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HOLDING THE THERAPEUTIC STATE AT BAY? BALANCING AUTONOMY AND PROTECTION IN SINGAPORE'S VULNERABLE ADULTS ACT

WING-CHEONG CHAN*

ABSTRACT

Abuse, exploitation and neglect of adults raise complex issues on the freedom of the individual to choose for themselves versus the powers of the State to intervene. The law has traditionally limited the scope of compulsory intervention to extreme situations only which can frustrate social workers who deal with such cases. On the other hand, it would be unacceptable to allow intervention simply because it is assessed to be in the adults' best interests. A balance therefore has to be struck between autonomy and protection. This paper examines how Singapore's *Vulnerable Adults Act* identifies the point for intervention and embodies safeguards to prevent abuse of the State's powers.

I INTRODUCTION

The *Mental Capacity Act*¹ ('MCA') was enacted in Singapore to help the country manage the challenge of a rapidly ageing population and to provide for proxy decision makers for those who unfortunately lose mental capacity.² In order to deter abuse or neglect of those who lack mental capacity, a new criminal offence of 'ill-treatment' was created.³ However, the number of abuse or neglect cases have continued to increase.⁴ It can be argued that the offence under the MCA is too narrow in any case because of the way mental capacity is defined: a person lacks mental capacity only if they are unable to make a decision in relation to a matter and that inability is the result of an impairment of, or a disturbance in the functioning of, their mind or

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¹ Cap 177A, Revised Edition 2010. This Act is modelled on the UK *Mental Capacity Act 2005* (c 9). It was passed by the Singapore Parliament in 2008 and brought into operation in March 2010.

² When moving the second reading of the *Mental Capacity Bill*, the then Minister for Community Development, Youth and Sports, Dr Vivian Balakrishnan, said: 'Our population is ageing and with ageing, unfortunately, the rate of dementia will also increase. 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 10. (*Singapore Parliament Reports*, 15 September 2008, col 107)

³ MCA s 42, provides: (1) Subsection (2) applies if a person ('D') - (a) has the care of a person ('P') who lacks, or whom D reasonably believes to lack, capacity; (b) is the donee of a lasting power of attorney created by P; or (c) is a deputy appointed by the court for P, and P is 16 years of age or above. (2) D shall be guilty of an offence if he ill-treats or causes, procures or knowingly permits P to be ill-treated by any other person. Subsection (3) defines when D is said to ill-treat P.

⁴ Rachel Au-Yong, 'Abuse of children, the elderly on the rise: Faishal Ibrahim' *The Straits Times*, 12 February 2019. See also Theresa Tan, 'More cases of vulnerable adults being abused by their families', *The Straits Times*, 13 March 2016.

brain.⁵ Other persons, such as the elderly and those who are physically disabled, who are not mentally incapable of making decisions may also be vulnerable to abuse or neglect and require state protection.⁶ A comparison can be made with the plethora of specific legal provisions crafted to pre-emptively protect children from abuse or neglect in addition to the general criminal and tort laws available to all persons.⁷ Vulnerable adults are similar to children in that they are dependent and often abused by a loved one and are thus unable or unwilling to seek protection themselves for fear of losing their caregiver or fear of further repercussions.⁸

But herein lies the difficulty: can state intervention in the name of protection be justified in the case of an adult? Unlike children, adults cannot be presumed to lack mental capacity.⁹ Would state intervention not amount to an unjustified interference with the adult's autonomy and freedom of choice? On the other hand, there is the not unusual situation where a health or social service provider is prevented - often by a caregiver or a member of the family - from having access to the suspected victim of abuse or neglect.¹⁰ The service provider is unable to investigate whether the victim is incapacitated or wishes to receive help until *after* they have gained access and made inquiries.

Legislatures in a number of jurisdictions have responded to concerns about the abuse, exploitation and neglect of vulnerable adults (including older adults). The legislation is not uniform, with different jurisdictions taking different approaches to the need to balance protection with individual interests in privacy and autonomy.¹¹ In the case of Singapore, it has tried to balance the competing concerns of protection and individual freedom in a new law called the *Vulnerable Adults Act*¹² ('VAA'). State intervention to protect mentally competent, but vulnerable, adults is generally possible only if they consent to it. If they do not, a court order is required which can only be obtained on proof that the vulnerable adult has experienced, or is experiencing or at risk of, abuse, neglect or self-neglect, and that the making of the order is necessary for the safety and protection of the vulnerable adult.

⁵ MCA s 4(1). A person is unable to make a decision in relation to a matter if they are unable to understand, retain, use or weigh information relevant to the decision, or to communicate their decision: MCA s 5(1).

⁶ There is a degree of overlap between vulnerable and mentally incapable persons, but the point remains that the MCA only protects a vulnerable adult only if they are also mentally incapable. See also the recommendations by the Law Commission for England and Wales to expand the scope of the state's protective powers in *Mentally Incapacitated Adults and Decision-Making: An Overview* (Consultation Paper No. 119) (London: HMSO, 1991); *Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection* (Consultation Paper No. 130) (London: HMSO, 1993) and *Mental Incapacity* (Law Com No. 231) (HMSO, 1995). These proposals were left out of the UK *Mental Capacity Act 2005* (c 9) which was eventually passed.

⁷ *Children and Young Persons Act* (Cap 38, 2001 Revised Edition) ('CYPA').

⁸ But this should not be taken to suggest that the legislation for protection of children can be simply extended to adults. The aim and philosophy behind the intervention differ between children and vulnerable adults.

⁹ Children are presumed to be incapable of protecting themselves but the decision of a mentally competent adult - be it wise or unwise - is virtually sacrosanct, see *Re LP (adult patient: medical treatment)* [2006] 2 SLR(R) 13.

¹⁰ Media reports in Singapore gave the example of a case which took three weeks for the social workers to gain access to an elderly woman in her 80s. Her daughter made her sleep on the floor, disallowed her from leaving the flat or speaking to anyone, did not change her diapers and overdosed her on sleeping pills. With the VAA, access by the social workers would have been earlier, thereby reducing risk to the woman's welfare, see Lim Min Zhang, 'Vulnerable adults get greater protection now' *The Straits Times*, 7 January 2019.

