

# Closing Speech By Mr Tan Chuan-Jin At The Second Reading Of The Mental Capacity (Amendment) Bill 2016 In Parliament, 14 Mar

Sir, I thank Members for their participation in today's debate, and the very useful considerations, suggestions especially from Mr Vikram Nair. I think these are points that we will definitely take into consideration when we look at the regulatory framework. We will also be consulting widely but the inputs today have actually been quite useful, and we do urge you to continue to provide us more details should you have other suggestions.

## **Professional donees & deputies**

Members have supported the introduction of "professional donees" and "professional deputies". I think we all recognise that given the trends going forward, this is something that we all need. And you have also raised concerns; fair concerns and things we were also preoccupied with when preparing these amendments. Let me address them.

First, several Members, including A/P Fatimah Lateef, Mr Louis Ng, Ms Rahayu Mahzam, Mr Dennis Tan and Ms Jessica Tan highlighted that there must be proper rules and I think also training for professional donees and deputies. And I fully agree. I think we need to make sure that not only are they qualified, but they are also suitable. I'm not sure whether it's easy, as Mr Dennis Tan suggested in terms of attitudes, to assess that. But those are factors that I think, highlighted the importance of making sure that due diligence is put in place to pick the right donees and deputies.

So we do intend to put in place a robust set of criteria for those who wish to register with the OPG as a professional deputy. Our initial thinking is this - that the person must be of sound financial standing, must not have a criminal record. If the person belongs to a professional body, he or she should not have any disciplinary action taken against him. Lastly, he or she must have sufficient experience as a deputy or in a related field. And certainly I think what is important is that we are also looking into training programmes to ensure competency. And I think through that process, through training programme,

possibly we may also detect if the individuals are not suitable, we may then not register them accordingly.

Mr Ng wished to clarify if all professional donees must register with the Public Guardian. The short answer is no. But this is not to say they will not be regulated. We envisage two categories of professional donees. The first comprises persons who have been registered with the Public Guardian as professional deputies. The second comprises persons who fall under a prescribed class. We intend to keep this class very narrow, and for now, we are contemplating only licensed trust companies. Simply, they can already act as donees and deputies under the MCA today. They are tightly regulated by the Monetary Authority of Singapore – MAS – under the Trust Companies Act. As such, professional donees will be regulated, either by the Public Guardian as they are also professional deputies or by the MAS for licensed trust companies.

A/P Lateef and Mr Ng asked if nursing homes and voluntary welfare organisations can serve as deputies to their clients. We prefer that they do not do so. Doing so could create a potential conflict of interest where they can decide to procure and charge for their own services. It would really be better if an independent professional deputy was appointed, if needed.

Second, several Members, in fact a number of you expressed concern about the fees professional donees and deputies may charge. In fact, this is one area I was concerned about as well. I will want to assure Members that my ministry will work with partners to ensure that pro bono, low-cost services or financial assistance are readily available for the low income, for those who need it but are not able to afford.

We think that controlling fees right at the onset might not be the best way to keep prices affordable. A fee cap could remove the incentive for service providers to charge competitive rates, and stunt the growth of services for differing needs and circumstances. Because, as you realise, every individual comes with a very different context and there might be different types of services required, and thereby, requiring different charges. It may also deter competent service providers from entering, if the fee cap is set wrongly especially. Moreover, with regard to Mr Tan's question, the remuneration of a professional

deputy may claim actually also depends on what the court deems fit in his case. So the court will also have to apply themselves to assess whether the remuneration is appropriate or not.

Mr Vikram Nair asked if there will be standardised LPA forms and fee guidelines for professional donees. As the donor may wish to give specific powers to the donee, we're not sure if that's advisable to have standardised forms. The donor and the donee should also be free to decide on the fee arrangements. After all, this is where the donor has his full mental faculties and he should be able to decide for himself what he is prepared to pay, and what the arrangements he would like to put in place with the donee.

Third, Ms Joan Pereira asked how the court would decide on which professional deputy to appoint. When a professional deputy applies to court, the court would have to evaluate, based on the circumstances of the case, whether it is appropriate to appoint that professional as the person's deputy. Minimally, the professional deputy must be registered with the PG and unrelated to the person who lacks mental capacity. In addition, as Ms Rahayu noted, the court could also appoint a professional deputy if it is satisfied that the significant others are unwilling, unable or unsuitable to act, especially if there are family disputes. And as we all know, that happens.

On a related point on safeguards, A/P Lateef also asked if an Independent Mental Capacity Advocate – or the IMCA – service could be considered in Singapore. This is an advocacy service provided in the UK to those without deputies, donees and family support.

