

## **Consultation Paper on the Continuing Powers of Attorney Bill**

### **Objectives**

The Law Reform Commission of Hong Kong (LRC) published the report on “Enduring Powers of Attorney: Personal Care” (2011 Report) in July 2011, recommending the extension of the scope of an enduring power of attorney (EPA) to cover not only decisions on a donor’s property and financial affairs, but also decisions on a donor’s personal care.

2. The Department of Justice (DoJ) has convened an inter-departmental working group (IWG) to examine the 2011 Report. Representatives from the Labour and Welfare Bureau, the Food and Health Bureau and the Social Welfare Department are members of the IWG. After careful consideration of the views and recommendations of the LRC and those provided by members of the IWG, the DoJ has prepared the proposed Continuing Powers of Attorney Bill (Bill) with a view to implementing the relevant recommendations in the 2011 Report.

3. It is proposed that a new Continuing Powers of Attorney Ordinance (CPA Ordinance) be enacted to replace the existing EPA scheme with a new regime known as the continuing power of attorney (CPA) to distinguish it from an EPA created under the existing Enduring Powers of Attorney Ordinance (Cap. 501) (EPA Ordinance). More specifically, the Bill seeks to provide a statutory framework for the creation of CPAs, under which the donor confers on the attorney authority to act for (including making decisions for) the donor on any matters relating to the personal care, and property or financial affairs, of the donor. As in the case of an EPA, a CPA will survive the subsequent mental incapacity of the donor. Whilst new EPAs may no longer be created after the commencement of the CPA Ordinance, EPAs executed prior to that would continue to be governed by the EPA Ordinance.

## **Background**

4. According to the EPA Ordinance, an EPA is a legal instrument which allows its donor (i.e. the person who wishes to give his/her power of attorney to someone), while he/she is still mentally capable, to appoint attorney(s) to take care of the donor's affairs in the event that he/she subsequently becomes mentally incapacitated. While a general power of attorney will cease to be effective if the donor becomes mentally incapacitated, an EPA will "endure" the donor's mental incapacity and give the attorney(s) the power to continue to take care of the donor's affairs despite such incapacity.

5. At present, the powers which may be delegated under an EPA in Hong Kong are limited to decisions in relation to the property and financial affairs of the donor.

6. The terms of reference of a previous LRC's study, which resulted in the publication of the report entitled *Enduring Powers of Attorney* (March 2008) (2008 Report), were confined to the execution requirements of an EPA.<sup>1</sup> In its consultation paper on this topic, the LRC also sought preliminary views on, *inter alia*, whether powers delegated under an EPA should be extended to include decisions in relation to a donor's personal care, as in a number of other jurisdictions:

*"Do you think that the scope of the existing EPA should be reviewed and consideration given to including decisions as to the donor's personal care (but not decisions as to giving or refusing medical treatment)?"<sup>2</sup>*

7. The majority of those who responded to this question were in favour of consideration of such an extension, including both the Bar Association and the Law Society. The LRC concluded that

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<sup>1</sup> In April 2009, DoJ announced that it had decided to put forward legislation to implement the recommendations in the 2008 Report in full. These recommendations were subsequently implemented by the Enduring Powers of Attorney (Amendment) Ordinance (Ord No 25 of 2011) (December 2011) amending the EPA Ordinance which came into effect on 3 July 2012.

<sup>2</sup> Consultation paper on *Enduring Powers of Attorney*, LRC (April 2007), at page 39.

the review of the execution requirements for an EPA should not be delayed by expanding that study to include the question of personal care. Instead, the LRC agreed that the issue should be considered as a separate research project. The 2008 Report reflected the decision that the LRC intended to consider as a separate research project the possible extension of an EPA to include personal care decisions.<sup>3</sup>

8. To this end, the LRC set the terms of reference of an ensuing project commenced in late 2008 as follows:

*“To consider: (a) whether the scope of an enduring power of attorney should be extended beyond the donor’s property and financial affairs to include matters relating to the donor’s ‘personal care’ and, if so, what matters that term should encompass; (b) whether provision should be made for the recognition in Hong Kong of enduring powers of attorney executed overseas; and (c) what provision should be made for the supervision of an attorney appointed under an enduring power of attorney and for the resolution of disputes.”*

9. In July 2009, the LRC issued a consultation paper, setting out the LRC’s tentative conclusions in respect of these questions. After the consultation exercise, a separate issue which was brought to the LRC’s attention was whether to remove 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.

### **LRC’s Recommendations**

10. The LRC set out in the 2011 Report its final recommendations on these issues which are reproduced at Annex A.

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<sup>3</sup> 2008 Report, at page 38.

## **The IWG's Response and Proposals**

11. The IWG then examined the recommendations in the 2011 Report, and agreed to adopt most of the recommendations, with some modifications.<sup>4</sup> In a nutshell, the IWG proposes:

- (a) to extend the scope of an EPA to include decisions on a donor's personal care;
- (b) to give additional powers to the Guardianship Board and the court for the supervision of an attorney appointed under an EPA and for the resolution of disputes in relation to an EPA; and
- (c) to remove 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.

## **Other Proposed Legislative Amendments**

*Failure to specify whether joint or joint and several attorneys are appointed (section 15(1) of the EPA Ordinance)*

12. During the deliberation of the Enduring Powers of Attorney (Amendment) Bill 2011, some members of the Legislative Council Bills Committee (BC) expressed concern about the mandatory requirement as stipulated in section 15(1) of the EPA Ordinance which provides that "[a]n instrument which appoints more than one attorney cannot create an enduring power unless the attorneys are appointed to act jointly or jointly and severally."<sup>5</sup> A possible scenario is that if a donor has become mentally

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<sup>4</sup> For example, the IWG has agreed not to implement in this exercise the recommendation on recognising in Hong Kong an EPA (or an instrument of similar effect) made outside Hong Kong as it involves complex conflict of laws issues (see Recommendations 2 and 12). The IWG will study this issue further at an appropriate juncture.

<sup>5</sup> A similar provision can be found in section 11(1) of the Enduring Powers of Attorney Act 1985 of England and Wales.

incapacitated and it is only then found out that the EPA is invalid by virtue of section 15(1), nothing can be done to remedy the situation.

13. Some BC members suggested amending section 15(1) to provide that where a donor fails to specify in the instrument whether joint attorneys or joint and several attorneys are appointed, the attorneys should be joint attorneys by operation of the law. In response to members' concern, the Government undertook to review in future the need to amend section 15(1) of the EPA Ordinance in this respect.

14. Having considered the issue and having regard to the proposed new CPA regime, the IWG proposes to include a provision in the new regime to the effect that where a donor fails to specify in an instrument (which appoints more than one attorney) whether joint attorneys or joint and several attorneys are appointed, the attorneys are taken to be joint attorneys.<sup>6</sup>

### **A New Continuing Powers of Attorney Ordinance**

15. The proposed changes in the preceding paragraphs would substantially alter the existing EPA regime under the EPA Ordinance. It is considered that implementing the proposed changes by way of amending the EPA Ordinance, resulting in provisions applicable to the existing EPA regime or to both the existing EPA and proposed new CPA regimes, would not be advisable, particularly as it would cause confusion to the general public. Therefore, it is proposed that a new Continuing Powers of Attorney Ordinance be introduced by way of a new CPA regime to cover decisions in relation to a donor's personal care as well as his/her property and financial affairs.<sup>7</sup> In parallel, the EPA Ordinance would continue to apply to EPAs executed prior to the

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<sup>6</sup> Cf. section 10(5) of the Mental Capacity Act 2005 of England and Wales which provides to the extent that the donor does not specify in a lasting power of attorney whether the attorneys are to act jointly or jointly and severally, the instrument is to be assumed to appoint them to act jointly.

<sup>7</sup> The proposed approach is based on Mental Capacity Act 2005 of England and Wales, in which a lasting power of attorney regime (covering the donor's property and financial affairs as well as personal welfare) came into effect in 2007 to replace the pre-existing enduring power of attorney regime (covering only the donor's property and financial affairs).

commencement of the CPA Ordinance (see paragraph 48 below).

### **The Continuing Powers of Attorney Bill (Bill)**

16. A consultation draft of the Bill is attached at Annex B which may be fine-tuned from the drafting perspective and revised in the light of the results in the public consultation. Where appropriate, provisions of the existing EPA Ordinance have been adopted in the Bill, with modifications, where appropriate, under the proposed new CPA regime. The main provisions of the Bill are outlined below with reference to the LRC Recommendations and other proposed legislative amendments discussed in the preceding paragraphs.

### ***Nature and Scope of a Continuing Power (Part 2 of the Bill)***

17. Clause 3 of the Bill explains the nature of a continuing power. A person (**donor**) who is not mentally incapable may, by giving a continuing power, confer on another person (**attorney**) the authority to act for the donor<sup>8</sup> in relation to any or all of: (a) the donor's personal care matters; and (b) the donor's financial matters.<sup>9</sup> The authority that the donor may confer on the attorney is subject to the restrictions under clause 4 and survives any subsequent mental incapacity of the donor. Furthermore, the attorney's authority conferred is subject to the restrictions under clause 5 and any conditions and restrictions specified by the donor. In relation to any of the donor's personal care matters, the attorney may act for the donor only if the attorney believes on reasonable grounds that the donor is mentally incapable of acting on his or her own in relation to those matters (see Recommendations 1, 5 and 13).

### ***Meaning and Scope of Personal Care Matters***

18. "Personal care matters", in relation to an individual, are defined in clause 2(1) as "matters concerning the welfare, other than the financial matters, of the individual". Clause 6 then sets out a

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<sup>8</sup> The term "act for the donor", as defined in clause 2(1) of the Bill, includes making a decision for the donor.

<sup>9</sup> The term "financial matters", in relation to an individual, is defined in clause 2(1) of the Bill as meaning "matters concerning the property or financial affairs of the individual".

non-exhaustive list of personal care matters on which the attorney under a continuing power may act for the donor (see Recommendation 4). Those include, under clause 6(j), matters relating to the donor's healthcare, including, for the purpose of providing healthcare to the donor, (a) access to the donor's health record; (b) sharing the record (or any part of it) with a person (other than the donor); and (c) giving consent to a person (other than the donor) to have access to the record and to further share the record with another person.

19. For clause 6(j), there is an issue relating to the Electronic Health Record Sharing System Ordinance (Cap. 625) (eHRSS Ordinance) under the policy purview of Food and Health Bureau.<sup>10</sup> The aim of the eHRSS Ordinance is to lay down a legal framework for the territory-wide Electronic Health Record Sharing System which, upon commencement of operation, will provide an efficient platform for healthcare providers (e.g. hospitals and clinics) to upload and access individuals' electronic health records for healthcare purposes, subject to the individual's consent.

20. The eHRSS Ordinance provides for an arrangement for substitute decision makers to give such consent on behalf of individuals who may not have the capacity to understand electronic health record sharing or provide an express consent (e.g. a minor or a person who is mentally incapacitated). It is proposed to make it clear that an attorney appointed to act on matters in relation to the donor's personal care under a continuing power is an eligible person to be a substitute decision maker of the donor under the eHRSS Ordinance (see clause 89 and paragraph 49 below).

21. Clause 5(1) imposes restrictions on an attorney's decisions relating to the donor's personal care matters (see Recommendation 5). In particular, clause 5(1)(d) and (e) provides that, in relation to the donor's personal care, the attorney must not, *inter alia*, make any decision to give, refuse or withdraw life-sustaining treatment for the donor, or to make, vary or revoke an advance directive for the donor (see Recommendation 3).

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<sup>10</sup> The eHRSS Ordinance largely came into operation on 2 December 2015.

### ***Appointment of Attorneys (Part 3 of the Bill)***

22. Clause 7 provides that the donor may appoint 1 or more attorneys to act for the donor. Clause 8 deals with the requirements for a person becoming an attorney under a continuing power. An attorney appointed to act in relation to donor's personal care matters must be an individual who has reached the age of 18 years and is not mentally incapable. However, if the continuing power only deals with the donor's financial matters, the attorney may be a trust corporation. An individual who is bankrupt must not be appointed as an attorney to act in relation to the donor's financial matters.

23. Clause 9 provides for the capacities of 2 or more persons appointed as attorneys under a continuing power. Clause 9(2) provides that, where 2 or more attorneys are appointed, "[i]f the donor fails to specify in the continuing power of attorney whether the attorneys are appointed to act jointly, or to act jointly and severally, they are taken to be appointed to act jointly" (see paragraphs 12 to 14 above). Clauses 10 and 11 deal with the situations of joint attorneys and joint and several attorneys with respect to compliance with the requirements in clause 8 (see Recommendation 6).

24. Division 2 in Part 3 of the Bill (Clauses 12 - 17) provides for the designation of substitute attorneys, substitution for original attorneys by substitute attorneys as well as succession of office of substitute attorneys. In particular, this set of provisions enables a donor to designate a person for the purpose of substituting for an original attorney if the donor becomes mentally incapable and the appointment of the original attorney is terminated on the happening of a specified event (e.g., the death of the attorney - see Clause 16 and the relevant term as defined in Clause 2(1)) in relation to the original attorney,

### ***Execution of a CPA (Part 5 of the Bill)***

25. Clauses 28 to 31 set out the requirements in relation to



the execution of an instrument creating a continuing power. These requirements are based on those set out in section 5 of the EPA Ordinance. Section 5 of the EPA Ordinance was amended by the Enduring Powers of Attorney (Amendment) Ordinance 2011 to implement some of the witness requirements proposed in the 2008 Report (see Recommendation 7).