¹¹ See Lorna Montgomery *et al*, 'Implications of divergences in adult protection legislation' (2016) 18(3) *Journal of Adult Protection* 149; Robert M Gordon, 'Adult protection legislation in Canada: Models, issues and problems' (2001) 24 *International Journal of Law and Psychiatry* 117,117.

¹² Act No. 27 of 2018. This Act was brought into force on 19 December 2018.

Under the VAA, orders allowing for both emergency and gradual intervention are possible, in accordance with the needs of the person's circumstances.¹³ This allows for a range of services to be provided in accordance with the severity of the abuse or neglect. The operation of the VAA is described in the following sections.

II SINGAPORE'S *VULNERABLE ADULTS ACT*

While it may be accepted that the law's protection should extend beyond those who are mentally incapable or are mentally disordered, how broadly should the group of vulnerable adults be defined?¹⁴ Should vulnerability be defined purely in terms of inherent characteristics of the person such as age, illness or disability, or by the person's situational inability to take care or to protect themselves from harm, or should it be a bit of both? A wider conception of vulnerability will allow consideration of the personal, social, economic and cultural circumstances of the individual.

What should be the threshold for protective state intervention - should it be inability to protect themselves from any harm or is something more required such as significant / life-threatening harm? Moreover, how should harm be defined? Should the focus be on the wrongful acts committed ('ill-treatment') or on the effect of the acts on the person? The effect of social isolation and denial of therapy, for example, may take a long time to be seen among the elderly and those with learning impairments but can be long-lasting.

A Definitions under the VAA

The VAA provides a four part definition of a 'vulnerable adult' and all parts must be met.¹⁵ First, the person must be 18 years old or above.¹⁶ Secondly, the person must be incapable of protecting themselves. Thirdly, the incapacity must be by reason of mental or physical infirmity, disability or incapacity. Fourthly, the type of harm that the person is unable to protect themselves from must be 'abuse, neglect or self-neglect'. Each of these terms are in turn defined in the VAA.

It can be noted that under the VAA, a vulnerable adult is not simply equated with either a person above a certain age, or a person without mental capacity. A person who is above a certain age need not be vulnerable, and conversely, a person who is vulnerable can be of any age.

A person who is mentally incapable will also conceivably be unable to protect themselves, but the converse may not be true. Hence, a person who is bed- or wheelchair-bound, for example, may not be mentally incapable but they may not be able to protect themselves from abuse,

¹³ The VAA has also added a new provision, s 74A, to the *Penal Code* (Cap 224, 2008 Rev Ed) to enhance penalties for certain offences against vulnerable adults. The maximum sentences that can be imposed has since been increased by the *Criminal Law Reform Act* (No. 15 of 2019).

¹⁴ There is a growing literature on the conception of vulnerability in healthcare, see for example Judith Spiers, 'New perspectives on vulnerability using emic and etic approaches' (2000) 31(3) *Journal of Advanced Nursing* 715; Patricia Jones, Xinwei Zhang and Afaf Meleis 'Transforming vulnerability' (2003) 25(7) *Western Journal of Nursing Research* 835; Barry Hoffmaster 'What does vulnerability mean?' (2007) 36(2) *Hastings Center Report* 44.

¹⁵ The definition of 'vulnerable adult' in s 2 of the VAA is divided into two parts, but there are in fact four parts to it.

¹⁶ Protection for those who are below 18 years old come within the CYP, as amended by the *Children and Young Persons (Amendment) Act 2019* (No. 30 of 2019).

neglect or self-neglect and therefore fall within the definition of a ‘vulnerable person’ in the VAA.

Two suggestions for improvement to the definition of vulnerable person can be made. First of all, it should not be limited to incapacity which arises ‘by reason of mental or physical infirmity, disability or incapacity’ only. A person may also be vulnerable due to psychological reasons such as having been victims of sexual or domestic abuse who have suffered long-term abuse leaving them unable to protect themselves. Secondly, the requirement of being ‘incapable’ of protecting themselves is a high one. It should be sufficient if the person’s ability to protect themselves is ‘impaired’ or ‘impaired in their ability’ such that they are more at risk than other persons.

‘Abuse’ is defined in the VAA as:¹⁷

- (a) physical abuse;
- (b) emotional or psychological abuse;
- (c) conduct or behaviour by an individual that in any other way controls or dominates another individual and causes the other individual to fear for his or her safety or wellbeing; or
- (d) conduct or behaviour by an individual that unreasonably deprives, or threatens to unreasonably deprive, another individual of that other individual’s liberty of movement or wellbeing.

‘Emotional or psychological abuse’ is defined in the VAA as conduct or behaviour:¹⁸

- (a) that torments, intimidates, harasses or is offensive to the other individual; or
- (b) that causes or may reasonably be expected to cause mental harm to the other individual, including thoughts of suicide or inflicting self-harm.

‘Neglect’ is defined in the VAA as:¹⁹

the lack of provision to the individual or essential care (such as but not limited to food, clothing, medical aid, lodging and other necessities of life), to the extent of causing or being reasonably likely to cause personal injury or physical pain to, or injury to the mental or physical health of, the individual.

‘Physical abuse’ is defined in the VAA to *include* conduct or behaviour:²⁰

- (a) that causes, or threatens to cause, personal injury or physical pain to an individual;
- (b) that coerces,²¹ or attempts to coerce, an individual to engage in sexual activity; or

¹⁷ VAA s 2(1). Missing from this list is financial abuse. This is particularly worrying since a 2014 study of cases from TRANS SAFE Centre, a charity specialising in tackling elder abuse, found that one in three cases of elder abuse involved financial abuse, see Theresa Tan, ‘Breaking the silence on financial abuse of elders’, *The Straits Times*, 6 February 2016. The Singapore Government has said that this aspect will be re-examined later after more experience is gained from tackling physical and emotional abuse, see *Closing Speech by Minister Desmond Lee at the Second Reading of the Vulnerable Adults Bill* (18 May 2018), para 19.

