

## **LEGISLATIVE COUNCIL BRIEF**

### **ENDURING POWERS OF ATTORNEY (AMENDMENT) BILL 2011**

#### **INTRODUCTION**

**Annex**

At the meeting of the Executive Council on 3 May 2011, the Council ADVISED and the Chief Executive ORDERED that the Enduring Powers of Attorney (Amendment) Bill 2011, at Annex, should be introduced into the Legislative Council to relax the existing execution requirement under section 5(2)(a) of the Enduring Powers of Attorney Ordinance and to adopt new statutory forms and associated explanatory information which are drafted in plain language and in a more user-friendly format.

#### **JUSTIFICATIONS**

2. An enduring power of attorney (“EPA”) is a mechanism by which one person (“the donor”) appoints and empowers another person (“the attorney”) to act on the donor’s behalf and in the donor’s name. An EPA survives the onset of the donor’s mental incapacity if it is in the form, and executed in the manner, prescribed under the Enduring Powers of Attorney Ordinance (Cap. 501) (“the EPA Ordinance”).

3. Section 5(2)(a) of the EPA Ordinance imposes a strict requirement for the execution of an EPA. Unless the donor is physically incapable of signing, the prescribed form must be signed by the donor before a solicitor and a registered medical practitioner who must both be present at the same time. Pursuant to section 5(2)(e) of the EPA Ordinance, the medical practitioner must also certify that the

medical practitioner “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)”.

4. The take-up rate of EPAs in Hong Kong is extremely low. As at the end of 2010, only 40 EPAs have been registered in Hong Kong since the EPA Ordinance was enacted in 1997. In contrast, over 19,000 were registered in England and Wales in 2006 alone. 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 in Hong Kong, a reference was made to the Law Reform Commission (“the LRC”).

5. The LRC published its Report on Enduring Powers of Attorney in March 2008 (“the Report”) and recommended in the Report 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 and that the Law Society should be encouraged to issue practice directions to its members, making clear that where a solicitor has grounds for doubting the mental competence of his client to execute an EPA, the solicitor must obtain an assessment of his client's mental capacity from a medical practitioner before the EPA is executed (“**Recommendation 1**”). The LRC added that if, contrary to the LRC’s preferred approach, it was decided to retain the existing requirement in section 5(2) of the EPA Ordinance, this should be relaxed to allow a donor and a solicitor to sign an EPA within 28 days after it had been signed by a registered medical practitioner (“**Recommendation 2**”). The Report also recommended that the existing EPA form and its explanatory notes should be drafted in plain language and in a more user-friendly format. To that end, the Report recommended that the Schedule to the Enduring Powers of Attorney (Prescribed Form) Regulation (Cap. 501 sub. leg. A) (“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 the reform proposed in Recommendation 1 is adopted or the existing law retained.

6. The purpose of the Bill is to amend the EPA Ordinance to relax

the existing requirement in section 5(2) of the Ordinance to give effect to Recommendation 2 by allowing a donor and a solicitor to sign an EPA within 28 days after the date it has been signed by a registered medical practitioner<sup>1</sup>.

7. The Bill also gives effect to the LRC's recommendation to adopt a new statutory form and associated explanatory information drafted in plain language and in a more user-friendly format.

## **THE BILL**

8. The main provisions of the Bill are set out below.

9. Clause 3 amends section 5(2) of the EPA Ordinance to give effect to Recommendation 2, so that an EPA must be signed by a donor before a solicitor either at the same time when it is signed before a registered medical practitioner or at any time after that signing but before the expiry of a period of 28 days after the day on which it is so signed.

10. Clauses 4 to 13 amend section 18(3) of the EPA Ordinance and the Regulation so as to give effect to the LRC's recommendation to replace the form set out in the Schedule to the Regulation by the new statutory forms and to make consequential and related amendments.

## **LEGISLATIVE TIMETABLE**

11. The legislative timetable will be as follows –

Publication in the Gazette

13 May 2011

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<sup>1</sup> The Bill does not give effect to Recommendation 1 (abolition of the requirement for a medical practitioner to sign an EPA) because it was strenuously opposed by the medical sector and the social welfare sector in their responses to the public consultation conducted by the Department of Justice in June 2010. Reservations to Recommendation 1 were also expressed by the Bar Association before the AJLS Panel when the subject was discussed by the Panel in December 2010.

