THE LAW SOCIETY OF SINGAPORE

The Law Society of Singapore
28 Maxwell Road #01-03
Maxwell Chambers Suites S(069120)

t: +65 6538 2500 f: +65 6533 5700
www.lawsociety.org.sg

Sender's DID: 6530 0249

Sender's Email: represent@lawsoc.org.sg

Our Ref: LS/10/RLR/Consultations/2020/MSF/TL/yj/lf

18 November 2020

Family Development Group
Ministry of Social and Family Development
20 Lengkok Bahru, #04-02
Singapore 159053

Dear Sir / Mdm,

THE LAW SOCIETY OF SINGAPORE'S FEEDBACK – PUBLIC CONSULTATION ON MENTAL CAPACITY (AMENDMENT) BILL 2020

1. We refer to the Ministry of Social and Family Development's (**MSF**) Public Consultation on the draft Mental Capacity (Amendment) Bill 2020.

2. The Law Society of Singapore's Probate Practice Committee considered the draft Bill and we enclose a copy of the Law Society's response (**Annex A**) for MSF's consideration.

3. The Law Society sincerely hopes that our members' views will be taken into consideration. We remain available to engage in further discussion and dialogue with MSF in this regard as considered appropriate.

4. You may contact Ms. Ting Lim, Manager of the Representation and Law Reform Department at huiting@lawsoc.org.sg should you require clarification.

Yours faithfully,

Ms Ting Lim
Head of Department, Representation and Law Reform

Annex A

LAW SOCIETY'S RESPONSE TO THE PUBLIC CONSULTATION ON THE DRAFT MENTAL CAPACITY (AMENDMENT) BILL 2020

Name (of individual or organization)	**Law Society of Singapore,** **28 Maxwell Road, #01-03, Maxwell Chambers Suites,** **Singapore 069120**
Name of Contact person (if submitting on behalf of an organization)	**Ms Ting Lim,** **Head of Department,** **Manager of Representation and Law Reform**
Mobile Number	**6530 0249**
Email Address	huiting@lawsoc.org.sg; represent@lawsoc.org.sg

Proposed Amendments	**Corresponding Clause in Draft Mental Capacity (Amendment) Bill 2020**	**Comments**
Amendment of Section 12, Subsection 9	Subsection 9	*Propose* "(9) To avoid doubt, an instrument used to create a lasting power of attorney – (a) May itself appoint one or more replacement donees in respect of a particular donee, ***including a particular donee that had been appointed to exercise powers jointly with another donee***; OR (b) May itself appoint one or more replacement donees in respect of a particular donee, ***except a particular donee that had been appointed to exercise powers jointly with another donee*** The reason for this amendment is after receiving feedback from the general public that there is great confusion over the consequences of appointing two donees to exercise powers 'jointly'. The common understanding among the layman is that exercising powers 'jointly' means that both donees would have to give their express consent (i.e. signing jointly) for decisions made for P. However, many have expressed

Proposed Amendments	**Corresponding Clause in Draft Mental Capacity (Amendment) Bill 2020**	**Comments**
		surprise when it is further explained that if one of the two joint donees is unable to act as a donee, the other joint donee is also unable to continue acting as a donee. In this case, either the Lasting Power of Attorney is revoked because none of the donees that had been appointed by the donor is able to act and that a deputy now has to be appointed by the court OR that the single replacement donee (under the LPA Form 1) now replaces the 'joint donees' and act as a sole donee. It has been raised by the general public that they are discomforted by the fact that the lasting power of attorney does not allow for the replacement donee to act jointly with the remaining joint donee and that the existing joint donee is forced to be replaced by the replacement donee even though the joint donee is perfectly capable of continuing to perform his duties as P's donee and to continue to act jointly with the replacement donee. Donors have stated that they feel compelled to mandate that their two donees act 'jointly and severally' so that the replacement donee can replace any one of the two donees and act 'jointly and severally' with the remaining donee (which is permitted). Donors further have stated that they wish to benefit from the safeguard that comes with their donees having to act jointly and not to lose this safeguard completely as soon as one of the two joint donees is unable to continue acting as a donee.

