Guide to Professional Conduct* states as follows:

*“A solicitor cannot be retained by a client who does not have a mental capacity. There is a legal presumption of capacity unless the contrary is shown. Whether a client does have capacity is a matter of law and it should be borne in mind that different levels of capacity are required for different activities. **If there is doubt about a client’s mental capacity it may be advisable, where possible, to seek an opinion from the client’s doctor having explained to the doctor the relevant test of capacity.**”* (emphasis added)

17. The Law Society considered that it would be more appropriate to issue a Practice Note which would provide detailed guidelines on matters of which solicitors must be aware when dealing with EPAs. The main distinction between a Practice Direction and a Practice Note is that a breach of a Practice Direction may attract professional disciplinary action whilst a Practice Note only provides guidance on professional practice. Besides, a Practice Note gives cross-references to the main Ordinance and provides extensive guidance thereon. Practice Directions do not do this. Guidance will accordingly be provided on “mental capacity” in a new Practice Note to be issued by the Law Society.

Consultation

18. In June 2010, the Department of Justice issued a consultation paper to the Law Society, the Bar Association, the medical and social welfare sectors, as well as other interested parties to seek their views on the proposed legislative amendments as contained in the draft Bill and on the Law Society’s proposal to issue a Practice Note as mentioned above. A summary of their views is reproduced below.

Recommendation 1

19. The Law Society fully supported the proposal to abolish the existing requirement in section 5(2) of the EPA Ordinance requiring an EPA to

be signed before a medical practitioner. Four other respondents gave their support to the proposal to abolish the requirement that an EPA must be signed before a registered medical practitioner. It was pointed out that the requirement that a medical practitioner be present discouraged the use of EPAs while not, in practice, offering a real safeguard. Further, solicitors were generally very aware that where there might be capacity issues in relation to their clients they must 'tread carefully' by obtaining a medical assessment.

20. There were ten responses against the removal of a requirement for medical certification. It was pointed out that an EPA is a document of considerable importance. The circumstances in which an EPA is likely to be executed are those in which it is anticipated that mental incapacity is likely to occur in the future. Those who opposed the proposal argued that it was good practice to have a medical practitioner certifying the mental state of the donor at the time of execution because a registered medical practitioner would be in the best position to assess the donor's mental capacity. In contrast, the solicitor might not have adequate professional knowledge and ability to identify the donor's mental problems. Doubt was also expressed as to whether the issuance of practice notes by the Law Society would be sufficient to safeguard the donors' interests from being abused. It was pointed out by one respondent that the main reason for the extremely low take-up rate of EPAs in Hong Kong was a lack of understanding among the public of the contents, effects and procedure of EPAs. More education and promotion was needed. The remaining 15 respondents either had no comments or came to no concluded positions on the proposals.

Recommendation 2

21. Seven of the ten respondents who opposed the removal of the requirement for medical certification supported relaxation of the rule to allow certification by a medical practitioner within a certain period of time before the EPA was executed, rather than requiring both the doctor and the lawyer to be present at the time of execution. The time limit between medical certification and execution suggested were: within 14 days, 'a reasonably short period of time', 'a short period of time' or a 28 day time limit (the 28 day time limit is the same as Recommendation 2 of the LRC Report).

22. On 12 October 2010, the Department of Justice held a meeting with the representatives from the medical and social welfare sectors. All representatives attending showed support to Recommendation 2 and they have in general agreed to the following features of Recommendation 2:

- (a) An EPA may be signed before a registered medical practitioner and

the donor should be permitted to sign the EPA before a solicitor separately at a later date;

