

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

Madam Speaker, I beg to move, “That the Bill be now read a Second time”.

With your permission Madam Speaker, may I ask the Clerks to distribute the documents that illustrate the points I am covering in my speech.

A Law for Dignified Living

As a country, we have done well to provide the conditions for Singaporeans to enjoy increased longevity. Our average life expectancy is now about 83 years. And increasing. However, one of the issues that may arise in old age is the loss of cognitive ability. A recent study by the Institute of Mental Health shows that the prevalence of dementia was 10% among persons 60 years and above. This means that out of 100 elderly persons, 10 might have dementia at some point. I understand that Minister Vivian, when he introduced the MCA a couple of years ago, asked the same question - imagine all of us in this house here, quite a number of us will have dementia. The question is, will we be ready when it happens to us?

Loss of cognitive ability is of course not an issue that only older Singaporeans face. Life is uncertain. Accidents and illnesses may rob us of our ability to make decisions at any time.

The MCA is a key statute that empowers Singaporeans to plan ahead and make their wishes known. It is writing into law what we feel in our bones - that is to enable us to live meaningful and dignified lives, even if we lose our mental capacity.

Passed in 2008, the MCA introduced the Lasting Power of Attorney (or LPA). This is a

legal instrument that allows each of us to choose someone we trust to make decisions for us, if and when we are no longer able to do so. We are called the ‘donor’. The entrusted proxy decision maker, who is usually a family member, is called the “donee”.

It also enables us to act in the best interests of our incapacitated loved ones. We can apply to court to be appointed as “deputies” to act for our loved one who has lost capacity but has no LPA.

The MCA is undergirded by three fundamental principles:

First, we respect the choices of a person who has mental capacity. We cannot assume a donor lacks capacity just because we think he or she could have made a better decision. This is so, even in respect of the choice of donee.

Secondly, family should be the first line of support, and the community should also play a part in supporting those who do not have familial support when they lose capacity.

Third, the State must build a system with sufficient checks and balances to protect individuals who lack mental capacity from abuse or having their interest compromised. This has to be done without making access to LPAs too restrictive, which will defeat the purpose of the LPA in the first place.

Reasons for Review

The MCA has been in operation for about six years now. During this time, the number of LPAs registered with the Office of the Public Guardian (or OPG) has grown significantly from 480 in 2010, to 8400 in 2015. But honestly, this is still not enough. More of us need to make our LPAs.

Over these past six years, we have also implemented the MCA framework. We have learnt useful lessons, and it is timely to amend the MCA to meet emerging needs and strengthen its protection capability.

Specific Amendments

Let me now draw the attention of the House to the key amendments which we are proposing to the MCA. In summary, the amendments aim to:

- a. Firstly, Better prepare us for a future where there will be a need for professional donees and deputies to help those who do not have family or close friends to be their proxy decision-makers;
- b. Secondly, to better protect individuals who lack mental capacity from being abused or exploited by their donees or deputies;
- c. Thirdly, to improve commercial certainty in the use of LPAs in transactions with third parties for the benefit of the donor; and
- d. Lastly, to improve the operations of the Public Guardian's office to serve the public better, by equipping the office to handle higher volumes of LPAs and more complex investigative work.

In preparing this Bill, we have sought feedback from organisations in the legal, banking, insurance, medical and social service sectors, as well as members of the public. They have all provided valuable insights, and supported the proposed enhancements.

We also studied the experience in some countries with longer history of similar legislations, such as England and the US (particularly in Florida). These jurisdictions also have a more developed private sector to serve as professional donees and deputies.

Besides these legislative amendments, we are also undertaking some policy initiatives that complement these amendments. I will elaborate more on these initiatives later.

Being future-ready - Professional Donees & Deputies

Families are a key source of support for our elderly. A large majority of donees and deputies today are family members. They have stepped up out of love and concern for the person whom they have been appointed for. And this is as it should be.

