Ms Áine Flynn
Director of Decision Support Service
Waterloo Exchange
Waterloo Road
Dublin 4

Our ref:
STEP/Law Reform

Date:
21 March 2022

Matter: **Assisted Decision-Making (Capacity) (Amendment) Bill 2021: Draft General Scheme and Heads of Bill**

Dear Ms Flynn

I am writing to you as the Chairperson of the Society of Trust and Estate Practitioners ("**STEP**") Ireland.

STEP provides education, training, representation and networking for its members who are professionals specialising in trusts and estates, executorship, administration and related taxes. Its membership includes solicitors, accountants, tax practitioners, barristers, investment advisers, banking, pension and insurance professionals. STEP is a global organisation, the Irish branch of which, was formed in October 1998.

STEP Ireland has reviewed the provisions of the Draft General Scheme and Heads of Bill in relation to the Assisted Decision-Making (Capacity) (Amendment) Bill 2021 (the "**Heads of Bill**") which was published on 22 November 2021. We are aware that a public consultation seeking submissions in relation to the Heads of Bill was announced on 20 December 2021. We understand that this closed for submissions on 17 January 2022. As the consultation largely took place over the Christmas period and before our volunteer committee members met in the New Year, unfortunately, we were unable to undertake a timely review and make submissions in relation to the Heads of Bill.

The legislation as currently drafted and as proposed in the Heads of Bill will have a significant impact on our members. As private client practitioners and trusted advisers, our members will frequently act for vulnerable persons, or their families in relation to all aspects of their affairs, but in particular in relation to Enduring Powers of Attorney ("**EPAs**"), Wardship and Advance Healthcare Directives.

1. **2015 ACT**

1.1 Given the proposed extensive changes to the legislation (we understand there are currently 88 amendments being proposed to the 2015 Act), you might advise if you know whether it is proposed that there will be a consolidated Act printed either formally or informally to make the legislation more manageable for practitioners or whether consideration could be given to enacting a new act to incorporate the 2015 Act, and the considerable changes to the 2015 Act, and repealing the existing 2015 Act.

2. **ENDURING POWERS OF ATTORNEY**

We have concerns about the proposed changes in the Heads of Bill to the 2015 Act in relation to EPAs.

2.1 *Registration*

2.1.1 We query the purpose behind the proposed requirement for the donor to register an EPA with your offices at the date of execution of the EPA, rather than as previously envisaged when the donor loses capacity.

2.1.2 Given that a donor will, post implementation of the 2015 Act, have a solicitor, a doctor and a healthcare professional (subject to our comments below) co-signing the EPA, we do not understand the reasoning for this change and are concerned that this could undermine the solicitor/client relationship.

2.1.3 Furthermore, this additional registration requirement could also discourage people from creating EPAs. An EPA is a vital tool to deal with incapacity in a manner consistent with the wishes of the donor and therefore this change could be counterproductive to the aims of the 2015 Act by reducing the number of EPAs being created and imposing unnecessary restrictions on the rights of donors to manage their property and affairs.

2.1.4 In our view, a two stage process is not required. Oversight in circumstances where the donor has capacity is unnecessary as it is adequately covered by existing safeguards. It will impose additional unnecessary costs on donors. An EPA is created by a person

with full capacity in comparison to an assisted decision-making or co-decision making agreement where capacity is already in question.

2.1.5 We have sought to understand the rationale for implementation of registration at execution. If it is being imposed due to concerns regarding undue influence, the solicitor acting for the donor, is already required to satisfy himself/herself that this is not an issue before the EPA can be completed. In addition, two notice parties are also notified at this time of the decision of the donor to execute on EPA. A solicitor has a duty of care to the donor to ensure that the EPA is effective and complies with all the requirements of the existing legislation. This duty is adequately covered under existing legislation. We therefore do not understand why it is considered necessary that the compliance burden should fall on the Director.