### *Formalities for Executing a CPA*

26. Clauses 24 to 25 set out the requirements relating to the use of a prescribed form as the instrument to create a continuing power. The requirements are based on those in sections 3(1) and 3(2) of the EPA Ordinance. The prescribed form, the details of which will be set out in the subsidiary legislation, will provide for a CPA which delegates decisions as to: (a) the donor's financial matters; or (b) the donor's personal care; or (c) both (a) and (b) (see Recommendation 8). Clause 26 requires a CPA to contain the prescribed explanatory information.

### *Nominating Persons for Purpose of Notification*

27. Clause 27 provides that the donor must nominate in the instrument creating the continuing power up to 5 persons (other than the donor) to 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.<sup>11</sup> The IWG is of the view that the approach adopted in clause 27, which is different from that recommended by the LRC (i.e. the donor should be required to nominate in the instrument two persons other than the donor who must be given notice of the attorney's intention to register the instrument) will allow more flexibility for the donor to decide whether to make such nomination and, if so, the number of persons to be nominated (see Recommendation 9).

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<sup>11</sup> This approach is based on section 2(1)(c) of Schedule 1 to the Mental Capacity Act 2005 of England and Wales.

### *Commencement of a continuing power*

28. Clause 32 provides for the commencement date of a continuing power for the donor's personal care matters only. The continuing power may only commence after the donor has become mentally incapable. Clause 33 provides for the commencement date of a continuing power relating to the donor's financial matters only. The continuing power may commence on a specified date or specified event, or on the execution of the instrument.

29. Clause 34 provides for the commencement date of a continuing power of attorney covering the donor's personal care matters as well as the donor's financial matters. The power relating to the donor's financial matters must not commence later than the date on which the power relating to the donor's personal care matters commences.

### ***Duties of Attorneys (Part 4 of the Bill)***

30. Clause 18, which is based on section 12 of the EPA Ordinance, sets out the duties of an attorney towards the donor of a continuing power. In addition, clause 19 provides that, in performing the duties, 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 (see Recommendation 10).

### ***Registration of CPA and Notification of Registration etc. (Part 6 of the Bill)***<sup>12</sup>

31. Clause 35 deals with the application for registering a CPA to the Registrar of the High Court ("Registrar"). Clause 36 deals with the application by one or more attorneys if 2 or more persons

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<sup>12</sup> Reference: Section 9 of the EPA Ordinance.

are appointed as attorneys to act jointly or jointly and severally. Clauses 37 and 38 provide for the registration of CPAs by the Registrar and the effect of registration.

32. Clause 39 deals with the register of the instruments registered under clause 37 and the public inspection of the register. Clause 40 requires the applicant of the registration of a CPA to give notice of the application to the person(s) nominated by the donor under clause 27. Clause 41 provides for the effect of failure to give notice under clause 40.

33. Clauses 42 and 43 provide for the Registrar's function of cancelling the registration of a CPA under certain circumstances<sup>13</sup> and amending record of the register upon notification of certain orders made by the Guardianship Board to (i) revoke or confirm revocation of the continuing power or remove the attorney for the continuing power without replacement; or (ii) vary or to suspend the continuing power.

34. **Views are sought on whether (i) the functions of registering a CPA, maintaining the register of CPAs and other related matters should be given to the Guardianship Board instead of the Registrar; and (ii) the Guardianship Board should be empowered to supervise EPA executed under the EPA Ordinance.**

***Revocation of Continuing Power (Part 7 of the Bill) and Functions of the Guardianship Board and Court (Part 8 of the Bill)***

35. Part 7 of the Bill sets out various grounds for revocation of a CPA in the light of the position under the common law and the existing provisions in the EPA Ordinance. The functions of the Guardianship Board and the Court are set out in Part 8 of the Bill, and these would include, among other things, determination of issues relating to validity and revocation of a CPA under Part 7.

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<sup>13</sup> Reference: Section 11(4) of the EPA Ordinance.

### *Proceedings before the Guardianship Board*

36. Clauses 57 to 61 set out the functions of the Guardianship Board in relation to a continuing power as recommended by the LRC (see Recommendation 11(2)).

37. In addition, clause 56 provides that the provision has effect without limiting the functions and powers of the Guardianship Board under Part IVB of the Mental Health Ordinance (Cap. 136) (MHO). Clause 57 provides that the Guardianship Board may, on application of an interested party or on its own initiative on hearing a matter under the Bill or the MHO, review the validity, revocation, or operation and effect of a continuing power. Clause 58 provides that the Guardianship Board may make 1 or more decisions specified in Division 5 (clauses 69 to 73) in relation to a continuing power if the Guardianship Board is satisfied that it would be in the best interests of the donor to do so, having regard so far as to the donor's wishes and feelings that are ascertainable.<sup>14</sup>

38. Clauses 59 and 60 enable the Guardianship Board to require written reports of 2 registered medical practitioners specified in section 59M(3) of the MHO from an applicant for a review of a continuing power and a social enquiry report from the Director of Social Welfare.

39. Clauses 61(1) and 61(2) enable the Guardianship Board to treat an application to review a continuing power under clause 57(a) as an application for guardianship under Part IVB of the MHO and dispense with the formalities.<sup>15</sup> Clause 61(3) further provides that a guardianship order made by operation of clause 61(1) does not revoke but suspends the continuing power for the duration specified in the order.<sup>16</sup> Clause 61(4) provides that so long as the

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<sup>14</sup> Based on section 4(6)(a) of the Mental Capacity Act 2005 of England and Wales.

<sup>15</sup> Section 59M of the MHO provides that a guardianship application should be made in the prescribed form.

<sup>16</sup> A "guardianship order" is defined in clause 55 as "a guardianship order as defined by section

authority of the attorney to act is suspended under the guardianship order, section 5 of the Powers of Attorney Ordinance (Cap. 31)<sup>17</sup> applies (so far as applicable) as if the continuing power had been revoked.<sup>18</sup> Clause 61(5) provides that the attorney may, during the suspension period, act for the donor to the extent authorized by the Guardianship Board. Clause 61(6) provides that if the attorney purports to act under clause 61(5), the transaction between the attorney and a person dealing with the attorney is valid in favour of the person if the person does not have knowledge that the attorney is acting otherwise than in accordance with clause 61(5).<sup>19</sup>

40. Where a guardianship order is made other than by operation of clause 61(1), and where the terms of the guardianship order are in conflict with the authority conferred on an attorney under a continuing power, such overlapping of power may cause confusion to those who are involved in the relevant decision making process (e.g. frontline personnel who provide healthcare services to the donor). This may, for instance, occur when at the time of making the guardianship order the Guardianship Board was not aware of the existence of the CPA, such that the terms of the guardianship order would be in conflict with the authority conferred on the attorney under that continuing power. **Views are sought on whether, under such circumstances, the guardianship order should be deemed as having the effect of suspending the continuing power for the duration of the guardianship order.**

#### *Transfer of Forum of Proceedings and Appeals*

41. Clause 62 deals with the forum of the proceedings relating to a continuing power. Clause 62(1) provides that an application for proceedings relating to a continuing power may only

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59I(1) of the Mental Health Ordinance”.

<sup>17</sup> The provision provides for protection of a donee of a power of attorney acting in pursuance of the power and a third person dealing with the donee of the power at a time when the power has been revoked (and they had no knowledge of the revocation).

<sup>18</sup> Adapted from section 4(4) of the EPA Ordinance.

<sup>19</sup> Based on section 4(6) of the EPA Ordinance.

be made to the Guardianship Board. Clause 62(2) provides that the Guardianship Board may, in appropriate cases, refer an application to the court. Clause 62(3) provides that, in deciding whether to refer an application to the court, the Guardianship Board must take into account the matters specified in clause 63.<sup>20</sup> Clause 64 provides that the court may issue Practice Directions governing the procedures on the transfer of proceedings. Clauses 74 to 76 set out the matters regarding an appeal to the court against any decision made by the Guardianship Board in relation to a continuing power (see Recommendation 11(3)).

### *Proceedings in Court*

42. Clause 65 empowers the court to review the validity, revocation, or operation and effect of a continuing power. Clause 66 provides that the court may make any of the declarations or orders that may be made by the Guardianship Board under clauses 68 to 73, if the court is satisfied that it would be in the best interests of the donor to do so, having regard so far as practicable to the donor's wishes and feelings that are ascertainable (see Recommendations 11(1) and 11(2)).

### ***Protection of Attorneys and Other Persons (Part 9 of the Bill)***

43. Clause 77 provides that the Guardianship Board or the court may relieve an attorney under a continuing power wholly or partly from any liability that the attorney has or may have incurred on account of a breach of duty as attorney, if it appears to the court that the attorney has acted honestly and reasonably.<sup>21</sup>

44. Clauses 78 to 81 provide that the attorney and/or the person who enter(s) into a specified transaction<sup>22</sup> may be protected from liability when: (a) the continuing power is suspended under the

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<sup>20</sup> Reference: Section 34 of the Powers of Attorney Act 2003 of New South Wales

<sup>21</sup> Reference: Section 11(3) of the EPA Ordinance.

<sup>22</sup> The term "specified transaction" is defined in clause 82(4) as meaning "a transaction referred to in [clause] 78(1)(b), 79(1)(c), 80(1)(c) or 81(1)(b)".

Bill (other than in the circumstances stated in clauses 22(2) and 61(3)); (b) the instrument only creates a power of attorney but not a valid continuing power and is revoked by the donor's subsequent mental incapacity<sup>23</sup>; (c) the continuing power is subsequently revoked by the donor; or (d) a guardian has been appointed for the donor by the Guardianship Board.<sup>24</sup>

45. Clause 82 provides for the protection of a purchaser in good faith for valuable consideration if the purchaser's interest in the property in question depends on the validity of a transaction between the attorney under a continuing power and another person.<sup>25</sup>

### ***Miscellaneous Provisions (Part 10 of the Bill)***

46. Clause 83 prohibits a waiver of the requirements of the Bill, except as otherwise provided in the Bill.<sup>26</sup>

47. Clause 84 empowers the Secretary for Justice to make regulations to, among others, specify the form of, and prescribe for other matters in relation to, a continuing power of attorney.<sup>27</sup> Clause 85 empowers the Secretary for Food and Health to make regulations to prescribe the type or form of healthcare for the purposes of clause 5(1)(j). Clause 86 empowers the Secretary for Labour and Welfare to make rules for the proceedings before the Guardianship Board for matters relating to a continuing power.

### ***Related Amendments (Part 11 of the Bill)***

48. Clause 88 provides for amendments to the EPA Ordinance to the effect that no EPA may be created on or after the commencement date of the CPA Ordinance. Accordingly, matters

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<sup>23</sup> Reference: Section 14 of the EPA Ordinance.

<sup>24</sup> Clauses 79, 80 and 81 were based on sections 47 and 48 of the Powers of Attorney Act 2003 of New South Wales with modification of the wording to reflect the policy intention.

<sup>25</sup> Reference: Section 14(1)(c) of the EPA Ordinance.

<sup>26</sup> Reference: Section 16 of the EPA Ordinance.

<sup>27</sup> Reference: Section 18 of the EPA Ordinance.

relating to the EPAs created before the commencement date of the CPA Ordinance will continue to be governed by the EPA Ordinance (see paragraph 15 above).

49. Clause 89 provides for amendments to the eHRSS Ordinance to include the attorney under a continuing power of attorney as an eligible person to be a substitute decision maker under that Ordinance (see paragraph 20 above).

### **Consultation**

50. Before taking the matter forward, DoJ would like to seek in particular the views of the legal, healthcare and welfare sectors, professional bodies and other interested parties on the proposed Bill outlined above.

51. Please address your views or comments on the proposed Bill to the following on or before 28 February 2018 -

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**Summary of the Recommendations of the Law Reform  
Commission (LRC)**

**Recommendation 1**

*(Scope of an enduring power of attorney (“EPA”))*

The LRC recommended that the scope of an EPA in Hong Kong be extended to include decisions as to the donor's personal care.

**Recommendation 2**

*(Recognition of EPAs executed outside Hong Kong)*

The LRC recommended that provision should be made for the recognition in Hong Kong of EPAs executed outside Hong Kong in specific circumstances.

**Recommendation 3**

*(What “personal care” decisions should be covered?)*

The LRC recommended that, for the purposes of the proposed expanded EPA, "personal care" should include [everyday] decisions<sup>1</sup> as to the donor's health care, but not decisions involving the giving or refusing of life-sustaining treatment or the making or revoking of advance directives.

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<sup>1</sup> In Recommendation 3 after paragraph 3.9 of the 2011 LRC Report, the term “decisions” is used. In Recommendation 3 of the summary of recommendations in Chapter 5 of the 2011 LRC Report, the term “everyday decisions” is used (this observation is only applicable to the English version of the 2011 LRC Report).

## Recommendation 4

*(Examples of “personal care” decisions)*

The LRC recommended that legislative provision should be made to allow personal care decisions to be included in the scope of an EPA. The LRC recommended that legislation should provide that such decisions may include:

- (a) where the donor lives;
- (b) who the donor lives with;
- (c) whether the donor works and, if he does so, where and how the donor works;
- (d) what education or training the donor gets;
- (e) whether the donor applies for a licence or permit;
- (f) the donor's daily dress and diet;
- (g) whether to consent to a forensic examination of the donor;
- (h) whether the donor will go on holiday and where;
- (i) legal matters relating to the donor's personal care;
- (j) a power to refuse access to, or contact with, the donor by specific individuals;<sup>2</sup>
- [(j) everyday decisions as to the donor's health care;]<sup>3</sup> and
- (k) decisions as to the donor's health care.<sup>4</sup>
- [(k) other decisions of a similar nature.]<sup>5</sup>

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<sup>2</sup> This is the version in Recommendation 4 after paragraph 3.17 of the 2011 LRC Report.

