

**SPEECH BY MINISTER FOR COMMUNITY DEVELOPMENT, YOUTH AND
SPORTS DR VIVIAN BALAKRISHNAN, FOR THE SECOND READING OF
THE MENTAL CAPACITY BILL, ON 15 SEPTEMBER 2008**

1. Mr. Speaker, Sir, I beg to move, "That the Bill be now read a second time".
2. Our population is ageing. At the age of 65 years one in twenty of us may have dementia. By the time we are 75 years old, the incidence could be as high as one in ten.
3. As we grow older and become frail, our dependency on others increases. In the book, "Tuesdays with Morrie"¹, Morrie Schwartz describes this need succinctly. He says, and I quote,

"It's like going back to being a child again. Someone to bathe you. Someone to lift you. Someone to wipe you."
4. Morrie Schwartz graciously accepted his need for others as his body wasted away from Lou Gehrig's Disease (the same disease as that inflicting Stephen Hawking). This need for others may not be just because our bodies are wasting away. Sometimes, our minds may go first. We may be unable to make decisions on our own. We may be unable to fend for ourselves.
5. At that point, we will need assurance. Assurance that the person whom we depend on, is someone we had chosen when we were well. Someone we can trust and rely on. Someone who is willing. The best time to choose someone is now, before we lose our minds. Can we do so under the current legal system? The short answer is "not quite".
6. Today, a Committee of Person or Estate may be appointed by the High Court to manage the personal welfare and financial matters of those with 'unsound mind' and incapable of managing their affairs. This is provided for under the Mental Disorders and Treatment Act. However, the appointment of the Committee of Person or Estate can only be done *after* an individual person has lost his mental capacity. We cannot plan in advance. We cannot exercise a choice.

¹ "Tuesdays with Morrie" is a bestselling book by American writer Mitch Albom. The book chronicles the lessons about life that Mitch Albom learns from his professor, Morrie Schwartz, who was dying from amyotrophic lateral sclerosis (ALS), also known as Lou Gehrig's Disease. Morrie's gracious and dignified way of dying was the centrepiece of the book.

7. I am introducing the Mental Capacity Bill to address this lacuna. We have studied the legislative frameworks of various countries. These included the U.K., Germany, Australia, and countries nearer to us, namely Japan and Hong Kong. We have found the England and Wales Mental Capacity Act to be comprehensive, and have modelled our Bill after theirs.

8. The Mental Capacity Bill puts in place a framework for proxy decision making. This framework sets out who can make decisions on behalf of those who are mentally incapacitated, which includes persons with dementia, intellectual disabilities or even those with brain damage. It also specifies the processes for doing so. Family members and caregivers making decisions on behalf of those lacking capacity will be guided by such a framework. Recognising that persons who lack capacity are vulnerable, the Bill provides safeguards against abuse by proxy decision makers.

Public Consultation

9. Sir, we have consulted extensively on the Bill. We actively sought the views of the social welfare, legal, banking and medical sectors. I am heartened that most Singaporeans and key stakeholders have welcomed the Bill as a timely measure in view of our ageing population. They have also provided useful feedback. We have evaluated all the feedback received. We have made relevant amendments to our draft, and come up with the Bill that I have introduced.

10. I would now like to draw the attention of the House to the main features of the Bill.

Lasting Power of Attorney

11. The Mental Capacity Bill will empower individuals to plan in advance. It introduces a new statutory mechanism – the Lasting Power of Attorney (or the LPA in short). With the LPA, individuals can now choose, in advance, the person they would like to have to make decisions on their behalf, if and when they lose their capacity in the future. The designated proxy decision maker is known as the donee.

12. The LPA is a flexible instrument. Individuals are empowered to determine in advance the areas that their donee may make decisions for them. These areas may cover property and financial matters, as well as personal welfare, including healthcare matters. When the individual loses his mental capacity, his donee is sanctioned to make decisions on his behalf in the areas earlier determined by him. An individual may appoint one or several donees.

13. Under the Bill, we have provided that bankrupts will not be able to act as a donee for property and financial affairs. When we consulted the public on the exclusion criteria for donees, there were mixed reactions. Some wanted additional exclusion criteria to protect the mentally incapacitated person. Yet others wanted to give each individual the free choice to decide who they trust. We have to take a position between protection and choice, and strike the right balance. We have decided that we should draw the line on bankrupts. We do not want to be over-prescriptive; in line with our intention to empower Singaporeans to choose those they trust to be their donees.

14. When individuals plan in advance, they may alleviate their loved ones of much stress later when they lose capacity. Let me share with you the case of Madam Adeline Ang. She is married with two sons. Some time ago, her husband was diagnosed with brain cancer. When he lost his ability to make decisions, Madam Ang found that she could not gain access to his bank account to pay for his medical bills. She had to make an application to the Court. She discovered that this process could be costly. She chose not to go through the court process in the end. Not only did Madam Ang have to care for her husband and her children, she also had to find ways to foot the hospitalisation bills of her husband. Having gone through this unfortunate experience, she sees the merits of the new Lasting Power of Attorney.

15. While we see the merits of having an LPA, the state would not mandate that everyone makes one. Making an LPA will be entirely voluntary. With this Bill, we are merely providing individuals with the means to do so. This, we hope, is the attraction of the Bill. It empowers. It allows you and me to plan in advance. But it does not compel that we do so. It is voluntary.

Court-appointed Deputies

16. However, there would be some who could not or did not plan in advance. In such a case, there is the option of applying to the High Court when the person loses capacity, for a court decision on the person's personal welfare or property and affairs.

17. The High Court's powers could extend to making decisions on the control and management of the mentally incapacitated person's property, carrying on the profession or business of the mentally incapacitated person and the execution, amendment or revocation of a will on behalf of the mentally incapacitated person.

