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Paper for the House Committee meeting on 9 December 2011

**Report of the Bills Committee on Enduring Powers of Attorney
(Amendment) Bill 2011**

Purpose

This paper reports on the deliberations of the Bills Committee on Enduring Powers of Attorney (Amendment) Bill 2011.

Background

Existing execution requirements for an enduring power of attorney

2. A power of attorney is a legal instrument 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. 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. An enduring power of attorney ("EPA") is a special type of power of attorney which survives beyond 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 registered medical practitioner must, among other things, certify that the registered medical practitioner "satisfied himself that the donor was mentally capable".

4. According to the Administration, 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 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 ("LRC") to study the subject matter.

Recommendations of LRC

5. LRC published its Report on Enduring Powers of Attorney in March 2008 ("the LRC Report"), recommending 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 it clear that if a solicitor has grounds for doubting the mental competence of the client to execute an EPA, the solicitor must obtain an assessment of the client's mental capacity from a registered medical practitioner before the EPA is executed ("Recommendation 1"). LRC added that if it is decided that the existing requirement in section 5(2) of the EPA Ordinance should be retained, it should be relaxed to allow a donor and a solicitor to sign an EPA within 28 days after it has been signed before a registered medical practitioner ("Recommendation 2"). The LRC Report has also recommended that the existing EPA form and its explanatory notes should be drafted in plainer language and in a more user-friendly format.

The Bill

6. The object of the Bill is to amend the EPA Ordinance to relax the existing requirement in section 5(2) of the Ordinance for the execution of an EPA so as to give effect to Recommendation 2 in the LRC Report by allowing a donor and a solicitor to sign an EPA within 28 days after the EPA has been signed before a registered medical practitioner. The Bill also amends the Enduring Powers of Attorney (Prescribed Form)

Regulation (Cap. 501A) ("the Regulation") to give effect to LRC's recommendation to replace the form set out in the Schedule to the Regulation by new statutory forms and makes consequential and related amendments.

The Bills Committee

7. At the House Committee meeting on 27 May 2011, Members agreed to form a Bills Committee to study the Bill. The membership list of the Bills Committee is in **Appendix I**. Under the chairmanship of Dr Hon Margaret NG, the Bills Committee has held four meetings with the Administration.

Deliberations of the Bills Committee

The medical certification requirement

8. Members have enquired about the rationale for the requirement of certification by a registered medical practitioner for the execution of an EPA under the existing law, noting that no such requirement applies to the execution of a will.

9. The Administration has explained that certification of the donor's mental capacity by a registered medical practitioner is required for the execution of an EPA as it is expected that the common users of EPAs are persons whose mental state will likely deteriorate in the future and a registered medical practitioner will be in the best position to assess a donor's mental capacity.

10. Members note the differences in views on the need to retain the medical certification requirement in the execution of an EPA between the Law Society on the one hand and the medical sector, the social welfare sector and the Hong Kong Bar Association on the other. The Law Society is of the view that the procedure proposed in the Bill remains cumbersome and expensive and will not encourage the use of EPAs. The Law Society considers that the existing medical certification requirement in section 5(2) of the EPA Ordinance should be abolished

altogether. On the other hand, the medical sector, the social welfare sector and the Hong Kong Bar Association have objected to the abolition of the medical certification requirement, on the ground that as an EPA is 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, it is good practice to have a registered medical practitioner certifying the mental state of the donor before execution of the EPA because a registered medical practitioner would be in the best position to assess the donor's mental capacity. Members generally agree on the need to retain the medical certification requirement for the execution of EPAs.

Proposed time limit between medical certification by a registered medical practitioner and the signing of an EPA by the solicitor and the donor

11. Members have enquired about the rationale for setting the time limit between medical certification by a registered medical practitioner and the signing of an EPA by the solicitor and the donor at 28 days in the proposed section 5(2)(a)(ii) of the EPA Ordinance. Dr Hon LEUNG Ka-lau and Hon Audrey EU have expressed concern that the mental state of a donor may deteriorate within the 28-day period and suggested that consideration be given to shortening the proposed time limit.