<sup>3</sup> This is the version in Recommendation 4 of the summary of recommendations in Chapter 5 of the 2011 LRC Report. This observation is only applicable to the English version of the 2011 LRC Report.

<sup>4</sup> This is the version in Recommendation 4 after paragraph 3.17 of the 2011 LRC Report.

<sup>5</sup> This is the version in Recommendation 4 of the summary of recommendations in Chapter 5 of the 2011 LRC Report. This observation is only applicable to the English version of the 2011 LRC Report.

## **Recommendation 5**

*(What should be statutorily excluded from the scope of an EPA)*

The LRC recommended that the following decisions should be statutorily excluded from the scope of an EPA:

- (a) making, varying or revoking the donor's will;
- (b) making, varying or revoking an EPA for the donor;
- (c) exercising the donor's right to vote in an election;
- (d) consenting to the adoption of a child of the donor who is under 18;
- (e) consenting to any change in the marital status of the donor;
- (f) removal of non-regenerative tissue from the donor while alive for donation to someone else;
- (g) sterilisation of the donor if the donor is, or is reasonably likely to be, fertile;
- (h) participation in medical research or experimental health care;
- (i) placing the donor in hospital for treatment of mental disorder against his will;
- (j) consenting to electroconvulsive therapy or psychiatric surgery; and
- (k) consenting to health care prescribed by regulation.

## **Recommendation 6**

*(Single attorney for all matters or separate attorneys for different matters)*

The LRC recommended that the donor of an EPA should be able to appoint a single attorney to make decisions on his behalf in relation to both financial matters and health care or to appoint separate attorneys to deal with each of these categories of decisions.

## **Recommendation 7**

*(Same execution requirements)*

The LRC recommended that the witness requirements proposed in its March 2008 report on *Enduring Powers of Attorney* for the execution of an EPA should apply to all EPAs, whether or not they extend to personal care decisions.

## **Recommendation 8**

*(Statutory EPA form)*

The LRC recommended that the statutory EPA form should be revised so that it provides for an EPA which delegates decisions as to: (a) the donor's financial and property affairs; or (b) the donor's personal care; or (c) both (a) and (b).

## **Recommendation 9**

*(Persons to be notified before registering an EPA)*

The LRC recommended that an EPA donor should be required to nominate in the EPA two persons other than the donor who must be given notice of the attorney's intention to register the EPA.

## **Recommendation 10**

*(Attorney to act in the donor's best interest)*

The LRC recommended that an EPA attorney should be under a statutory duty to act in the donor's best interests. In determining the donor's best interests, the attorney should be required to have regard so far as practicable to the donor's wishes and feelings, to the extent that these are ascertainable. If it is practicable and appropriate, the attorney should be required to consult any person named by the donor as a person to be consulted on matters arising

from the EPA and any person caring for the donor or interested in his welfare.

## **Recommendation 11**

*(Supervision and discharge of EPA attorneys and the resolution of disputes)*

(1) The LRC recommended that the court's existing powers of supervision and discharge of an EPA attorney in the EPA Ordinance (Cap 501) should be supplemented by powers to:

- (i) direct an attorney to do, or not to do, a specific act;
- (ii) appoint a substitute attorney;
- (iii) give directions as to the remuneration or expenses of an attorney; and
- (iv) make such other orders as the court thinks are appropriate in the best interests of the donor.

(2) The LRC further recommended that the Guardianship Board should be given power in relation to an EPA to:

- (i) direct an EPA attorney to do, or not do, a specific act ;
- (ii) vary a term of an EPA;
- (iii) make a declaration about the interpretation or effect of an EPA;
- (iv) remove a power from an attorney and give the removed power to another attorney or a new attorney;
- (v) require an attorney to provide accounts and records of transactions carried out for the donor;

- (vi) require an attorney to submit a plan of financial management for approval; and
- (vii) give directions as to the remuneration or expenses of the attorney.

(3) The LRC recommended that the powers listed at (2) should also be exercisable by the court and the Board should be able to refer matters to the court, and *vice versa*. An appeal should lie to the court from any decision by the Board.

### **Recommendation 12**

*(Recognition of EPAs executed outside Hong Kong).*

The LRC recommended that an EPA made in a jurisdiction other than Hong Kong should be recognised in Hong Kong if:

- (a) it complies with the Hong Kong execution requirements (though witnessed by a solicitor/doctor registered in the other jurisdiction, rather than Hong Kong); or
- (b) it complies with the EPA requirements of that jurisdiction.

### **Recommendation 13**

*(Scope of an attorney's authority under section 8(1)(b) of the EPA Ordinance)*

The LRC recommended that section 8(1)(b) of the EPA Ordinance (Cap 501) be repealed and replaced with a provision to the effect that an EPA donor may authorise the attorney to act in relation to all of the donor's property and affairs or in relation to specified parts of the donor's property and affairs. In either case, the authorisation may be given subject to conditions and restrictions.



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# **Continuing Powers of Attorney Bill**

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# A BILL

## To

Provide for the creation of continuing powers of attorney and related matters.

Enacted by the Legislative Council.

### Part 1

#### Preliminary

##### 1. Short title and commencement

- (1) This Ordinance may be cited as the Continuing Powers of Attorney Ordinance.
- (2) This Ordinance comes into operation on a day to be appointed by the Secretary for Justice by notice published in the Gazette.

##### 2. Interpretation

- (1) In this Ordinance—

*act for the donor* (代授權人行事) includes making a decision for the donor;

*attorney* (承權人), in relation to a continuing power, means the person appointed as attorney for the power and includes, where applicable, a serving substitute attorney;

*continuing power* (持續授權) means a continuing power within the meaning of section 3;

*continuing power of attorney* (持續授權書) means an instrument that—



- (a) creates a continuing power; and
- (b) complies with section 24;

***court*** (法院) means the Court of First Instance;<sup>1</sup>

***donor*** (授權人), in relation to a continuing power, means the person giving the power;

***financial matters*** (財務事宜), in relation to an individual, means matters concerning the property or financial affairs of the individual;

***function*** (職能) includes a power and a duty;

***Guardianship Board*** (監委會) means the Guardianship Board established under section 59J of the Mental Health Ordinance;

***healthcare*** (醫護服務), in relation to an individual, means an activity performed for the individual for—

- (a) assessing, recording, maintaining or improving the individual's health;
- (b) diagnosing the individual's illness or disability; or
- (c) treating the individual's illness or disability, or suspected illness or disability;<sup>2</sup>

***Mental Health Ordinance*** (《精神健康條例》) means the Mental Health Ordinance (Cap. 136);

***mentally incapable*** (精神上無能力行事) means—

- (a) being mentally incapable; and
- (b) suffering from mental incapacity within the meaning of section 1A of the Powers of Attorney Ordinance,

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<sup>1</sup> This is also provided in the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>2</sup> This definition is modified from the definition of healthcare in the Electronic Health Record Sharing System Ordinance (Cap. 625).

and *mental incapacity* (精神上無行為能力)<sup>3</sup>, *mentally capable* (精神上有能力行事) and *mental capacity* (精神上行為能力) are to be construed accordingly;<sup>4</sup>

*original attorney* (原任承權人) has the meaning given by section 12;

*personal care matters* (個人照護事宜), in relation to an individual, means matters concerning the welfare, other than the financial matters, of the individual;

*Powers of Attorney Ordinance* (《授權書條例》) means the Powers of Attorney Ordinance (Cap. 31);

*prescribed* (訂明) means prescribed by regulations made under section 84 or 85;

*prescribed explanatory information* (訂明解說) means the information prescribed by regulations made under section 84(2)(a);

*registered* (登記) means registered under section 37;

*Registrar* (司法常務官) means the Registrar of the High Court;

*serving substitute attorney* (在任替代承權人) has the meaning given by section 12;

*specified event* (指明事件), in relation to an attorney for a continuing power, means any of the following—

- (a) the death of the attorney;
- (b) the lack of mental capacity of the attorney;
- (c) if the attorney acts for the donor in relation to the donor's financial matters—the bankruptcy, winding up or dissolution of the attorney;

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<sup>3</sup> The Chinese renditions for the two forms (adjective and noun) of the expression are different.

<sup>4</sup> Reference : Section 2(1) of the Enduring Powers of Attorney Ordinance (Cap. 501).

- (d) the removal of the attorney under section 73(g);
- (e) the disclaimer by the attorney of the attorney's appointment in accordance with the requirements prescribed by regulations made under section 84;

***substitute attorney*** (替代承權人), in relation to a continuing power of attorney, means a person designated in the continuing power of attorney for the purpose mentioned in section 13.

- (2) For the purposes of this Ordinance—
  - (a) a reference to a power of attorney in section 1A of the Powers of Attorney Ordinance is a reference to a continuing power of attorney; and
  - (b) a reference to the effect of the power of attorney in that section is a reference to the effect of—
    - (i) the continuing power of attorney; and
    - (ii) the prescribed explanatory information in the continuing power of attorney<sup>5</sup>.

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<sup>5</sup> Reference: Section 2(2) of the Enduring Powers of Attorney Ordinance (Cap. 501).

## Part 2

### Nature and Scope of Continuing Power

#### 3. Nature of continuing power

- (1) A person (*donor*) who is not mentally incapable<sup>6</sup> may, by giving a continuing power, confer on another person (*attorney*) authority<sup>7</sup> to act for the donor in relation to any or all of the following<sup>8</sup>—
  - (a) the donor’s personal care matters<sup>9</sup>;
  - (b) the donor’s financial matters.
- (2) However, the authority that the donor may confer on the attorney is subject to the restrictions mentioned in section 4.
- (3) The authority conferred by the continuing power on the attorney survives any subsequent mental incapacity of the donor.<sup>10</sup>
- (4) The authority conferred on the attorney is subject to—
  - (a) the restrictions mentioned in section 5; and
  - (b) any conditions and other restrictions specified by the donor.

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<sup>6</sup> Reference : Section 5(1) of the Enduring Powers of Attorney Ordinance (Cap. 501) and section 9(2)(c) of the Mental Capacity Act 2005 of England and Wales.

<sup>7</sup> The expression “confer on ... authority” is used in section 8(1) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>8</sup> Reference: Section 9(1) of the Mental Capacity Act 2005 of England and Wales and section 6(1) of the Irish Powers of Attorney Act 1996 and section 98 of the New Zealand Protection of Personal and Property Rights Act 1988.

<sup>9</sup> Reference: Recommendation 1 of the 2011 LRC Report.

<sup>10</sup> Reference : Section 4(1) of the Enduring Powers of Attorney Ordinance (Cap. 501).

- (5) Also, the attorney may act for the donor in relation to any of the donor's personal care matters only if the attorney believes on reasonable grounds that the donor is mentally incapable of acting on his or her own in relation to those matters.<sup>11</sup>

**4. Restrictions on scope of authority donor may confer in relation to any matter<sup>12</sup>**

The donor of a continuing power may not authorize an attorney to do any of the following—

- (a) to make, vary or revoke the donor's will;
- (b) to make, vary or revoke a continuing power given by the donor;
- (c) to exercise the donor's right to vote in an election;
- (d) to consent to the adoption of a child of the donor, being a child under the age of 18 years;
- (e) to consent to any change in the marital status of the donor;<sup>13</sup>
- (f) to appoint another person in substitution for the attorney or as the attorney's successor;
- (g) to delegate trusts for the purposes of section 27 of the Trustee Ordinance (Cap. 29).<sup>14</sup>

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<sup>11</sup> Reference: Section 98(3)(b) of the New Zealand Protection of Personal and Property Rights Act 1988.

<sup>12</sup> Based on Recommendation 5 of the 2011 LRC Report with modification.

<sup>13</sup> Reference: Recommendation 5 of the 2011 LRC Report. Sub-clauses (a) to (e) are based on section 3(a) to (g) of Schedule 2 to the Queensland Powers of Attorney Act 1998 and section 36(a) to (e) of Powers of Attorney Act 2006 of the Australian Capital Territory.

<sup>14</sup> Sub-clauses (f) and (g) are based on section 7 of the Enduring Powers of Attorney Ordinance (Cap. 501).

**5. Restrictions on decisions in relation to personal care matters**

- (1) The attorney for a continuing power in relation to a personal care matter may not make a decision to do any of the following—
- (a) to remove non-regenerative tissue or any organ from the donor while the donor is alive—
    - (i) for transplanting into another person; or
    - (ii) for any purpose that is not in the donor’s best interests;
  - (b) to sterilize the donor if the donor is, or is reasonably likely to be, fertile;
  - (c) to place the donor in a mental hospital (as defined by section 2(1) of the Mental Health Ordinance) for treatment of mental disorder against the donor’s will;<sup>15</sup>
  - (d) to give, refuse or withdraw any life-sustaining treatment for the donor;<sup>16</sup>
  - (e) to make, vary or revoke an advance directive for the donor;<sup>17</sup>
  - (f) to make the donor participate in any medical research or experimental healthcare;
  - (g) to make the donor take any electroconvulsive therapy or psychiatric surgery;<sup>18</sup>

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<sup>15</sup> Reference: Section 16(6) of the Adults with Incapacity (Scotland) Act 2000.

<sup>16</sup> Decisions involving the giving or refusing of life-sustaining treatment were excluded from the definition of “personal care” in Recommendation 3 of the 2011 LRC Report.

<sup>17</sup> Decisions involving the making or revoking of advance directives were excluded from the definition of “personal care” in Recommendation 3 of the 2011 LRC Report.

<sup>18</sup> Sub-clauses (2)(a) to (c) and (e) are based on section 37(1) of the Powers of attorney Act 2006 of the Australian Capital Territory.

- (h) to make the donor take any reproductive technology procedure (as defined by section 2(1) of the Human Reproductive Technology Ordinance (Cap. 561));
- (i) to make the donor take any healthcare or medical procedure that is prohibited by the laws of Hong Kong;
- (j) to make the donor take a type or form of healthcare as may be prescribed for the purpose of this section<sup>19</sup>.