Court Made Wills

18. Sir, allowing the High Court to make wills on behalf of a person who lacks capacity was a recommendation by the Law Society. Together with the Ministry of Law, we had studied this recommendation before agreeing that this is something the Bill should provide for. Why? When a person who has not made a will has lost his capacity, and he has got quite a fair bit of assets that need to be distributed, and where it is apparent from his circumstances that distribution of his assets according to the laws of intestacy may be inappropriate, there is advantage in allowing an application to the High Court for the court to step in and decide in an objective manner how these assets ought to be distributed in the person's best interests. This clarifies misapprehensions and prevents possible disputes or tensions among family members. They can then focus on looking after the well-being of the mentally incapacitated person.

Deputies

19. For those who have not planned in advance, and where there is a need for **ongoing** decisions to be undertaken, the High Court can also appoint a deputy for the person who lacks capacity. This system is not unlike the Committee of Person or Estate today.

20. This provision would be particularly useful for parents of children with intellectual disabilities. Very often, these parents would share with me their worry – who would look after their children when they pass on? As a parent myself, I can empathise with them. Although this Bill would not be a panacea to all their worries, I am pleased to say that it will at least seek to assuage some of their fears.

21. I will explain how it will do so. Parents can apply to the High Court to appoint a deputy for their child. In the case where the child has reached the age of 21 years, the court may make the appointment if the child lacks capacity within the meaning of the Bill. In the case where the child has not reached the age of 21 years, the court may make the appointment if it considers it likely that the child will still lack capacity when he reaches the age of 21 years. In appointing a deputy for a child who has not reached the age of 21 years, the court must have regard to the principle that an appointment of his parents or guardian is to be preferred. The court also has the power to appoint successor deputies. When considering who shall be the successor deputy for a child who has not reached the age of 21 years, the court shall have regard to the parents' wishes. This establishes a succession pathway for the care of the child with intellectual disability. We hope to make the process efficient and affordable to parents.

Safeguards and Protection

22. Sir, I have shared with the House the avenues provided for under this Bill to appoint a proxy decision maker. In addition to providing avenues, the Bill also guides proxy decision makers – donees, deputies or even caregivers – in the discharge of their duties. Let me elaborate on these provisions.

Key Principles

23. At the heart of the Bill is a set of key principles. Its core tenet is that every individual must be presumed to have capacity unless shown otherwise. The Bill provides a two-stage test that must be applied in order to determine whether the person has the capacity to carry out an act or make a particular decision. It focuses on the particular time when a decision has to be made and on the particular matter to which the decision relates. This allows calibration of the powers to be granted to appointed proxy decision-makers, to take into account the extent of a person's mental capacity.

24. And, for those that lack capacity, decisions taken on their behalf must be taken in their best interests. The Bill offers guidance on what constitute best interests. One example would be in the case of making a decision with respect to an incapacitated person's property. The Bill states that where there is a need to dispose of or settle the person's property, the decision-maker must be motivated by a desire to ensure that the incapacitated person's property is preserved as far as possible to maintain the incapacitated person during his life.

Statutory Protection for Informal Caregivers

25. As long as caregivers perform acts in connection with the care or treatment of persons who lack capacity, in their best interests, and without negligence, Clause 7 of the Bill will provide caregivers with protection against civil and criminal liability.

26. The requirement to act in the best interests of the mentally incapacitated person and without negligence is based on existing common law principles. Caregivers should be assuaged that they would not be 'criminalised' nor face civil suits in their course of caring for the mentally incapacitated insofar that they were performing these acts of care and treatment in the best interests of the mentally incapacitated.

Excluded Decisions

27. Sir, while the Bill facilitates proxy decision making, it also recognises that there are decisions which are so sensitive that no proxy decision maker should be allowed to make them on another person's behalf. These excluded decisions include consent to marriage or divorce; sexual relations; sterilisation; adoption; renouncing a religion, and change of gender. The Bill will also not affect the existing operation of the Human Organ and Transplant Act or the Advance Medical Directive (known as the AMD in short). Where the person has made an AMD, the AMD prevails.

Criminalisation of Ill-treatment

28. Where we are to care for or decide on behalf of those who lack capacity, I am certain that the majority of us will do so sincerely. However, we are also aware of the vagaries of human nature. Some of us may have read in the New Paper in May this year, of a wife who was appointed Committee of Person to her husband by the Court. Her husband was incapacitated due to a work-related accident. She was appointed to manage the sum of money that was awarded to her husband as a result of the accident. Many of us must have been appalled to read that not only had the wife pocketed all the money for herself, she had also locked her husband up at home without care so as to live with another man.

29. We want to deter such abuse as far as possible. As a bulwark against abuse, the Bill also introduces a new criminalisation clause. Ill-treatment or wilful neglect of a mentally incapacitated person will be a criminal offence. Any caregiver, donee or deputy found guilty of such an offence shall be liable to imprisonment or a fine or both.

Office of Public Guardian

30. Sir, we will set up a new Office of Public Guardian. It will perform a range of functions that contribute to the protection of those that lack capacity. The Office will also supervise and support court-appointed deputies. Families may approach the Office as well for information on making the Lasting Power of Attorney, such as what powers they could consider granting and what to consider when choosing who may act as a donee. We expect that the Office would be operational sometime next year.

Conclusion

31. Mr Speaker Sir, we cannot stop the ageing process. We cannot guarantee that we will not have dementia or lose our mental capacity. But, we would like to provide some assurance for a future where we may lose our mental capacity. We want to enable people to choose someone they trust, especially a family member, to make decisions on their behalf if they are no longer able to do so. This Bill will empower Singaporeans to plan in advance, so as to secure peace of mind, even if we lose our mental capacity in the future.

32. Mr. Speaker, Sir, I beg to move.