However, there will be a small and increasing number of elderly singles or childless elderly couples, who may not have family members or close friends to rely on to be their proxy decision-makers.

One MSF officer recently recounted to me her visit to a Dementia Day Care Centre. Some of the elderly there were in the early stages of dementia and were still lucid. Among them were a few single elderly with no relatives or close friends. They had worked hard and saved carefully for their old age. But they were deeply anxious, as they had no suitable person to nominate as their donee. They were actually quite afraid about what would happen to their dignity and quality of life when they lose capacity. They did not want to become wards of the State. The officer told me that she cannot forget the worry and anxiety she saw in their eyes.

The community has stepped forward to work with MSF on supporting a small number of such elderly who had no family support. About 1½ years ago, we started work with public-spirited volunteers from the medical, legal, accounting and social work professions to form a panel of deputies. Once appointed by the Court as deputies, they helped to manage the affairs of the elderly persons and ensure that their finances are used for their care by setting up a trust with the MSF-funded Special Needs Trust Company (or SNTC).

This arrangement - which is in the pilot stage with 5 test cases - has worked well so far. In one case, the elderly lady who was helped could use her finances to upgrade to a better room at the nursing home. She was happy with this. She was even more joyous that she could resume attending her weekly church service, as she could now pay for the transport fee and other incidental costs.

The number of elderly without next-of-kin will increase. In light of this, we intend to enable paid doneeship and deputyship services. The Bill thus introduces the concept of “professional donees” and “professional deputies”. It empowers such elderly, especially those with assets, to have a choice, and to give more complex instructions as to their care should they lose capacity.

Professional Deputies

Professional deputies are those who can provide deputyship services for a fee. They are appointed by the Court to act on the behalf of individuals with assets who lack mental capacity, and do not have family members or friends who can play the role of a deputy. We envisage that professional deputies would include licensed trust companies, as well as professionals such as lawyers and accountants. They must not be related to the person they have been appointed for.

A professional deputy must be registered with the Public Guardian. We have not finalised the details of the registration framework, and we will be consulting stakeholders extensively before we do so. However, let me share some of our initial thoughts on how we think it will work.

To be considered for registration, the professional deputy should not be a bankrupt. He should also have sufficient knowledge of the MCA and what a deputy’s role and responsibilities are. The Public Guardian will be empowered to cancel the registration of a professional deputy, if certain events occur. One such event could be that the professional deputy becomes bankrupt or is convicted of an offence involving fraud or dishonesty. Upon cancelling registration, the Public Guardian can apply to court for

the professional deputy's appointment to be revoked.

Professional Donees

Now unlike deputies, who are appointed by Court after the individual has lost mental capacity, professional donees are chosen by the individual when he still has capacity. The Bill will limit professional donees to two groups, namely -

- a. Professional deputies who are registered with the Public Guardian; and
- b. Certain prescribed classes of persons such as licensed trust companies, which can already act as donees and deputies under the MCA today. Licensed trust companies are regulated by MAS under the Trust Companies Act.

The passing of these amendments will just be the first step towards regulating the professional deputy and donee sector. We will consult the various stakeholders extensively before finalising the details. But the key principle behind the framework is this - mentally incapacitated persons are extremely vulnerable. Hence the regulatory framework must ensure that a professional donee or deputy is competent, of suitable character, and is accountable to the relevant authorities for what he does.

Members may have concerns about the fees that professional deputies and donees will charge, and what will be done for those who need these services but are without means. I assure members that for these individuals, MSF will work with partners to ensure that pro bono or low-cost services are available, just like what we did in the pilot.

Some may also ask why the government does not provide doneeship and deputyship services. I don't think it's possible nor wise for the government to be everyone's donee or deputy. It is certainly not appropriate for the government to manage the

assets and personal welfare matters of private individuals. Our role is to put in place an effective regulatory framework that enables these services to be provided, while protecting the interests of those without mental capacity.