Proposed Amendments	**Corresponding Clause in Draft Mental Capacity (Amendment) Bill 2020**	**Comments**
		It is submitted that legislation is amended allow for a replacement donee to replace any one of the two appoint donees even in the situation where the donees are to act jointly.
Amendment to Section 2, Subsection 1	To insert into Draft Mental Capacity (Amendment) Bill 2020	*Propose* *"*(1) (a) The definition of '*Registered Medical Practitioner'* to be amended to "means any person who is registered as a medical practitioner under the Medical Registration Act (Cap. 174) or a foreign doctor (b) The Court may require a medical report made by a foreign doctor to be accompanied by documentary evidence of a valid foreign registration of the foreign doctor of approved universities that are recognised for the foreign trained doctors approved by the Singapore Medical Council. (i) "foreign registration", in relation to a foreign doctor, means the authorisation or registration of the foreign doctor to practise medicine in a state or territory other than Singapore by a foreign authority having the function conferred by law of authorising or registering individuals to practise medicine in that state or territory. Currently, the Act only provides for medical reports from registered medical practitioners who are based in Singapore and registered under the Medical Registration Act. This poses an issue when P, who is residing overseas and a

Proposed Amendments	**Corresponding Clause in Draft Mental Capacity (Amendment) Bill 2020**	**Comments**
		deputyship application is filed, and the court requires a medical report to be submitted, however there is no possibility of flying P back to Singapore, even more so now with COVID-19 and closed borders. The proposed amendment of the definition expands the term 'Registered Medical Practitioner" to also include a foreign doctor. This definition is taken from Family Justice Rules 2014 Rule 87A Sub-rule (3) and (4). It is submitted that it would be in P's best interest for a foreign doctor's medical assessment to be accepted. The Court can still require the foreign doctor to do the assessment in line with Form 224 (Family Justice Courts Practice Directions Annex A) and the Court, as an arbiter of fact can decide to call into question the foreign doctor's medical assessment as with any Singapore registered doctor's medical assessment.
Amendment of Section 13, Subsection 10	To insert into Draft Mental Capacity (Amendment) Bill 2020	*Propose,* "(10) (a) Notwithstanding any other provision of the Act, a person dealing with a donee in matters relating to P's <u>personal welfare and</u> property may require the donee to produce a certificate from a registered medical practitioner stating that P's lack of capacity <u>for a specific decision or decisions that the donee wishes to make for P, is likely to be the case when the donee has to make such decision or decisions at the material time or is</u> permanent, and if the donee fails to produce such

Proposed Amendments	**Corresponding Clause in Draft Mental Capacity (Amendment) Bill 2020**	**Comments**
		certificate, the person may refuse to accept the donee's authority to make decisions for P in such matters." (b) The registered medical practitioner may exercise his or her discretion and submit such certificate to the Public Guardian without the need of the donee's consent and the Public Guardian shall file such certificate in the register of lasting powers of attorney. Under the Act, a donee may only make decisions under the lasting power of attorney where P lacks, or the donee reasonably believes that P lacks capacity (Section 13, Subsection 1) The donee exercising his or her authority has his/her authority subject to section 3 (the principles) and 6 (best interest) and any conditions or restrictions specified in the instrument. (Section 11, Subsection 4(a) and 4(b)) Hence, there is no one single moment where the Lasting Power of Attorney can be said to be 'activated' because in cases where mental incapacity is temporary (because of recover or P's mental state fluctuating between having capacity and no capacity) (refer to Section 6, Subsection 3(a), 3(b) and 4) it could be said that the donee have to reasonably believes that at that specific moment of time where P has to make a decision; that P lacks capacity to make the decision and hence the donee has to make it for P in P's best interest.

Proposed Amendments	**Corresponding Clause in Draft Mental Capacity (Amendment) Bill 2020**	**Comments**
		However, in order to safeguard P's interest and in order to get a second opinion on P's lack of capacity, donees have been approaching doctors to do an assessment of P's mental capacity before exercising their authority. It has come to our attention that the doctors in hospitals have *also* taken the initiative to assess both P's mental capacity in order to make P's own decision over P's *personal welfare* and property and affairs. Therefore, in order to safeguard P's interest, it would be consistent with the general spirit of the act that Section 13, Subsection 10 is amended to include 'personal welfare'. It is also proposed that to clarify Section 13 Subsection 10 and for Section 13 Subsection 10 to be consistent with the Act (refer to Section 4, Subsection 1 and 2), that P's lack of capacity has to be nuanced to whether it's a situation where the lack of capacity is going to be over all decisions that has to be made for P going forward or whether this lack of capacity for a specific decision or decisions that P previously had the capacity to make. The further nuanced amendment to specify if P's lack of capacity would be permanent or 'at a material time' also consistent with Section 4, Subsection 1 and 2 of the Act. In order to safeguard P from abuse from his donees, it is submitted to extend discretion to the registered medical professional to be able to