¹⁸ VAA s 2(1). The following examples are given in the VAA on what amounts to emotional or psychological abuse:

- (a) X has Parkinson’s disease and cannot walk without assistance. Her caregiver, Y, does not physically abuse X but regularly threatens to beat or harm X’s grandchild (a baby) whom X is devoted to.
- (b) X has dementia and lives with her adult son, Y. When Y is drunk and does not get what he wants from X, Y shouts at X and destroys X’s belongings in X’s presence, causing fear and distress to X.

¹⁹ VAA s 2(1).

²⁰ VAA s 2(1) (emphasis added). The definition of physical abuse was intentionally not exhaustive.

²¹ ‘Coerce’ is defined in VAA s 2 to mean:

- (a) to compel or force the individual to do, or refrain from doing, something; or

- (c) that threatens an individual with the death or injury of the individual.

‘Self-neglect’ is defined in the VAA as:²²

- ... the failure of the individual to perform essential tasks of daily living (such as but not limited to eating, dressing and seeking medical aid) to care for himself or herself, resulting in the individual:
- (a) living in grossly unsanitary or hazardous conditions;
 - (b) suffering from malnutrition or dehydration; or
 - (c) suffering from untreated physical or mental illness or injury.

‘Wellbeing’ is defined in the VAA to mean any of the following:²³

- (a) personal dignity;
- (b) physical, mental and emotional health;
- (c) control by the individual over his or her day-to-day life (including over the day-to-day care provided by another individual and the way in which it is provided);
- (d) social, domestic, family and personal relationships.

As can be seen in the above definitions, a very wide approach is taken under the VAA. A vulnerable person is to be protected from physical, sexual as well as psychological harm which need not be intentionally inflicted. Psychological abuse extends to instances social isolation and where the person may be deprived of their sense of self-worth and dignity. Positive acts as well as omissions which have an impact on the vulnerable adult are covered. Finally, even instances of ‘self-neglect’, which do not involve an external perpetrator, is a situation considered for State intervention.

B Principles under the VAA

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- (b) to cause the individual to do something without the individual’s consent.

²² VAA s 2(1).

²³ VAA s 2(1). The following examples are given in the VAA on when the wellbeing of X is unreasonably deprived:

- (a) X is wheelchair-bound and does not lack mental capacity. X is prescribed medication to prevent serious deterioration of his health. X’s caregiver, Y, prevents X from taking the medication by hiding it in a cupboard beyond X’s reach. Y’s conduct has an adverse effect on X’s physical health.
- (b) X is unable to dress herself. Y, her caregiver, does not dress X after bathing her. Despite X’s protests, Y leaves her unclothed in a room with the windows open so that X is in full view of neighbours walking past the flat. The flat is situated along a common corridor to which members of the public have access. X is deprived of her personal dignity.
- (c) X’s family member, Y, controls all of X’s daily living activities (including eating, drinking, bathing, toileting and the programmes X watches on the television or listens to on the radio) and refuses to allow X to have contact with any other person or to receive visitors. Y’s control over X’s day-to-day life and social relationships has an adverse effect on X’s emotional health.

The VAA contains principles which guide persons acting under the statute.²⁴ These principles are of crucial importance in resolving the tension between autonomy and protection of the vulnerable adult. These principles state:²⁵

- (a) the duty is being performed or the power is being exercised [under the VAA] for the purpose of protecting the vulnerable adult from abuse, neglect and self-neglect;
- (b) a vulnerable adult, where not lacking in mental capacity, is generally best placed to decide how he or she wishes to live and whether or not to accept any assistance;
- (c) if a vulnerable adult lacks mental capacity, the vulnerable adult's views (whether past or present), wishes, feelings, values and beliefs, where reasonably ascertainable, must be considered;
- (d) regard must be had to whether the purpose for which the duty is being performed or the power is being exercised [under the VAA] can be achieved in a way that is less restrictive of the vulnerable adult's rights and freedom of action;
- (e) in all matters relating to the administration or application of [the VAA], the welfare and best interests of the vulnerable adult must be the first and paramount consideration.

These principles are not ranked in order of importance and there is potential for the principles to be in conflict. For example, what if it is in the best interests of the vulnerable adult that they be removed to prevent the risk of harm but they, being fully competent, refuse to agree. How should the case be resolved?

Of prime importance is the principle of adopting the least restrictive alternative (principle (d)) if the protection cannot be obtained by other means. This principle can also be found under the MCA where a deputy's power to make decisions for a person without mental capacity is to be 'as limited in scope and duration as reasonably practicable in the circumstances'.²⁶ Hence, State intervention is not meant to take over the person's life completely. The preference for choosing the minimum or least restrictive alternative means that the vulnerable person should be made safe in their present living environment rather than being institutionalised where possible; and if removal the vulnerable person must be carried out, this should be for as short a period as possible.

If the vulnerable adult has mental capacity, principle (b) states that they are best placed to make the decision whether to accept assistance. In order to help them decide, sufficient information and support (for example by the use of interpreters) must be given so that they can participate fully in the decision-making.

²⁴ Under VAA s 4(3), a court must also have regard to these principles when deciding whether to make an order under the Act, but it 'may also have regard to such other matters as the court thinks fit'. There is no explanation of what such 'other matters' could be. Similar principles can also be found in the MCA s 3:

- a person must be assumed to have capacity unless it is established that he lacks capacity;
- a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success;
- a person is not to be treated as unable to make a decision merely because he makes an unwise decision;
- an act done, or a decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests;
- before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

²⁵ VAA s 4(1).

²⁶ MCA s 20(4).

In the case where the vulnerable adult lacks mental capacity, principle (c) requires consideration of the ascertainable views of the vulnerable adult. This may involve seeking information from relevant persons such as immediate family members, relatives or care givers on the views of the vulnerable adult.

