

**Hong Kong Bar Association's  
Comments on the Consultation Paper  
Enduring Powers of Attorney: Personal Care**

The comments of the Hong Kong Bar Association (“the Bar”) are set out below, in the format of a response to each of the questions posed at paragraph 20 of the Executive Summary of the Consultation Paper on Enduring Powers of Attorney: Personal Care, published by the Law Reform Commission of Hong Kong (“LRC”) in June 2009.

Question (1) – The view of the Bar is that the scope of an Enduring Power of Attorney (“EPA”) should be extended to include decisions about the donor’s personal care. The same view was expressed in the Bar’s comments to the Law Reform Commission on 15 June 2007.

However, the Bar would also repeat its view that the requirement for medical certification for an EPA should be retained, particularly if the scope of EPAs is to be expanded as proposed.

The Bar notes that the LRC’s Report on Enduring Powers of Attorney dated March 2008 rejected the Bar Council’s recommendation that the requirement for medical certification for EPAs be retained. On balance, the Bar is inclined to the view that the extension should still be supported. The adverse effects of the removal of the requirement for medical certification may be to some extent alleviated by the proposed extension of supervisory powers of the Court and Advisory Board over donees of EPAs (see further below), and do not in the Bar’s view outweigh the benefits of the extension of EPAs to cover decisions on the donor’s personal care.

Question (2)(a) – Yes. Personal care should include decisions as to the donor’s day-to-day health care. The rationale for the general use of EPAs as an important and useful tool to enable persons to make advanced provision for the management of their affairs following mental disability applies equally to the important area of the donor’s day-to-day health care. The Bar further agrees with the proposed limitation that decisions involving the giving or refusing of life-sustaining treatment should not fall within the permissible scope of EPAs.

Question 2(b) – Yes. The Bar agrees that there should be a non-exhaustive statutory list of personal care decisions which may be covered by an EPA.

Question 2(c) – The Bar agrees with the majority of the decisions specified under the LRC’s Recommendation 4. However, the proposed category of “legal matters relating to the donor’s personal care” may be rather vague, and consideration should be given to whether this category can be defined with more precision. In addition, another category of decisions which might be specified is decisions as to what persons are permitted to have access to the donor and his residence, and when (see e.g. the position in Ireland referred to at paragraph 2.14 of the Consultation Paper; decisions as to “whom the donor should see and not see” are expressed to fall within the permissible scope of EPAs).

Question 2(d) – Yes.

Question 2(e) – The Bar agrees with the items on the proposed list of matters to be excluded from the permissible scope of personal care EPAs. The Bar notes that there is provision excluding consent to marriage on behalf of the donor, but no equivalent provision in respect

of divorce. The LRC may consider that applying for or consenting to divorce is a matter which ought to fall outside the scope of an EPA, because of the potential for abuse.

Question 2(f) – Yes. Should the donor wish to appoint separate attorneys for personal care and financial decisions, it is difficult to see any objection to this arrangement, whilst there are obvious potential advantages.

Question 2(g) – The Bar supports a requirement that notice be given upon registration of the EPA, as an additional safeguard against abuse. The Bar suggests a requirement that the donor nominate in the EPA two persons to be notified upon an application for registration of the EPA, and that the donor also be notified. This additional safeguard is particularly desirable if the requirement of medical certification upon execution of an EPA is to be dropped, as has been recommended by the LRC.

Question 2(h) – As noted above, the Bar would reiterate the Bar Council's previous recommendation that the requirement for medical certification should be retained, in respect of all EPAs. However, it is logical that the same witness requirements should apply to all EPAs, whether they include personal care decisions or are restricted to financial and property affairs.

Question 2(i) – Yes.

Question 2(j) – Yes.

Question 2(k) – Yes. The Bar is of the view that the extensive powers of supervision by the Court and Guardianship Board are of vital importance to prevent abuse, particularly given the LRC's recommendation that the requirement for medical certification upon execution of an EPA be dropped. The Bar agrees with the recommended list of supervisory powers to be given to the Court.

Question 2(l) – Yes. The Bar agrees with the recommended list of supervisory powers to be given to the Guardianship Board.

Question (3) – Yes.

Question (4) – Yes. The Bar would in its view be too restrictive to decline to recognise in Hong Kong an EPA which is executed overseas and which complies with the EPA requirements of the jurisdiction in which it is executed.

Hong Kong Bar Association

30th October 2009