



ENDURING POWERS OF ATTORNEY (AMENDMENT) BILL 2011

1. The Law Society raised the matter of the extremely low take-up rate of Enduring Powers of Attorney (EPAs) with the Department of Justice (DOJ) as long ago as 2003. This eventually led to the Law Reform Commission reviewing the matter and issuing a Consultation Paper in April 2007. The Law Society was of the view that one of the main reasons for the low take-up rate was the statutory requirement for the statutory form to be signed concurrently in the presence of a medical practitioner and a solicitor.
2. The LRC published its Report on EPAs in March 2008 and the Department of Justice noted the following:
 - “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:*

“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.”(emphasis added).
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.” 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. 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. (emphasis added)*
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).*(emphasis added)

The Law Society fully supported Recommendation 1, namely the abolition of the requirement for a medical witness to sign the EPA as did four other respondents to the DOJ's consultation on the LRC Report. However in DOJ's Brief to the Legislative Council's Panel on Administration of Justice and Legal Services dated December 2010 it noted the following:

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."

"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 EPA is executed.*
3. The Law Society **does not support** the Administration's adoption of Recommendation 2 in the LRC Report and notes:
- (a) **The proposal "to relax the medical certification requirement by allowing the donor and the solicitor to sign an enduring power of attorney within 28 days after it has been signed by a registered medical practitioner" will not encourage more Hong Kong residents to take up EPAs. The procedure remains:**
- **cumbersome**
 - **time consuming**
 - **expensive.**
- (b) **The Law Society queries whether medical general practitioners are familiar with the requirements of the Ordinance or whether they will advise donors to seek the assistance of psychiatrists to sign the statutory form?**
- (c) **Hong Kong citizens will find the proposed amendments to be meaningless as a valid EPA will still require 2 signatures and the change in procedure to enable the donor to have the document witnessed by a solicitor 28 days after witnessing by the medical practitioner *only serves to introduce uncertainty into the procedure.* In reality, there is no real change and no real benefit as solicitors will accompany the donor to the doctor's office in order to ensure the EPA will be a valid document as soon as practicable.**

The Law Society does not support the Administration's decision to adopt Recommendation 2 as we envisage it will create uncertainty and will not achieve the goal of encouraging end-users to adopt EPAs.

The Law Society of Hong Kong
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