

## CONSULTATION ON NEW HONG KONG LEGISLATION FOR CONTINUING POWERS OF ATTORNEY

The Department of Justice (DoJ) published its long-awaited consultation paper on the Continuing Powers of Attorney Bill on 28 December 2017. It is proposed that a Continuing Powers of Attorney Ordinance (CPA Ordinance) be enacted to introduce a new continuing power of attorney (CPA) regime covering decisions in relation to an individual's personal care as well as their property and financial affairs.

### INTRODUCTION

Whilst most people understand the importance of having a will, there is the tendency to overlook the significance of a power of attorney.

Unlike a general power of attorney which ceases to be effective once the donor becomes mentally incapacitated, an Enduring Power of Attorney (EPA) allows a donor, while they are still mentally capable, to appoint an attorney to take care of their financial affairs in the event that they subsequently become mentally incapacitated. The current regime is governed by the Enduring Powers of Attorney Ordinance (Cap. 501) (EPA Ordinance).

As in the case of an EPA, a CPA will survive any subsequent mental incapacity of the donor. It is proposed that the scope of a CPA be extended beyond the financial affairs of a donor to cover also their personal care.

The proposed legislative framework has been prepared by the DoJ after a careful consideration of the Law Reform Commission's report on "Enduring Powers of Attorney: Personal Care" dated July 2011 (2011 Report) and the views of the members of an inter-departmental working group.

We set out below a high-level overview of the key proposals relating to the CPA regime.

### KEY DEVELOPMENTS

**Scope:** The draft bill extends the scope of a CPA to include decisions on a donor's personal care (including where the donor lives, whom the donor lives with, whether to refuse any specific individual to have access to or contact with the donor, matters relating to the donor's healthcare etc.). The restriction in section 8(1)(b) of the EPA Ordinance that the donor of an EPA cannot confer upon the attorney a general power to act in relation to all of the donor's property and financial affairs no longer exists in the draft bill. Nevertheless, the authority that may be conferred by the donor and an attorney's authority under a CPA are subject to specific restrictions under

#### Key issues

- It is proposed that the scope of a continuing power of attorney be extended to cover not only decisions on a donor's property and financial affairs, but also decisions on a donor's personal care.
- The appointed attorney must act in the donor's best interests.
- No new enduring power of attorney may be created after the commencement of the Continuing Powers of Attorney Ordinance.
- Financial institutions should familiarise themselves with the proposed new requirements, so as to prepare themselves for handling instructions from clients based on the new CPA.

clauses 4 and 5 of the draft bill. By way of example, a donor may not authorise an attorney to make, vary or revoke the donor's will; and an attorney may not make a decision to give, refuse or withdraw any life-sustaining treatment for the donor.

**The attorney:** Two or more persons can be appointed as attorneys under an EPA or a CPA. The EPA Ordinance provides that an enduring power cannot be created unless the instrument specifies whether the attorney is appointed jointly or jointly and severally. As an improvement to the EPA Ordinance, the proposed regime assumes that the attorneys are jointly appointed unless otherwise specified. In addition to performing their fiduciary duties to the donor, the attorney must act in the donor's best interests, having regard so far as practicable to the donor's wishes and feelings that are ascertainable. The attorney is also required to consult, if practicable and appropriate, the views of any person named by the donor as a person to be consulted on matters arising in relation to the continuing power and any person caring for, or interested in the welfare of, the donor.

**Notification before registration:** An application to register an EPA or a CPA should be made to the Registrar of the High Court. There is currently no notice requirement stipulated in relation to EPAs in Hong Kong. The 2011 Report expressed the view that the advantage of requiring some kind of pre-registration notification is that it offers a safeguard against possible abuse by the prospective attorney. The proposed bill provides that the donor must nominate in the instrument creating the continuing power up to five persons (other than the donor) who should be notified of an application for the registration of the instrument. However, if the donor does not wish to make such nomination, the donor must make a statement in the instrument to that effect.

**Proceedings:** Under the existing EPA Ordinance, the court is provided with the relevant supervisory powers. The Law Reform Commission noted that having a specialist tribunal exercising the supervisory power has the advantage of simplifying the process and reducing costs. Accordingly, it is proposed that the Guardianship Board<sup>1</sup> will be given the power to review the validity, revocation, or operation and effect of a continuing power. An application for proceedings relating to a continuing power has to start in the Guardianship Board, which may in appropriate cases refer an application to the court. The decision of the Guardianship Board can be subsequently appealed to the court.

There are two interesting proposals from the 2011 Report which have not been adopted: that provision be made for the recognition in Hong Kong of EPAs executed outside Hong Kong and the recognition of EPAs made in a jurisdiction other than Hong Kong. The consultation paper noted that such matters involve complex conflict of laws issues and proposed to study them further at an appropriate juncture.

## IMPLICATIONS

As noted above, the introduction of the new legislation will have an impact on the scope of the instrument, the appointment and the duties of the attorney(s), the registration of the instrument and the dispute resolution mechanism in respect of CPAs.

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<sup>1</sup> The Guardianship Board is a legal quasi-judicial tribunal. Its central statutory role is to conduct hearings in order to make guardianship orders for people aged 18 years and over with decision-making incapacities. It may make a range of ancillary orders as well.

As financial institutions are regularly presented with EPAs from their clients – together with requests for them to act in accordance with the instructions of an attorney appointed under the EPA – it would be prudent for such institutions to familiarise themselves with the proposed new CPA and be prepared to handle instructions based on such new instrument. It is relevant to note that new EPAs may no longer be created after the commencement of the CPA Ordinance; however EPAs executed prior to that would continue to be governed by the EPA Ordinance.

The closing date for the public to submit comments and feedback to the consultation is 28 February 2018.

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