

立法會
Legislative Council

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**Paper for the House Committee Meeting
on 27 May 2011**

**Legal Service Division Report on
Enduring Powers of Attorney (Amendment) Bill 2011**

I. SUMMARY

- 1. Objects of the Bill** To amend the Enduring Powers of Attorney Ordinance (Cap. 501) to implement certain recommendations contained in the report of the Law Reform Commission (LRC) on Enduring Powers of Attorney published in March 2008.
- 2. Comments** The Bill proposes to relax the existing requirements for the execution of an enduring power of attorney (EPA) under section 5(2) of Cap. 501 by allowing a donor and a solicitor to sign an EPA within 28 days after the EPA has been signed by a registered medical practitioner, and to replace the statutory form for EPAs and its explanatory notes with new statutory forms and explanatory information drafted in plain language and in a more user-friendly format.
- 3. Public Consultation** According to the Administration, the legal, medical and social service sectors and other interested parties were consulted from June 2010 to March 2011. All consultees, except the Law Society of Hong Kong, supported LRC's recommendation on relaxation of the execution requirements for EPAs.
- 4. Consultation with LegCo Panel** The Panel on Health Services (HS Panel) and the Panel on Administration of Justice and Legal Services (AJLS Panel) were consulted on 11 June 2007 and 21 December 2010 respectively. Members of the HS Panel supported the abolition of the medical certification requirement for EPAs. Members of the AJLS Panel generally did not object to the policy intent of relaxing the execution requirements.
- 5. Conclusion** In light of the different views raised by members of HS Panel and AJLS Panel and the Law Society's view on the proposals, Members may wish to examine the policy aspects of the Bill in detail.

II. REPORT

Objects of the Bill

To implement certain recommendations contained in the report of the Law Reform Commission (LRC) on Enduring Powers of Attorney published in March 2008 by –

- (a) relaxing the existing requirements for the execution of an enduring power of attorney (EPA) under the Enduring Powers of Attorney Ordinance (Cap. 501); and
- (b) replacing the existing statutory form for EPAs with new statutory forms.

LegCo Brief Reference

- 2. LP 699/00C XIII issued by the Department of Justice (DOJ) dated 11 May 2011.

Date of First Reading

- 3. 25 May 2011.

Background

4. A power of attorney is a legal instrument that is used to delegate legal authority to another person. By executing a power of attorney, the donor of the power gives legal authority to another person (the attorney) to make property, financial and other legal decisions on the donor's behalf. A power of attorney can only be made by a mentally capable person. If the donor subsequently becomes mentally incapable, 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.

5. The Enduring Powers of Attorney Ordinance (Cap. 501) (the Ordinance) was enacted in 1997 to create a special type of power of attorney, namely, an enduring power of attorney, which survives the onset of the donor's mental incapacity provided that it is in the prescribed form, executed in the

prescribed manner and contains the prescribed explanatory information at the time of execution. Under the Ordinance, the scope of an EPA is restricted to the donor's property and financial affairs.

6. Under section 5(2) of the Ordinance, in executing an EPA, a donor is required to sign the prescribed EPA form before a solicitor and a registered medical practitioner (RMP) who must both be present at the same time. Section 5(2)(d) requires the solicitor concerned to certify that (i) the donor attended before him at the time of the execution of the EPA; (ii) the donor appeared to be mentally capable; and (iii) the EPA was signed in his presence. In the case of the RMP, apart from certifying the donor's attendance and signature before him, the RMP is required to certify that he satisfied himself that the donor was mentally capable.

7. According to paragraph 4 of the LegCo Brief, the take-up rate of EPAs in Hong Kong is extremely low. In response to the views given by, among others, the Law Society of Hong Kong (the Law Society) that the existing execution requirements were unduly onerous, a reference was made by the Administration to LRC to study the subject.

