

LC: Speech by SJ in moving the Second Reading of the Enduring Powers of Attorney (Amendment) Bill 2011

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Following is the speech (English translation) by the Secretary for Justice, Mr Wong Yan Lung, SC, in moving the Second Reading of the Enduring Powers of Attorney (Amendment) Bill 2011 in the Legislative Council meeting today (May 25):

Mr President,

I move that the Enduring Powers of Attorney (Amendment) Bill 2011 be read a second time.

The Bill proposes to amend the Enduring Powers of Attorney Ordinance (Cap 501) to relax the existing execution requirements for an enduring power of attorney under section 5(2) (a) of that Ordinance and to adopt new statutory forms and associated explanatory information which are drafted in plain language and in a more user-friendly format.

Background

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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 remains valid only so long as the donor retains mental capacity. An attorney therefore loses his power to act for the donor once the donor becomes mentally incapable, but in fact it may be in precisely those circumstances that the donor would wish to have his affairs looked after by an attorney. To meet those difficulties, a special type of power of attorney (called an "enduring power of attorney" (EPA)) was introduced by the Enduring Powers of Attorney Ordinance in 1997. An EPA survives the onset of the donor's mental incapacity provided it is in the form, and executed in the manner, prescribed under the EPA Ordinance. Unlike a conventional power of attorney, the scope of an EPA is restricted to the donor's property and financial affairs and it cannot, for instance, empower decision making relating to the donor's health care. Pursuant to section 5(2) (e) of the EPA Ordinance, a medical practitioner witnessing execution of an EPA must certify that the medical practitioner "satisfied himself that the donor was mentally capable".

While new to Hong Kong when introduced in 1997, EPAs had been in place in a number of overseas jurisdictions for some time and were (and continue to be) widely used. However, the take-up rate of EPAs in Hong Kong has been extremely low compared with other jurisdictions. As at the end of 2010, only

40 EPAs had 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.

#### The LRC Recommendations

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In response to concerns raised by, among others, the Law Society of Hong Kong that the existing execution requirements were unduly onerous and were one of the reasons for the low take-up rate in Hong Kong, the matter was referred to the Law Reform Commission for study in November 2006.

In its March 2008 report on Enduring Powers of Attorney, the Commission suggested that there may be a variety of reasons for the exceptionally low take-up rate of EPAs in Hong Kong, including cultural factors and a lack of public awareness, but that it seemed reasonable to suppose that one factor discouraging the use of EPAs was the requirement that an EPA be signed by the donor before a solicitor and a registered medical practitioner, who must both be present at the same time. The Commission accordingly recommended 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 the client to execute an EPA, the solicitor must obtain an assessment of the client's mental capacity from a medical practitioner before the EPA is executed. The Commission added that if, contrary to the Commission'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.

The Report also recommended that the EPA form and its explanatory notes should be drafted in plain language and in a more user-friendly format and the Report put forward suggested alternatives.

#### Implementation of the LRC Recommendations

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Madam President, the Bill adopts the Law Reform Commission's second recommendation, i.e. a donor and a solicitor be allowed to sign an EPA within 28 days after the date it has been signed by a registered medical practitioner. The Bill also gives effect to the Commission's recommendation to adopt a new statutory form and associated explanatory

information drafted in plain language and in a more user-friendly format.

The Commission's first recommendation, i.e. the requirement for execution before a medical practitioner be abolished altogether, is not adopted mainly because that recommendation was strenuously opposed by the medical and social welfare sectors when they were consulted by the Department of Justice in June 2010. They expressed concern that there would be insufficient safeguards to donors including the elderly if there was no statutory requirement for a medical doctor to assess and certify the mental capacity of donors. The Bar Association also expressed reservations before the Legislative Council Panel on Administration of Justice and Legal Services when the recommendation was discussed by the Panel in December 2010.

Having carefully considered the Law Reform Commission's report and the views of all those consulted, the Administration has concluded that, by adopting the second recommendation and pursuing a partial relaxation of the existing execution requirement under section 5(2) of the EPA Ordinance, it would have struck an appropriate balance between maintaining adequate safeguards for donors on the one hand and encouraging a greater use of EPAs on the other.

Conclusion

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Madam President, as the Law Reform Commission pointed out in its Report, the use of an EPA has benefits not only for the donor but also for the donor's family and the wider community. We hope that the enactment of the Bill, together with measures to increase awareness and understanding of the concept of EPAs in the community, will encourage more people in Hong Kong to use EPAs to make arrangements for the administration of their property and financial affairs.

With these remarks, I would like to appeal to Members to support the Bill.

Ends/Wednesday, May 25, 2011