- (b) The medical certification by a registered medical practitioner should be available before the signature of the EPA by the donor and the solicitor. It is agreed that such sequence of signature would save abortive effort and expenses of donor and solicitor in case where mental capacity of the donor is in doubt when the medical assessment is made;
- (c) A 28 day time limit between the signature by the registered medical practitioner and the signature of the EPA by the donor and the solicitor is acceptable. The expert view is that in the majority of EPA donors, who are elderly suffering from dementia, the deterioration of their mental capacity would not be significant within a short period of time. Sufficient time is also needed for the family members or social workers to make logistical arrangement for the separate attendance of elderly or physically incapacitated donors to the offices of doctors and solicitors;
- (d) Since the deterioration of the mental capacity of the elderly donors would unlikely be significant within a short period of time, it is not necessary to consider whether doctors can assess a donor on a case by case basis and certify that his/her mental capacity can be maintained only within a specified period which is shorter than 28 days;
- (e) However, if the mental capacity of the donor is in doubt at the time of execution of an EPA, it remains necessary to rely on the professional practice/conduct of the attesting solicitor, so that medical advice should be sought before the EPA is executed.

Recommendation 4

23. We received five responses which supported the proposal to replace the existing schedule to the Regulation by the form and explanatory notes at Annex D to the Report.

Promotion of the Use of EPAs

24. Furthermore, as suggested in Recommendation 3 of the LRC Report (following paragraph 3.23 of the Report), while the existing execution

requirement undoubtedly contributes 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 (Paragraph 3.18 of the Report). The Administration supports the LRC's suggestion that more should be done to publicise and explain EPAs to the community, setting out the benefits for both donors and their families which an EPA offers and outlining the steps which must be taken to execute and register an EPA (Paragraph 3.18 of the Report). The Law Society should be encouraged to disseminate information about EPAs to its members and to organise more Continuing Professional Development ("CPD") courses on EPAs for solicitors.

25. In response to our concern over the promotion of the use of EPAs, the Law Society proposed to invite the Academy of Law to offer training on EPAs together with Continuing Professional Development courses on the Mental Health Ordinance (Cap. 136) which should contain specific material on "mental capacity".

The Way Forward

26. Having considered the LRC Report, the Administration has decided to introduce legislative amendments to address the issues discussed in 'the Background' section above. In view of the diversified comments on the legislative proposals, the Administration would like to consult the Panel and invite Members to give their views on whether Recommendation 1 or 2 should be adopted. Members' views on any other issues (e.g. the proposed time limit of 28 days between the signature by the registered medical practitioner and the signature of the EPA by the donor and the solicitor referred to in paragraph 22(c) above) are welcome.

27. The Administration will propose corresponding amendments to the draft Bill after taking into account the views expressed by Members at the Panel meeting on 21 December 2010. The tentative schedule for introduction of the Enduring Powers of Attorney (Amendment) Bill to the Legislative Council is the second quarter of 2011.

Department of Justice
December 2010

Enduring Powers of Attorney (Amendment) Bill 2011

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A BILL

To

Amend the Enduring Powers of Attorney Ordinance and the Enduring Powers of Attorney (Prescribed Form) Regulation.

Enacted by the Legislative Council.

Part 1

Preliminary and amendments to Enduring Powers of Attorney Ordinance

1. Short title and commencement

- (1) This Ordinance may be cited as the Enduring Powers of Attorney (Amendment) Ordinance 2011.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

2. Enduring Powers of Attorney Ordinance amended

The Enduring Powers of Attorney Ordinance (Cap. 501) is amended as set out in sections 3 and 4.

3. Section 5 amended (Mental capacity and formalities for execution of enduring power)

(1) Section 5(2)(a)—

Repeal

everything after “the instrument”

Substitute

“creating the enduring power before a solicitor who must not be the person being appointed as the attorney, the spouse of the attorney or a person related by blood or marriage to the donor or the attorney;”.

(2) Section 5(2)—

Repeal paragraph (b)

Substitute

“(b) if the donor is physically incapable of signing, any other person, not being the attorney, the spouse of the attorney, or the spouse of the solicitor before whom the instrument is signed, may sign the instrument on behalf of the donor in the presence, and under the direction, of the donor;”.

(3) Section 5(2)—

Repeal paragraph (c)

Substitute

“(c) the attorney must sign the instrument; and”.

(4) Section 5(2)(d)(i)—

Repeal

“attended before him”

Substitute

“was present before the solicitor”.