C Powers of intervention under the VAA

State intervention, through the Director-General of Social Welfare²⁷ ('Director') or 'protector'²⁸ appointed under the VAA can only be exercised if:²⁹

- (i) the Director-General or protector has reason to believe that the individual is a vulnerable adult, and the individual has experienced, or is experiencing or at risk of, abuse, neglect or self-neglect; or
- (ii) the court has made an order ... authorising the Director-General or protector to do so.

The intervention powers under the VAA for adults at risk of harm can be placed in an hierarchy and viewed in terms of a pyramid (Figure 1). At the bottom of the pyramid, vulnerable adults may be subjected to assessment of their risk at their residence. The level of protection increases as we progress up the pyramid, with increasing levels of compulsion.³⁰ The principles applicable to the VAA, particularly the principle of minimum intervention, must be followed in order to ensure that the vulnerable adult's liberty is not unduly restricted. Conceptualising the powers of intervention as a pyramid helps to visualise the increasingly intrusive nature of the interventions and to identify the appropriate legal safeguards to prevent abuse of such powers that go with each level of intervention.

²⁷ VAA s 2(1). They are appointed under the CYPA s 3(1). The 'Director of Social Welfare' was renamed the 'Director-General of Social Welfare' by the *Children and Young Persons (Amendment) Act 2019* (No. 30 of 2019).

²⁸ Such persons are 'public officers with suitable qualifications and experience' appointed by the Director-General of Social Welfare, VAA s 3(2).

²⁹ VAA s 5(a). If the vulnerable adult is already subject to a court order, the intervention must also not be inconsistent with any condition or direction in the court order.

³⁰ There can be debate as to whether certain measures are placed in the correct hierarchy. For example, it can be argued that the order for non-contact by a third party should be placed higher than the temporary removal order since the former can be of indefinite duration. However, it can also be argued that the latter constitutes a more severe intrusion on the liberty of the vulnerable adult even though it may be temporary.



Figure 1: Powers of intervention

1 *Level 1: Obtain information*

If there is reasonable belief that the person is either a vulnerable adult or is a person who has experienced, or is experiencing or at risk of, abuse, neglect or self-neglect, the Director or a protector may require information to be given in order to assess the condition of the vulnerable adult.³¹ To this end, the Director and protector may examine and take records of the person's health record and 'any record ... compiled in connection with a social service function'.³² The latter is not defined in the VAA and its scope may need to be clarified through case law.

A court is also given similar powers to require a person to give information to it such as the vulnerable adult's family background, home environment, medical history and state of physical and mental health and wellbeing, if there is reason to believe that the person has experienced, or is experiencing or at risk of, abuse, neglect or self-neglect, and the order is necessary for the protection and safety of the vulnerable adult.³³

To overcome concerns about breach of confidentiality, the VAA provides that information given to the Director or protector is not to be regarded as breach of 'any code of professional etiquette or ethics or to have departed from any accepted form of professional conduct' and there is no civil or criminal liability in giving this information.³⁴ A criminal offence is

³¹ VAA s 9(1), (2). To the extent that the Director or protector can act so long as *either* requirement is satisfied, this is inconsistent with the VAA s 5(a) mentioned above.

³² VAA s 9(3).

³³ VAA ss 12(1) and 14(4)(b).

³⁴ VAA s 9(4).

committed if the requested information is not given without a reasonable excuse³⁵ or if false information is knowingly given.³⁶

2 Level 2: Assessment in Situ

Level 2 involves a visit to the vulnerable adult's residence for an assessment to be made by the Director, protector or a 'qualified assessor'.³⁷ Such visit can be made without notice, at any time of the day or night.³⁸ If the vulnerable adult to be assessed is prevented from being seen by a third party, the Director or protector may direct the third party to produce the vulnerable adult for assessment.³⁹ Failure to produce the vulnerable adult without a reasonable excuse or obstructing another person from doing so results in a criminal offence.⁴⁰

If the visit is not welcomed by the vulnerable adult or a third party, there are powers to use force to enter the premises,⁴¹ and for the Director or protector to be accompanied by other persons such as a medical practitioner or auxiliary police officer.⁴² In addition, the Director or protector may request for any person present to leave so that the assessment can be held in private.⁴³

Considering the intrusive and delicate nature of the task, it will be good practice for the visitors to identify themselves, inform the vulnerable adult of their reason for visiting, and also the vulnerable adult's right to refuse to co-operate. If the vulnerable adult is reasonably believed to lack mental capacity, the assessment can be carried out if the Director or protector is satisfied that the assessment would be in the person's best interests.⁴⁴ However, if the vulnerable adult has mental capacity but refuses to be assessed, the Director or protector must apply for a court order for the assessment to take place. The court must be satisfied, on a balance of probabilities, that the vulnerable adult has experienced, or is experiencing or at risk of, abuse, neglect or self-neglect, and that the making of the order is necessary for the safety and protection of the vulnerable adult.⁴⁵ Before the order is made, the vulnerable adult must be given an opportunity to be heard, unless it is not practicable to do so.⁴⁶

3 Level 3: Assessment in Another Place

Despite the attempt to engage with the vulnerable adult or their caregiver, situations may arise such that there is a need for the Director or protector to remove the vulnerable adult from their residence to another place for assessment.⁴⁷ This avenue is especially useful where a third party is being obstructive.

³⁵VAA ss 9(5), 14(13)(a).

³⁶ VAA s 9(6).

³⁷ VAA s 6(1)(a), (b). 'Qualified assessors' are persons whom the Director or protector 'reasonably considers qualified to conduct an assessment' VAA s 2(1). Such persons include 'mental capacity assessors' as well who could be a medical practitioner, a psychiatrist or a psychologist, VAA s 3(4).

³⁸ VAA s 8(1).

³⁹ VAA s 6(1)(c).

⁴⁰ VAA s 6(8).

⁴¹ VAA s 8(3).

⁴² VAA s 8(2) and the definition of 'relevant support person' in VAA s 2(1).

⁴³ VAA s 6(4).

⁴⁴ VAA s 7(2).