8. On being commissioned, LRC studied the laws in relation to EPAs in Australia, Canada, England and Wales, Ireland, New Zealand and Scotland. After considering the relevant experience of the overseas jurisdictions¹, LRC made two alternative recommendations in relation to the execution of EPAs in its March 2008 report (the Report) –

- (a) The requirement under section 5(2) of the Ordinance that an EPA be signed before a RMP should be abolished, and 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 RMP before the EPA is executed (Recommendation 1). This recommendation was favoured by LRC.²
- (b) Alternatively, the existing requirements under section 5(2) of the Ordinance should be relaxed to allow a donor and the solicitor to sign an EPA within 28 days after it has been signed by the RMP

¹ According to the LRC report, only Ireland requires a medical witness and even in Ireland the medical witness does not have to sign at the same time as the solicitor. Also, the requirement for medical certification has been specifically considered and rejected by the Law Commissions of England and New Zealand.

² The reasons given by LRC in support of Recommendation 1 are (i) no other common law jurisdiction except Ireland has such a requirement; (ii) the abolition of the requirement does not mean a prudent solicitor should not choose to obtain a medical assessment on the donor's mental competence where he has doubt as to his client's medical competence; (iii) no such requirement applies to the making of a will or a power of attorney; and (iv) the requirement adds financial and emotional costs on the donor (pages 30 and 31 of the Report).

(Recommendation 2). LRC considered that the 28-day period would provide a reasonable flexibility while not being so long as to render the medical assessment no longer current.

9. According to the LegCo Brief, the Department of Justice (DOJ) consulted various interested bodies including the legal profession, and representatives of the medical and social welfare sectors from June 2010 to March 2011 after the publication of the Report. Following the consultation, DOJ prepared an amendment bill (the Bill) to give effect to certain recommendations of the Report.

Comments

10. This Bill seeks to amend the Ordinance to give effect to Recommendation 2.

11. The Bill proposes to relax the existing requirements for the execution of an EPA under section 5(2) of the Ordinance by allowing a donor and a solicitor to sign an EPA within 28 days after the EPA has been signed by a RMP.

12. The Bill also proposes to give effect to LRC's recommendations relating to the existing statutory form for EPAs specified in the Schedule to the Enduring Powers of Attorney (Prescribed Form) Regulation by replacing it with new forms and associated explanatory information drafted in plain language and in a more user-friendly format. The key changes are summarized as follows –

- (a) splitting one EPA form into two forms to be used for appointing one attorney and more than one attorney respectively;
- (b) examples will be introduced in the new EPA forms and its explanatory information for illustration purposes and to show the effect of the provisions; and
- (c) setting out important information such as the legal effect of the EPA form and the powers and authority of the appointed attorney in the new forms.

13. If enacted, the Bill will come into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

Public Consultation

14. According to paragraphs 14 to 19 of the LegCo Brief, DOJ conducted various consultation exercises from June 2010 to March 2011 on LRC's recommendations in the Report. Various interested parties including the Law Society, the Hong Kong Bar Association, the Medical Council of Hong Kong, the Hong Kong Medical Association and the Hong Kong Council of Social Service have been consulted. According to the Administration, except for the Law Society which considered that the new procedure would create uncertainty and would not encourage end-users to adopt EPAs, all consultees supported the implementation of Recommendation 2 through the Bill.

Consultation with LegCo Panel

15. The Administration briefed the Panel on Health Services (HS Panel) on 11 June 2007. Members of the HS Panel expressed concerns about the costs and logistical problems in arranging execution of EPAs and in general supported Recommendation 1.

16. On 21 December 2010, the Administration briefed the Panel on Administration of Justice and Legal Services (AJLS Panel) on the Bill. While members of the AJLS Panel indicated different preferences on whether Recommendation 1 or Recommendation 2 should be adopted, no member had expressed objection in principle to the policy intent of relaxing the existing execution requirements proposed under Recommendation 2.

Conclusion

17. The Legal Service Division is scrutinizing the Bill and will make a further report, if necessary. In light of the different views raised by members of HS Panel and AJLS Panel and the Law Society's view on the proposals, Members may consider whether it is necessary to examine the policy aspects of the Bill in detail.

Prepared by
Carrie WONG
Assistant Legal Adviser
Legislative Council Secretariat
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