(2) In this section—

**advance directive** (預設指示), in relation to a mentally capable person who has reached the age of 18 years, means a decision in writing by the person to receive, or refuse to receive, any specific treatment to be taken by the person at a later time and in the specified circumstances when the person becomes mentally incapable;<sup>20</sup>

**life-sustaining treatment** (續命治療), in relation to an individual, means a treatment which, in the view of a person providing healthcare for the individual, is necessary to sustain the individual's life<sup>21</sup>;

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<sup>19</sup> Sub-clauses (2)(a) to (e) and (j) are based on Recommendation 5 of the 2011 LRC Report with modifications.

<sup>20</sup> References: Helen FK Chiu, SW Li, *Advance Directive: A Case for Hong Kong*, Journal of the Hong Kong Geriatrics Society, Vol 10, No. 2, July 2000, at 99, as cited in the LRC Report on *Substitute Decision-making and Advance Directives in relation to Medical Treatment* (August 2006) (“2006 LRC Report”), at p. 12 (para 2.1); section 24(1) of the Mental Capacity Act 2005 of England and Wales. According to para 2.1 of the 2006 LRC Report, an advance directive is “usually in writing”, but under sections 24 and 25 of the Mental Capacity Act 2005 of England and Wales, there is no express requirement for an advance decision to be in writing unless it is applicable to life-sustaining treatment.

<sup>21</sup> Reference: Section 4(10) of the Mental Capacity Act 2005 of England and Wales.

*organ* (器官) has the meaning given by paragraph (a) of the definition of *organ* in section 2 of the Human Organ Transplant Ordinance (Cap. 465).

- (3) In this section, a reference to making a decision to do a thing includes giving a consent to do the thing.

## 6. **Personal care matters on which attorney may act**

Subject to section 5, the personal care matters on which the attorney for a continuing power may act for the donor include the following<sup>22</sup>—

- (a) where the donor lives;
- (b) whom the donor lives with;
- (c) the donor's daily dress and diet;
- (d) what education or training the donor undertakes;
- (e) whether, and if so where and how, the donor works;
- (f) whether the donor applies for a licence or permit;
- (g) whether, and if so where, the donor goes on holiday;
- (h) whether to refuse any specific individual to have access to, or contact with, the donor;
- (i) legal matters relating to the donor's personal care;
- (j) matters relating to the donor's healthcare, including the following for the purpose of providing healthcare to the donor—
  - (i) access to the donor's health record;
  - (ii) sharing the record (or any part of it) with a person (other than the donor);

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<sup>22</sup> Reference: Recommendation 4 of the 2011 LRC Report. Most of the sub-clauses are based on the *examples* in section 11 of the Powers of Attorney Act 2006 of the Australian Capital Territory.



- (iii) giving consent to a person (other than the donor) to have access to the record and to further share the record with another person;
  - (k) whether to consent to a forensic examination of the donor.
- \_\_\_\_\_

## Part 3

### Appointment of Attorneys

#### Division 1—Requirements and Capacities

##### 7. Donor may appoint multiple attorneys

The donor of a continuing power may appoint 1 or more attorneys to act for the donor.<sup>23</sup>

##### 8. Requirements for attorney<sup>24</sup>

- (1) An attorney for a continuing power must be an individual—
  - (a) who has reached the age of 18 years; and
  - (b) who is not mentally incapable.<sup>25</sup>
- (2) However, if the continuing power relates only to the donor's financial matters, the attorney may be a trust corporation.<sup>26</sup>
- (3) An individual who is bankrupt<sup>27</sup> must not be appointed to act as an attorney under a continuing power in relation to the donor's financial matters.
- (4) In this section—

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<sup>23</sup> Reference: Recommendation 6 of the 2011 LRC Report and suggestions made by the Bills Committee of the Enduring Powers of Attorney (Amendment) Bill 2011 on joint and several attorneys under section 15 of the Enduring Powers of Attorney Ordinance (Cap 501).

<sup>24</sup> Reference: Section 6 of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>25</sup> Reference: Section 6(a) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>26</sup> Reference: Section 6(b) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>27</sup> Reference: Section 6(a) of the Enduring Powers of Attorney Ordinance (Cap. 501).

*trust corporation* (信託法團) has the meaning given by section 2 of the Trustee Ordinance (Cap. 29).

## 9. Capacities of 2 or more attorneys

- (1) If 2 or more persons are appointed as attorneys for a continuing power, the donor may appoint them to act—
  - (a) jointly;
  - (b) jointly and severally; or
  - (c) jointly in relation to some matters, and jointly and severally in relation to the other matters.
- (2) If the donor fails to specify in the continuing power of attorney whether the attorneys are appointed to act jointly, or to act jointly and severally, they are taken to be appointed to act jointly.<sup>28</sup>

## 10. Joint attorneys

- (1) This section applies to an instrument—
  - (a) that is intended to take effect as a continuing power of attorney; and
  - (b) under which 2 or more persons are appointed as attorneys to act jointly.
- (2) The instrument may take effect as a continuing power of attorney only if the requirements in section 8 are complied with in relation to each of the attorneys.

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<sup>28</sup> Reference: Recommendation 6 of the 2011 LRC Report and suggestions made by the Bills Committee of the Enduring Powers of Attorney (Amendment) Bill 2011 on joint and several attorneys under section 15 of the Enduring Powers of Attorney Ordinance (Cap. 501).

- (3) The instrument is regarded as executed by the attorney at the time of execution by the last of the attorneys.<sup>29</sup>

## 11. Joint and several attorneys

- (1) This section applies to an instrument—
- (a) that is intended to take effect as a continuing power of attorney; and
  - (b) under which 2 or more persons are appointed as attorneys to act jointly and severally.
- (2) The instrument may still take effect as a continuing power of attorney even if the requirements in section 8 are not complied with in relation to each of the attorneys.
- (3) If the requirements in section 8 are not complied with in relation to an attorney, the failure to comply with the requirements—
- (a) prevents the instrument from creating a continuing power for that attorney; but
  - (b) does not prevent the instrument from creating a continuing power for the other attorney in relation to whom the requirements in section 8 are complied with.<sup>30</sup>

## Division 2—Substitute Attorneys

### 12. Interpretation of Division 2

In this Division—

***original attorney*** (原任承權人), in relation to a continuing power, means the person appointed as an attorney when the continuing power is created;

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<sup>29</sup> Reference: Section 15(2) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>30</sup> Reference: Section 15(3)(a) of the Enduring Powers of Attorney Ordinance (Cap. 501).

*servicing substitute attorney* (在任替代承權人) means—

- (a) a substitute attorney who is substituted for the original attorney; or
- (b) a substitute attorney who has succeeded another substitute attorney to be substituted for the original attorney.

### 13. Purpose of designation of substitute attorney

A donor may, in a continuing power of attorney, designate a person (*substitute attorney*) for the purpose of substituting for an original attorney if—

- (a) the donor becomes mentally incapable; and
- (b) the appointment of the original attorney is terminated under section 16(1).

### 14. Requirements relating to designation of substitute attorney

- (1) The requirements of section 8 in relation to an attorney apply in relation to a substitute attorney.
- (2) If a substitute attorney is designated, the donor must specify in the continuing power of attorney how the substitute attorney is to be substituted for the original attorney.<sup>31</sup>

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<sup>31</sup> The latest policy intention is to allow continuation of substitution by succession, so the two concepts of “substitution” and “succession” should be separated : “substitution” only refers to the substitution for the original attorney and “succession” refers to the succession of office of substitute attorneys. We therefore only refer to substitution of the original attorney here.

**15. Order of priority among substitute attorneys**

- (1) If more than 1 substitute attorney is designated, the donor may specify the order of substitution priority, and the order of succession, among the substitute attorneys.
- (2) If the donor fails to specify any of the orders, the substitute attorneys are assumed to take office in the order of appearance of their names in the continuing power of attorney under the part relating to designation of substitute attorneys.

**16. Substitution and succession of attorneys**

- (1) The appointment of an original attorney under a continuing power of attorney is terminated on the happening of a specified event in relation to that attorney.
- (2) The termination of appointment of the original attorney does not revoke the continuing power if a substitute attorney has been designated for the power.
- (3) A substitution of attorney takes effect on the termination subject to any order of the Guardianship Board or the court regarding replacement of the relevant attorney<sup>32</sup>.
- (4) A serving substitute attorney has the same extent of authority that was conferred on the original attorney under the continuing power of attorney before the termination.
- (5) Without limiting subsection (4), the provisions of Part 4 (duties and powers of attorneys) apply to a serving substitute attorney once the substitution takes effect.
- (6) On the happening of a specified event in relation to a serving substitute attorney—
  - (a) that attorney ceases to hold office as an attorney for the continuing power; and

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<sup>32</sup> Please see clause 73(g).

- (b) that attorney is succeeded by another substitute attorney according to the order of succession referred to in section 15 subject to any order of the Guardianship Board or the court regarding replacement of the relevant attorney<sup>33</sup>.

**17. Substitution in case of joint attorneys**

- (1) This section applies if 2 or more original attorneys have been appointed to act jointly in relation to a continuing power.
- (2) In substituting an original attorney who was a joint attorney, a substitute attorney is to act—
  - (a) as a joint attorney with the remaining 1 or more joint attorneys in relation to the continuing power; or
  - (b) as the remaining attorney for the continuing power if the appointments of all of the original attorneys have been terminated under section 16(1).

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<sup>33</sup> Please see clause 73(g).

## Part 4

### Duties and Powers of Attorneys

#### 18. Duties of attorney<sup>34</sup>

- (1) The duties of an attorney towards the donor in relation to a continuing power are of a fiduciary nature.
- (2) Without limiting subsection (1), the attorney has the following duties—
  - (a) to exercise powers as an attorney honestly and with due diligence;
  - (b) to keep proper accounts and records;
  - (c) not to enter into any transaction if a conflict of interest would arise with the donor;
  - (d) not to mix the donor's property with any other property.

#### 19. Acts in best interests of donor<sup>35</sup>

In performing the duties under section 18, an attorney must—

- (a) act in the donor's best interests, having regard so far as practicable to the donor's wishes and feelings that are ascertainable<sup>36</sup>; and
- (b) consult, if practicable and appropriate, the views of—
  - (i) any person named by the donor as a person to be consulted on matters arising in relation to the continuing power; and

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<sup>34</sup> Reference: Section 12 of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>35</sup> Reference: Section 12 of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>36</sup> Reference: Recommendation 10 of the 2011 LRC Report.



- (ii) any person caring for, or interested in the welfare of, the donor.<sup>37</sup>

## **20. Acts to meet needs**

An attorney under a continuing power of attorney may, subject to any conditions and restrictions specified in the continuing power of attorney, act in relation to a continuing power to benefit the attorney or a person other than the donor—

- (a) only if the donor might be expected to provide for the needs of the attorney or that person; and
- (b) only to the extent to which what the attorney does is what the donor might be expected to do to meet those needs.<sup>38</sup>

## **21. Acts to make gifts**

(1) An attorney under a continuing power of attorney may, subject to any conditions and restrictions specified in the continuing power of attorney, act in relation to a continuing power to dispose of the donor's property by way of gift only to the extent to which—

- (a) the gift—
  - (i) is of a seasonal nature; or
  - (ii) is made at the time, or on an anniversary, of a birth or marriage,  
to a person (including the attorney) who is related to, or connected with, the donor; or
- (b) the gift is made to a charity to which the donor made, or might be expected to make, gifts.<sup>39</sup>

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<sup>37</sup> Reference: Recommendation 10 of the 2011 LRC Report.

<sup>38</sup> Reference: Section 8(3)(b) of the Enduring Powers of Attorney Ordinance (Cap. 501).

- (2) A gift made under subsection (1) must not be unreasonable having regard to all the circumstances, including the donor's estate.<sup>40</sup>

**22. Acts when donor becomes mentally incapable<sup>41</sup>**

- (1) This section applies if—
- (a) the attorney under a continuing power of attorney believes on reasonable grounds that the donor has become, or is becoming, mentally incapable; and
  - (b) the continuing power of attorney is not registered.
- (2) The continuing power is not revoked but is suspended because of the donor's mental incapacity.
- (3) The attorney must, as soon as practicable, apply to register the continuing power of attorney with the Registrar under section 35.

**23. Suspension of continuing power**

- (1) If a continuing power is suspended under section 22(2), the attorney must not do anything under the authority of the continuing power of attorney<sup>42</sup> until the continuing power of attorney is registered under 37.
- (2) So long as the continuing power is suspended, section 5 of the Powers of Attorney Ordinance applies (so far as applicable) as if the power had been revoked as a result of the donor's mental incapacity.<sup>43</sup>

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<sup>39</sup> Reference: Section 8(3)(c) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>40</sup> Reference: Section 8(4) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>41</sup> Reference: Section 4 of the Enduring Powers of Attorney Ordinance (Cap 501).

<sup>42</sup> Reference: Section 4(3) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>43</sup> Reference: Section 4(4) of the Enduring Powers of Attorney Ordinance (Cap. 501).

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- (3) Despite subsections (1) and (2), the attorney may, pending the registration, act for the donor on the donor's financial matters—
- (a) to maintain the donor;
  - (b) to prevent loss to the donor's estate; and
  - (c) to maintain the attorney and any other person in so far as the attorney is permitted to do so under section 20.<sup>44</sup>
- (4) If the attorney purports<sup>45</sup> to act under subsection (3), the transaction between the attorney and a person dealing with the attorney is valid in favour of the person if the person does not have knowledge that the attorney is acting otherwise than in accordance with that subsection.
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<sup>44</sup> Reference: Section 4(5) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>45</sup> Reference: Section 4(6) of the Enduring Powers of Attorney Ordinance (Cap. 501).