Better protection - remove donee / deputy if there is risk of abuse & urgent suspension orders

Let me now turn to enhancing the protection of those who lack mental capacity from abuse or exploitation, and share what we have learnt after operating the MCA for six years.

Members of the House will know of some of the cases we have encountered, where there were concerns about exploitative behaviour by donees. Some of you also offered suggestions on how to improve the LPA framework to prevent such abuses from recurring.

I am relieved to say that these cases actually only form a small minority, and the law has taken its course in protecting the donors. Nonetheless, we have reviewed the matter and propose two key amendments to the MCA. The aim is to enable pre-emptive action, so that individuals who lack mental capacity can be better protected against abuse by their donees or deputies.

First, the amendments will allow the Court to revoke a donee's or deputy's powers if there is significant risk of the donee or deputy abusing the person whom they have been appointed for. For instance, the risk of abuse would be significant, if the donee or deputy is convicted of an offence involving dishonesty or fraud. This offence could have been committed against some other person, and not simply just the donor. However, the donor has no capacity. He is vulnerable. With the proposed amendments, the Court can pre-emptively revoke the donee's or deputy's appointment, and eliminate chances of the exploitation from happening.

Second, the amendments will allow the Court to suspend the powers of a donee or deputy, even if no prior application was made to it. Let me explain how this works.

Say for example, a deputy has been charged with an offence involving fraud or dishonesty, and there is a real risk that he will dissipate the assets of the person who lacks mental capacity. We want to be able to suspend the deputy's powers while investigations are ongoing. We cannot do it today. We must have a prior or concurrent Court application to revoke the deputyship order. However, it is not appropriate to apply for a revocation as the deputy has only been charged, but not yet found guilty and convicted by the Courts.

With the amendment, we can now apply to Court to suspend the powers of the deputy without having to apply to revoke the deputyship order. We can thus act pre-emptively and hopefully in a timely manner.

Let me illustrate how these two amendments will work together, to protect donors who have lost capacity. I will use the facts that are already known to the public about the case involving Madam Chung and former China tour guide, Yang Yin. But I will just be using the case as an illustration. I will not comment on any aspect of the case which is still ongoing in the Courts, and I will also not comment further than what I will say below.

As is public knowledge, Yang Yin was charged with offences of falsifying receipts at his company and criminal breach of trust of monies belonging to Madam Chung. In these kinds of cases, there is a cause for concern because the donee has been charged with an offence involving fraud or dishonesty, and there is a risk of the donor's property being dissipated if nothing is done.

In order to preserve the donor's assets, the proposed amendment will now allow an application to be made to the Court to suspend the LPA immediately, without having to apply for a revocation of the LPA. Once investigations are complete and if the

donee is eventually convicted of the offences, the Court may then revoke the LPA.

Some may suggest that we should be even more pre-emptive. Nip the problem in the bud at the LPA-making stage. For instance, make it mandatory for donors to inform their family members about their LPA. Or give the Public Guardian the power to refuse the registration of an LPA if he suspects that the proposed donee is not a suitable candidate, or is not a family member.

But I think it's important that we must remember that one of the fundamental principles of the MCA is that the decisions of a person who has mental capacity must be respected. Where do we draw the line if we do not respect a person's autonomy?

The officers at OPG have encountered cases where both sides of the same donor's family have competing claims. In one case, the donor's daughter alleged that her brother had unduly influenced their mother to make an LPA appointing him as donee, and restricted her access to their mother. According to her, he was eyeing their mother's property. On the other hand, the brother claimed that the relationship between mother and daughter was so estranged that their mother did not want to see her and never wanted to appoint his sister as a donee. So who is right and who is wrong?

In another case, a donor appointed a friend to be his donee, even though he had three children as well as extended family. His children complained to OPG, but it turned out that there was no evidence of undue influence. In fact, the children did not appear to play a big part in the donor's life at all. And the donee turned out to be his close childhood friend whom he trusts.

