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Panel on Administration of Justice & Legal Services
Legislative Council
8 Jackson Road
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Dear

Consultation Paper on
Enduring Powers of Attorney

The Enduring Powers of Attorney Ordinance (Cap 501) was enacted in 1997 to allow individuals to make advance provision for the management of their property and financial affairs in the event of their subsequent mental incapacity. Section 5(2)(a) 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.

Since the Ordinance came into effect on 1 July 1997, only three enduring powers of attorney have been registered. This contrasts with the position in England, where in 2000 alone, 12,340 applications were made to register enduring powers of attorney. It has been suggested that the low take-up rate in Hong Kong may be caused at least in part by the cumbersome requirement that an enduring power of attorney be executed in the presence of a medical practitioner and a solicitor.

I enclose a short paper prepared by the Legal Policy Division of the Department of Justice which considers the background to this provision, and proposes that that requirement should now be relaxed. The Department would welcome views on this proposal, and I would appreciate any thoughts you might have. I would be grateful if you could let me have any response by 31 January 2004. A similar letter has been sent to the Panel on Health Services and to the Legal Adviser, Legislative Council.

Yours sincerely,

(Michael Scott)
Senior Assistant Solicitor General
(General Legal Policy)

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Consultation Paper on
Enduring Powers of Attorney

Introduction

1. The Enduring Powers of Attorney Ordinance (Cap 501) was enacted in 1997 to allow individuals to make advance provision for the management of their property and financial affairs in the event of their subsequent mental incapacity. Section 5(2)(a) 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.

2. Since the Ordinance came into effect on 1 July 1997, only a handful of enduring powers of attorney have been registered.[1] This contrasts with the position in Ireland over the same period, where 312 enduring powers of attorney had been registered as at 30 April 2003.[2] The contrast with the position in England and Wales is even more stark. In 2000 alone, 12,340 applications were made to register enduring powers of attorney in England, and that figure has risen each year since 1986.[3] It has been suggested that the low take-up rate in Hong Kong may be caused at least in part by the cumbersome requirement that an enduring power of attorney be executed in the presence of a medical practitioner and a solicitor. This paper considers whether that requirement should now be relaxed.

The existing law in Hong Kong

3. 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.[4] The rationale behind this rule is that a person's agent is treated as having capacity only to do

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1 As at September 2003, only thee enduring powers of attorney have been registered since the legislation was enacted in 1997: one in 2001, two in 2002 and none in any other year (source: memo from Registrar, High Court dated 11 September 2003)

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

3 Figures provided by the Master of the Court of Protection in an email dated 4 November 2203.

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

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.

4. 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."*[5] *[emphasis added]*

5. 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.

6. The scope of what is termed an "enduring power of attorney" is restricted to the donor's property and financial affairs.[6] It cannot, for instance, empower the attorney to make decisions relating to the donor's health care.[7] 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."*

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

6 Section 8(1) of Cap 501.

7 The subject of "advance directives" as to health care is currently being considered by a sub-committee of the Law Reform Commission.

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:

> *"(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 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)*".[8]

9. An enduring power of attorney is not revoked by the subsequent mental incapacity of the donor.[9] 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.[10] 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.[11] 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.[12]

10. 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

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8 See section 5(2)(e) of Cap 501.
9 Section 4(1) of Cap 501.
10 Section 4(2) of Cap 501.
11 Section 4(3) of Cap 501.
12 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).

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.[13]

Background to the existing law

11. In December 1993 the then Attorney General's Chambers issued a consultation paper[14] which proposed the creation of a new type of power of attorney, the enduring power of attorney. The scheme suggested 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.

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

- the donor attended before the lawyer;
- the donor appeared competent to grant the enduring power of attorney;
- the lawyer satisfied himself that the donor understood the explanatory notes; and
- the donor signed the enduring power of attorney in the presence of the lawyer and acknowledged he was signing voluntarily.[15]

13. 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.[16] 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*

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13 Section 13 of Cap 501.

14 "*Enduring Powers of Attorney: Consultation Document*", Attorney General's Chambers, December 1993.

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

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

> *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*."[17]

14. Two of the seven respondents to the consultation paper issued by the Attorney General's Chambers picked up this point.[18] 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."*[19]

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."*[20]

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.[21]

15. 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

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

18 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.

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

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

21 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.

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 <u>both</u> a doctor <u>and</u> 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 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."*[22]

The approach in other jurisdictions

16. 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.[23] 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.[24] The sole exception appears to be the Republic of Ireland, which requires the inclusion in the document creating the

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22 "*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

23 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).

24 "*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).

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.[25] 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.

17. The New Zealand Law Commission in their report on *Misuse of Enduring Powers of Attorney* considered whether there should be a requirement of a certificate of capacity by a medical practitioner at the time the power of attorney is created, but rejected this option:

> *"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."*[26]

18. The New Zealand Commission concluded that it was unnecessary "to go further than to stipulate for legal advice."[27] In relation to the determination of the point at which the deterioration in the donor's mental state justified the *application* of the enduring power, however, the Commission proposed that, insofar as enduring powers of attorney in relation to personal care and welfare were concerned, there should be a requirement that a medical practitioner certify in writing that the donor is mentally incapable.[28] 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 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."*

The case for change

19. The existing provisions in the Enduring Powers of Attorney Ordinance (Cap 501) have rarely been used. One factor discouraging use may be the requirement in section 5(2)(a) that the deed creating the enduring power of

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

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

27 Above, at para 25. 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.

28 See above, at para 30.

attorney must be signed by the donor before a solicitor and a registered medical practitioner, who must both be present at the same time.

20. The inclusion of this requirement in Cap 501 is at odds with the approach adopted by the legislation of every other common law jurisdiction (save Ireland) which has been examined. Even in Ireland, the requirement is less onerous than Hong Kong's, and does not require the simultaneous presence of both solicitor and medical practitioner.

21. The requirement of certification by a medical practitioner has been specifically considered and rejected by the Law Commissions of England and New Zealand. There is no equivalent requirement in relation to the making of a will, where the solicitor is considered well able to assess the mental competence of the testator at the time the will is made. Equally, as the law stands, the solicitor is trusted to assess the donor's mental competence alone when determining the point at which the enduring power of attorney should come into operation under Cap 501. There is no reason to suppose that he cannot equally assess the donor's capacity to execute the original deed creating the enduring power of attorney without the additional requirement of certification by a medical practitioner. As the New Zealand Law Commission has pointed out, a solicitor will be financially liable if any negligent breach of their professional obligations results in loss to the donor.

22. It is accordingly proposed that the Enduring Powers of Attorney Ordinance (Cap 501) be amended to remove the requirement that an enduring power of attorney be executed in the presence of a medical practitioner, and that it should be sufficient that the deed is executed in the presence of the donor, the attorney and an independent solicitor. Your views on this proposed amendment are invited.

Legal Policy Division
Department of Justice
November 2003