## Part 5

### Execution of Continuing Powers of Attorney

#### Division 1—Formalities

##### 24. Requirements for continuing power of attorney

An instrument purporting to create a continuing power cannot take effect as a continuing power of attorney unless—

- (a) at the time of execution of the instrument, the donor—
  - (i) has reached the age of 18 years; and
  - (ii) has the mental capacity to execute it;
- (b) the applicable requirements relating to the attorney under Division 1 of Part 3 are complied with; and
- (c) the other requirements relating to the formalities and execution of a continuing power of attorney under this Division and Division 2 are complied with.<sup>46</sup>

##### 25. Prescribed form and execution

- (1) An instrument creating a continuing power—
  - (a) must be in the prescribed form;<sup>47</sup> and
  - (b) must be executed by the donor and the attorney in the prescribed way<sup>48</sup>.
- (3) For the purposes of subsection (1)(a), an instrument creating a continuing power is taken as being in the prescribed form if it

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<sup>46</sup> Reference: Section 9(2) of the Mental Capacity 2005 of England and Wales.

<sup>47</sup> Reference: Recommendation 8 of the 2011 LRC Report.

<sup>48</sup> Reference: Section 3(1)(b) of the Enduring Powers of Attorney Ordinance (Cap. 501).

differs only in a respect that is not material in form or mode of expression from that prescribed.<sup>49</sup>

## **26. Prescribed explanatory information**

- (1) An instrument creating a continuing power must contain the prescribed explanatory information at the time of its execution by the donor.<sup>50</sup>
- (2) For the purposes of subsection (1), an instrument creating a continuing power that is in the prescribed form and that purports to have been executed in the prescribed way is taken, in the absence of evidence to the contrary, to be a document that contained the prescribed explanatory information at the time of its execution by the donor.<sup>51</sup>

## **27. Nominating persons for purpose of notification**

- (1) The donor of a continuing power must nominate in the instrument creating the continuing power the person (other than the donor) whom the donor wishes to be notified of an application for registration of the instrument.<sup>52</sup>
- (2) A maximum of 5 persons may be nominated under subsection (1).
- (3) However, if the donor does not wish to nominate any person in the instrument and states that fact in the instrument, subsection (1) does not apply.<sup>53</sup>

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<sup>49</sup> Reference: Section 3(2)(b) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>50</sup> Reference: Section 3(1)(c) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>51</sup> Reference: Section 3(2)(a) of the Enduring Powers of Attorney Ordinance Cap. 501).

<sup>52</sup> Reference: Recommendation 9 of the 2011 LRC Report.

<sup>53</sup> Reference: Section 2(1)(c) of Schedule 1 to the Mental Capacity Act 2005 of England and Wales.

## Division 2—Execution

### 28. Execution by donor<sup>54</sup>

- (1) Subject to section 29, the donor of a continuing power must personally sign the instrument creating the power before—
  - (a) a registered medical practitioner<sup>55</sup>; and
  - (b) a solicitor.
- (2) The medical practitioner and the solicitor must not be—
  - (a) the attorney for the continuing power;
  - (b) the spouse of the attorney; or
  - (c) a person related by blood or marriage to the donor or the attorney.
- (3) The instrument must be signed by the donor before the solicitor either—
  - (a) at the same time when the instrument is signed before the medical practitioner; or
  - (b) within 28 days after the day on which the instrument is signed before the medical practitioner.

### 29. Donor incapable of signing

- (1) If the donor of a continuing power is physically incapable of signing the instrument creating the power, an eligible signatory may sign the instrument on behalf of the donor in the presence, and under the direction, of the donor.
- (2) In this section—

***eligible signatory*** (合資格簽署人) means a person other than—

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<sup>54</sup> Reference: Section 5 of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>55</sup> The expression “registered medical practitioner” is defined in section 2(1) of the Medical Registration Ordinance (Cap. 161).

- (a) the attorney;
- (b) the registered medical practitioner before whom the instrument is signed;
- (c) the solicitor before whom the instrument is signed;
- (d) the spouse of the person mentioned in paragraph (a), (b) or (c).

**30. Certification<sup>56</sup> by registered medical practitioner and solicitor<sup>57</sup>**

- (1) A registered medical practitioner referred to in section 28(1)(a) must certify—
  - (a) that the medical practitioner was satisfied that the donor of the continuing power was mentally capable<sup>58</sup>;
  - (b) that the instrument creating the power was signed in the presence of the medical practitioner;
  - (c) if the instrument is signed by the donor—that the donor acknowledged that it was signed voluntarily; and
  - (d) if the instrument is signed on the donor’s behalf—that it was signed in the presence, and under the direction, of the donor.
- (2) A solicitor referred to in section 28(1)(b) must certify—
  - (a) that the donor of the continuing power appeared to be mentally capable<sup>59</sup>;

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<sup>56</sup> The certificate will be kept with the CPA as part and parcel of the prescribed CPA form.

<sup>57</sup> Reference: Section 5 of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>58</sup> Reference: Section 5(2)(e)(ii) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>59</sup> Reference: Section 5(2)(d)(ii) of the Enduring Powers of Attorney Ordinance (Cap. 501).

- (b) that the instrument creating the power was signed in the presence of the solicitor;
- (c) if the instrument is signed by the donor—that the donor acknowledged that it was signed voluntarily; and
- (d) if the instrument is signed on the donor’s behalf—that it was signed in the presence, and under the direction, of the donor.<sup>60</sup>

### **31. Execution by attorney**

- (1) The attorney appointed under a continuing power must sign the instrument creating the power.
- (2) If a substitute attorney is designated in the instrument, the substitute attorney must also sign the instrument.

## **Division 3—Commencement**

### **32. Commencement of continuing power<sup>61</sup> for personal care matters**

- (1) If a continuing power confers on an attorney authority to act for the donor only in relation to the donor’s personal care matters, the continuing power commences when both of the following events happen—
  - (a) the donor has become mentally incapable of making decisions about those matters;
  - (b) the instrument creating the continuing power is registered under section 37.
- (2) The date of the later of the 2 events under subsection (1) is regarded as the commencement date of the continuing power.

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<sup>60</sup> Reference: Recommendation 7 of the 2011 LRC Report.

<sup>61</sup> Reference: Section 10 of the Enduring Powers of Attorney Ordinance (Cap. 501).



**33. Commencement of continuing power<sup>62</sup> for financial matters**

- (1) If a continuing power confers on an attorney authority to act for the donor only in relation to the donor's financial matters, the continuing power commences—
  - (a) if a date is specified in the instrument creating the power for its commencement—on that date;
  - (b) if an event is specified in the instrument creating the power for its commencement—on the happening of that event; or
  - (c) if no such date or event is specified—on the execution of the instrument creating the power.
- (2) For the purposes of subsection (1)(c), an instrument creating a continuing power is executed when it is, subject to section 24,<sup>63</sup> duly signed before a solicitor in compliance with section 28.

**34. Commencement of continuing power<sup>64</sup> for mixed matters**

- (1) This section applies if a continuing power confers on an attorney authority to act for the donor in relation to both the donor's personal care matters and the donor's financial matters.
- (2) The continuing power must not commence on a date later than that referred to in section 32(2) (for commencement of the power in relation to the donor's personal care matters) even if the date is earlier than—
  - (a) the specified date referred to in section 33(1)(a); or

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<sup>62</sup> Reference: Section 10 of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>63</sup> To LPD : Clause 33 (1)(c) only follows section 10(1)(b) of Cap. 501. Please confirm if the addition of these words would deal with the question CAU raised.

<sup>64</sup> Reference: Section 10 of the Enduring Powers of Attorney Ordinance (Cap. 501).

- (b) the happening of the specified event referred to in section 33(1)(b),  
for commencement of the power in relation to the donor's financial matters.
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## Part 6

### Registration and Notification

#### Division 1—Registration of Continuing Power of Attorney

##### 35. Application for registration<sup>65</sup>

- (1) An application to register a continuing power of attorney may be made to the Registrar.
- (2) The application may be made by—
  - (a) the donor of the continuing power of attorney; or
  - (b) the attorney under the continuing power of attorney.
- (3) The application may be made at any time, including before the donor becomes mentally incapable.

##### 36. Application by attorneys

- (1) This section applies if an application under section 35 is made by the attorney under the continuing power of attorney.
- (2) If 2 or more persons are appointed as attorneys to act jointly, the application must be made by all of the attorneys.
- (3) If 2 or more persons are appointed as attorneys to act jointly and severally, the application may be made by any 1 or more of the attorneys.

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<sup>65</sup> Reference: Section 9 of the Enduring Powers of Attorney Ordinance (Cap. 501).

**37. Registration by Registrar<sup>66</sup>**

- (1) On receiving an application under section 35, the Registrar must register the continuing power of attorney if satisfied that—
  - (a) the requirements in this Ordinance or in any rules relating to the registration of the continuing power of attorney have been complied with; and
  - (b) the prescribed fee for the registration has been paid.<sup>67</sup>
- (2) The original, and a certified copy, of the continuing power of attorney must be lodged with the Registrar for registration.
- (3) The power to make rules under section 54 of the High Court Ordinance (Cap. 4) includes a power to make rules of court (including rules specifying fees) for the purposes of this section.<sup>68</sup>

**38. Effect of registration<sup>69</sup>**

- (1) Section 37 must not be construed as requiring the Registrar to determine the validity of an instrument the registration of which is applied for under section 35.
- (2) A registration under section 37 does not validate an invalid continuing power of attorney.

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<sup>66</sup> Reference: Section 9 of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>67</sup> Reference: Section 9(2) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>68</sup> Reference: Section 9(6) of the Enduring Power of Attorney Ordinance (Cap. 501).

<sup>69</sup> Reference: Section 9(7) of the Enduring Powers of Attorney Ordinance (Cap. 501).

**39. Register and public inspection<sup>70</sup>**

- (1) The Registrar must establish and keep a register of the instruments registered under section 37.
- (2) The register must be in a form approved by the Chief Justice.
- (3) The Registrar has the custody of—
  - (a) the register; and
  - (b) the instruments kept in the register.
- (4) The register must be made available for public inspection during normal office hours.
- (5) A member of the public may obtain a copy (whether a sealed copy or otherwise) of an instrument kept in the register on payment of the prescribed fee.

**Division 2—Notice of Registration****40. Notice on application for registration**

- (1) This section applies if, in the instrument creating a continuing power, the donor has nominated 1 or more persons under section 27.
- (2) If an application is made under section 35 to register the instrument, the applicant must give notice of the application to each nominated person.
- (3) The notice must be given within the period—
  - (a) beginning 30 days before the date of application for registering the instrument; and
  - (b) ending on the day on which the instrument is registered.

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<sup>70</sup> Reference: Section 9(4) and (5) of the Enduring Powers of Attorney Ordinance (Cap. 501).

- (4) Despite subsection (2), the court may, on application by a person proposing to make an application under section 35, dispense with the requirement to notify a nominated person if satisfied that the notice would serve no useful purpose.<sup>71</sup>

**41. Effect of failure to notify persons nominated by donor<sup>72</sup>**

- (1) If an applicant fails to give a notice under section 40—
- (a) the failure does not preclude the registration of the continuing power of attorney; and
  - (b) the continuing power created under the instrument is not invalidated because of that failure.
- (2) However, in any legal proceedings relating to the continuing power, the Guardianship Board or the court may take that failure into account in drawing any adverse inference.

### **Division 3—Cancellation or Amendment**

**42. Cancellation of registration<sup>73</sup>**

- (1) This section applies if a continuing power of attorney is registered under section 37.
- (2) The Registrar must cancel the registration of the continuing power of attorney if satisfied<sup>74</sup> that the continuing power—
- (a) has expired; or
  - (b) has been revoked under Part 7.

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<sup>71</sup> Reference: Paragraph 10 in Part 2 of Schedule 1 to the Mental Capacity Act 2005 of England and Wales.

<sup>72</sup> Reference: Section 19 of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>73</sup> Reference: Section 11(4) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>74</sup> Reference: Paragraph 17 of Schedule 1 to the Mental Capacity Act 2005 of England and Wales.

- (3) Also, the Registrar must cancel the registration of the continuing power of attorney if—
  - (a) the Guardianship Board or the court has confirmed the revocation of the continuing power; or
  - (b) the attorney for the continuing power has been removed by the board or the court without replacement.
- (4) For the purposes of subsection (2)(b), if the Registrar has any doubt as to whether the continuing power has been revoked, the Registrar may refer the matter to the Guardianship Board or the court (as appropriate) for a determination.
- (5) For the purposes of subsection (2)(b) and (3), the Guardianship Board must notify the Registrar in writing as soon as practicable if the board has made any of the following orders in relation to the continuing power—
  - (a) an order to revoke the continuing power;
  - (b) an order to confirm revocation of the continuing power;
  - (c) an order to remove the attorney for the continuing power without replacement.
- (6) For the purposes of subsection (3)(b)—
  - (a) if the donor of a continuing power has appointed 2 or more persons as attorneys to act jointly—a reference to the attorney is a reference to any of the attorneys for the continuing power; and
  - (b) if the donor of a continuing power has appointed 2 or more persons as attorneys to act jointly and severally—a reference to the attorney is a reference to the last remaining attorney for the continuing power.

#### **43. Amendment of details of registration**

- (1) This section applies if a continuing power of attorney is registered under section 37.