12. The Administration has advised members that the proposed time limit of 28 days is based on the recommendation in the LRC Report and the views of the consultees has been taken into account. Representatives of the social welfare sector consider that 28 days would allow reasonable time for making the logistical arrangements for the signing of an EPA before a registered medical practitioner and a solicitor. Representatives from the medical sector find the proposed time frame acceptable, with the Hong Kong Geriatrics Society indicating particular support for the proposal. In the view of the Administration, the proposed 28-day period provides a reasonable level of flexibility while not being so long as to render the medical assessment no longer current.

13. Dr Hon LEUNG Ka-lau has also suggested that flexibility be allowed for medical certification by a registered medical practitioner to take place after the signing of the EPA by a solicitor. Some members,

including Hon Miriam LAU and Hon LAU Kong-wah, have expressed disagreement with the proposal. They are of the view that medical certification by a registered medical practitioner should be made before the signature of the EPA by a solicitor, as the solicitor has the responsibility to ensure that the donor has the mental capacity to sign the EPA.

14. According to the Administration, the proposed sequence of signature by the registered medical practitioner before the solicitor is based on the recommendation in the LRC Report. Under the proposal, the solicitor has to complete the certificate by solicitor under paragraph 9 of Part A to certify that the donor is mentally capable when the solicitor signs the EPA, so that the solicitor can act as the final gatekeeper to ensure compliance with the legal requirements for the execution of the EPA. If the solicitor has any ground for doubting the mental capacity of the donor at the time of signing the EPA, medical opinion should be sought before the EPA is completed.

Revocation of an EPA

15. Members have sought clarification on the legal test for the revocation of an EPA and in particular, whether a later EPA would necessarily revoke an earlier one.

16. The Administration has explained that at common law, a power of attorney may be revoked by the donor in any circumstances and without obtaining any consent. Revocation may be express (in which case it will usually be by deed) or implied by the doing of an act which is incompatible with the continued operation of the power of attorney. In *Re E (a donor)*¹, the English court held that the execution of a later EPA did not automatically revoke an earlier EPA. In the absence of any contemporaneous or later evidence as to the donor's intention, the court concluded that to have several simultaneous powers of attorney would be a legitimate and understandable wish, not an irrational one. In Hong Kong, the EPA Ordinance does not contain any provision which prohibits the execution of simultaneous or successive EPAs. Whether the earlier EPA will be revoked in such circumstances is a question of fact to be

¹ [2000] 3 WLR 1974

considered in the light of the legal principles enunciated in *Re E (a donor)*.

17. Members have noted that under section 13(1)(g) of the EPA Ordinance, an EPA is revoked "subject to this Ordinance, on any ground on which a power of attorney is revoked at common law". In response to members' enquiry, the Administration has explained the circumstances under which a power of attorney is revoked at common law. In *Cali Enterprises Ltd v. Chongmark Ltd*², the court held that prior to the coming into operation of section 5 of the Powers of Attorney Ordinance (Cap. 31) on 1st October 1972, the question of whether a power of attorney had been revoked was a question of fact. Three possible ways had been suggested in the context of the case in which the power of attorney might have been revoked. They were death, lunacy and bankruptcy. According to the Administration, these possible ways of revocation of a power of attorney at common law have to some extent been reflected in section 13(1)(b) (bankruptcy of the attorney), section 13(1)(e) (revocation by direction of the court on the appointment of a committee pursuant to Part II of the Mental Health Ordinance (Cap 136)), and section 13(1)(f) (death of the donor or the attorney) of the EPA Ordinance.