We did consider this quite carefully when we first introduced the Mental Capacity Act. We believed then, and we still do now, that we have sufficiently protected mentally incapacitated persons. Section 7 of the MCA allows for professionals such as doctors and caregivers to act in the best interest of the incapacitated person. They can consult those who know the mentally incapacitated persons to better understand their wishes. And in this way, we enable professionals and caregivers to care for the incapacitated confidently, while avoiding unnecessary costs and complexity. Where it is really necessary, professional deputies may be appointed.

The passing of these amendments is the first step towards regulating the professional deputy and donee sector. We will consult stakeholders and relevant professional bodies extensively before finalising the details, which will be promulgated in subsidiary legislation.

### **Protecting P from risk of abuse by donees / deputies**

Members supported the amendments to enable pre-emptive action to protect individuals from abuse by their proxy decision-makers, but had some concerns. I will address the concerns but let me first reiterate that the fundamental principle of the MCA is to respect the decisions of a person who has mental capacity. And this is something that Ms Jessica had also highlighted. It is important for us to remember that we may not always agree with the decision, we may think that the decision is unwise, but if they still retain their full mental faculties, that is something that we have to respect. It is the same way as they make wills, I mean individuals who make wills, are up to different individuals, and we have to respect that.

Ms Pereira and A/P Lateef asked about how and how long it would take to suspend an unsuitable donee or deputy. Well, the process involves preparing an application that is supported by sworn statements from the witnesses, to prove that it is necessary for the court to suspend the donee's or deputy's powers. The duration of this process will largely depend on the complexity and evidence provided.

Where there is an urgent need for protection, the OPG will expedite the filing of the court application, and ask the court to hear the application on an urgent basis. The order will then continue until the donee or deputy applies to set it aside or until a further Court order, whichever is earlier.

If there is a suspension order, the Court may also place limits on what can be withdrawn by the donee or deputy for the day-to-day living and medical expenses of the person without capacity. I think in this same way, the same level of care can be provided as before the suspension order.

Mr Nair asked if PG is resourced to investigate complaints, and about access to Courts. We will certainly be monitoring the volume of complaints, and resource OPG appropriately. We are also amending the MCA to introduce an Assistant PG and allow the PG to engage auditors to assist with investigations. As to access to Court, apart from PG, concerned others can apply to Court. While permission is required for non-family members, the process is similar to that for PG.

Ms Pereira also asked how members of the public will know whether a donee or deputy has been suspended. The information on suspended or revoked LPAs is available on the OPG's website after the information is received from the Family Justice Courts. It would also be prudent to request to search Court records for the latest status on the validity of a court order appointing a deputy.

Ms Denise Phua, Ms Sylvia Lim and Ms Pereira asked if OPG can do more to check LPA applications, particularly for "high-risk" cases. Ms Sylvia Lim asked if the option to notify "named persons" could be reinserted into the standard LPA Form. The option was there previously, as highlighted by Ms Lim. It was taken out in large part as less than 1% of the donors used this option. Paradoxically, I fully understand and I agree with the concern, that actually the intent of this option was really to protect against undue influence. I think a donor who is actually unduly influenced is very unlikely to notify anyone. And even if he or she did, probably would not be notifying the correct persons. So what we hope to do really is in terms of the problem is to advise them to speak to their family, brief them on your LPA arrangements so that at least they can understand. This is no guarantee that they will do it, but that's something that we are putting in place.

OPG checks LPA applications to ensure that they comply with the legal requirements set out in the MCA and the Regulations. As I have highlighted, OPG typically does not question the donor's choice of donee – whether the donee is a family member, as in most cases, or a professional – because the donor is deemed to have mental capacity. The donor must also get a certificate issuer to certify that the donor understands the purpose of the LPA and scope of the authority conferred on donees in the LPA, and that no fraud or undue pressure was used to induce the donor to make the LPA.

As I shared earlier, each case really has its own unique circumstances. It is, I don't believe it's appropriate for PG to raise red flags just because the donee is a foreigner or not a relative. The PG should not, I believe, act as an arbiter of another's choices. Again, just to reiterate, the core principle of the MCA is to respect the choice of a person who has mental capacity.

Actually the registry of LPAs is a confidential registry, similar to the Wills Registry. It would be inappropriate for PG to share information about the donor's LPA with the donor's family members.