⁴⁵ VAA s 7(3).

⁴⁶ VAA s 13(3), (4).

⁴⁷ VAA s 6(1)(d).

Where the vulnerable adult has mental capacity, they can consent to the removal even if a third party objects.⁴⁸ If the vulnerable adult does not have mental capacity to consent to the removal, they can be removed by the Director or protector without seeking the consent of the vulnerable adult's donee or deputy if one has been appointed.⁴⁹

However, if the vulnerable adult has mental capacity but refuses to be removed, the Director or protector may apply for a court order for the removal.⁵⁰ The court can issue the order only if it is satisfied on a balance of probabilities that the vulnerable adult has experienced, or is experiencing or at risk of, abuse, neglect or self-neglect, and that the order is necessary for the safety and protection of the vulnerable adult.⁵¹ Before the order is made, the vulnerable adult must be given an opportunity to be heard, unless it is not practicable to do so.⁵²

In order to carry out the removal, the Director or protector may be accompanied by 'relevant support persons' such as an auxiliary police officer and may use force as the Director or protector considers necessary to remove the vulnerable adult or to prevent a third party from obstructing their removal.⁵³ The Director or protector may enter the premises where the vulnerable adult is staying at any time in the day or night, and may break open any door, window, lock etc that is necessary to effect entry.⁵⁴

After assessment, the vulnerable adult is to be returned to where they were removed or to the care of another person.⁵⁵

4 Level 4: Medical and Dental Treatment

The Director or protector may require the vulnerable adult to be produced for medical and dental treatment before or during the time when they are under the temporary care.⁵⁶ If needed, a court may make an order to a third party to produce the vulnerable adult for medical or dental treatment before they are committed to temporary care.⁵⁷ It is a criminal offence to obstruct compliance with the court order.⁵⁸

Such medical or dental treatment can only be administered with the vulnerable adult's consent unless they lack mental capacity to consent and the treatment is reasonably believed by the doctor or dentist to be in the vulnerable adult's best interests, or if it is not practicable to obtain consent because the doctor or dentist reasonably believes that a medical or dental emergency exists and it is in the vulnerable adult's best interests to receive the treatment.⁵⁹

Where the vulnerable adult lacks mental capacity, the medical or dental treatment is to be carried out with the consent of the vulnerable adult's donee or deputy (if one has been

⁴⁸ VAA s 6(1)(d)(i).

⁴⁹ VAA s 6(2) of the VAA. For the appointment of donees and deputies, see the MCA.

⁵⁰ VAA s 6(1)(d)(iii).

⁵¹ VAA s 7(3).

⁵² VAA s 13(3), (4).

⁵³ VAA s 6(5).

⁵⁴ VAA s 8.

⁵⁵ VAA ss 6(6) and 7(4).

⁵⁶ VAA s 18(1).

⁵⁷ VAA s 14(1)(c).

⁵⁸ VAA s 14(12).

⁵⁹ VAA s 18(2).

appointed) unless the consent cannot be obtained within a reasonable time or if the consent is unreasonably withheld by the donee or deputy.⁶⁰

5 Level 5: Supervision

The Director or protector may apply to court for a vulnerable adult to be placed under the supervision of a protector, an approved welfare officer⁶¹ or another person appointed by the court for a specified period.⁶² The court must be satisfied, on a balance of probabilities, that the vulnerable adult has experienced, or is experiencing or at risk of, abuse, neglect or self-neglect, and the order is necessary for the protection and safety of the vulnerable adult.⁶³ It is a criminal offence to obstruct compliance with this order.⁶⁴

6 Level 6: Counselling

The Director or protector may apply to court to direct the vulnerable adult to attend counselling or other programmes.⁶⁵ The court must be satisfied, on a balance of probabilities, that the vulnerable adult has experienced, or is experiencing or at risk of, abuse, neglect or self-neglect, and the order is necessary for the protection and safety of the vulnerable adult.⁶⁶ It is a criminal offence to obstruct compliance with this order.⁶⁷ Non-compliance with the order to attend counselling or other programmes will also amount to contempt of court which may be applied for by the Director or protector.⁶⁸

The use of counselling orders by a court is not new. It can also be found in legislation relating to family violence⁶⁹ and in cases involving juveniles.⁷⁰

7 Level 7: Decluttering

The Director or protector may apply to court to authorise the disposal of items in the vulnerable adult's residence in order to make it a safe living environment if the condition of the residence poses a risk to the safety or health of the vulnerable adult.⁷¹ The court must be satisfied, on a balance of probabilities, that the vulnerable adult has experienced, or is experiencing or at risk of, abuse, neglect or self-neglect, and the order is necessary for the protection and safety of the vulnerable adult.⁷² It is a criminal offence to obstruct compliance with this order.⁷³

In making the court order, there must generally be consent by every owner of the residence as well as the vulnerable adult. However, consent by the owner of the residence is not needed if the vulnerable adult consents and the owner(s) cannot be located despite reasonable attempts

⁶⁰ VAA s 18(3).

⁶¹ Such officers must be 'suitably qualified' and appointed by the Director under VAA s 3(3).

⁶² VAA s 14(1)(d).

⁶³ VAA ss 12(1), 14(1).

⁶⁴ VAA s 14(12).

⁶⁵ VAA s 14(1)(i).

⁶⁶ VAA ss 12(1), 14(1).

⁶⁷ VAA s 14(12).

⁶⁸ VAA s 16(4)(c).

⁶⁹ *Women's Charter* (Cap 353, 2009 Revised Edition) s 65(5)(b).

⁷⁰ CYPA ss 46, 51.

⁷¹ VAA s 14(1)(j).

⁷² VAA ss 12(1), 14(1).