(5) Section 5(2)(d)—

Repeal subparagraph (iii)

Substitute

“(iii) that the instrument was signed in the presence of the solicitor and, if it is signed by the donor, that the donor acknowledged that it was signed voluntarily and, if it is signed on the donor’s behalf, that it was so signed under the donor’s direction.”.

(6) Section 5(2)—

Repeal paragraph (e).

4. Section 18 amended (Regulations)

Section 18—

Repeal subsection (3)

Substitute

“(3) The prescribed form for the instrument creating an enduring power of attorney may provide for the donor to nominate the persons (whose number must not exceed the number specified in the form) to be notified by the attorney before the attorney applies for the registration of the instrument under section 9.”.

Part 2

Amendments to Enduring Powers of Attorney (Prescribed Form) Regulation

5. Enduring Powers of Attorney (Prescribed Form) Regulation amended

The Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501 sub. leg. A) is amended as set out in sections 6 to 13.

6. Section 1A added

Before section 2—

Add

“1A. Interpretation

In this Regulation—

Form 1 () means the form set out in Schedule 1;

Form 2 () means the form set out in Schedule 2.”.

7. Section 2 substituted (Prescribed form)

Section 2—

Repeal the section

Substitute

“2. Prescribed form

(1) An instrument creating an enduring power of attorney which appoints only one attorney must be in Form 1.

(2) An instrument creating an enduring power of attorney which appoints more than one attorney must be in Form 2.

- (3) If an instrument which purports to create an enduring power of attorney does not contain the explanatory information given under the heading “**Information you must read**” in Form 1 or Form 2, it does not create an enduring power of attorney.
- (4) An enduring power of attorney may include any conditions or restrictions that the donor specifies in paragraph 3 of Part A of Form 1 or paragraph 4 of Part A of Form 2 (as the case requires).
- (5) The form of execution by an attorney may be adapted to provide for execution by a trust corporation.”.

8. Section 3 substituted (Execution)

Section 3—

Repeal the section

Substitute

“3. Execution

- (1) An instrument creating an enduring power of attorney must be signed by both the donor and the attorney, although not necessarily at the same time, in accordance with this section and section 5 of the Ordinance.
- (2) The attorney must sign in the presence of a witness.
- (3) The witness must sign the instrument and provide his or her full name and address in the instrument.
- (4) The donor must not witness the signature of the attorney nor one attorney witness the signature of another attorney.
- (5) The solicitor who certifies as to the matters specified in section 5(2)(d) of the Ordinance must provide his or her full name and address in the instrument.
- (6) If, under section 5(2)(b) of the Ordinance, the instrument is signed under the donor’s direction, paragraph 7 of Part

A of Form 1 or paragraph 8 of Part A of Form 2 (as the case requires) must be completed.

- (7) The person who signs the instrument on behalf of the donor under section 5(2)(b) of the Ordinance must not be the solicitor who certifies as to the matters specified in section 5(2)(d) of the Ordinance.”.

9. Section 4 substituted (Execution where more than one attorney is appointed)

Section 4—

Repeal the section

Substitute

“4. Execution if more than one attorney is appointed

- (1) If more than one attorney is appointed and they are to act jointly and severally, then at least one of the attorneys so appointed must sign the instrument for it to take effect as an enduring power of attorney.
- (2) Only an attorney who has signed the instrument has the functions of an attorney under an enduring power of attorney in the event of the registration of the instrument under section 9 of the Ordinance or the donor becoming mentally incapable, whichever first occurs.”.

10. Section 5 amended (Donor to specify decisions attorney may make)

Section 5(3)(d)—

Repeal

“his”

Substitute

“the donor’s”.