Unintended ordinary power of attorney and commencement of EPAs

18. Given the proposed 28-day period allowed between medical certification by a registered medical practitioner and the solicitor's witnessing, members have sought clarification on the commencement of an EPA. They have queried whether the document which is intended to take effect as an EPA will operate as an ordinary power of attorney after medical certification by a registered medical practitioner but before it is signed by a solicitor as required in the proposed section 5(2) of the EPA Ordinance. Members have also expressed concern about possible abuse that may arise from an unintended ordinary power of attorney. For instance, the attorney may dispose of the donor's properties under the authority given by the donor under an unintended ordinary power of attorney.

² [1986] HKLR 816

19. The Administration has advised members that under section 10 of the EPA Ordinance, an EPA commences upon its execution unless a date or an event is specified in the instrument creating it for its commencement. In view of members' concern about the need to protect the donor's interests against possible abuse that may arise from the legislative proposal in the Bill and in order to rule out any question of an uncompleted EPA operating as an ordinary power of attorney as stated in the preceding paragraph, the Administration has agreed to move Committee Stage amendments ("CSAs") to add provisions to section 10 of the EPA Ordinance to expressly provide that an EPA does not take effect as an ordinary power of attorney before it is executed and that an EPA is executed when it is duly signed before the solicitor under the proposed section 5(2)(a)(ii).

20. Noting that an EPA will take effect immediately upon execution unless otherwise stated in the EPA, members have suggested that in order to protect the interests of the donor, a reminder should be added to the EPA forms to alert the donor of the legal effect of the document once he or she executes it. Having considered members' views, the Administration has agreed to move CSAs to the EPA forms in the proposed Schedules 1 and 2 to the EPA Ordinance to remind the donor that the EPA will take effect upon execution unless he or she has specified in the EPA form a later date or later event for the EPA to take effect.

Appointment of joint and several attorneys

21. Members have sought information on the underlying policy reason for the existing section 15(1) of the EPA Ordinance which provides for the mandatory requirement for appointing attorneys to act jointly or to act jointly and severally and whether the Administration would review and amend this mandatory requirement, non-compliance of which may render an EPA invalid. Members have expressed concern that by the time the donor has become mentally incapacitated and it is then found out that the EPA is invalid by virtue of section 15(1), nothing can be done to remedy the situation. Some members have suggested amending section 15(1) to provide that if the donor fails to specify in the instrument whether joint attorneys or joint and several attorneys are appointed, the attorneys should be joint attorneys by operation of the law.

22. The Administration has advised members that pursuant to section 15(1) of the EPA Ordinance which stipulates that "[a]n instrument which appoints more than one attorney cannot create an enduring power unless the attorneys are appointed to act jointly or jointly and severally", failure on the part of the donor to specify the appointment of more than one attorney to act jointly or to act jointly and severally would render the EPA invalid. In the United Kingdom ("UK"), section 11(1) of the Enduring Powers of Attorney Act 1985 ("the 1985 UK Act") contains a similar provision.

23. The Administration has pointed out that there is an essential difference between acting as joint attorneys and acting as joint and several attorneys. In the case of the former, all attorneys must together join in a transaction; while in the latter case, each attorney may act by himself or herself, with the same effect as if all the attorneys have joined in the transaction. Given the crucial difference between these two types of appointment, the EPA Ordinance contains a number of special provisions dealing with these appointments, such as section 15(2) and (3). The EPA Ordinance underscores the importance for the donor to indicate his or her wish to appoint joint attorneys, or whether the donor prefers that they should be able to act severally as well. Nevertheless, the Administration acknowledges the concern raised by members over the consequences which may arise as a result of the rigid mandatory requirement provided in section 15(1) of the EPA Ordinance. In response to the suggestions of members and the legal adviser to the Bills Committee, the Administration has agreed to move amendments to the wording and presentation of paragraph 2 of Part A of Form 2 in the proposed Schedule 2 to the Bill to make it clear to the donor that he or she is required to make a choice expressly between the attorneys acting jointly and acting jointly and severally, and to draw the donor's attention to the serious legal consequence of failing to do so. The Administration has also undertaken to keep track of the developments after the coming into force of the Bill, if enacted, and review in future whether there is a need to amend section 15(1) of the EPA Ordinance. The Bills Committee has agreed to refer the issue to the Panel on Administration of Justice and Legal Services ("AJLS Panel") for follow-up as appropriate.