- (2) The Guardianship Board must notify the Registrar in writing as soon as practicable if the board has made any of the following orders in relation to a continuing power created by the instrument—
    - (a) an order to vary the continuing power;
    - (b) an order to suspend the continuing power.
  - (3) The Registrar must amend the record of the register to reflect the variation or suspension in relation to the continuing power of attorney.
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## Part 7

### Revocation of Continuing Power

#### 44. Interpretation of Part 7

For the purposes of this Part—

- (a) if the donor of a continuing power has appointed 2 or more persons as attorneys to act jointly—a reference to a specified event in relation to the attorney is a reference to the specified event in relation to any of the attorneys for the continuing power; and
- (b) if the donor of a continuing power has appointed 2 or more persons as attorneys to act jointly and severally—a reference to a specified event in relation to the attorney is a reference to the specified event in relation to the last remaining attorney for the continuing power.

#### 45. Revocation by donor

- (1) Subject to subsection (2), the donor of a continuing power may revoke the power at any time while the donor is mentally capable.
- (2) If the continuing power of attorney is registered, the donor's revocation of the continuing power may not take effect unless the Guardianship Board or the court has made an order confirming the revocation under section 71.<sup>75</sup>

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<sup>75</sup> Reference: Section 13(2) of the Enduring Powers of Attorney Ordinance (Cap. 501) and para 15(1)(a) of Schedule 4 to the Mental Capacity Act 2005 of England and Wales.

**46. Revocation on donor's death**

A continuing power is revoked on the death of the donor.<sup>76</sup>

**47. Revocation on donor's bankruptcy**

If the donor of a continuing power has become bankrupt, the power is revoked so far as it relates to the donor's financial matters.

**48. Revocation on attorney's death<sup>77</sup>**

Subject to any substitution and succession of attorneys under Division 2 of Part 3, a continuing power is revoked on the death of the attorney<sup>78</sup>.

**49. Revocation on attorney's lack of mental capacity**

Subject to any substitution and succession of attorneys under Division 2 of Part 3, a continuing power is revoked on the lack of mental capacity of the attorney.<sup>79</sup>

**50. Revocation in relation to donor's financial matters on attorney's bankruptcy<sup>80</sup>, winding up or dissolution**

- (1) If a continuing power confers on the attorney authority to act for the donor in relation to the donor's financial matters, the power is, subject to any substitution and succession of

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<sup>76</sup> Reference: Section 13(1)(f) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>77</sup> Reference: Section 13(1)(f) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>78</sup> For a case of multiple attorneys, this provision should be read with clause 44.

<sup>79</sup> For a case of multiple attorneys, this provision should be read with clause 44.

<sup>80</sup> Reference: Section 13(1)(b) of the Enduring Powers of Attorney Ordinance (Cap. 501).

attorneys under Division 2 of Part 3, revoked on the attorney's bankruptcy, winding up or dissolution.<sup>81</sup>

- (2) To avoid doubt, if 2 or more persons are appointed as attorneys to act jointly and severally under the continuing power—
  - (a) the power is not revoked on the bankruptcy, winding up or dissolution of an attorney unless the attorney is the last remaining attorney for the power; but
  - (b) the appointment of the attorney to act for the donor in relation to the donor's financial matters is terminated on the attorney's bankruptcy, winding up or dissolution.
- (3) Without limiting subsection (1), if the continuing power also confers on the attorney authority to act for the donor in relation to the donor's personal care matters, the attorney's bankruptcy<sup>82</sup> does not—
  - (a) revoke the power for personal care matters; or
  - (b) terminate the appointment of the attorney to act for the donor in relation to the donor's personal care matters.

#### **51. Revocation by attorney's disclaimer<sup>83</sup>**

- (1) A disclaimer by an attorney in relation to a continuing power has the same effect as a disclaimer has in relation to a power of attorney at common law if—
  - (a) the donor of the continuing power is mentally capable; and

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<sup>81</sup> For a case of multiple attorneys as joint attorneys, this provision should be read with clause 44(1)(a).

<sup>82</sup> An attorney for personal care matters must be an individual.

<sup>83</sup> Reference: Section 17 of the Enduring Powers of Attorney Ordinance (Cap. 501).

- (b) the continuing power of attorney is not registered.<sup>84</sup>
- (2) A disclaimer by the attorney in relation to a continuing power does not revoke the power if—
  - (a) the donor of the power has become mentally incapable; or
  - (b) the continuing power of attorney is registered, unless the Guardianship Board or the court has made an order confirming the revocation under section 72.<sup>85</sup>

### **52. Revocation under order of Guardianship Board<sup>86</sup>**

A continuing power is revoked if the Guardianship Board makes an order for—

- (a) its revocation; or
- (b) the removal of the attorney<sup>87</sup> under section 73(g) without replacement.

### **53. Revocation under court order<sup>88</sup>**

- (1) A continuing power is revoked if the court makes an order for—
  - (a) its revocation; or
  - (b) the removal of the attorney<sup>89</sup> under section 73(g) without replacement.

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<sup>84</sup> Reference: Section 17(c) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>85</sup> Reference: Section 17(a) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>86</sup> Parallel provision with revocation under court order (see clause 53 below).

<sup>87</sup> For a case of multiple attorneys, this provision should be read with clause 44.

<sup>88</sup> Reference: Section 13(1)(c) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>89</sup> For a case of multiple attorneys, this provision should be read with clause 44.

- (2) Also, a continuing power is revoked on the appointment of a committee pursuant to Part II of the Mental Health Ordinance, if the court gives a direction revoking the power.<sup>90</sup>

**54. Revocation at common law<sup>91</sup>**

Except as otherwise provided in this Ordinance, a continuing power is revoked on any ground on which a power of attorney is revoked at common law.

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<sup>90</sup> Reference: Section 13(1)(e) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>91</sup> Reference: Section 13(1)(g) of the Enduring Powers of Attorney Ordinance (Cap. 501).

## Part 8

### Functions of Guardianship Board and Court

#### Division 1—Interpretation

##### 55. Interpretation of Part 8

(1) In this Part—

**decision** (決定), in relation to the Guardianship Board or the court, includes—

- (a) a declaration made by the board or the court under section 69 or 70; and
- (b) an order made by the board or the court under section 71, 72 or 73;

**guardianship order** (監護令) means a guardianship order as defined by section 59I(1) of the Mental Health Ordinance;

**MHO Part IVB** (第 136 章第 IVB 部) means Part IVB of the Mental Health Ordinance;

**social enquiry report** (社會背景調查報告) has the meaning given by section 59P(1) of the Mental Health Ordinance.

(2) For the purposes of this Part, a reference to a continuing power, if the validity of the power is in issue, includes a power purporting to be a continuing power.

**Division 2—Proceedings before Guardianship Board<sup>92</sup>****56. Effect of Division 2**

This Division has effect without limiting the functions of the Guardianship Board under MHO Part IVB.

**57. Guardianship Board may review continuing power**

The Guardianship Board may review the validity, revocation, or operation and effect, of<sup>93</sup> a continuing power—

- (a) on the application of an interested party; or
- (b) on its own initiative on hearing a matter under—
  - (i) this Ordinance; or
  - (ii) the Mental Health Ordinance.

**58. Guardianship Board may make decisions**

- (1) The Guardianship Board may, subject to subsection (2), make 1 or more decisions specified in Division 5 in relation to a continuing power.
- (2) The Guardianship Board may make a decision only if it is satisfied that it would be in the best interests<sup>94</sup> of the donor of the continuing power to do so, having regard so far as practicable to the donor's wishes and feelings<sup>95</sup> that are ascertainable.

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<sup>92</sup> Reference: Recommendation 11 of the 2011 LRC Report.

<sup>93</sup> Reference: Section 37 of Powers of Attorney Act 2003 of New South Wales.

<sup>94</sup> Reference: Recommendation 10 of the 2011 Report.

<sup>95</sup> Reference: Section 4(6)(a) of the Mental Capacity Act 2005 of England and Wales.

**59. Guardianship Board may require reports of registered medical practitioners**

The Guardianship Board may require an applicant for a review to submit, at the time specified by the board, the written reports of 2 registered medical practitioners specified in section 59M(3) of the Mental Health Ordinance.

**60. Guardianship Board may require social enquiry report**

The Guardianship Board may require a social enquiry report from the Director of Social Welfare for the purpose of making a decision under this Part.

**61. Application treated as application under MHO Part IVB**

- (1) The Guardianship Board may treat an application to review a continuing power under section 57(a) as an application for<sup>96</sup> guardianship under MHO Part IVB if the board considers it not appropriate to make an order under this Ordinance.
- (2) For the purposes of subsection (1), the Guardianship Board may dispense with the formalities<sup>97</sup> of making an application under MHO Part IVB.
- (3) A guardianship order made by the Guardianship Board by operation of subsection (1)—
  - (a) does not revoke the continuing power; but
  - (b) suspends the continuing power for the duration specified in the order.
- (4) So long as the authority of the attorney to act is suspended under the guardianship order, section 5 of the Powers of

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<sup>96</sup> Reference: Section 37 of the Powers of Attorney Act 2003 of New South Wales.

<sup>97</sup> Guardianship application under section 59M of the Mental Health Ordinance (Cap. 136) should be made in the prescribed form.



Attorney Ordinance applies (so far as applicable) as if the continuing power had been revoked.<sup>98</sup>

- (5) The attorney may, during the suspension period, act for the donor to the extent authorized by the Guardianship Board.
- (6) If the attorney purports to act under subsection (5), the transaction between the attorney and a person dealing with the attorney is valid in favour of the person if the person does not have knowledge that the attorney is acting otherwise than in accordance with that subsection.<sup>99</sup>

### **Division 3—Transfer of Forum**

#### **62. Forum of proceedings relating to continuing power**

- (1) An application for proceedings relating to a continuing power may only be made to the Guardianship Board.
- (2) The Guardianship Board may, in appropriate cases, refer an application to the court.
- (3) In deciding whether to refer an application to the court, the Guardianship Board must consider the matters specified in section 63.<sup>100</sup>

#### **63. Matters for consideration in referral of application to court**

The following matters are specified for the purposes of section 62(3)—

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<sup>98</sup> Reference: Section 4(4) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>99</sup> Reference: Section 4(6) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>100</sup> Sub-clauses (2) and (3) are based on section 34 of the Powers of Attorney Act 2003 of New South Wales.

- (a) whether the application relates to the effect of a continuing power, or a revocation of the continuing power, on a third party;<sup>101</sup>
- (b) whether the application is likely to raise for consideration complex or novel legal issues that the court is better suited to determine;
- (c) any other matter relevant in the circumstances.

#### **64. Practice Directions by court**

The court may issue Practice Directions governing the procedures about the transfer of proceedings.

### **Division 4—Proceedings in Court<sup>102</sup>**

#### **65. Court may review continuing power**

On the referral of the Guardianship Board, the court may review the validity, revocation, or operation and effect, of a continuing power.

#### **66. Court may make decisions**

- (1) The court may, subject to subsection (2), make 1 or more decisions specified in Division 5 in relation to a continuing power.
- (2) The court may make a decision only if it is satisfied that it would be in the best interests<sup>103</sup> of the donor of the continuing power to do so, having regard so far as practicable to the donor's wishes and feelings<sup>104</sup> that are ascertainable.

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<sup>101</sup> Reference: Section 34 of the Powers of Attorney Act 2003 of New South Wales.

<sup>102</sup> Reference: Recommendation 11 of the 2011 LRC Report

<sup>103</sup> Reference: Recommendation 10 of the 2011 LRC Report.

<sup>104</sup> Reference: Section 4(6)(a) of the Mental Capacity Act 2005 of England and Wales.

**67. Court may remit case to Guardianship Board**

- (1) Without limiting section 66, the court may, after hearing an application relating to a continuing power, remit the case to the Guardianship Board.
- (2) In remitting the case, the court may give the directions that the court considers appropriate, including a direction to the Guardianship Board to conduct the proceedings in question afresh for the purpose of determining any question specified by the court.<sup>105</sup>

**Division 5—Decisions by Guardianship Board or Court****68. Decisions for purposes of sections 58 and 66**

The declarations and orders set out in this Division are specified as decisions for the purposes of sections 58 and 66.

**69. Declaration relating to validity of continuing power**

- (1) If a review is in relation to the validity of a continuing power, the following declarations may be made—
  - (a) a declaration stating that the donor did or did not have the mental capacity to give the continuing power;
  - (b) a declaration stating that the continuing power is valid or invalid (either in whole or in part).
- (2) The Guardianship Board or the court, as appropriate, may make a declaration that a continuing power is invalid if it is satisfied that—
  - (a) the donor did not have the mental capacity necessary to give the continuing power;

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<sup>105</sup> Reference : Section 267(1) of the Securities and Futures Ordinance (Cap 571).

- (b) the continuing power does not comply with the other requirements of this Ordinance applicable to it; or
- (c) the continuing power is invalid for any other reason<sup>106</sup>.

**70. Declaration relating to donor’s revocation of continuing power**

- (1) If a review is in relation to the donor’s revocation of a continuing power, the following declarations may be made—
  - (a) a declaration stating that the donor did or did not have the mental capacity to revoke the continuing power;
  - (b) a declaration stating that the continuing power remains, or is no longer, valid (either in whole or in part).
- (2) The Guardianship Board or the court, as appropriate, may make a declaration that a continuing power remains valid if it is satisfied that—
  - (a) the donor did not have the mental capacity necessary to revoke the continuing power; or
  - (b) the revocation is invalid for any other reason<sup>107</sup>.

**71. Order confirming donor’s revocation of registered continuing power of attorney**

- (1) This section applies if—
  - (a) a continuing power of attorney is registered;
  - (b) the donor purports to revoke the continuing power; and
  - (c) an application for confirmation of the revocation has been made by, or on behalf of, the donor.

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<sup>106</sup> Reference: Section 36(3)(b) of the Powers of Attorney Act 2003 of New South Wales.