⁷³ VAA s 14(12).

to do so.⁷⁴ Consent by the owner of the residence or the vulnerable adult is also not needed if either lack mental capacity, or if the court is of the view that the order is necessary for the protection and safety of the vulnerable adult.⁷⁵ Before the order is made, the vulnerable adult must be given an opportunity to be heard, unless it is not practicable to do so.⁷⁶

Hence, even if the vulnerable adult (or owner of the residence) has mental capacity and objects to the disposal of items, the ‘decluttering’ order may nevertheless be made by the court on satisfaction that it concerns a vulnerable adult and it is necessary for their protection and safety. However, this latter requirement is not an additional safeguard at all since a court can only make orders if satisfied that it is necessary for the protection and safety of the vulnerable adult.⁷⁷ The added safeguard for the decluttering order is that the court must sit with 2 advisers when determining whether to make this order.⁷⁸

8 Level 8: Non-contact by third party

Non-contact orders can be expected to cause great unhappiness and strain family relationships where the third party is a family member or relative of the vulnerable adult. Such orders must therefore be used with caution.

A third party can be directed by the Director or protector not to contact the vulnerable adult who has been temporarily removed if it is reasonably believed not to be in the vulnerable adult’s best interests.⁷⁹ Such a direction can last till a court makes orders concerning the vulnerable adult. Failure to comply without reasonable excuse amounts to a criminal offence.⁸⁰

In addition, a court order may be obtained to prohibit a third party from entering and remaining in an area outside the vulnerable adult’s residence or any other place frequented by the vulnerable adult,⁸¹ or visiting or communicating with the vulnerable adult.⁸² The court may also make an order to restrain the abuser from abusing the vulnerable adult or to exclude the abuser from the residence of the vulnerable adult.⁸³ As with other court orders, the court must be satisfied, on a balance of probabilities, that the vulnerable adult has experienced, or is experiencing or at risk of, abuse, neglect or self-neglect, and the order is necessary for the protection and safety of the vulnerable adult.⁸⁴ Where the court is satisfied, on a balance of probabilities, that the vulnerable adult is experiencing, or is imminent danger of, abuse, neglect or self-neglect, it may issue an ‘expedited order’,⁸⁵ meaning that the order can be made even if the application for it is not served on the person against whom it is to be made or if that person does not appear at the hearing of the application.⁸⁶

⁷⁴ VAA s 14(2).

⁷⁵ VAA s 14(3).

⁷⁶ VAA s 13(3), (4).

⁷⁷ VAA ss 12(1), 14(1).

⁷⁸ VAA s 13(6).

⁷⁹ VAA s 11(4).

⁸⁰ VAA s 11(5).

⁸¹ VAA s 14(1)(g).

⁸² VAA s 14(1)(h).

⁸³ VAA s 14(1)(e), (f).

⁸⁴ VAA ss 12(1), 14(1).

⁸⁵ VAA s 15(1).

⁸⁶ VAA s 15(2).

The court orders may be applied for by the Director, protector, approved welfare officer or family member of the vulnerable adult. If the vulnerable adult lacks mental capacity, the person's donee or deputy (if one is appointed) may apply for the order as well. If the vulnerable adult has mental capacity, their consent must be obtained if the application is made by the approved welfare officer or family member, and the vulnerable adult may also apply for the order on their own.⁸⁷

Failure to comply with these court orders without reasonable excuse is a criminal offence.⁸⁸ However, in recognition that breaches of the court orders may arise from a variety of reasons including caregiver stress, action is not taken by the police but by Ministry officials.⁸⁹ The Director and 'authorised officers'⁹⁰ are empowered to arrest, without warrant, any person reasonably suspected of violating these orders.⁹¹ Breach of the order prohibiting a third party from entering and remaining in an area outside the vulnerable adult's residence or any other place frequented by the vulnerable adult can also be treated as a contempt of court which the vulnerable adult can apply for.⁹²

Curiously, the VAA states that the court order prohibiting the third party from entering and remaining in an area outside the vulnerable adult's residence or place frequented by them is 'for a specified period', but there is no time limit for the order prohibiting the third party from visiting or communicating with the vulnerable adult.⁹³ This is probably because the latter order is not considered as intrusive on the rights of the third party as the former. In any case, application can be made for the court orders to be varied, suspended or revoked, subject to the court's satisfaction that this is in the best interests of the vulnerable adult.⁹⁴

9 Level 9: Temporary Removal

Where the Director or protector is satisfied on reasonable grounds that the vulnerable adult has experienced, or is experiencing or at risk of, abuse, neglect or self-neglect, they can be committed to a place of temporary care and protection or to the care of a fit person.⁹⁵ It can be anticipated that such removals will only be used in crisis situations where the vulnerable adult is at grave risk should they continue living in their current premises.

Such removals must be with the consent of the vulnerable adult unless they are assessed to lack mental capacity to consent. There is no need to obtain the consent of the vulnerable adult's donee or deputy (if appointed) in such cases where the person lacks mental capacity.⁹⁶ But if the vulnerable adult has mental capacity and objects to the removal, an order of court must be obtained to authorise the removal.⁹⁷ The court must be satisfied, on a balance of probabilities,

⁸⁷ VAA s 12(2).

⁸⁸ VAA ss 14(10), 15(8).

⁸⁹ *First Reading of the Vulnerable Adults Bill: Strengthening Our Ability to Protect* (20 March 2018), para 7(c).

⁹⁰ Such officers are auxiliary police officers and 'enforcement officers' who are public officers with 'suitable qualifications and experience', VAA ss 2(1), 3(5) and 3(9).

⁹¹ VAA s 28.

⁹² VAA s 16(4)(d).

⁹³ VAA s 14(1)(g), (h).

⁹⁴ VAA s 17.

⁹⁵ VAA ss 10(1), 11(1)(a). Places of temporary care and protection are places where assessments and investigations are carried out and where longer-term care arrangements are planned (VAA s 19). Fit persons can be an individual (such as a family member or relative) or organisation which the court or Director thinks is competent to provide care and protection to the vulnerable adult (VAA s 2(1)).

⁹⁶ VAA s 10(2).