Defective EPA taking effect as an ordinary power of attorney

24. Noting that an instrument which intends to appoint more than one attorney but fails to specify whether the attorneys are appointed to act jointly or to act jointly and severally cannot create an EPA because of section 15(1) of the EPA Ordinance, members have queried whether such an instrument can nonetheless take effect as an ordinary power of attorney.

25. According to the Administration, the legal position in UK is that an instrument which does not satisfy the requirement of an EPA may nevertheless take effect as an ordinary power of attorney, by virtue of section 11(4) of the 1985 UK Act³. This question was further considered by the UK court in *Re E (a donor)*. In that case, an EPA was found to be technically invalid because of an inconsistency in the appointment of joint attorneys contrary to section 11(1) of the 1985 UK Act. It was held that the instrument took effect as an ordinary power of attorney although it could not take effect as an EPA. It is the Administration's view that the same principle is likely to apply in Hong Kong as section 15(3)(a) of the EPA Ordinance contains a provision very similar to section 11(4) of the 1985 UK Act. In the Administration's view, the failure of an instrument to comply with the requirements for the creation of an EPA operates to prevent the instrument from creating such a power but the instrument may still take effect as an ordinary power of attorney. If the instrument does not create a valid EPA and the ordinary power of attorney has been revoked by virtue of the donor's mental incapacity, section 14 of the EPA Ordinance provides legal protection for the interests of eligible third parties.

The use of modal verbs in the prescribed forms

26. Members have pointed out that although the modal verb "must" is used in various places of the proposed new EPA forms, it is not clear whether a failure on the part of the donor to comply with the specified

³ Section 11(4) of the Enduring Powers of Attorney Act 1985 provides that "A failure, as respects any one attorney, to comply with the requirements for the creation of enduring powers, shall prevent the instrument from creating such a power in his case without however affecting its efficacy for that purpose as respects the other or others or its efficacy in his case for the purpose of creating a power of attorney which is not an enduring power."

requirements would render the EPA invalid. Members have requested the Administration to conduct an overall review of the use of modal verbs (e.g. "must" and "should") in the proposed new EPA forms with a view to clarifying the legal consequences of the failure on the part of the donor to comply with the requirements specified in the forms.

27. The Administration has drawn members attention to section 3(2)(b) of the EPA Ordinance, which provides that "where the instrument differs in any respect which is not material in form or mode of expression from that prescribed, it shall be treated as being in the prescribed form". A similar provision is also found in section 2(6) of the 1985 UK Act. It is suggested by the Administration that whether deviations from the prescribed EPA forms will invalidate the EPA and whether any other legal consequences will arise should be assessed in each particular case as a matter of fact and degree in its proper legal context. A hard and fast rule of employing a standard form of modal verbs in the prescribed EPA forms may not be advisable. The court will construe the wording in a particular form against the factual matrix and provisions of the EPA Ordinance that are applicable to the case before it and determine the legal effect of an action or default as appropriate in the particular case.

28. Having conducted a review on the use of modal verbs in the proposed new EPA forms in the light of the considerations set out in the preceding paragraph, the Administration has agreed to propose amendments to the EPA forms to spell out clearly the legal consequences for failing to comply with certain requirements specified in the forms. Apart from the proposed amendments to paragraph 2 of Part A of Form 2 in the proposed Schedule 2 to the Bill mentioned in paragraph 23, the Administration will also move CSAs to paragraph 2 of Part A of Form 1 in the proposed Schedule 1 and paragraph 3 of Part A of Form 2 in the proposed Schedule 2 to highlight the legal consequences of a failure on the part of the donor to specify the authority of the attorney(s).

