



EDURING POWERS OF ATTORNEY

Enduring Powers of Attorney (Amendment) Bill 2011

The Law Society has the following comments in response to queries raised in the Department of Justice's letter dated 25 March 2010:

1. Proposal to remove existing requirements in section 5(2) of the Enduring Powers of Attorney Ordinance (EPAO) for medical practitioner to witness

The Law Society welcomes the Department's decision to put forward legislation to implement the recommendations in the LRC Report on "*Enduring Powers of Attorney*" (Report) dated March 2008. We fully support the proposal to "abolish the existing requirement in section 5(2) of the EPAO requiring an EPA to be signed before a medical practitioner".

2. Law Society to issue Practice Direction

The Law Society notes the recommendation to issue a Practice Direction on "mental competence" and having duly reviewed the matter considers it more appropriate to issue a Practice Note which provides detailed guidelines on matters that solicitors must be aware of when dealing with EPAs. The Law Society of England and Wales issued a Practice Note on "*Lasting Powers of Attorney*" and we note the Law Society of Ireland published a Practice Note on "*Enduring Powers of Attorney*" and not Practice Directions.

We wish to bring to your attention that solicitors are required to keep the issue of "mental capacity" to the forefront when dealing with clients, especially those providing instructions on EPAs and wills before any retainer can be considered. Principle 5.01 of the *Hong Kong Solicitors' Guide to Professional Conduct* clearly states:

"A solicitor cannot be retained by a client who does not have a mental capacity. There is a legal presumption of capacity unless the contrary is shown. Whether a client does have capacity is a matter of law and it should be borne in mind that different levels of capacity are required for different activities. If there is doubt about a client's mental capacity it may be advisable, where possible, to seek an opinion from the client's doctor having explained to the doctor the relevant test of capacity." (emphasis added)

We propose that guidance be provided on "mental capacity" in a new Practice Note to be issued by the Law Society.

3. Publicity on EPAs

The Law Society will invite the *Academy of Law* to offer training on EPAs together with CPD courses on the Mental Health Ordinance which should contain specific material on “mental capacity”.

4. Draft Powers of Attorney (Amendment) Bill 2011

(a) Statutory forms

We note paragraphs 4 in Form A, and 5 in Form B of the Introductory Notes emphasise the fact the donor “cannot give your attorney a general authority over all your property and financial affair. If you do, your EPA will not be valid”, and that such information is based on the provisions in Section 8(1)(b) of the EPAO.

The Law Society notes such restriction can result in very practical problems such as:

- If property is sold, what will be the position? Will the attorney be required to “trace” the proceeds in order to provide for the donor?
- If a donor is hospitalised for a very long time what happens if assets itemized in the EPA become depleted but there are additional assets elsewhere? In such circumstances the EPA will be of no further use and the family of the donor will then have to make an application under the Mental Health Ordinance.

The recommendations in the Report do not address these practical problems and we invite the Department to review the restrictions imposed by S8(1)(b) of the EPAO.

(b) User-friendly forms

We also recommend that the Department should ensure that user-friendly versions of the statutory forms are made available to the public in both hard and soft copy versions.

Advanced Directives

The Government should reconsider the introduction of advanced directives as its approach is lagging behind public awareness of this issue. Our practitioners have reported that a significant number of Hong Kong citizens travel abroad and are fully aware of the availability of “living wills and advanced directives” in other jurisdictions. The Government should fast track legislation to provide a statutory framework and perhaps a statutory form to enable those who wish to do so to take advantage of making a “living will” which could go hand in hand with an EPA. The fact that some parts of Hong Kong society are ignorant of such practices should not be used as an excuse to deny those who choose to order their affairs from doing so.

Council
Law Society of Hong Kong
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