

CONTINUING POWERS OF ATTORNEY BILL SUBMISSIONS

1. The Department of Justice (“DOJ”) in December 2017 released a consultation paper on the Continuing Powers of Attorney Bill (the “Consultation Paper”).
2. Annexed to the Consultation Paper is a draft of the Continuing Powers of Attorney (“CPA”) Bill “which may be fine-tuned from the drafting perspective and revised in the light of the results in the public consultation” (para. 16 of the Consultation Paper). The DOJ seeks views on this draft bill (para. 50). Apart from the draft bill, the Consultation Paper poses two specific questions (para. 34 and 40).
3. The Law Society has studied the Consultation Paper. In response thereto, we set out below our observations on the proposed CPA (Section 1 below), and our views on the two consultation questions (Section 2). Specific comments on certain clauses in the draft Bill are set out at the end of this submission (Section 3).

SECTION 1: GENERAL OBSERVATIONS

The Approach

4. The Administration proposes that “a new Continuing Powers of Attorney Ordinance be introduced by way of a new CPA regime to cover decisions in relation to a donor’s personal care as well as his/her property and financial affairs. In parallel, the EPA Ordinance would continue to apply to EPAs executed prior to the commencement of the CPA Ordinance” (para 15). We

have slight reservations on this approach, as we consider there could be cases where potential conflicts arise – as when a donor does not wish his donee who is to look after his personal care to also know and/or to take care of his financial affairs (and vice versa). Should there be a discretion for the donor to choose and to have separate power of attorneys for personal care and for financial affairs, where relevant?

5. In any event, before Hong Kong is to have a new regime for powers of attorney for personal care of donors, the Administration should review the relatively low take-up rate of EPAs and the efforts (including the publicity campaigns) deployed in the past on the promotion of EPAs. The general public should more relevantly be educated on the use of these powers of attorneys. This is important, particularly when Hong Kong is having an aging society¹. Focused promotion to arouse public awareness of CPAs (if launched) should carefully be considered and be planned before the regime is formally launched.

Number of Attorneys

6. Clause 7 of the draft bill provides that the donor of a CPA may appoint 1 or more attorneys to act for the donor. We ask that, except where the attorneys are appointed in a joint and several manner, the number of attorneys appointed for a CPA should be an odd number in order to avoid deadlocks. The number should preferably be limited to 3.
7. Additionally, if more than one attorney is to be appointed, the donor should clearly specify whether a majority of votes or a unanimous agreement is needed for the attorneys to act – the latter has been posing practical problems.

¹ See Census and Statistics Department's press release: (http://www.censtatd.gov.hk/press_release/pressReleaseDetail.jsp?pressRID=4200&charsetID=1) dated 8 September 2017, where the Deputy Commissioner for Census and Statistics, Ms Marion Chan, said that "The latest projection results suggest that population ageing will continue, and is expected to be most rapid in the coming 20 years. Society should get prepared for this demographic challenge."

Protection of the donors

8. We note that in the comparable legislation in the UK² and in Singapore³, there are provisions which allows for the Court to make a determination on a Lasting Power of Attorney (which should be similar to the CPAs as currently proposed), if the Court is satisfied that fraud or undue pressure has been used to induce the donor into making the Lasting Power of Attorney. The above should merit a careful consideration by the Administration.
9. We also note that in Singapore, the Singapore Government has introduced a section (Section 36A) in their Mental Capacity Act in March 2016. Under the amended legislation, their Public Guardian can seek from the Court a suspension order to preserve the donor's assets where there is clear evidence that a donee or deputy⁴ has acted in a way which compromises the interests of the donor and there is no one else to protect him. Once the Court makes the suspension order, the Office of Public Guardian in Singapore will annotate on the original Lasting Power of Attorney that the Lasting Power of Attorney is suspended. This information is uploaded on its website so that third parties can check and not proceed with any transactions. The appointed donees and deputies would no longer be able to make decisions and act on behalf of the donor for the time period as stipulated in the Court order.
10. For the CPA Bill, suspension orders are provided for (see clause 73(c)), but that is too general and apparently it does not cater for the above scenario. We are not at this stage advocating for or against the inclusion of a suspension power similar to the Singaporean model. However, we ask the Administration to give careful thoughts to the above latest development.
11. On the other hand, when we are reviewing comparable legislation for the purpose of this submission, we note the Mental Capacity Act in Singapore has also a 'whistle-blower' section to protect the identity of a whistle-blower

² See section 22 of the Mental Capacity Act 2005 <https://www.legislation.gov.uk/ukpga/2005/9/contents>

³ See Section 17(3) of the Mental Capacity Act <https://sso.agc.gov.sg/Act/MCA2008?ValidDate=20171101&ProvIds=P1IX-#pr42->