2.2 *Notice Parties*

2.2.1 We are also concerned about the notice party provisions where it is a requirement of the legislation for all children of the donor to be notified of the creation of an EPA. Some donors may be estranged from their children, and not wish to notify them. A donor with full capacity should be able to make the decision with regard to whom to notify. In our view, this will dissuade certain donors from making EPAs and impact on their privacy and personal freedom. We appreciate that this requirement was included in the 2015 Act, however, we mention it here in the context of the substantial changes now being made to the 2015 Act. In our view, the current notice provisions under the Powers of Attorney Act 1996 are sufficient, provide adequate safeguards and respect the right of the donor to choose their notice parties.

2.3 *Healthcare Professionals*

2.3.1 Furthermore to the extent many of our members' clients are not engaged with healthcare professionals already, it seems an unnecessary addition to require such a sign off where a doctor is already certifying capacity. If there are concerns around those in residential care or others who are already engaged with healthcare professionals, we would suggest that this requirement could be added in such circumstances. Otherwise the need to brief such a professional simply for the purpose of making an EPA will put off many prudent potential donors from making their EPA in the first instance. We appreciate that the requirement to engage a healthcare professional in addition to a medical and legal professional was included in the 2015 Act, however, we mention it here in the context of the substantial changes now being made to the 2015 Act.

2.4 *Time Restrictions*

2.4.1 We would also like to query the purpose behind the proposed time restrictions on variation of EPAs post registration but prior to the donor losing capacity. Our members would frequently receive instructions from donors who wish to alter an EPA for various reasons shortly after they have made the power. We do not see why it is necessary to restrict their ability to amend the EPA following execution in circumstances where they have capacity to do so. We are concerned that the proposed amendment could restrict the right of a donor to deal with his/her property and affairs in the manner in which he/she is entitled in circumstances where the donor has full capacity.

2.5 *Notifications/Objections*

2.5.1 From a practical perspective, it would be useful to have a mechanism in the legislation to ensure the advising legal practitioner is informed that the Director has made direct contact with a client whom they are representing. We would suggest that the legal practitioner ought to be copied on correspondence with his/her client, the donor, and indeed on correspondence with any attorney of their client's as it relates to their client's affairs. We understand, for example that direct contact may be made with the donor/attorney in circumstances where an objection to registration is made, and with the donor on application for registration. We should be obliged if you would confirm if you are proposing to contact the donor or attorney in any other circumstances.

2.5.2 We would also like to seek clarity on the criteria that will be applied by your office in relation to objections raised pursuant to notices received under the 2015 Act.

3. **WARDSHIP**

3.1 We understand that in preparation for the implementation of Part 6 of the Assisted Decision-Making (Capacity) Act 2015 (the "**2015 Act**") (which will ultimately be amended by the proposed Assisted Decision-Making (Capacity) Amendment Act) that the office of the Accountant of the Courts of Justice which manages funds on behalf of existing wards has begun to transfer assets of existing wards from long term into shorter term investments to enable investments to be encashed and transferred to the wards (with the assistance where required of a decision-making assistant or a co-decision-maker) or to a decision-making representative appointed by the Court on behalf of a ward when the ward is ultimately discharged from wardship. We are concerned about both the taxation implications of these disposals for the wards, and also whether such

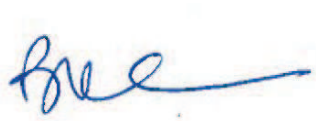
transfers are appropriate from an investment perspective for all wards as the discharge from wardship is outside their control.

3.2 We have written separately to the Wards of Court Office in relation to this and enclose copy of our letter for your information.

We welcome the opportunity to understand better the approach of your office as outlined above and to meet with your office to discuss these issues further. My colleagues Aileen Keogan and Tracey O'Donnell are assisting me with this matter. If you have any queries in relation to the above, you might please contact Aileen and Tracey.

We look forward to hearing from you.

Yours sincerely



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Barry Kennelly
Chairperson, Society of Trust & Estate Practitioners