Registration of EPAs

29. Members have enquired whether the attorney can apply for registration of an EPA before the onset of the donor's mental incapacity. Some members including Hon Miriam LAU are of the view that it will be

in the interest of donors, in particular the elderly, to do so as it will be difficult to know when they will become mentally incapable.

30. According to the Administration, while section 4(2) of the EPA Ordinance provides that an attorney must apply for registration as soon as practicable if the attorney has reason to believe that the donor is or is becoming mentally incapable, the EPA Ordinance does not contain any provision which prohibits the registration of an EPA before the onset of the donor's mental incapacity. Under section 9(5) of the EPA Ordinance, a register of EPAs registered under the Ordinance is kept by the Registrar and the register as well as the EPAs are open to public inspection. Section 13(2) of the EPA Ordinance provides that where an EPA is registered, its revocation would require confirmation of the court on application made by or on behalf of the donor. In deciding the timing of registration of the EPA, the donor should take into account his or her own circumstances and the effects of registration under sections 9(5) and 13(2) of the EPA Ordinance. The Administration recognizes the importance of enhancing public awareness and understanding of the EPA concept and promotional pamphlets will be prepared for distribution by professional bodies and non-governmental organizations in the medical, legal and social welfare sectors. The Administration has agreed to consider members' suggestion of including information on the timing and effect of registration of EPAs in the promotional pamphlets.

Committee Stage amendments

31. Apart from the CSAs discussed in paragraphs 19, 20, 23 and 28, in response to the views expressed by the legal adviser to the Bills Committee, the Administration will also propose CSAs in respect of the drafting of the proposed section 4(2) and the Chinese text of the proposed section 5(2)(d)(iii), 5(2)(e)(iii) and 5(2A). A full set of the CSAs to be moved by the Administration and agreed by the Bills Committee is in **Appendix II**.

32. The Bills Committee has not proposed any amendment.

Resumption of Second Reading debate

33. Subject to the moving of the proposed CSAs by the Administration, the Bills Committee supports the resumption of the Second Reading debate on the Bill at the Council meeting of 21 December 2011.

Follow-up action required

34. As discussed in paragraph 23, the Administration has agreed to review in future the need to amend section 15(1) of the EPA Ordinance in respect of the mandatory requirement for appointing attorneys to act jointly or to act jointly and severally. The issue will be referred to the AJLS Panel for follow-up as appropriate.

Advice sought

35. Members are invited to note the deliberations of the Bills Committee and the date for resumption of the Second Reading debate on the Bill.

Council Business Division 2
Legislative Council Secretariat
8 December 2011

Bills Committee on Enduring Powers of Attorney (Amendment) Bill 2011

Membership list

Chairman Dr Hon Margaret NG

Members Hon LAU Kong-wah, JP
Hon Miriam LAU Kin-ye, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Cyd HO Sau-lan
Dr Hon LEUNG Ka-lau
Hon CHEUNG Kwok-che
Dr Hon PAN Pey-chyou

(Total : 8 Members)