First Reading and commencement  
of Second Reading debate

25 May 2011

Resumption of Second Reading debate,  
Committee Stage and Third Reading

To be notified

## **IMPLICATIONS OF THE PROPOSAL**

12. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It has no economic, financial, civil service, productivity, environmental or sustainability implications.

13. The Bill will not affect the current binding effect of the EPA Ordinance.

## **PUBLIC CONSULTATION**

14. The LRC issued a public consultation paper on Enduring Powers of Attorney in April 2007 which was discussed at the Legislative Council's Panel on Health Services at its meeting on 11 June 2007. In subsequently recommending in the Report the abolition of the requirement for a medical practitioner's certification in section 5(2) of the EPA Ordinance, the LRC rejected the arguments of those in favour of retention. In doing so, the LRC pointed out in particular that no other common law jurisdiction save Ireland had such a requirement; that no such requirement applied to the making of a will or a conventional power of attorney; and that the removal of a *requirement* for a medical witness in every case did not mean that a prudent solicitor should not *choose* to seek a medical assessment where the solicitor had doubts as to the mental competence of the client.

15. In June 2010, the Department of Justice issued a consultation paper to the Law Society, the Bar Association, the Medical Council of Hong Kong, the Hong Kong Medical Association, the Hong Kong Doctors Union, the Hong Kong Psychogeriatric Association and the Hong Kong Council of Social Service, as well as other interested

parties, to seek their views on whether legislative proposals should be introduced to abolish the existing medical certification requirement in section 5(2) of the EPA Ordinance. The responses to the consultation paper were mixed. On the one hand, five respondents gave their support to Recommendation 1 and pointed out that the requirement of the presence of a medical practitioner discouraged the use of EPAs while not, in practice, offering a real safeguard. On the other hand, ten respondents were against Recommendation 1, pointing out that an EPA was a document of considerable importance and 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 Recommendation 1 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 a donor's mental capacity.

16. In October 2010, the Department of Justice held a meeting with the representatives of the institutions and bodies from the medical and social welfare sectors which were against Recommendation 1<sup>2</sup>. All representatives attending the meeting showed support for Recommendation 2 after discussion.

17. The Legislative Council Panel on Administration of Justice and Legal Services ("the AJLS Panel") was consulted at its meeting on 21 December 2010 on the question of whether Recommendation 1 or 2 should be adopted. While Panel members had indicated different preferences on which recommendation should be adopted, no member had expressed objection in principle to the option of relaxing the existing execution requirement proposed under Recommendation 2.

18. In March 2011, the Law Society, the Bar Association and the representatives of the medical and social welfare sectors were consulted on a draft Bill giving effect to Recommendation 2. Except for the Law Society, all consultees supported the implementation of Recommendation 2 through the Bill.

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<sup>2</sup> The Medical Council of Hong Kong, the Hong Kong Medical Association, the Hong Kong Doctors Union, the Hong Kong Psychogeriatric Association and the Hong Kong Council of Social Service.

19. The Law Society, however, does not support Recommendation 2. In a submission sent to the Department of Justice on 29 March 2011, the Law Society expressed its view that the procedure under Recommendation 2 remains cumbersome, time-consuming and expensive. The Law Society envisaged that the new procedure would create uncertainty and would not encourage end-users to adopt EPAs.

## **PUBLICITY**

20. A press release will be issued on 12 May 2011. A spokesperson will be available to answer enquiries.

## **ENQUIRY**

21. Any enquiry on this brief can be addressed to Mr Lee Tin Yan, Senior Government Counsel, Legal Policy Division, Department of Justice, at Tel. No. 2867 4226.

Department of Justice  
11 May 2011

#362982-v4

# 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

##### 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.

### Part 2

#### Amendments to Enduring Powers of Attorney Ordinance

##### 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)—

###### Repeal paragraph (a)

###### Substitute

“(a) subject to paragraph (b)—

- (i) the donor must sign the instrument creating the enduring power before a registered medical practitioner and a solicitor; and
- (ii) the instrument must be signed by the donor before the solicitor either at the same time when it is signed before the registered medical practitioner or at any time after that signing but before the expiry of the period of 28 days after the day on which it is so signed;
- (aa) the registered medical practitioner and the solicitor before whom the instrument is signed must each 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;”.

