

**Consultation Paper on Enduring Powers of Attorney**  
**Comments of the Hong Kong Bar Association**

1. The Hong Kong Bar Association ('the Bar') has some hesitation as to the suggestion that the requirement for a medical certificate at the time of the execution of an Enduring Power of Attorney ("EPA") should be entirely dispensed with. It seems that an EPA is a document of considerable importance, which can confer extensive powers on a third party in respect of the donor's affairs, which powers survive the mental incapacity of the donor, and in the ordinary course of events would operate for the remainder of the donor's life (unless revoked prior to mental incapacity). Further, as noted in the Consultation Paper, 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 (near) future. The usual scenario would be the gradual onset of senile dementia.
2. The question of mental incapacity in the usual EPA scenario referred to above, will often be very difficult to assess indeed. Ultimately, the question is one which only a medical practitioner can properly assess, particularly in a borderline case. A solicitor is rather ill-placed to make an assessment of mental capacity in such a case. Of course, once the point in time at which the EPA was executed has passed, it would usually be very difficult or impossible to later obtain medical evidence as to the donor's mental state at the time when the EPA was executed, were an issue to subsequently arise on this point.
3. The Consultation Paper points out at §3.5 that there is no requirement for medical certification upon the making of a will, nor upon the registration of an EPA. However:
  - (a) The Bar is of the view that a distinction between the certification requirements for a will and an EPA is or may be justified, since an EPA (unlike a will) is an instrument which is specifically designed for use in a situation where mental incapacity is contemplated in the future. As noted above, an EPA is therefore particularly likely to be executed at a point in time where there is doubt as to the donor's current mental capacity, and is particularly likely to be the subject of a subsequent challenge on the basis of mental incapacity at the time of execution.

- (b) The registration of an EPA does not involve the creation of any new power which would survive mental incapacity. It simply marks the commencement of the donor's mental incapacity, and therefore of the period during which the EPA continues to operate despite that mental incapacity. Hence it is rational that there is a requirement for a medical certificate upon the creation of the EPA, but not at the point of registration.
4. In light of all of the above, the Bar is of the view that the requirement of medical certification at the time of creation of an EPA is a useful and important additional safeguard, which helps to ensure that EPAs are only executed with the valid consent of the donor.
  5. The Bar would however support the suggestion that it is not necessary to have the certifying medical practitioner and solicitor present at the same time. As noted in the Consultation Paper, this requirement is likely to add to the inconvenience (and perhaps cost) of executing an EPA, without adding greatly to the safeguards provided. The Bar would suggest a maximum period of seven days between the time of medical certification as to mental capacity, and the time the donor and solicitor sign the EPA.
  6. The Bar is in favour of expanding the scope of EPAs to include decisions as to the donor's personal care. This would widen the scope of the EPA as a useful tool for a person who is likely to encounter mental disability in the future, to make an advanced choice as to whom should be entrusted with their future care. However, if this expansion were to be effected, the Bar is of the view that it would be particularly important to maintain the safeguard of medical certification, at the time of execution of an EPA.

Hong Kong Bar Association

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