But what we do, really, is to encourage the donor himself to share the information with his family members. But what we can do, and have done, is this, to encourage them to, not just to talk to the family members, and hopefully the process, to choose their donee wisely. PG would only step in, and rightly so, when the donee is not acting in the donor's best interests and has no one else to intervene. The MCA also provides for whistleblower protection to those who report potential abuse. So we want to assure Members that we fully understand the dilemmas that you've brought to bear, because of many of the cases you have seen. The vast majority of cases, we don't face the problem, but obviously these cases when they do surface can be quite dramatic and they seize the public's imagination. But it's a fine balance to strike. On the one hand, I think it's important to respect the individual. On the other hand, we also need to be sufficiently rigorous to protect the individual as well.

### **Improve operations of PG's office**

Ms Phua expressed concern about the retiring of the PG Board although the Chairman of the PG Board had made this recommendation. Ms Lim also asked why the Ministry has done away with the requirement of an Annual Report.

I want to assure Members that we considered this very carefully before deciding to make this move, and I've explained earlier in my opening speech.

The PG Board was really established to scrutinise and review the way in which the PG's functions were discharged, when the MCA was a relatively new piece of legislation.

28. With the Board's help, I think we have improved various internal processes and guidelines for OPG to operate effectively. The Board also assisted OPG in establishing links which you have rightly pointed out is really important not only with key stakeholders like the Law Society and College of Family Physicians, but also at the customer front-ends such as the CPF and the grassroots and many other stakeholders.

Based on these improvements, the Chairman himself felt that they have achieved their objectives and could be dissolved. After examining their proposal thoroughly, I agree with the recommendation.

What we have done is to reconstitute the PG Board into an Advisory Panel that does not compromise checks and balances so that remains important. Individuals who suspect that the PG had not discharged his functions in good faith and with reasonable care can make this known to the Minister. The Annual Report was submitted by the PG Board to the Minister. It accounted primarily for the initiatives and the review of the OPG's activities in the year concerned. And with this amendment, the PG is directly accountable to the Minister, and will continue to make available relevant information, such as key initiatives and statistics, on its website. Appeals against certain administrative decisions made by the PG can also be made to the Minister. And lastly, the judicial review and appeal through the Courts remains an option.

Some may feel that it is better to retain the PG Board so that it can provide constructive feedback. But however, I think the idea is that the Advisory Panel, which we are forming, will continue to comprise various respected professionals in the medical, legal, finance, and social work sectors. And I am very sure that they will provide independent and constructive feedback. As they have done so previously when they were on board.

### **Policy initiatives not involving legislative amendments**

Members asked how to increase public awareness and accessibility of the LPA, and how to reduce the cost in making an LPA or a deputyship order.

Ms Mahzam, A/P Lateef and Ms Tan believe that more need to be educated about the LPA, and the implications of the appointment and choice of donees. Ms Pereira, A/P Lateef and Mr Ng and Mr Tan have suggested various ways to raise the awareness and accessibility of the LPA and especially keeping the process simple. Which we agreed. And I fully agree with these areas of concerns that you have raised, and your suggestions.

We need more to spread the word. OPG has to also play its part. We are producing more collaterals and guide books in the four official languages. OPG conducts monthly LPA talks at Raffles Place for example, and will hold talks in mother tongues later this year. The talks cover the technical aspects of how to make an LPA, the types of powers donees may be given, and also the importance of choosing trusted persons to act as donees. These talks are open to the public. OPG has also recently produced two videos; one on the need for an LPA, specifically targeting the elderly and the other on how exactly to apply for an LPA itself. These videos have been subtitled in the four languages and would soon be posted on OPG's website and further disseminated. The OPG's helpline can also handle calls and enquiries in the four official languages. Basically, I think the idea is that we will do whatever we can to basically raise awareness as much as possible, and we do ask members of this House to support us in this process.

On Ms Pereira and Mr Ng's point that the Pioneer Generation Ambassadors can play a role – that is something that we can definitely consider. Feedback from the public and the Pioneer Generation Office has been positive. They are indeed a good resource base that we can draw on, especially to encourage those without family members to make an LPA. While they may appoint close and trusted friends to be their donees, some may also consider appointing a professional donee when the regulatory framework is up. As for getting registered medical practitioners to put up signs indicating that they can certify LPAs, we can explore that if that is feasible, as well.