These cases illustrate that each case has its unique circumstances. It is not for the Public Guardian to decide against a donor's wishes. Neither is the Public Guardian the arbiter of another's choices, such as in appointing one child as donee and not the other. Doing so will compromise PG's ability to render objective reports to the Courts

when called upon to do so.

The Public Guardian only steps in, and rightly so, when there is no family or friend to intervene for a donor who has lost capacity, and the donee or deputy is not acting in his best interests.

But having said that, we do want to encourage donors to not only choose their donees carefully but to discuss their wishes ahead with their loved ones. Hence, we have amended the LPA Information Sheet to encourage donors to inform their family members about their LPA. We believe that this would enhance family support if the LPA needs to be activated.

Commercial certainty in use of LPAs in transactions

Let me now move on to a different matter altogether. Besides making amendments to better protect individuals who lack capacity, we also want to improve commercial certainty for donees and third parties who transact using the LPA.

Currently, section 16 of the MCA protects a donee or any third party who transacted with the donee, if they genuinely did not know that the LPA has not been validly created. An LPA could be invalidly created, for example, if the donee handling property and affairs is an undischarged bankrupt at the point when the LPA was made. The third party transacting with the donee may not know of the donee's bankruptcy, which renders the LPA invalidly created. So Section 16 protects a third party in this scenario.

This Bill extends the current section 16 to situations where the donee or third party did not know that the LPA had been revoked or suspended. This amendment will also provide commercial certainty for subsequent transactions involving the donor's assets in such scenarios.

With this amendment, businesses will have confidence to transact with donees using the LPAs as there would be sufficient commercial certainty. And this is important because this will in turn help the persons who have lost mental capacity to access needed services.

Improve Operations of the Public Guardian's office

Let me go on to the final part of the amendments. We do want to improve the operations of the OPG to serve the public better. We are grateful to all those who made suggestions on how to do this. We have already made some changes based on feedback received, involving the simplifying of the LPA form. However, there are other improvements that require changes to the MCA.

First, we have seen a sharp rise in the volume of LPAs registered with us. We expect this trend to continue as the population ages and as awareness increases. In fact, we do want this to happen. So we will introduce an Assistant Public Guardian to assist the PG in carrying out his functions. The Assistant PG will exercise all the powers of the PG, except the power of delegation. The Assistant PG will be an MSF officer.

Second, we also anticipate that the cases which the OPG has to investigate will become more complex, especially when fraud and financial exploitation has allegedly been committed against a donor with significant and different types of assets. The amendments will allow the PG to appoint an auditor to assist the PG in examining donees' and deputies' reports or any information obtained by the PG in the exercise of PG's investigative functions. The auditor appointed by the PG must be a public accountant registered under the Accountants Act.

Third, we will repeal section 33 of the MCA which established the PG Board. When the MCA was first enacted, the PG Board was created to review the way in which the PG's functions were discharged and to report to the Minister. This was something new to us - and to my knowledge, no board was ever set up in Singapore previously to specifically supervise the work of a public officer. But given that the MCA was an

important and a new piece of legislation modelled after the English Mental Capacity Act, we thought it would be prudent to also follow England's practice of having a Board as well.

The Chairman of the PG Board has now recommended to me that the existing Board be replaced with an administrative Advisory Panel, as OPG has reached a level of maturity in its operations. He noted that in 2012, even England's PG Board too was dissolved after being in existence for about five years.

Even as we replace the PG Board with an Advisory Panel, I think it's important to ensure that there are adequate checks and balances. First, the Public Guardian - like any other public officer in the Ministry - will continue to be accountable to the Minister. Appeals against decisions made by the Public Guardian can be made to the Minister. Ultimately, a judicial review and appeal through the Courts remains options.

Given these reasons and the checks and balances in place, I have agreed with the Chairman to replace the PG Board with an Advisory Panel.