11. Section 6 substituted (nomination of persons to be notified)

Section 6—

Repeal the section

Substitute

“6. Nomination of persons to be notified

- (1) The donor may, in the instrument, nominate all or any of the following persons to be notified by the attorney applying for the registration of the instrument under section 9 of the Ordinance before the application is made—
 - (a) the donor;
 - (b) any attorney who does not join in the application;
 - (c) a maximum of 2 other persons.
- (2) The donor must provide in the instrument the address of any person nominated under subsection (1).
- (3) If the donor’s intention is not to make any nomination under subsection (1), the donor must indicate that intention by deleting paragraph 4 of Part A of Form 1 or paragraph 5 of Part A of Form 2 (as the case requires).”.

12. Schedule substituted

The Schedule—

Repeal the Schedule

Substitute

“Schedule 1

[s. 1A]

Form 1

Information you must read

1. This form is a legal document that allows you to create an enduring power of attorney (“EPA”). An EPA enables you to authorize another person (“your attorney”) to act on your behalf in relation to your property and financial affairs. You must use this form if you intend to appoint only one attorney. If you become mentally incapable, your attorney will be able to make decisions for you after your attorney has registered this form with the Registrar of the High Court.
2. If you are a trustee, you should seek legal advice if you want your attorney to act as a trustee on your behalf.
3. You must complete Part A, except for paragraph 8 of that Part. Paragraph 8 of Part A must be completed by a solicitor, who will have to certify that you are mentally capable. You should ask the solicitor who witnesses your signature on this form to explain it to you, and you must not sign this form unless you understand what it means.
4. **Paragraph 1 of Part A:** You must 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 must complete Part B and sign this form in the presence of a witness.
5. **Paragraph 2 of Part A:** You cannot give your attorney a general authority 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 what you authorize your attorney to do with your property and financial affairs, or the particular property or financial affairs for which you have given your attorney authority to act. For example, you may decide to give your attorney authority only for a particular bank account, or a particular piece of property.

6. **Paragraph 3 of Part A:** You may include any restrictions you like on the authority you give to your attorney. For example, you may include a restriction that your attorney must not act on your behalf until your attorney has reason to believe that you are becoming mentally incapable, or that your attorney must not enter into a contract without first seeking legal advice if its value exceeds a specified amount. You should set out these restrictions at paragraph 3 of Part A.

7. 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 the needs of your attorney or the needs of other persons. 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.

8. Your attorney may recover out-of-pocket expenses for acting as your attorney. If your attorney is a professional person, such as an accountant or a solicitor, your attorney may charge for any professional services provided when acting as your attorney.

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

10. **Paragraph 4 of Part A:** If you would like to be notified before your attorney applies to the Registrar of the High Court to register this EPA, or if you would like other persons to be notified, you must include the names and addresses of the persons to be notified at paragraph 4 of Part A. You can include up to 2 persons to be notified 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. However, in any legal proceedings relating to the EPA the court may, if it considers it appropriate, draw an adverse inference from the failure to notify you or the nominated persons.

11. Paragraphs 6 and 8 of Part A: You must sign this form at paragraph 6 of Part A 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 to certify that you are mentally capable when you sign this form.

12. Paragraph 7 of Part A: If you are physically unable to sign this form yourself, you can direct someone else to sign on your behalf. In this case, paragraph 7 of Part A must be completed and that person must sign at that paragraph in your presence and in the presence of the solicitor. The person signing on your behalf must not be your attorney, the spouse of your attorney or the spouse of the solicitor.

Form of enduring power of attorney (for appointment of only one attorney)

Part A

[This Part must be completed by the person appointing the attorney (“the donor”), except for paragraph 8, which must be completed by a solicitor. You should read the explanatory information given under the heading “Information you must read” before you fill it in. Do not sign this form unless you understand what it means.]

1. Appointment of attorney by donor

I, *[your name here]*,
of *[your address here]*
.....

appoint *[your attorney's name here]*
 of *[your attorney's address here]*

 to be my attorney under the Enduring Powers of Attorney
 Ordinance (Cap. 501).

