



**S T E P**

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**Via Email only: [tylee@doj.gov.hk](mailto:tylee@doj.gov.hk)**

Mr Tin Yan Lee

Senior Government Counsel

Legal Policy Division

Department of Justice

Dear Mr Lee

**Consultation Paper on the Enduring Powers of Attorney (Amendment) Bill 2011**

**Response of the Society of Trust and Estate Practitioners ('STEP')**

**1. Background**

1.1 The Department of Justice's Consultation Paper on the Enduring Powers of Attorney (Amendment) Bill 2011 (the '**Consultation**') invites views on proposed legislative amendments to the Enduring Powers of Attorney Ordinance (the '**Ordinance**') on two recommendations advanced in the Law Reform Commission's 2008 report on Enduring Powers of Attorney (the '**Report**'), namely:

- (a) whether the existing requirement in section 5(2) of the Ordinance that an EPA be signed before a medical practitioner be abolished; and
- (b) whether the existing Schedule to the EPA (Prescribed Form) Regulation should be replaced with the form set out in Annex D to the Consultation.

STEP is a unique professional body for practitioners in the field of trust and tax planning and is well placed to offer comment on this area, given that our members are professionally concerned with estate and succession planning. We set out below STEP's responses to the two proposals.

1.2 Before turning to the two issues on which views are sought, it is worth setting out briefly STEP's general position in relation to enduring powers of attorney ('**EPAs**')

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- (a) With increasing life expectancy and advances in medical technology, mental capacity issues are becoming of great importance in estate and succession planning. In estate planning, it is vital that consideration is given to the position that would arise if the individual concerned lost mental capacity.
- (b) It is clearly desirable to have a mechanism allowing individuals to appoint an attorney or attorneys to make financial decisions for them in the event that they lose capacity. In some jurisdictions such mechanisms have been subject to abuse<sup>1</sup>, such that rather than support incapacitated individuals, the regime has led to their mistreatment. Accordingly, while STEP would want the mechanism to be as simple as possible to encourage individuals to use it, there have to be some safeguards within the process.

**2. Should the existing requirement in section 5(2) of the Ordinance that an EPA be signed before a medical practitioner be abolished?**

- 2.1 Section 5(2)(a) of the Ordinance provides that an EPA can only be signed before both a solicitor and a registered medical practitioner. If the EPA is not signed before both the solicitor and the medical practitioner together, the EPA is invalid. The medical practitioner is asked to certify that he has satisfied himself that the donor was mentally capable when the EPA was executed.
- 2.2 The Report recommends the abolition of the requirement that there be a medical practitioner present because of:
  - (a) the logistical difficulties in arranging for the medical practitioner and the solicitor to be present together discourage the use of EPAs (adding a degree of cost and logistical difficulty);
  - (b) 'the trauma and indignity' for an elderly person in having their mental faculties called into question; and because
  - (c) of the other jurisdictions considered in the Report, only the Republic of Ireland requires the involvement of a physician but their instruments relate to medical and welfare decision-making as well as to financial affairs.

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<sup>1</sup> In the UK, the Master of the Court of Protection has estimated that as many as 15% of English EPAs may be operated improperly or fraudulently.

2.3 STEP supports the recommendation that the requirement that there be a medical practitioner present be abolished. It is our view that the requirement that a medical practitioner be present does discourage the use of EPAs but also that the involvement of the medical practitioner does not, in practice, offer a real safeguard. Experience shows that where they are willing to act (and many are not), medical practitioners do not always take steps to verify the identity of the donor nor to properly test their mental capacity. Further, solicitors are generally very aware that where there may be capacity issues in relation to their clients they must 'tread carefully' obtaining a medical assessment before planning steps are taken<sup>2</sup>.

3. **Should the existing Schedule to the EPA (Prescribed Form) Regulation be replaced with the form set out in Annex D to the Consultation?**

STEP supports the proposal to replace the existing Schedule to the EPA (Prescribed Form) Regulation with the form set out in Annex D to the Consultation.

We have, however, comments on its drafting:

- 3.1 Note 2 on Form 1 – in practice, only a small proportion of those entering into EPAs will be trustees and we wonder whether this might be omitted so as not to raise unnecessary concerns with those reading the notes.
- 3.2 Note 3 on Form 1 – we wondered whether it might be preferable to take the solicitor's certification out of Part A so that, for simplicity, the donor knows that he will need to complete every part of it.
- 3.3 Form - there might be merit in having a space for ID card numbers.
- 3.4 Note 3 on Form 2 – there might be merit in making the point that the death of one jointly-appointed attorney will revoke the instrument, notwithstanding that another attorney may survive.

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<sup>2</sup> We would note that where there are concerns about an individual's mental capacity, it does need to be tested notwithstanding that this may (at least if not sensitively handled) cause 'the trauma and indignity' that worried the Law Reform Commission.

4. **Comments on the draft Enduring Powers of Attorney (Amendment) Bill 2011 (the 'Bill')**

The Bill does not seem to contain any clear transitional provisions to deal with the position of existing EPAs which are neither on Form 1 or Form 2. We would assume that the intention must be to treat existing EPAs as valid and would suggest that there could be merit in including a provision to this effect.



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