At this juncture, I wish to place a record of thanks to the PG Board for its contributions during these six years. They have guided the OPG in the implementation of the MCA and was instrumental in establishing OPG's links with the medical, legal, and financial sectors.

Policy initiatives not involving legislative amendments

I mentioned earlier that the amendments introduced by this Bill will be complemented by policy initiatives that do not require legislative amendments. One such initiative involves helping families caring for adult children with intellectual disabilities.

It is not easy to bring up a child with intellectual disabilities, especially if the

caregivers themselves are getting older.

An MSF officer told me about an elderly couple in their 70s. They have two children with intellectual disabilities, who are in their 30s and 40s. Their father is a lorry driver, their mother a full-time caregiver.

They worry about their children's welfare when both of them are no longer around. They could will their assets to their children, but who will manage it for their benefit? Their case is urgent because they are no longer young.

And these concerns are not uncommon. In fact, I think many parents who have children with intellectual disabilities, this is one of their main areas of concerns. We have been working hard to address the concerns of these parents. First, we have worked with the special needs community to set up the SNTC, which I mentioned earlier. This non-profit trust company enables parents to set aside money for their child in a trust account, so that the trust money will be used for the child's care needs when they as parents are no longer around. Money placed in the trust will be administered according to a care plan drawn up by the parents with the help of SNTC.

This elderly couple signed up straightaway after hearing about SNTC. They shared with us that their minds are definitely more at ease now, as SNTC will use their savings to implement their children's care plan after they pass on. We want to encourage more parents to make use of this service.

The second thing we are doing is to help parents who have children with special needs to obtain deputyship orders more easily. We have piloted a project with MINDS for parents of MINDS students to obtain deputyship orders. Three cases have obtained Court orders so far. The parents are grateful for the help extended. They initially hesitated due to concerns about cost and complexity of the process. But they realised that their fears were unfounded. Immediately after the court hearing was over, one

set of parents came out of the courtroom and thanked everyone involved. In another case, the whole family got involved. While the parents became deputies, the MINDS student's two older brothers (who are in their twenties) became successor deputies. As successor deputies, they could take over from their parents should the need arise. And this is a good thing.

We are very heartened by the experience, but we know that there is much work that needs to be done in this area. We are now working with MINDS to put in place a systematic process for every year's graduating cohort of students with intellectual disabilities. We also hope to start work to look at those who have already graduated, as well as cover other forms of relevant disabilities including certain types of autism. We are also working with the Family Justice Courts on a user-friendly IT system to enable parents and laypersons to apply for deputyship orders without incurring high cost or hassle.

Conclusion

Madam Speaker, the MCA is not a law for older Singaporeans only. It is a mirror for all of us. It reflects the way we want to live, across the different phases of our lives and across the generations. How we treat our parents and family members; how we ourselves want to be treated - with respect, with dignity; and when we are no longer the man or woman we once were, how we want the younger generation to step in to hold our hands and help us along. Not in the direction that they want, but to respect the decisions that we, in our better days, had decided for ourselves. To this end, I urge more Singaporeans to think about their future, make plans and do up an LPA. This will help make the caregiving journey easier for your family members.

This mirror also reflects on the professional communities. As our population ages, we need more professionals willing to step up to serve as professional donees and deputies.

The role of the government is to create regulatory frameworks such as the MCA to

allow us to live the best life possible, whatever our circumstances - in sickness and in health, in wealth or poverty, *compos mentis* or not.

But the MCA can only contain so much. Madam Speaker, I said earlier that the MCA is merely writing into law what we feel in our bones. What is our collective understanding about the duty owed to the elderly and to respect the wishes of the mentally incapacitated among us? What is our joint action on the policy initiatives, and family and community effort? The most vulnerable members in our society - the individuals who lack mental capacity - are often the most invisible. Our duty is to protect them, to respect their wishes and to enable them to live with dignity.

Madam Speaker, I beg to move.