2. **Attorney's authority**

*[You must specify what you authorize your attorney to do. You cannot give a general authority over all your property and financial affairs. If you do, your EPA will not be valid. You can **either** specify at subparagraph (1) what you authorize your attorney to do, **or** you can list at subparagraph (2) the particular property or financial affairs for which you have given your attorney authority to act. You must give your attorney authority under subparagraph (1) **or** (2).]*

- (1) My attorney has authority to act on my behalf: *[If you do not want your attorney to act for you in relation to one or more of these matters, you must delete the appropriate item or items below.]*
 - (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.
- (2) My attorney has 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 must list them here.]

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

3. Restrictions on attorney

This enduring power of attorney is subject to the following conditions and restrictions: *[If you want to put conditions or restrictions on the way your attorney exercises any powers, you must list them here. For example, you may include a restriction that your attorney must not act on your behalf until your attorney has reason to believe that you are becoming mentally incapable. If you do not want to impose any conditions or restrictions, you must delete this paragraph.]*

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

4. Notification of named persons

[If you do not want anyone (including yourself) to be notified of the application for the registration of this EPA, you must delete subparagraphs (1) and (2).]

- (1) My attorney must notify me before applying for the registration of this enduring power of attorney. *[If you do not want to be notified, you must delete this subparagraph.]*
- (2) My attorney must notify the following persons before applying for the registration of this enduring power of attorney. *[Fill in the names and addresses of up to 2*

persons (other than yourself) to be notified. If you do not want other persons to be notified, you must delete this subparagraph.]

Name:

Address:

Name:

Address:

5. Power to continue

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

6. Signatures

Signed by me as a deed *[sign here]*

on *[date]*

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

.....

.....

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

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

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

.....

under the donor's direction.

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 was present before me at the time of the execution of this 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 form was signed by the donor in my presence and the donor acknowledged signing it voluntarily.
[If someone else signs this form on the donor's behalf, this statement must be deleted.]
- (d) this form was signed, in my presence, by *[name of person signing on donor's behalf]*
.....
on behalf of and under the direction of the donor.
[If the donor signs this form, this statement must be deleted.]

Signed by solicitor

Part B

[This Part must be completed by the attorney.]

1. I understand that I have a duty to apply to the Registrar of the High Court to register 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 [*signature of attorney*]
on [date]
in the presence of [*signature and name and address of witness, who must not be the donor*]
.....
.....”

- 13. Schedule 2 added**
After Schedule 1—
Add

“Schedule 2

[s. 1A]

Form 2

Information you must read

1. This form is a legal document that allows you to create an enduring power of attorney (“EPA”). An EPA enables you to authorize another person to act on your behalf in relation to your property and financial affairs. You must use this form if you intend to appoint more than one person to act on your behalf. If you

become mentally incapable, the persons you have appointed (“your attorneys”) will be able to make decisions for you after they have registered this form with the Registrar of the High Court.

2. If you are a trustee, you should seek legal advice if you want your attorneys to act as trustees on your behalf.

3. **Paragraph 2 of Part A:** You must decide whether your attorneys are to act—

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

You must indicate your decision at paragraph 2 of Part A.

4. You must complete Part A, except for paragraph 9 of that Part. Paragraph 9 of Part A must be completed by a solicitor, who will have to certify that you are mentally capable. You should ask the solicitor who witnesses your signature on this form to explain it to you, and you must not sign this form unless you understand what it means.

5. **Paragraph 1 of Part A:** You must include the names and addresses of the persons you wish to appoint as your attorneys at paragraph 1 of Part A. The persons you appoint as your attorneys must be over 18 years of age and must not be bankrupt or mentally incapable. Your attorneys do not have to be solicitors. Your attorneys must complete Part B and each of them must sign this form in the presence of a witness.

6. **Paragraph 3 of Part A:** You cannot give your attorneys a general authority over all your property and financial affairs. If you do, your EPA will not be valid. Instead, you must specify at

paragraph 3 of Part A what you authorize your attorneys to do with your property and financial affairs, or the particular property or financial affairs for which you have given your attorneys authority to act. For example, you may decide to give your attorneys authority only for a particular bank account, or a particular piece of property.