⁴ A deputy is appointed by the court to make certain decisions on behalf of a person who lacks mental capacity when the person has not made a Lasting Power of Attorney and has no donee to decide on his behalf in respect of those decisions. A deputy can be an individual or a licensed trust company under the Trust Companies Act (Cap.336), as prescribed by the Mental Capacity Regulations. See <https://www.publicguardian.gov.sg/opg/Pages/What-Is-A-Court-Appointed-Deputy.aspx>

in a report of ill-treatment of a person who lacks mental capacity⁵. Under their provision, anyone who knows, suspects or believes that a person who lacks capacity is not properly looked after and/or needs care or protection can report the case to the Office of Public Guardian. In addition, an annual report containing information on major decisions made in the past year would need to be filed for the Public Guardian's review. If there are areas of concern highlighted through a report, the Public Guardian will take the appropriate action to safeguard the person's well-being. Again, we ask the Administration to have a look on the above to consider whether a similar provision could be desirable or be adapted to the local legislation.

Relief from liability if act honestly

12. Under Clause 77 of the draft bill, "if it appears to the Guardianship Board or the court that the attorney for a continuing power has acted honestly and reasonably, the board or the court, as appropriate, may relieve the attorney wholly or partly from any liability that the attorney has or may have incurred on account of a breach of duty as attorney". We ask: how honestly and reasonably should an attorney have acted in order to have the relief as provided for in the above?

SECTION 2: CONSULTATION QUESTIONS

QUESTION:

Views are sought on whether (i) the functions of registering a CPA, maintaining the register of CPAs and other related matters should be given to the Guardianship Board instead of the Registrar; and (ii) the Guardianship Board should be empowered to supervise EPA executed under the EPA Ordinance (para 34).

13. To both Questions (i) and (ii) above, we say no.
14. We received views from our members whose daily practices involve the Guardianship Board that the current workload of the Board is already

⁵ See section 43, Mental Capacity Act (ibid)

extremely heavy. Asking the Board to take up EPAs and CPAs would only delay the process and is against the interest of the public.

15. On the other hand, entrusting the High Court with the functions of overseeing and registering of EPAs and CPAs would instill a sense of solemnity for these important documents.

QUESTION:

Views are sought on whether ... the guardianship order should be deemed as having the effect of suspending the continuing power for the duration of the guardianship order (para 40).

16. We agree that in cases where there is a disagreement among the attorneys, and that both the guardianship order and a CPA are in existence, the guardianship order should take precedence. However, family members should have the right to appeal against or review the order. Other people could also have the common law right to bring the matter to the Guardianship Board.

SECTION 3: COMMENTS ON CLAUSES OF THE BILL

17. We set out below our specific comments on various clauses in the draft bill.

Clause 33

“33. Commencement of continuing power for financial matters

- (1) If a continuing power confers on an attorney authority to act for the donor only in relation to the donor’s financial matters, the continuing power commences—
 - (a) if a date is specified in the instrument creating the power for its commencement—on that date;
 - (b) if an event is specified in the instrument creating the power for its commencement—on the happening of that event; or
 - (c) if no such date or event is specified—on the execution of the instrument creating the power.
- (2) For the purposes of subsection (1)(c), an instrument creating a continuing power is executed when it is, subject to section 24, duly signed before a solicitor in compliance with section 28.”

18. If a donor makes a CPA for his personal care matters under clause 32 and makes another CPA for his financial matters under clause 33 but appointing different attorneys for each CPA, whether the law will require the commencement of the CPA for financial matters under clause 33 to be no later than that of the commencement of the CPA for personal care matters? In other words, whether clause 34(2) should also apply to a CPA made under clause 33? The proposed clause 33 is unclear on this point.
19. In case a donor makes more than one CPA covering the same matter or mixed matters but on different date, whether the later CPA will revoke the former? It may cause doubts if there are CPAs appointing different attorneys for the same matter.
20. According to clause 33(1)(a) and (c) of the Bill, continuing power under the CPA commences if a date is specified in the instrument creating the power for its commencement or if no such date or event is specified on the execution of the instrument. Clause 22 of the Bill provides that if the attorney under the CPA believes on reasonable grounds that the donor has become or is becoming mentally incapable and the CPA is not registered, the CPA is suspended under clause 23 of the Bill until the CPA is registered under clause 37 of the Bill. There may therefore be a situation where the attorney may act under the CPA when the donor is still mentally sound and the CPA is not registered and would not therefore appear in the Register upon public inspection, thereby causing confusion for those presented with such CPA. It might be more desirable and to avoid such confusion / uncertainty if the CPA under clause 33(1)(a) and (c) can only be used if it has been registered irrespective of the donor's mental capacity. If the donor does not wish the CPA to be available for public inspection when he is still mentally capable, he can make a power of attorney under Power of Attorney Ordinance (Cap.31) to govern his financial matters when he is mentally capable rather than making a CPA under clause 33(1)(a), (b) or (c) of the CPA Ordinance.
21. Since there is a Register of CPA open for public inspection under clause 39, it should be mandatory that only CPA intended to be used must be registered under clause 37. For example, a clause 32 CPA should not be

permitted to be registered until clause 32(1)(a) condition is satisfied; and a clause 33 CPA must be registered before the attorney can act on it.