Proposed Amendments	**Corresponding Clause in Draft Mental Capacity (Amendment) Bill 2020**	**Comments**
		voluntarily submit the medical certificate to the Office of Public Guardian in order to alert the OPG that a donee intends to exercise his/her authority over P.
Amendment of Section 13, Subsection 1	To insert into Draft Mental Capacity (Amendment) Bill 2020	*Propose* *"*(a) A donee under a lasting power of attorney (or, if more than one any of them) may only make decisions under the lasting power of attorney where P lacks, or the donee reasonably believes that P lacks capacity <u>and after notifying the Public Guardian of such intentions."</u> It is proposed that in order to better safeguard P from abuse, that there is a mandatory requirement for donee or donees to notify the Public Guardian of their intention to exercise their authority before doing so. It is further suggested that the Public Guardian has a mechanism to flag out Lasting Power of Attorneys where the donee or donees are actively using their authority to make decisions for P.
Amendment of Section 15, Subsection 9	(9) "A donor who revokes a lasting power of attorney must notify all the following persons that the donor has done so: (a) The Public Guardian; (b) The donee or (if more than one) each of them"	**<u>Question:</u>** Since the Revocation of the LPA has to be lodged with the Office of Public Guardian, there should be no necessity to inform the Public Guardian. The Revocation Form also requires consents of the donees to be furnished. This has proven to be difficult in cases where the Donor and the Donees have fallen out. **<u>Comments</u>** On the need for all donees to be informed, being that if the donees do not know that the Lasting

Proposed Amendments	**Corresponding Clause in Draft Mental Capacity (Amendment) Bill 2020**	**Comments**
		Power of Attorney has been revoked, this could lead to confusion in the future when they try to exercise their powers. It is suggested that it is the Public Guardian should be the party who notifies the donees that the donor has revoked their appointment as donees once the Revocation Form is lodged.
New Section 31A, Subsections 1 and 2	(1) "If on receiving an application to register an instrument purporting to create a lasting power of attorney, the Public Guardian has reasonable cause to suspect that fraud or undue pressure was used to induce a person ("P") to…" (2) "The Public Guardian or authorised officer may interview the donor to ascertain whether any fraud or undue pressure was used to induce P…"	The Public Guardian may wish to include whistle-blowing provisions in the act to extend Section 43 defences and indemnity to beyond 'health care workers', to be extended to lawyers as well and professional deputies and donees, There is need for more comprehensive coverage of relevant persons involved (lawyers and professional donees), not just health care workers.
New Section 31A, Subsection 3	(3) "Where the Public Guardian has reason to suspect that fraud or undue pressure has been used to induce P to execute an instrument to appoint a particular person as P's donee, the Public Guardian may disclose to P the number of lasting powers of attorney under which that person is appointed as donee."	**Question:** We would like to understand the rationale why P needs to know this in a suspected fraud or undue pressure case and the relevance to this. If a person, who is not a professional donee, wishes to be appointed as to be the non-remunerated donee of many donors, that is up to their discretion to do so. It would be useful if the Public Guardian could share its rationale for this provision so that we can understand how to help safeguard a P under undue influence and fraud.

Proposed Amendments	**Corresponding Clause in Draft Mental Capacity (Amendment) Bill 2020**	**Comments**
New Section 33A, Subsection 2 and 2(b)	(2) "Before the Public Guardian rectifies or updates the register under subsection (1), the Public Guardian must, except under prescribed circumstances, give written notice to the person whose documents or particulars are to be rectified or updated… (a) … (b) the date by which any written objection to the proposed rectification or updating must be delivered to the Public Guardian, being a date at least 30 days or other prescribed period after the date of the notice."	We would like to clarify how are circumstances prescribed and will it be published anywhere? We would like to understand is there any reason for any proposed rectifications or updating to have 30 days waiting period for objections when it is mostly typographical or grammar mistakes? It is suggested that this could be shorter and that typographical mistakes be corrected directly with mere notice to the donor.
Service of Documents New Section 43C(2)	(2) "Subject to subsections (5), (6), (7) and (9), a document may be served on an individual — (a) by giving it to the individual personally; (b) by sending it by prepaid registered post to the address specified by the individual for the service of documents or, if no address is so specified, the individual's residential address or business address; (c) by leaving it at the individual's residential address with an adult person apparently residing there, or at the individual's business address with an adult person apparently employed there; (d) by affixing a copy of the document in a conspicuous place at the individual's residential address or business address;	We note that the reforms to what is accepted as service is very bold and wide-sweeping and could also affect service in other areas of law. There is a need to further define who this 'individual is'. Does it also include P or a vulnerable donor, because if it includes P or a vulnerable donor, there could be safeguarding issues. Where a document is served on an individual, this would suggest personal service and not ordinary service. When it comes to personal service, if the documents failed to be served, then substituted service application has to be taken out. These amendments seem to be merging both personal service and substituted service without a need of a sub-service application. We would like to raise concerns to Section 43(c) as "by leaving it at the individual's residential address with an adult person apparently residing there…"