Clerk Ms Amy YU

Legal Adviser Miss Carrie WONG

Enduring Powers of Attorney (Amendment) Bill 2011

COMMITTEE STAGE

Amendments to be moved by the Secretary for Justice

<u>Clause</u>	<u>Amendment Proposed</u>
2	By deleting “3” and substituting “3, 3A”.
3(5)	In the proposed section 5(2)(d)(iii), in the Chinese text, by deleting “確認該文書是在授權人在場並在其指示下由他人” and substituting “該文書是在授權人在場並在其指示下由他人代其”.
3(7)	In the proposed section 5(2)(e)(iii), in the Chinese text, by deleting “確認該文書是在授權人在場並在其指示下由他人” and substituting “該文書是在授權人在場並在其指示下由他人代其”.
New	<p>By adding—</p> <p style="padding-left: 40px;">“3A. Section 10 amended (Commencement)</p> <p style="padding-left: 80px;">(1) Section 10—</p> <p style="padding-left: 120px;">Renumber the section as section 10(1).</p> <p style="padding-left: 80px;">(2) After section 10(1)—</p> <p style="padding-left: 120px;">Add</p> <p style="padding-left: 160px;">“(2) To avoid doubt, an enduring power does not commence as a power of attorney before it is executed.</p> <p style="padding-left: 160px;">(3) For the purposes of subsections (1)(b) and (2), an enduring power is executed when it is duly signed before the solicitor in compliance with the requirements in</p>

section 5.

- (4) Subsections (2) and (3) do not affect any enduring power executed before the commencement date of the Enduring Powers of Attorney (Amendment) Ordinance 2011 (of 2011).”.”.

9 In the proposed section 4(2), by deleting “donor becoming mentally incapable” and substituting “donor’s mental incapacity”.

10(1) In the proposed section 5(2A), in the Chinese text, by deleting “事預” and substituting “事項”.

12 (a) In the proposed Schedule 1, under the heading “**Information you must read**”, by adding—

“13. This form takes effect as an EPA in accordance with section 10 of the Enduring Powers of Attorney Ordinance (Cap. 501) when it is signed by you or the person signing on your behalf and under your direction before the solicitor. You should note that unless and until this form is so signed, it has no effect either as an EPA or an ordinary power of attorney. However, if you wish, you may choose a later date or later event, on which the EPA will take effect. In such case you must specify this later date or event in paragraph 4A of Part A.”.

(b) In the proposed Schedule 1, under the heading “**Form of enduring power of attorney (for appointment of only one attorney)**”, in Part A—

(i) in paragraph 2, by deleting “*If you do, your EPA will not be valid.*” and substituting “*If you do, your EPA will not be valid.*”;

(ii) by adding—

“4A. **Commencement of EPA**

[This EPA takes effect on the date it is signed before the solicitor in paragraph 6 or 7 below. If you want to specify a later date or later event on which this EPA will take effect, please fill in the gap in the sentence marked with an asterisk below. Delete that sentence if you wish this EPA to take effect on the date it is signed before the solicitor.]

*This EPA takes effect on
 (insert a later date or event).”.

13

(a) In the proposed Schedule 2, under the heading “**Information you must read**”—

- (i) in paragraph 3, in the Chinese text, by deleting “個” and substituting “各”;
- (ii) by adding—

“14. This form takes effect as an EPA in accordance with section 10 of the Enduring Powers of Attorney Ordinance (Cap. 501) when it is signed by you or the person signing on your behalf and under your direction before the solicitor. You should note that unless and until this form is so signed, it has no effect either as an EPA or an ordinary power of attorney. However, if you wish, you may choose a later date or later event, on which the EPA will take effect. In such case you must specify this later date or event in paragraph 5A of Part A.”.

(b) In the proposed Schedule 2, under the heading “**Form of enduring power of attorney (for appointment of more than one attorney)**”, in Part A—

- (i) by deleting paragraph 2 and substituting—

“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 either (a) or (b) from the statement below. **If you do not, your EPA will***

not be valid.]

My attorneys appointed under paragraph 1 are to act—

(a) jointly.

or

(b) jointly and severally.”;

(ii) in paragraph 3, by deleting “*If you do, your EPA will not be valid.*” and substituting “*If you do, your EPA will not be valid.*”;

(iii) by adding—

“5A. Commencement of EPA

[This EPA takes effect on the date it is signed before the solicitor in paragraph 7 or 8 below. If you want to specify a later date or later event on which this EPA will take effect, please fill in the gap in the sentence marked with an asterisk below. Delete that sentence if you wish this EPA to take effect on the date it is signed before the solicitor.]

*This EPA takes effect on
..... (insert a later date or event).”.