(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, the registered medical practitioner or the solicitor before whom the instrument is signed or the spouse of the registered medical practitioner or the solicitor, may sign the instrument on behalf of the donor in the presence, and under the direction, of the donor.”.

(3) Section 5(2), English text—

**Repeal paragraph (c)****Substitute**

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

(4) Section 5(2)(d)—

**Repeal subparagraph (i).**

(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 in the presence, and under the direction, of the donor; and”.

(6) Section 5(2)(e)—

**Repeal subparagraph (i).**

(7) Section 5(2)(e)—

**Repeal subparagraphs (ii) and (iii)****Substitute**

“(ii) that the registered medical practitioner was satisfied that the donor was mentally capable (specifying in the certification that the registered medical practitioner was

satisfied that the donor was mentally capable in terms of section 2); and

(iii) that the instrument was signed in the presence of the registered medical practitioner 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 in the presence, and under the direction, of the donor.”.

**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 3

#### 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* (表格 1) means the form set out in Schedule 1;

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

##### 7. Section 2 substituted

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

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 and the registered medical practitioner who certify as to the matters specified in sections 5(2)(d) and 5(2)(e) of the Ordinance respectively must provide their full names and addresses in the instrument.

- (6) If, under section 5(2)(b) of the Ordinance, the instrument is signed in the presence, and under the direction, of the donor, paragraph 7 of Part A of Form 1 or paragraph 8 of Part A of Form 2 (as the case requires) must be completed.”.

**9. Section 4 substituted**

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)**

- (1) After section 5(2)—

**Add**

“(2A) To avoid doubt, subsection (2) is not to be construed as preventing the donor from specifying under both paragraphs of that subsection.”.

- (2) Section 5(3)(d)—

**Repeal**

“his”

**Substitute**

“the donor’s”.

**11. Section 6 substituted**

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.
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, 8 and 9 of Part A:** You must sign this form at paragraph 6 of Part A and fill in the names and addresses of the registered medical practitioner and the solicitor who are present when you sign. If you do not sign in the presence of both the registered medical practitioner and the solicitor at the same time, you must sign the form in the presence of the solicitor no later than 28 days after the date on which you sign in the presence of the registered medical practitioner. The registered medical practitioner and the solicitor will need to complete the certificates at paragraphs 8 and 9 of Part A respectively to certify that you are mentally capable when you sign this form.

**12. Paragraph 7 of Part A:** If you are physically incapable of signing 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 registered medical practitioner and the solicitor. The person signing on your behalf must not be your attorney, the spouse of your attorney, the registered medical practitioner or the solicitor before whom the instrument is signed or the spouse of the registered medical practitioner or 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 paragraphs 8 and 9, which must be completed by a registered medical practitioner and a solicitor respectively. 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]* .....,  
holder of *[your identification document here]* .....,  
of *[your address here]* .....  
.....  
appoint *[your attorney's name here]* .....  
holder of *[identification document 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 by ticking any or all of the appropriate boxes, or tick no box, in which case you must list at subparagraph (2) the particular property or financial affairs for which you have given your attorney authority to act. If you have ticked any or all the boxes at subparagraph (1), you may still list at subparagraph (2) any particular property or financial affairs in relation to which you have given your attorney authority to act. You must not make no ticks at*

*subparagraph (1) and list no property at subparagraph (2).]*

(1) My attorney has authority to act on my behalf:

- ☐ (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 registered medical practitioner]* .....  
 .....

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]* .....  
 holder of *[identification document]* .....,  
 of *[address of person signing on your behalf]* .....  
 .....  
 under the direction and in the presence of the donor.

Signed as a deed *[signature of person signing on your behalf]* .....  
 on *[date]* .....

in the presence of the donor and *[name and address of registered medical practitioner]* .....  
 .....  
 .....

Signed as a deed *[signature of person signing on your behalf]* .....

on *[date]* .....  
 in the presence of the donor and *[name and address of solicitor]* .....  
 .....  
 .....

**8. Certificate by registered medical practitioner**

I certify that:

- (a) I am satisfied that the donor is mentally capable in terms of section 2 of the Enduring Powers of Attorney Ordinance (Cap. 501); and
- (b) 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.]*
- (c) this form was signed, in the presence of the donor and me, by *[name of person signing on donor's behalf]* .....