⁹⁷ VAA s10(4).

that the vulnerable adult has experienced, or is experiencing or at risk of, abuse, neglect or self-neglect, and that the order is necessary for the safety and protection of the vulnerable adult.⁹⁸ An opportunity must be given for the vulnerable adult to be heard by the court unless it is not practicable in the circumstances to do so.⁹⁹

The Director or protector may enter the premises where the vulnerable adult is staying without notice, at any time of the day or night, and may break open any door, window or lock if necessary to effect entry.¹⁰⁰ The Director or protector may also be accompanied by ‘relevant support persons’ such as an auxiliary police officer and use such force as necessary to remove the vulnerable adult or to prevent a third party from obstructing the removal.¹⁰¹

Unless the vulnerable adult is returned, the Director or protector must apply to court, within 14 days after the day of the removal, for an order to be made.¹⁰² If this application cannot be made in time, the Director or protector must nevertheless apply for an order for the custody, charge and care of the vulnerable adult for the period before the court application for an order to be made and explain the reasons for the delay.¹⁰³

If the vulnerable adult refuses to be removed, the best approach would be to obtain a court order for the removal unless it is clear that they do not possess mental capacity. It may not be possible to come to an accurate assessment of mental capacity without the cooperation of the vulnerable adult and their care givers.

10 *Level 10: Temporary Care*

On application to court, an order may be made for the vulnerable adult to be committed to a place of temporary care and protection, or the care of a fit person, for a period not exceeding 6 months.¹⁰⁴ As with other court orders, the court must be satisfied, on a balance of probabilities, that the vulnerable adult has experienced, or is experiencing or at risk of, abuse, neglect or self neglect, and that the order is necessary for the protection and safety of the vulnerable adult.¹⁰⁵ The court must grant the vulnerable adult a reasonable opportunity to be heard unless it is not practicable to do so or if they are assessed to lack mental capacity.¹⁰⁶

A Review Board is established by the VAA to ensure that a proper care plan is in place for vulnerable adults committed to a place of temporary care and protection, or a place of safety¹⁰⁷ or the care of a fit person which is an organisation.¹⁰⁸ The Review Board also advises the Director whether the vulnerable adult can be discharged from such place or care before the completion of the period of committal.¹⁰⁹

11 *Level 11: Extended care*

⁹⁸ *Ibid.*

⁹⁹ VAA s 13(3), (4).

¹⁰⁰ VAA s 8.

¹⁰¹ VAA s 10(5).

¹⁰² VAA s 11(1).

¹⁰³ VAA s 11(2).

¹⁰⁴ VAA s 14(1)(a).

¹⁰⁵ VAA ss 12(1), 14(1).

¹⁰⁶ VAA s 13(3), (4).

¹⁰⁷ A place of safety is for the care and protection of vulnerable adults over the longer term, VAA s 19.

¹⁰⁸ VAA s 20(2).

¹⁰⁹ *Ibid.*

Finally, the court may also commit the vulnerable adult to stay in a place of safety or to a fit person for an extended duration exceeding 6 months. The only guidance to the court expressed in the VAA as to when this is more appropriate than a committal to temporary care is that ‘it is in the best interests of the vulnerable adult to be so committed.’¹¹⁰ Unfortunately, this does not provide much guidance since one of the principles to be followed in the VAA ‘in all matters’ is that ‘the welfare and best interests of the vulnerable adult must be the first and paramount consideration.’¹¹¹

However, a court hearing an application for extended care must sit with 2 advisers who will inform and advise the court on the protection and safety of the vulnerable adult, and the appropriateness of making the order.¹¹² This is unlike the application for an order for temporary care where the judge sits alone.

The court must grant the vulnerable adult a reasonable opportunity to be heard unless it is not practicable to do so or if they are assessed to lack mental capacity.¹¹³

The Review Board also plays a role as described in the previous section.

III GENERAL COMMENTS

It can be noted that the criteria for State intervention does not change even as the level of intervention increases. It may be argued that, under the principle of minimum intervention, the level of risk and degree of vulnerability are very important to justify the intervention. As the intrusiveness of the intervention increases, there ought to be proof of risk of *serious* harm, and not just risk of harm, and stronger proof that the vulnerable adult is unable to protect themselves.

In situations where a court order has to be obtained, for example where the elderly has mental capacity and object to their removal, one concern is whether the legal proceedings will turn out to be too adversarial in nature which can worsen the relationships between family members, caregiver(s), the elderly and the social workers. Legal representation can also cause their positions to be even more entrenched.¹¹⁴ Perhaps consideration can be given to whether the orders needed can be made by a tribunal which will not be bound strictly by matters of evidence and where the parties are not allowed to be legally represented. The tribunal system is already adopted for family matters under the *Maintenance of Parents Act*.¹¹⁵

Another query concerns how the initial determination of whether the vulnerable adult has mental capacity to object to the State intervention such as temporary removal for assessment can be made since the reason of seeking their removal is that a proper assessment cannot be made otherwise. The wording of section 6(1)(d)(ii) of the VAA assumes that the assessment of mental capacity can be made by a ‘qualified assessor’ even though assessment by the Director

¹¹⁰ VAA s 14(1)(b).

¹¹¹ VAA s 4(1)(d). However, it is noted that the court may consider ‘other matters as the court thinks fit’ as well, VAA s 4(3).

¹¹² VAA s 13(6), (8).

¹¹³ VAA s 13(3), (4).

¹¹⁴ Under the *Legal Aid and Advice Act* (Cap 160, 2014 Revised Edition), only Singapore citizens and Singapore permanent residents are eligible for legal aid in civil proceedings. Legal aid may also be refused based on the merits of the case or if the applicant has financial means (see ss 5 and 8).

¹¹⁵ Cap 167B, 1996 Revised Edition.

or protector may be prevented. However, it is equally likely that the vulnerable adult or a third party will prevent access by the qualified assessor as well. In such a case, it is not clear if it would be possible to resort to s 7(2) of the VAA which allows a Director or protector to exercise their powers if they have reason to believe that the vulnerable adult lacks mental capacity to refuse the assessment and that doing so will be in their best interests. If this is possible, then it is only the very few cases where the mental capacity of the vulnerable adult is known and they refuse to cooperate that a court order is needed. On the other hand, if this route is not available, the avenues for intervention will be hampered if access to the vulnerable adult is refused and it is not possible to assess the person's mental capacity, which is one of the issues which the VAA was meant to overcome.