Proposed Amendments	**Corresponding Clause in Draft Mental Capacity (Amendment) Bill 2020**	**Comments**

	(e) by sending it by fax to the fax number given by the individual as the fax number for the service of documents under this Act;
	(f) …
	(g) by sending it to the individual's account with the electronic transaction system and notifying the individual of this fact by —
	(i) email to the individual's email address; or
	(ii) an electronic notice to the individual's mobile telephone number via short message service.
		The first concern is that the courier sent by the Public Guardian will have to check NRIC of the person living there. We are concern if the adult person is the perpetrator in the ill-treatment, abuse and neglect of P and if these documents were meant for P. The same with by leaving documents at a conspicuous place (d). In both cases, the preparator could be alerted.
		
		For (e), one member is of the view that service by fax may be outmoded as most individuals do not owned a fax machine nowadays.
		
		For (g), service "by sending it to the individual's account with the electronic transaction system", there needs to be clarity unless such account refers to email address and SMS by mobile phone. We would also like to clarify if short message service, includes WhatsApp or just SMS.

Service of Documents New Section 43C(8)	(8) "Service of a document on a person under this section takes effect — (a) if the document is sent by prepaid registered post — on the second day after the day the document was posted (even if it is returned undelivered); (b) if the document is sent by fax and a notification of successful transmission is received — on the day of the transmission; (c) if the document is sent by email — at the time that the email becomes capable of being retrieved	Section 43(8)(a) We are concern that a document is served by prepaid registered post and even if the documents is returned undelivered, that the document is deemed to have been properly served. Section 43(8)(c) If the document is sent by email – at the time that the email becomes capable of being retrieved by the person at the email address of the person. This proves problematic because what does it means by 'becomes capable of being retrieved'? This is because once an email is sent,

Proposed Amendments	**Corresponding Clause in Draft Mental Capacity (Amendment) Bill 2020**	**Comments**
	by the person at the email address of the person; (d) …"	unless it fails to be delivered, it instantly falls within the definition of '*becomes capable of being retrieved*'.
Amendment of First Schedule – Remote witnessing of execution of electronic instrument by donor	1A. — (1) For the purposes of paragraph 1(1)(*ba*), if the Public Guardian has given prior approval on an application made under sub-paragraph (2), the requirement that the donor execute the instrument in the presence of a witness may be met by the witness witnessing the donor's execution of the electronic instrument via a live video or live television link and by using a method of accessing the electronic instrument which enables the witness to view the contents of the instrument being executed and to attest the execution on the same instrument. (2) Upon an application by the donor, the Public Guardian may grant approval for the donor to execute the instrument in the virtual presence of a witness in accordance with sub-paragraph (1) and the prescribed requirements, if the Public Guardian is satisfied that there is good reason why the donor cannot appear physically before the person mentioned in paragraph 2(1)(*e*) to execute the electronic instrument. (3) Where the Public Guardian refuses to grant an application under sub-paragraph (2), the Public Guardian must, if requested to do so by the donor, state in writing the reasons for the Public Guardian's refusal.	We would like to clarify why is it necessary to have to make a prior application to the Public Guardian and who has to decide if the reason is sufficient before carrying out remote witnessing? Our view is that it would be burden on time and resources, and adds to the costs for the donor. It should be for the Certificate Issuer to unilaterally determine if remote witnessing is suitable in the circumstances of the case. One member's view is that CI should still be done in person as far as possible. The Public Guardians may stipulate the guidelines for such remote witnessing if necessary.