.....  
 on behalf and under the direction of the donor. *[If the donor signs this form, this statement must be deleted.]*

Signed by registered medical practitioner .....  
on [date].....

**9. Certificate by solicitor**

I certify that:

- (a) the donor appears to be mentally capable in terms of section 2 of the Enduring Powers of Attorney Ordinance (Cap. 501); and
- (b) 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.]*
- (c) this form was signed, in the presence of the donor and me, by [name of person signing on donor's behalf] .....

.....  
on behalf and under the direction of the donor. *[If the donor signs this form, this statement must be deleted.]*

Signed by solicitor .....  
on [date].....

**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. You should note that if your attorneys are to act jointly, on the bankruptcy or death of any one of them this power of attorney becomes revoked under law.

4. You must complete Part A.

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, 9 and 10 of Part A:** You must sign this form at paragraph 7 of Part A and fill in the names and addresses of the registered medical practitioner and the solicitor who are present when you sign. If you do not sign in the presence of both the registered medical practitioner and the solicitor at the same time, you must sign the form in the presence of the solicitor no later than 28 days after the date on which you sign in the presence of the registered medical practitioner. The registered medical practitioner and the solicitor will need to complete the certificates at paragraphs 9 and 10 of Part A respectively to certify that you are mentally capable when you sign this form.

**13. Paragraph 8 of Part A:** If you are physically incapable of signing 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 registered medical practitioner and the solicitor. The person signing on your behalf must not be one of your attorneys, the spouse of any one of your attorneys, the registered medical practitioner or the solicitor before whom the instrument is signed or the spouse of the registered medical practitioner or 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 paragraphs 9 and 10, which must be completed by a registered medical practitioner and a solicitor respectively. 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]* .....,  
holder of *[your identification document here]* .....,  
of *[your address here]*.....  
.....  
appoint

(a) *[your attorney's name here]* .....  
holder of *[identification document here]* .....,  
of *[your attorney's address here]* .....  
.....;

and

(b) *[your attorney's name here]* .....  
holder of *[identification document 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 by ticking any or all of the appropriate boxes, **or** tick no box, in which case you must list at subparagraph (2) the particular property or financial affairs for which you have given your attorneys authority to act. If you have ticked any or all the boxes at subparagraph (1), you may still list at subparagraph (2) any particular property or financial affairs in relation to which you have given your attorneys authority to act. You must not make no ticks at subparagraph (1) **and** list no property at subparagraph (2).]*

**(1) My attorneys have authority to act on my behalf:**

- ☐ (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 registered medical practitioner]* .....

.....

.....

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]* .....

holder of *[identification document here]* .....

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

.....  
under the direction and in the presence of the donor.

Signed as a deed *[signature of person signing on your behalf]*  
.....

on *[date]* .....  
in the presence of the donor and *[name and address of  
registered medical practitioner]*.....  
.....  
.....

Signed as a deed *[signature of person signing on your  
behalf]* .....

on *[date]*.....  
in the presence of the donor and *[name and address of  
solicitor]* .....  
.....  
.....

#### 9. Certificate by registered medical practitioner

I certify that:

- (a) I am satisfied that the donor is mentally capable in terms of section 2 of the Enduring Powers of Attorney Ordinance (Cap. 501); and
- (b) 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.]*
- (c) this form was signed, in the presence of the donor and me, by *[name of person signing on donor's*

*behalf]* .....

.....  
on behalf and under the direction of the donor. *[If the donor signs this form, this statement must be deleted.]*

Signed by registered medical practitioner .....  
on *[date]*.....

#### 10. Certificate by solicitor

I certify that:

- (a) the donor appears to be mentally capable in terms of section 2 of the Enduring Powers of Attorney Ordinance (Cap. 501); and
- (b) 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.]*
- (c) this form was signed, in the presence of the donor and me, by *[name of person signing on donor's  
behalf]* .....

.....  
on behalf and under the direction of the donor. *[If the donor signs this form, this statement must be deleted.]*

Signed by solicitor .....  
on *[date]*.....

**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 at the same time before a registered medical practitioner and a solicitor should be relaxed, so that an enduring power of attorney may be signed before a solicitor any time after it has been signed before a registered medical practitioner so long as this is done before the expiry of the period of 28 days after the day on which the instrument is signed before the registered medical practitioner; 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.