It is also a very difficult and serious issue in deciding if the vulnerable adult has mental capacity or not. As mentioned in the Introduction, it is a highly artificial line to draw in a binary fashion between those who have or do not have mental capacity.¹¹⁶ The purely functional tests of mental capacity under the MCA fail to consider that a person may also find it difficult to make a decision because of their connections and inter-dependencies with others.¹¹⁷

What amounts to consent will also have to be fleshed out by case law since the VAA does not contain a definition. The scenarios envisaged is where the refusal of assistance 'stems from duress or pressure from family members or the perpetrator'¹¹⁸ or 'duress or undue influence'.¹¹⁹ But what kinds of 'influence' will amount to duress, pressure or undue influence? And at what stage would duress, pressure or undue influence vitiate consent?¹²⁰ Would submission amount to consent? Or must consent be actively given? Would any mistaken assumption made by the vulnerable adult vitiate the apparent consent? Or will only certain mistakes do so? What if the mistaken assumption was not encouraged by or reasonably known to other persons?

Although the VAA utilises the 'best interests' test, there is no guidance in the Act in how this is to be determined. This may be compared to the explicit guidance provided in s 6 of the MCA such as a person's best interests is not to be determined based on their age, how they look or how they behave; and requiring that the opinion of others such as the person's caregiver on what is in the person's best interests be consulted. Such guidance should also be considered for the VAA.

Finally, the limited role of the Review Board may also be criticised. It is to ensure that there is a proper care plan and reviews vulnerable adults committed to a place of temporary care and protection, a place of safety or care of a fit person which is an organisation.¹²¹ Its ambit does not extend to those who have been committed to the care of a fit person which is *not* an

¹¹⁶ This is recognised by the Minister for Social and Family Development when he said, 'mental capacity is not a black and white concept. Indeed, there are good days and bad days.' See *Closing Speech by Minister Desmond Lee at the Second Reading of the Vulnerable Adults Bill* (18 May 2018), para 33.

¹¹⁷ See Jonathan Herring, *Vulnerable Adults and the Law* (Oxford, UK: Oxford University Press, 2015), Chapter 3.

¹¹⁸ *First Reading of the Vulnerable Adults Bill: Strengthening Our Ability to Protect* (20 March 2018), para 7(b).

¹¹⁹ *Opening Speech by Minister Desmond Lee at the Second Reading of the Vulnerable Adults Bill* (18 May 2018), para 36.

¹²⁰ The Singapore courts may have to refer to case law from other jurisdictions to see how a refusal to consent may be ignored. See for example UK's *Adult Support and Protection (Scotland) Act 2007*, s 35 and British Columbia's *Adult Guardianship Act* [RSBC 1996] s 59. These two Acts were studied when drafting the VAA, see *Opening Speech by Minister Desmond Lee at the Second Reading of the Vulnerable Adults Bill* (18 May 2018), paras 39 and 40.

¹²¹ VAA s 20(1).

organisation such as a family member. Considering that the vulnerable adult has been subjected to abuse, neglect or self-neglect, there should be continued monitoring of the welfare of all vulnerable adults by the Review Board whether or not the fit person is an organisation.

IV CONCLUSION

A combination of approaches is needed to tackle abuse or neglect of the vulnerable: mandatory receipt as well as voluntary engagement of social services. The test of the former is how to do so without encouraging discrimination or violating individual autonomy. The VAA attempts to fill the current gaps in the law by keeping vulnerable adults safe through increasing powers of intervention. Those engaged in vulnerable adult protection will have to start from the bottom of the pyramid and justify the need to move up the different levels of intervention. Where the vulnerable adult to be protected has mental capacity but refuses to accept support, compulsory intervention is possible but is limited and subject to legal safeguards. Rather than focusing on the coercive powers of the VAA, the interventions should be seen as supporting vulnerable adults to lead lives free from harm. The VAA seeks to strike a balance between respecting the individual rights of the vulnerable adult and the duty to protect. The key is *how* the powers under the VAA are utilised in practice. As pointed out by the Minister for Social and Family Development at the Second Reading of the Bill, persons working with vulnerable adults will continue to build relationships with the vulnerable adults they serve.¹²² The VAA does not change the fundamentals of good social work practice of reaching out to the family, the community, the neighbours and the vulnerable adult, but provides an added legislative option to protect those at risk.¹²³ The VAA has been referred to numerous times as a means only to be used as ‘a last resort’ to protect vulnerable adults where attempts to engage with the vulnerable adult and/or their family have failed,¹²⁴ and that care arrangements are largely matters for individuals and families to decide on.¹²⁵

The VAA is only one step of the journey towards giving vulnerable adults the care that they deserve. It is hoped that by focussing on the role of the VAA in terms of ‘safeguarding of vulnerable adults’¹²⁶ rather than criminal punishment, there will be greater willingness of caregivers and vulnerable adults to engage with external support networks.¹²⁷

¹²² *Opening Speech by Minister Desmond Lee at the Second Reading of the Vulnerable Adults Bill* (18 May 2018), para 18.

¹²³ *Closing Speech by Minister Desmond Lee at the Second Reading of the Vulnerable Adults Bill* (18 May 2018), paras 27, 37, 38 and 44.

¹²⁴ *First Reading of the Vulnerable Adults Bill: Strengthening Our Ability to Protect* (20 March 2018).

¹²⁵ *Opening Speech by Minister Desmond Lee at the Second Reading of the Vulnerable Adults Bill* (18 May 2018).

¹²⁶ Short title to the VAA.

¹²⁷ This has been one of the difficulties faced in Japan, see Miharu Nakanishi *et al*, ‘Impact of the elder abuse prevention and caregiver support law on system development among municipal governments in Japan’ (2009) 90 *Health Policy* 254.