To increase accessibility, OPG has simplified the LPA Form 1, which meets the needs of most Singaporeans. We have also waived the LPA application fee for Form 1 for Singaporeans in September 2014, for a two-year period. Applications to register an LPA can also now be made by post. We have also waived the postage charge for a similar two-year period. We are closely working with the Family Courts to keep the process simple and I think that is something that many of you have raised, and we fully agree with that, and we welcome suggestions and specific ideas about how we can actually make it simple, because that's really where we should go. But again, I just want to flag up that, we do need to find a balance, because on one hand, and I think Ms Mahzam raised the point, on one hand we want ease and accessibility and of course with that, perhaps lower cost. But at the same time, we do need rigour. This is an important process, and we need to get it right. So these two considerations remain important, and I think we need to find the balance. And your inputs would be tremendously helpful for that front.

Regarding the fees that certificate issuers charge, while such fees, I believe they are, warranted because of their important role in the LPA-making process, and they carry serious significant legal implications. But having said that, as I just mentioned, we will continue to see how best to reduce the cost of making an LPA.

On the matter of deputyship applications, we agree with Ms Mahzam that deputyship is a serious matter, and we need to bear this in mind, even as we work with various groups to make the process easier for them to apply for deputyship.

This is also why, for Mr Ng's question on whether parents with children with intellectual disability can be made "natural deputies", Now we think that a judicial process is needed. The Court needs to evaluate whether, and the specific matters in which the individual with intellectual disability lacks capability, and whether the proposed deputy is suitable to act, even if it is the parent. There are also instances where parents may be unsuitable – for instance, parents who are abusive, or who have serious illnesses that they impair their own mental capacity.

Ms Phua asked if the deputyship process can be made easier and more accessible, especially for individuals with special needs. We are certainly making progress in the pilot project with MINDS which have been completed. With help of the NUS Law faculty, volunteers and MINDS itself, the average cost that each of the three families incurred was around \$300, comprising mainly Court fees. This is compared to the average of \$5,000 if lawyers and other professional services are involved.

So as for the next steps, which Ms Phua, Ms Lim and A/P Lateef asked about, we have, as I mentioned, completed the project and are now working with MINDS to scale up and cover the graduating cohort of MINDS students. We will also be covering those who have already left school, and also with those with other forms of intellectual disabilities and autism. Basically we're confident and found it useful, successful and do intend to scale up. It will take some time but we do intend to expand it. We will look into Ms Phua's suggestions to encourage healthcare professionals to act under section 7 of the MCA, in the best interests of their patients without the need for formally appointed deputies. At the same time, we will also look into familiarising healthcare professionals with the medical report required for deputyship, and encourage them to set reasonable fees.

In response to Mr Tan and also Ms Lim, we have completed work with the Family Justice Courts. We continue to work very closely with them, in fact it's been a very constructive relationship between the both parties, because of a lot of inputs that we've been able to gather from both sides, and we are in the process of further simplification of forms and some processes. And these have been implemented into the MINDS pilot. However, do continue to give us your suggestions, what you've highlighted have been most useful, we will certainly make sure that the points have been registered. We certainly hope to also achieve further cost savings and more user-friendly process for other families who need deputyship, once the IT system which the Family Justice Courts is developing, is up and running in a couple of years.

### **Technical clarifications on MCA**

Finally, let me address Members' questions on how MCA relates to other legislation. A/P Lateef asked whether a person with severe mental health disorder can be covered under

the MCA. I think Ms Phua also highlighted that there are also others with other conditions that may impair their ability to make decisions for themselves. And the answer is yes, if the severe mental disorder results in mental incapacity. Someone is considered to lack mental capacity to make a decision if he or she is: (i) firstly unable to understand the relevant information; (ii) to retain the information; (iii) to weigh the information as part of the decision-making process; or (iv) communicate his or her decision. So if a severe mental disorder or any other condition results in the inability to do one or more of these things, the person would be covered by the MCA. There may be cases of fluctuating capacity among those with severe mental health disorders. And in these cases, a report from a medical practitioner would be needed.

I would like to assure A/P Lateef that the MCA does not affect any Advance Medical Directive made. Donees and deputies are not permitted to make or revoke an AMD on behalf of persons without mental capacity.

### **Conclusion**

In conclusion, I mentioned earlier that the MCA reflects how we desire to live a dignified life, regardless of whether we have mental capacity or not.

As individuals, we really ought to plan ahead, for our own sake, but I think also for our families' sake, to make clear our wishes should we lose our capacity.

And as a country, we need to come together, and as a society, to protect those who are incapacitated, and to ensure that they live in dignity. And I think that the amendments to the MCA is a step in that direction that we call on, we want to play a part of. Certainly, thank you very much, I think, for all your valuable inputs, The inputs will continue to be sought, especially in terms of coming up with the regulatory framework, I encourage you to continue to provide us your suggestions and ideas and feedback from the public. With that, I thank you very much.