<sup>107</sup> Reference: Section 36(3A) of the Powers of Attorney Act 2003 of New South Wales.

- (2) The Guardianship Board or the court, as appropriate, may make an order confirming the revocation of the continuing power if it is satisfied that—
  - (a) the donor has done whatever is necessary in law to effect an express revocation of the power; and
  - (b) the donor was mentally capable of revoking a power of attorney when the donor did so.<sup>108</sup>
- (3) Revocation of the continuing power takes effect on the date of the order.

**72. Order relating to revocation of registered continuing power of attorney by attorney’s disclaimer**

- (1) This section applies if—
  - (a) either—
    - (i) the donor of a continuing power has become mentally incapable;<sup>109</sup> or
    - (ii) a continuing power of attorney is registered;
  - (b) the attorney has made a disclaimer to revoke the continuing power; and
  - (c) the attorney has made an application for confirmation of the revocation.
- (2) The Guardianship Board or the court, as appropriate, may make an order confirming the revocation of the continuing power if it is satisfied that the attorney has done whatever is necessary in law to effect the revocation of a power of attorney by a disclaimer.

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<sup>108</sup> Reference: Section 13(2) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>109</sup> This corresponds with clause 51(2).

- (3) Revocation of the continuing power takes effect on the date of the order.

**73. Orders relating to operation and effect of continuing power**

Without limiting sections 69, 70, 71 and 72, the following orders may also be made in relation to a continuing power<sup>110</sup>—

- (a) an order to revoke the continuing power (other than the circumstances where an order may be made under section 71 or 72);
- (b) an order to vary the continuing power;
- (c) an order to suspend the continuing power, either generally or with respect to a specific matter, for a specified period;
- (d) an order to require an attorney to provide records and accounts of the transactions carried out for the donor, and an order for their auditing;
- (e) an order to require an attorney to submit a plan of financial management for approval;
- (f) an order to direct an attorney to do, or not to do, a specific act;
- (g) an order to remove an attorney and, if appropriate, to replace the attorney with another person (whether or not the person is a substitute attorney);
- (h) an order to remove a specific power from an attorney and give it to—
  - (i) another attorney<sup>111</sup> under the continuing power; or
  - (ii) another person;

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<sup>110</sup> Reference: Section 4(6)(a) of the Mental Capacity Act 2005 of England and Wales.

<sup>111</sup> Examples : joint attorneys or substitute attorneys.

- (i) if the continuing power is revoked<sup>112</sup> because of the disclaimer, death or mental incapacity of the attorney—  
an order to reinstate the power and appoint a new attorney to act for the donor under the power;
- (j) an order to give directions with respect to the remuneration or expenses of an attorney;<sup>113</sup>
- (k) a declaration about the interpretation or effect of the continuing power;<sup>114</sup>
- (l) any other order that the Guardianship Board or the court considers appropriate.

## Division 6—Appeals

### 74. Appeal against decision of Guardianship Board<sup>115</sup>

- (1) A person aggrieved by a Guardianship Board’s decision in relation to the exercise of any power of the Guardianship Board under Division 2 or section 62 may appeal to the court—
  - (a) with leave of the court—on a question concerning the personal care matters of the donor of a continuing power; or
  - (b) without leave of the court—
    - (i) on a question of law; or

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<sup>112</sup> Reference: Section 36(4)(d) of the Powers of Attorney Act 2003 of New South Wales with modification.

<sup>113</sup> Reference: Section 23(3)(c) of the Mental Capacity Act 2005 of England and Wales.

<sup>114</sup> Reference: Section 11(2) of the Enduring Powers of Attorney Ordinance (Cap. 501) with modification.

<sup>115</sup> Reference: Section 59W of the Mental Health Ordinance (Cap. 136).

- (ii) on a question concerning the financial matters of the donor of a continuing power.
- (2) An appeal under this section must be made—
- (a) within 28 days after the day on which a document setting out the terms of the decision is sent to the person; or
  - (b) within any further period as the court may allow.

**75. Orders of court<sup>116</sup>**

- (1) The court must hear and determine an appeal made under section 74.
- (2) The court may make any order it considers appropriate including the following—
- (a) an order affirming the decision;
  - (b) an order setting aside the decision;
  - (c) an order remitting the case to be heard and decided again by the Guardianship Board (either with or without the hearing of further evidence) in accordance with the directions of the court.

**76. Stay of Guardianship Board's decision<sup>117</sup>**

Before an appeal is determined by the court, subject to any order made by the court to the contrary, the appeal operates to stay the decision appealed against.

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<sup>116</sup> Reference: Section 59W of the Mental Health Ordinance (Cap. 136).

<sup>117</sup> Reference: Section 59W of the Mental Health Ordinance (Cap. 136).



## Part 9

### Protection of Attorneys and Other Persons

#### 77. Relief from liability if act honestly<sup>118</sup>

If it appears to the Guardianship Board or the court that the attorney for a continuing power has acted honestly and reasonably, the board or the court, as appropriate, may relieve the attorney wholly or partly from any liability that the attorney has or may have incurred on account of a breach of duty as attorney.

#### 78. Suspension of continuing power

- (1) This section applies if—
  - (a) a continuing power is suspended<sup>119</sup> under this Ordinance (other than section 22(2) or 61(3)); and
  - (b) the attorney has acted under the continuing power to enter into a transaction with another person.
- (2) The attorney who acts under the continuing power does not, because of the suspension, incur any liability to any person if the attorney did not know of the suspension at the time of the transaction.
- (3) If the person referred to in subsection (1)(b) did not, at the time of the transaction, know of the suspension (whether or not the attorney knew of the suspension then)—
  - (a) the transaction is, in favour of that person, as valid as if the suspension had never been in existence; and

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<sup>118</sup> Reference: Section 11(3) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>119</sup> For example – under a court order under clause 73(c).

- (b) that person does not, because of the suspension, incur any liability to any other person.

**79. Revocation of instrument not creating valid continuing power<sup>120</sup>**

- (1) This section applies if—
  - (a) an instrument in the prescribed form creates a power of attorney but does not create a valid continuing power;
  - (b) the power of attorney is revoked by the donor's subsequent mental incapacity; and
  - (c) the attorney has acted under the power of attorney to enter into a transaction with another person.
- (2) The attorney who acts under the power does not, because of the revocation, incur any liability to any person if the attorney did not know of the relevant facts at the time of the transaction.<sup>121</sup>
- (3) If the person referred to in subsection (1)(c) did not, at the time of the transaction, know of the relevant facts (whether or not the attorney knew of the relevant facts then)—
  - (a) the transaction is, in favour of that person, as valid as if the power had then been in existence; and
  - (b) that person does not, because of the revocation, incur any liability to any other person.<sup>122</sup>

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<sup>120</sup> Reference: Section 14 of the Enduring Powers of Attorney Ordinance (Cap. 501). The provision of section 14 (unlike section 4 of the Enduring Powers of Attorney Ordinance (Cap. 501) which makes cross reference to section 5 of the Powers of Attorney Ordinance (Cap. 31)) sets out in details the protection for an innocent purchaser. As clause 79 mirrors to a large extent the contents of section 14, clause 79 also sets out the protection in details as that in section 14.

<sup>121</sup> Reference: Section 14(1)(a) of the Enduring Powers of Attorney Ordinance (Cap. 501)

<sup>122</sup> Reference: Section 14(1)(b) of the Enduring Powers of Attorney Ordinance (Cap. 501).

(4) In this section—

*relevant facts* (有關事實) means both of the following facts—

- (a) that the instrument did not create a valid continuing power;
- (b) that the donor has become mentally incapable.<sup>123</sup>

### 80. Revocation of continuing power

(1) This section applies if—

- (a) an instrument creates a valid continuing power;
  - (b) the continuing power is subsequently revoked by the donor; and
  - (c) the attorney has acted under the continuing power to enter into a transaction with another person.
- (2) The attorney who acts under the continuing power does not, because of the revocation, incur any liability to any person if the attorney did not know of the revocation at the time of the transaction.<sup>124</sup>
- (3) If the person referred to in subsection (1)(c) did not, at the time of the transaction, know of the revocation (whether or not the attorney knew of the revocation then)<sup>125</sup>—
- (a) the transaction is, in favour of that person, as valid as if the continuing power had then been in existence; and

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<sup>123</sup> Reference: Section 14(1)(a) and (b) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>124</sup> This would imply that the attorney is liable if at the time of the transaction the attorney knew about the revocation. The protection only covers an innocent attorney.

<sup>125</sup> Based on sections 47 and 48 of the Powers of Attorneys Act 2003 of New South Wales with modification.

- (b) that person does not, because of the revocation, incur any liability to any other person.

## **81. Attorney unaware of appointment of guardian**

- (1) This section applies if—
  - (a) the Guardianship Board has appointed a guardian for the donor of a continuing power; and
  - (b) the attorney has acted under the continuing power to enter into a transaction with another person.
- (2) The attorney who acts under the continuing power does not, because of the appointment, incur any liability to any person if the attorney did not know of the appointment at the time of the transaction.
- (3) If the person referred to in subsection (1)(b) did not, at the time of the transaction, know of the appointment (whether or not the attorney knew of the appointment then)<sup>126</sup>—
  - (a) the transaction is, in favour of that person, as valid as if the appointment had never been in existence; and
  - (b) that person does not, because of the appointment, incur any liability to any other person.

## **82. Interest of purchasers**

- (1) This section applies if an attorney for a continuing power (or a power of attorney under section 79(1)(a)) has acted under the relevant power to enter into a specified transaction with a specified person.
- (2) If the interest of a particular purchaser depends on whether a specified transaction is valid, it is conclusively presumed in

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<sup>126</sup> The policy is to protect an innocent 3<sup>rd</sup> person even if the attorney knows about the appointment at the time of the transaction.

favour of the purchaser that the specified transaction is valid if—

- (a) the specified transaction was completed within 12 months of the date on which the instrument creating the relevant power in favour of the attorney came into operation; or
- (b) the specified person makes a statutory declaration—
  - (i) before or within 3 months after the purchase was completed; and
  - (ii) stating that the specified person had no reason at the time of the specified transaction to doubt the attorney's authority to dispose of the property which was the subject of the specified transaction.<sup>127</sup>
- (3) For the purposes of subsection (2), section 5(8) of the Powers of Attorney Ordinance applies to, and in relation to, any reference to a statutory declaration.
- (4) In this section—

***purchaser*** (購買人) means—

- (a) a purchaser in good faith for valuable consideration;
- (b) a lessee, mortgagee or other person who for valuable consideration acquires an interest in property; or
- (c) an intending purchaser;<sup>128</sup>

***specified person*** (指明人士) means a person with whom the attorney enters into a specified transaction;

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<sup>127</sup> Reference: Section 14(1)(c) of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>128</sup> Copied from section 5(6) of the Powers of Attorney Ordinance (Cap. 31) to do away cross referencing.

***specified transaction*** (指明交易) means a transaction referred to in section 78(1)(b), 79(1)(c), 80(1)(c) or 81(1)(b);

***valuable consideration*** (有值代價) includes marriage but not a nominal consideration in money.<sup>129</sup>

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<sup>129</sup> Copied from section 5(6) of the Powers of Attorney Ordinance (Cap. 31) to do away cross referencing.

## Part 10

### Miscellaneous Provisions

#### 83. No waiver of requirements of Ordinance

Except as otherwise provided in the Ordinance, a waiver of the requirements of this Ordinance under an agreement or otherwise is invalid.<sup>130</sup>

#### 84. Regulations by Secretary for Justice<sup>131</sup>

- (1) The Secretary for Justice may make regulations for better carrying out the purposes of this Ordinance.
- (2) Without limiting subsection (1), regulations made under that subsection may—
  - (a) provide that an instrument does not create a continuing power unless it contains the information, as may be prescribed, explaining—
    - (i) the effect of creating a continuing power; and
    - (ii) the effect of accepting the continuing power;
  - (b) specify the form in which the matters in relation to which the attorney has authority to act must be set out in the instrument;
  - (c) for the purposes of paragraph (b), specify a list of powers, decisions or other matters with reference to which the attorney is to be given authority to act; and

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<sup>130</sup> Reference: Section 16 of the Enduring Powers of Attorney Ordinance (Cap. 501).

<sup>131</sup> Reference: Section 18 of the Enduring Powers of Attorney Ordinance (Cap. 501).

- (d) prescribe the requirements for a disclaimer for the purposes of paragraph (e) of the definition of *specified event* in section 2(1).

### **85. Regulations by Secretary for Food and Health**

The Secretary for Food and Health may make regulations to prescribe the type or form of healthcare for the purposes of section 5(1)(j).

### **86. Rules for Guardianship Board proceedings**

- (1) The Secretary for Labour and Welfare may make rules to provide for proceedings before the Guardianship Board for matters relating to a continuing power.
- (2) Without limiting subsection (1), rules made under that subsection may<sup>132</sup>—
- (a) regulate the methods by which documents and information relevant to any proceedings under Part 8 may be obtained by or given to the Guardianship Board;
  - (b) regulate the methods by which any written reports (or the substance of the reports) of registered medical practitioners and social enquiry reports, that are—
    - (i) required under sections 59 and 60; and
    - (ii) relevant to any proceedings under Part 8,may be obtained by or given to the Guardianship Board;
  - (c) regulate the methods by which the decisions of the Guardianship Board made under Part 8 may be communicated to the parties to a hearing and other interested parties;

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<sup>132</sup> Reference: Section 59Z(2) (except subsection (b)) of the Mental Health Ordinance (Cap. 136).