7. Paragraph 4 of Part A: You may include any restrictions you like on the authority you give to your attorneys. For example, you may include a restriction that your attorneys must not act on your behalf until they have reason to believe that you are becoming mentally incapable, or that your attorneys must not enter into a contract without first seeking legal advice if its value exceeds a specified amount. You should set out these restrictions at paragraph 4 of Part A.

8. Unless you include a restriction preventing it, your attorneys will be able to use any of your money or property to make any provision which you might be expected to make yourself for the needs of your attorneys or the needs of other persons. Your attorneys 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.

9. Your attorneys may recover out-of-pocket expenses for acting as your attorneys. If any of your attorneys is a professional person, such as an accountant or a solicitor, that attorney may charge for any professional services provided when acting as your attorney.

10. If your attorneys have reason to believe that you are, or are becoming, mentally incapable of managing your affairs, they must apply to the Registrar of the High Court to register this EPA. Registration will allow your attorneys to make decisions for you after you have become mentally incapable.

11. Paragraph 5 of Part A: If you would like to be notified before your attorneys apply to the Registrar of the High Court to register this EPA, or if you would like other persons to be notified, you must include the names and addresses of the persons to be notified at paragraph 5 of Part A. If you have decided that your attorneys may act separately, you may also nominate any of your attorneys not joining in the application to be notified. You can include up to 2 persons to be notified in addition to yourself and any attorney not joining in the application. If your attorneys do not notify you or the persons you have nominated, that does not prevent the registration of your EPA or make it invalid. However, in any legal proceedings relating to the EPA the court may, if it considers it appropriate, draw an adverse inference from the failure to notify you or the nominated persons.

12. Paragraphs 7 and 9 of Part A: You must sign this form at paragraph 7 of Part A 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 9 of Part A to certify that you are mentally capable when you sign this form.

13. Paragraph 8 of Part A: If you are physically unable to sign this form yourself, you can direct someone else to sign on your behalf. In this case, paragraph 8 of Part A must be completed and that person must sign at that paragraph in your presence and in the presence of the solicitor. The person signing on your behalf must not be one of your attorneys, the spouse of any one of your attorneys or the spouse of the solicitor.

Form of enduring power of attorney (for appointment of more than one attorney)

Part A

[This Part must be completed by the person appointing the attorneys (“the donor”), except for paragraph 9, which must be completed by a solicitor. You should read the explanatory information given under the heading “Information you must read” before you fill it in. Do not sign this form unless you understand what it means.]

1. Appointment of attorneys by donor

I, *[your name here]*,
of *[your address here]*
.....
appoint

(a) *[your attorney’s name here]*
of *[your attorney’s address here]*
.....;

and

(b) *[your attorney’s name here]*
of *[your attorney’s address here]*
.....

[If you appoint more than 2 attorneys, please add additional subparagraph(s) similar to subparagraphs (a) and (b).]

to be my attorneys under the Enduring Powers of Attorney Ordinance (Cap. 501).

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 from the statement below the part that does not apply.]*

My attorneys appointed under paragraph 1 are to act jointly/jointly and severally.

3. **Attorneys’ authority**

*[You must specify what you authorize your attorneys to do. You cannot give a general authority over all your property and financial affairs. If you do, your EPA will not be valid. You can **either** specify at subparagraph (1) what you authorize your attorneys to do, **or** you can list at subparagraph (2) the particular property or financial affairs for which you have given your attorneys authority to act. You must give your attorneys authority under subparagraph (1) **or** (2).]*

- (1) My attorneys have authority to act on my behalf: *[If you do not want your attorneys to act for you in relation to one or more of these matters, you must delete the appropriate item or items below.]*
 - (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.
- (2) My attorneys have authority to act on my behalf in respect of the following property or financial affairs: *[If you want your attorneys to act for you only in relation to*

some of your property or financial affairs, you must list them here.]