Clause 34

“34. Commencement of continuing power for mixed matters

- (1) This section applies if a continuing power confers on an attorney authority to act for the donor in relation to both the donor’s personal care matters and the donor’s financial matters.
- (2) The continuing power must not commence on a date later than that referred to in section 32(2) (for commencement of the power in relation to the donor’s personal care matters) even if the date is earlier than—
 - (a) the specified date referred to in section 33(1)(a); or
 - (b) the happening of the specified event referred to in section 33(1)(b), for commencement of the power in relation to the donor’s financial matters.”

22. In the event that a donor makes a CPA for both his personal care and financial matters, it is unclear from clause 34 if he can appoint one or more attorneys for his personal care matters and another different one or more attorneys for his financial matters.

Clause 57

“57. Guardianship Board may review continuing power

The Guardianship Board may review the validity, revocation, or operation and effect, of a continuing power—

- (a) on the application of an interested party; or
- (b) on its own initiative on hearing a matter under—
 - (i) this Ordinance; or
 - (ii) the Mental Health Ordinance.”

23. Under clause 57, the Bill proposes that the validity, revocation or operation and effect of the CPA may be reviewed by Guardianship Board on application of an interested party or on its initiative on hearing a matter under the CPA Ordinance or Mental Health Ordinance. Under clause 62(1), it appears that all applications for proceedings relating to the CPA must in the first instance be made to the Guardianship Board and under clause 65, the Court may only review the same on referral of the Guardianship Board. There may be concerns as to whether it is suitable for all proceedings to be

made at the Guardianship Board rather than giving the applicant a choice of either using the Guardianship Board or the Court especially in instance where the financial matters of the donor in the CPA are substantial. Moreover, consideration should be given to the capacity and supports required by the Guardianship Board should the Guardianship Board be vested with all applications for proceedings relating to the CPA.

Clause 74

“74. Appeal against decision of Guardianship Board

- (1) A person aggrieved by a Guardianship Board’s decision in relation to the exercise of any power of the Guardianship Board under Division 2 or section 62 may appeal to the court—
 - (a) with leave of the court—on a question concerning the personal care matters of the donor of a continuing power; or
 - (b) without leave of the court—
 - (i) on a question of law; or
 - (ii) on a question concerning the financial matters of the donor of a continuing power.
- (2) An appeal under this section must be made—
 - (a) within 28 days after the day on which a document setting out the terms of the decision is sent to the person; or
 - (b) within any further period as the court may allow.”

24. We consider that the Attorney in addition to the “a person aggrieved by a Guardianship Board’s decision” should also have the right to bring an appeal.
25. The appeals should be brought *without* leave of the court on questions of law, and also questions relating to personal care matters and financial matters of the donor.

Clause 82

“82. Interest of purchasers

- (1) This section applies if an attorney for a continuing power (or a power of attorney under section 79(1)(a)) has acted under the relevant power to enter into a specified transaction with a specified person.
- (2) If the interest of a particular purchaser depends on whether a specified transaction is valid, it is conclusively presumed in favour of the purchaser that the specified transaction is valid if—

- (a) the specified transaction was completed within 12 months of the date on which the instrument creating the relevant power in favour of the attorney came into operation; or
 - (b) the specified person makes a statutory declaration—
 - (i) before or within 3 months after the purchase was completed; and
 - (ii) stating that the specified person had no reason at the time of the specified transaction to doubt the attorney's authority to dispose of the property which was the subject of the specified transaction.
- (3) For the purposes of subsection (2), section 5(8) of the Powers of Attorney Ordinance applies to, and in relation to, any reference to a statutory declaration.
- (4) In this section—
- purchaser** (購買人) means—
- (a) a purchaser in good faith for valuable consideration;
 - (b) a lessee, mortgagee or other person who for valuable consideration acquires an interest in property; or
 - (c) an intending purchaser;
- specified person** (指明人士) means a person with whom the attorney enters into a specified transaction;
- specified transaction** (指明交易) means a transaction referred to in section 78(1)(b), 79(1)(c), 80(1)(c) or 81(1)(b);
- valuable consideration** (有值代價) includes marriage but not a nominal consideration in money.”

26. We propose to simplify the definition of "*specified transaction*" in the above. Instead of referring the transaction to different sections, the definition can be simplified to mean "a transaction which has entered into between the attorney acting under the continuing power and another person"
27. We also suggest to remove the requirement for the "*specified person*" to make a statutory declaration if the relevant power of attorney has already been registered in High Court.