- (d) regulate the circumstances in which the parties to a hearing before the Guardianship Board may be represented by counsel or a solicitor for the purpose of conducting the case on their behalf;
  - (e) regulate the circumstances in which copies of the following obtained by or given to the Guardianship Board may be disclosed or otherwise made available to the parties to a hearing—
    - (i) social enquiry reports and written reports;
    - (ii) any other documents or other information;
  - (f) require the Guardianship Board to give reasons for any decision made under Part 8; and
  - (g) confer on the Guardianship Board the ancillary powers that may be necessary for performing its functions under Part 8.
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## **Part 11**

### **Related Amendments**

#### **Division 1—Enactments Amended**

**87. Enactments amended**

The enactments specified in Divisions 2 and 3 are amended as set out in those Divisions.

#### **Division 2—Amendment to Enduring Powers of Attorney Ordinance (Cap. 501)**

**88. Section 21 added**

After section 20—

**Add**

**“21. Enduring power of attorney may not be created on or after specified date**

(1) No enduring power of attorney may be created on or after the specified date.

(2) In subsection (1)—

*specified date* (指明日期) means the date on which the Continuing Powers of Attorney Ordinance ( of 2017) comes into operation.”.

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**Division 3—Amendments to Electronic Health Record  
Sharing System Ordinance (Cap. 625)**

**89. Section 3 amended (substitute decision maker)**

- (1) After section 3(4)(e)—

**Add**

“(ea) if the healthcare recipient has appointed an attorney to act on the healthcare recipient’s personal care matters under a continuing power of attorney (as defined by section 2(1) of the Continuing Powers of Attorney Ordinance ( of 2017)) before the healthcare recipient becomes mentally incapable (as defined by section 2(1) of that Ordinance), the attorney who accompanies the healthcare recipient at the relevant time;”.

- (2) Section 3(4)(f)—

**Repeal**

“(d) and (e),”

**Substitute**

“(d), (e) and (ea),”.

- (3) Section 3(4)(g)—

**Repeal**

“(e) and (f),”

**Substitute**

“(e), (ea) and (f),”.

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## Explanatory Memorandum

The object of this Bill is to provide a statutory framework for the creation of continuing powers of attorney. A continuing power is a power of attorney under which the donor confers on the attorney authority to make decisions and act for the donor on any matters relating to the personal care, and property or financial affairs, of the donor. A continuing power survives the subsequent mental incapacity of the donor.

2. The Bill is divided into 11 Parts.

### Part 1—Preliminary

3. Clause 1 sets out the short title and provides for commencement.
4. Clause 2 contains definitions that are necessary for the interpretation of the Bill, including *continuing power*, *continuing power of attorney*, *financial matters*, *healthcare*, *mentally incapable*, *personal care matters*, *prescribed explanatory information*, *specified event* and *substitute attorney*.

### Part 2—Nature and Scope of Continuing Power

5. Clause 3 explains the nature of a continuing power. The donor of a continuing power may confer on another person authority to act for the donor in relation to any or all of the donor's personal care matters and the donor's property or financial affairs matters (*financial matters*). The authority conferred by the continuing power on the attorney survives any subsequent mental incapacity of the donor. Also, the attorney may act for the donor in relation to any of the donor's personal care matters only if the attorney believes on reasonable grounds that the donor is mentally incapable of acting on his or her own in relation to those matters.

6. Clause 4 sets out the restrictions on the scope of authority of a continuing power that the donor may confer on an attorney.
7. Clause 5 imposes restrictions on an attorney's decisions in relation to the donor's personal care matters.
8. Clause 6 gives a non-exhaustive list of the matters relating to the donor's personal care on which the attorney for a continuing power may act for the donor.

### **Part 3—Appointment of Attorneys**

#### *Division 1—Requirements and Capacities*

9. Clause 7 provides that the donor of a continuing power may appoint 1 or more attorneys.
10. Clause 8 deals with the requirements for a person becoming an attorney for a continuing power. An attorney appointed to act in relation to donor's personal care matters must be an individual who has reached the age of 18 years and is not mentally incapable. If the continuing power only deals with the donor's financial matters, the attorney may also be a trust corporation. An individual who is bankrupt must not be appointed to act as an attorney in relation to the donor's financial matters.
11. Clause 9 provides for the capacities of 2 or more persons appointed as attorneys under a continuing power.
12. Clauses 10 and 11 deal with the situations of joint attorneys, and joint and several attorneys, with respect to compliance with the requirements in clause 8.

#### *Division 2—Substitute Attorneys*

13. Clause 12 provides for the interpretation of Division 2. The meanings of *original attorney* and *servicing substitute attorney* are defined.

14. Clause 13 provides for the designation of a substitute attorney by the donor for the purpose of substituting an original attorney.
15. Clause 14 sets out the requirements relating to the designation of a substitute attorney.
16. Clause 15 provides that the donor of a continuing power may specify the order of substitution priority, and the order of succession, among substitute attorneys.
17. Clause 16 stipulates when a substitution, or succession, of attorney takes effect.
18. Clause 17 provides for the substitution of attorneys in the case of joint attorneys.

#### **Part 4—Duties and Powers of Attorneys**

19. Clause 18 provides for the duties of an attorney under a continuing power. The duties are of a fiduciary nature.
20. Clause 19 requires the attorney to act in the donor's best interests, having regard so far as practicable to the donor's wishes and feelings that are ascertainable.
21. Clauses 20 and 21 enable an attorney to act under a continuing power to meet needs and make gifts in certain circumstances.
22. Clause 22 requires the attorney under a continuing power to take certain actions (to register the instrument creating the continuing power in particular) when the attorney believes on reasonable grounds that the donor has become, or is becoming, mentally incapable.
23. Clause 23 provides for the suspension of a continuing power before the instrument creating the power is registered. The attorney must not do anything under the authority of the power during the suspension except as provided in the clause.

**Part 5—Execution of Continuing Powers of Attorney***Division 1—Formalities*

24. Clause 24 sets out the requirements for a continuing power of attorney to take effect. The requirements relate to the capacity of the donor and the attorney, and the formalities and execution of the continuing power of attorney.
25. Clause 25 deals with the prescribed form in creating a continuing power and the prescribed way of execution of the instrument.
26. Clause 26 requires a continuing power of attorney to contain the prescribed explanatory information.
27. Clause 27 requires the donor of a continuing power to nominate a person to be notified of an application to register the instrument creating the continuing power.

*Division 2—Execution*

28. Clause 28 sets out the execution requirements of the donor of a continuing power of attorney.
29. Clause 29 provides for how a donor who is physically incapable of signing may execute the continuing power of attorney.
30. Clause 30 provides for how a registered medical practitioner and solicitor may certify a continuing power of attorney.
31. Clause 31 requires the attorney to sign the continuing power of attorney.

*Division 3—Commencement*

32. Clause 32 provides for the commencement of a continuing power for the donor's personal care matters only. The continuing power may only commence after the donor has become mentally incapable and the instrument creating the continuing power is registered.

33. Clause 33 provides for the commencement of a continuing power in relation to the donor's financial matters only. The continuing power may commence on a specified date or the happening of a specified event, or on the execution of the instrument creating the continuing power.
34. Clause 34 provides for the commencement of a continuing power in relation to both the donor's personal care matters and the donor's financial matters. Commencement of the power relating to the donor's financial matters must not be later than the date on which the power relating to the donor's personal care matters commences.

## **Part 6—Registration and Notification**

### *Division 1—Registration of Continuing Power of Attorney*

35. Clause 35 deals with the application for registering a continuing power of attorney to the Registrar of the High Court (**Registrar**).
36. Clause 36 deals with the situation of 2 or more attorneys making an application.
37. Clauses 37 and 38 provide for the registration of continuing powers of attorney by the Registrar, and the effect of registration.
38. Clause 39 deals with the register of the instruments registered under clause 37 and the public inspection of the register.

### *Division 2—Notice of Registration*

39. Clause 40 requires an applicant for registration of an instrument creating a continuing power to give notice to the person nominated under clause 27.
40. Clause 41 provides for the effect of a failure to give notice under clause 40.

### *Division 3—Cancellation or Amendment*



41. Clause 42 provides for the Registrar's function of cancelling the registration of an instrument creating a continuing power in certain circumstances.
42. Clause 43 provides for the Registrar's function of amending the record of the register if notified of certain orders made by the Guardianship Board.

### **Part 7—Revocation of Continuing Power**

43. Clause 44 provides for the interpretation of Part 7.
44. Clauses 45, 46 and 47 provide that a continuing power may be revoked by the donor while the donor is mentally capable or on the donor's death or bankruptcy.
45. Clauses 48 and 49 provide that a continuing power may be revoked on the death, or the lack of mental capacity, of the attorney.
46. Clause 50 provides that a continuing power in relation to the donor's financial matters may be revoked on the attorney's bankruptcy, winding up or dissolution.
47. Clause 51 provides that a continuing power may be revoked by the attorney's disclaimer in certain circumstances.
48. Clause 52 provides that a continuing power may be revoked under an order of the Guardianship Board established under the Mental Health Ordinance (Cap. 136) (*Mental Health Ordinance*).
49. Clause 53 provides that a continuing power may be revoked under a court order.
50. Clause 54 provides that a continuing power may be revoked at common law.

### **Part 8—Functions of Guardianship Board and Court**

#### *Division 1—Interpretation*

51. Clause 55 provides for the interpretation of Part 8.

*Division 2—Proceedings before Guardianship Board*

52. Clause 56 provides that Division 2 has effect without limiting the functions of the Guardianship Board under Part IVB of the Mental Health Ordinance (**MHO Part IVB**).

53. Clause 57 enables the Guardianship Board to review the validity, revocation, or operation and effect, of a continuing power.

54. Clause 58 provides that the Guardianship Board may make 1 or more decisions specified in Division 5 in relation to a continuing power.

55. Clauses 59 and 60 enable the Guardianship Board to require reports of registered medical practitioners and a social enquiry report.

56. Clause 61 enables the Guardianship Board to treat an application under Division 2 as an application under MHO Part IVB and suspend the relevant continuing power for a certain period.

*Division 3—Transfer of Forum*

57. Clause 62 deals with the forum of the proceedings relating to a continuing power. An application for proceedings relating to a continuing power must be made to the Guardianship Board. The board may, in appropriate cases, refer an application to the Court of First Instance (**court**).

58. Clause 63 sets out matters for consideration in the referral of an application to the court.

59. Clause 64 deals with the Practice Directions by the court on the transfer of proceedings.

*Division 4—Proceedings in Court*

60. Clause 65 enables the court to review the validity, revocation, or operation and effect, of a continuing power on the referral of the Guardianship Board.
61. Clause 66 provides that the court may make 1 or more decisions specified in Division 5 in relation to a continuing power.
62. Clause 67 enables the court to remit an application relating to a continuing power to the Guardianship Board.

*Division 5—Decisions by Guardianship Board or Court*

63. Clause 68 provides that the declarations and orders set out in Division 5 are those that the Guardianship Board and the court may make under clauses 58 and 66.
64. Clause 69 provides for a declaration to be made in relation to the validity of a continuing power.
65. Clause 70 provides for a declaration to be made in relation to the donor's revocation of a continuing power.
66. Clause 71 deals with an order confirming the donor's revocation of a registered continuing power of attorney.
67. Clause 72 deals with an order confirming the revocation of a continuing power by an attorney's disclaimer.
68. Clause 73 sets out other orders to be made in relation to the operation and effect of a continuing power.

*Division 6—Appeals*

69. Clause 74 deals with appeals against the decisions of the Guardianship Board.
70. Clause 75 sets out the orders that the court may make in relation to an appeal under Division 6.
71. Clause 76 stays a decision under appeal.

**Part 9—Protection of Attorneys and Other Persons**

72. Clause 77 enables the Guardianship Board or the court to relieve an attorney for a continuing power from any liability if the attorney has acted honestly and reasonably.
73. Clause 78 provides for the authority of an attorney for a continuing power and protection of a person dealing with the attorney when the continuing power is suspended under the Bill (other than clause 22(2) or 61(3)).
74. Clauses 79 and 80 provide for the authority of an attorney for a continuing power and protection of a person dealing with the attorney in the case of an invalid or revoked continuing power.
75. Clause 81 provides for the protection of an attorney for a continuing power and a person dealing with the attorney if they are unaware that a guardian has been appointed for the donor by the Guardianship Board.
76. Clause 82 deals with the protection of a purchaser in good faith for valuable consideration if the purchaser's interest in the property in question depends on the validity of a transaction between the attorney for a continuing power and another person.

**Part 10—Miscellaneous Provisions**

77. Clause 83 prohibits a waiver of the requirements of the Bill, except as otherwise provided in the Bill.
78. Clause 84 empowers the Secretary for Justice to make regulations to, among others, specify the form of, and prescribe for other matters in relation to, a continuing power of attorney.
79. Clause 85 empowers the Secretary for Food and Health to make regulations to prescribe the type or form of healthcare for the purposes of clause 5(1)(j).

80. Clause 86 empowers the Secretary for Labour and Welfare to make rules to provide for proceedings before the Guardianship Board for matters relating to a continuing power.

### **Part 11—Related Amendments**

#### *Division 1—Enactments Amended*

81. Clause 87 provides for the amendments of the enactments specified in Divisions 2 and 3.

#### *Division 2—Amendment to Enduring Powers of Attorney Ordinance (Cap. 501)*

82. Clause 88 deals with the amendment to the Enduring Powers of Attorney Ordinance (Cap. 501) consequential to the commencement of the Bill. No enduring power of attorney may be created on or after the commencement date of the Bill.

#### *Division 3—Amendments to Electronic Health Record Sharing System Ordinance (Cap. 625)*

83. Clause 89 deals with the amendments to the Electronic Health Record Sharing System Ordinance (Cap. 625) to include the attorney under a continuing power of attorney as a substitute decision maker under section 3(4) of that Ordinance.