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

4. Restrictions on attorneys

This enduring power of attorney is subject to the following conditions and restrictions: *[If you want to put conditions or restrictions on the way your attorneys exercise any powers, you must list them here. For example, you may include a restriction that your attorneys must not act on your behalf until they have reason to believe that you are becoming mentally incapable. If you do not want to impose any conditions or restrictions, you must delete this paragraph.]*

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

5. Notification of named persons

[If you do not want anyone (including yourself) to be notified of the application for the registration of this EPA, you must delete subparagraphs (1), (2) and (3).]

- (1) My attorneys must notify me before applying for the registration of this enduring power of attorney. *[If you do not want to be notified, you must delete this subparagraph.]*
- (2) Any attorney applying for the registration of this enduring power of attorney must, before the application is made, notify any attorney not joining in the

application. *[If you decide that your attorneys may act separately and you do not require any attorney applying for the registration of this EPA to notify any attorney not joining in the application, you must delete this subparagraph.]*

- (3) My attorneys must notify the following persons before applying for the registration of this enduring power of attorney. *[Fill in the names and addresses of up to 2 persons (other than yourself or any of your attorneys) to be notified. If you do not want other persons to be notified, you must delete this subparagraph.]*

Name:

Address:

Name:

Address:

6. Power to continue

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

7. Signatures

Signed by me as a deed *[sign here]*

on *[date]*

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

.....

8. *[If you are physically incapable of signing this form and you direct someone else to sign on your behalf, that person must sign here and paragraph 7 must be deleted.]*

This enduring power of attorney has been signed by *[name of*

person signing on your behalf
of *[address of person signing on your behalf]*
.....
under the donor's direction.

Signed as a deed *[signature of person signing on your behalf]*
.....
on *[date]*
in the presence of *[name and address of solicitor]*
.....
.....

9. Certificate by solicitor

I certify that:

- (a) the donor was present before me at the time of the execution of this 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 form was signed by the donor in my presence and the donor acknowledged signing it voluntarily.
[If someone else signs this form on the donor's behalf, this statement must be deleted.]
- (d) this form was signed, in my presence, by *[name of person signing on donor's behalf]*
.....
on behalf of and under the direction of the donor.
[If the donor signs this form, this statement must be deleted.]

Signed by solicitor

Part B

[This Part must be completed by the attorneys. If you decide that your attorneys may act separately, then at least one of the attorneys appointed must sign this form for it to take effect as an EPA. An attorney will have the functions of an attorney under this EPA only if that attorney has signed this form.]

1. We understand that we have a duty to apply to the Registrar of the High Court to register this form under the Enduring Powers of Attorney Ordinance (Cap. 501) when the donor is, or is becoming, mentally incapable.
2. We also understand our 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 our duties and liabilities under section 12 of that Ordinance.
3. Signed as a deed—
 - (a) by *[signature and name of attorney]*

 on *[date]*
 in the presence of *[signature and name and address of witness, who must not be the donor or another attorney of the donor]*

and

- (b) by *[signature and name of attorney]*
.....
on *[date]*
in the presence of *[signature and name and
address of witness, who must not be the donor or
another attorney of the donor]*
.....
.....

*[If you appoint more than 2 attorneys, please add additional
subparagraph(s) similar to subparagraphs (a) and (b).]".*

Explanatory Memorandum

The object of this Bill is to implement certain recommendations of the report of the Law Reform Commission of Hong Kong on Enduring Powers of Attorney published in March 2008. The recommendations that the Bill deals with are—

- (a) that the requirement in section 5(2) of the Enduring Powers of Attorney Ordinance (Cap. 501) (“the principal Ordinance”) that an enduring power of attorney must be signed before a registered medical practitioner should be abolished; and
 - (b) that the form set out in the Schedule to the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501 sub. leg. A) (“the Regulation”) should be replaced.
- 2. Clause 3 amends section 5(2) of the principal Ordinance to give effect to the recommendation referred to in paragraph 1(a).
- 3. Clauses 4 to 13 amend the Regulation and section 18(3) of the principal Ordinance to give effect to the recommendations referred to in paragraph 1(a) and (b) and to make consequential and related amendments.