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By Fax (2180 9928)
14 June 2011

Mr LEE Tin-yan
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Dear Mr LEE,

Enduring Powers of Attorney (Amendment) Bill 2011

I am scrutinizing the legal and drafting aspects of the Bill. I would be grateful if you could clarify the following matters –

Clause 3

- (a) In the proposed section 5(2)(d)(iii), is a donor required to acknowledge that the enduring power of attorney was signed by a person in the presence, and under the direction, of the donor in the scenario where the instrument was signed by the person on the donor's behalf? The Chinese text seems to suggest that such acknowledgement is required, while the English text is unclear about this. It is noted that in the existing section 5(2)(d)(iii) of the Enduring Powers of Attorney Ordinance (Cap. 501), no reference is made to "確認" in the above scenario. It is also noted that there is nothing in the proposed forms in Schedules 1 and 2 to the Bill requiring the donor to make an acknowledgement in the same scenario. Please therefore clarify whether the phrase "the donor acknowledged that" in the proposed section 5(2)(d)(iii) is intended to qualify both the voluntary

signing of the instrument by the donor and the signing of the instrument on the donor's behalf in the presence, and under the direction, of the donor. If so, please consider adding "the donor acknowledged that" before "it was so signed".

- (b) The proposed section 5(2)(d)(iii) provides that where an enduring power of attorney is signed on the donor's behalf, the solicitor must certify that it was so signed in the presence, and under the direction, of the donor. The phrase "it was so signed" in the English text suggests that the instrument was signed on behalf of the donor. However, the meaning of "on behalf of" is not reflected in the Chinese text which simply refers to "在其指示下由他人簽署的". Please make the English and Chinese texts match.
- (c) The proposed section 5(2)(e)(iii), which is drafted in terms similar to the proposed section 5(2)(d)(iii), provides for the certification requirements by a registered medical practitioner. Our comments on the proposed section 5(2)(d)(iii) set out above apply to the proposed section 5(2)(e)(iii) as well.

Clause 9

- (d) Is the proposed section 4(2) of the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501A) intended to provide for the circumstances where an attorney who has signed the instrument can exercise the functions of an attorney under an enduring power of attorney? If so, should "情況" instead of "時" be used in the Chinese text to refer to these circumstances? It is noted that in the existing section 4 of Cap. 501A, "情況" is used as the Chinese text for "in the event of". Is there any reason for not adopting the same Chinese text in the Bill?
- (e) In the proposed section 4(2) of Cap. 501A, the reference to "the donor becoming mentally incapable" seems to point to a process, rather than a specific point of time when the donor becomes mentally incapable. If this is the case, at which point of time is the donor regarded as becoming mentally incapable for the purpose of deciding which event first occurs under the proposed section 4(2)?

Clause 10

- (f) The meaning "同時", which appears in the Chinese text of the proposed section 5(2A) of Cap. 501A, does not appear in the English text. There is also a typographical error in that "事預" should be replaced by "事項".

Clause 11

- (g) In the proposed section 6(3) of Cap. 501A, should "表明意向" be replaced by "表明該意向" to reflect the meaning of "indicate that intention" in the English text?

Clause 12

- (h) The proposed Schedules 1 and 2 to Cap. 501A set out respectively the forms used for appointing one attorney and more than one attorney, as well as important information relating to the forms. Our comments on the proposed paragraphs of Schedule 1 are also applicable to Schedule 2 with suitable modifications.
- (i) Proposed paragraph 6 of Schedule 1 (similar to proposed paragraph 7 of Schedule 2)

The meaning of the phrase "you may include a restriction" after "For example" in the English text is not reflected in the Chinese text. Please consider whether the said phrase is necessary in the English text.

- (ii) Proposed paragraph 10 of Schedule 1 (similar to proposed paragraph 11 of Schedule 2)

While the English text refers to "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.", the corresponding Chinese text is "即使受權人未有通知你或你所提名的人,亦不會令你的持久授權書不獲註冊或變成無效。". The English text, as drafted, does not appear to contain the meaning of "即使" in the Chinese text. Should "如" be used instead?

(iii) Proposed paragraph 12 of Schedule 1 (similar to proposed paragraph 13 of Schedule 2)

The meaning of "before whom the instrument is signed", which is present in the English text, is not reflected in the Chinese text. Please consider revising either the English or Chinese text to make both texts match.

(iv) Proposed paragraph 3, Schedule 2

(A) In the proposed paragraph 3 of Schedule 2, a donor is required to decide whether his attorneys are to act jointly, or jointly and severally. In the English text, if the donor decides that his attorneys are to act jointly, they "must" all act together and "cannot" act separately. Would it be more appropriate to use "must not" instead of "cannot" in the English text, and "不得" instead of "不能" in the Chinese text, to reflect the obligation imposed on the attorneys?

(B) In the proposed paragraph 3(b) of Schedule 2, while the English text provides that the attorneys "can" all act together or separately; in the Chinese text, reference is made to "可"全體一同行事或"可"分開行事. Where the donor has decided that his attorneys are to act jointly and severally, if the intention is to allow the attorneys to decide whether they are to act together or separately, would it be more appropriate to use "may" (instead of "can") in the above context in the English text? This will also achieve consistency with the Chinese text. It is noted that "may" is used in a similar context (your attorneys may act separately) in paragraph 11 under "Information you must read" of Schedule 2.

I would appreciate it if you could let me have the Administration's reply in both languages **by 22 June 2011**.

Yours sincerely,

(Miss Carrie WONG)
Assistant Legal Adviser

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