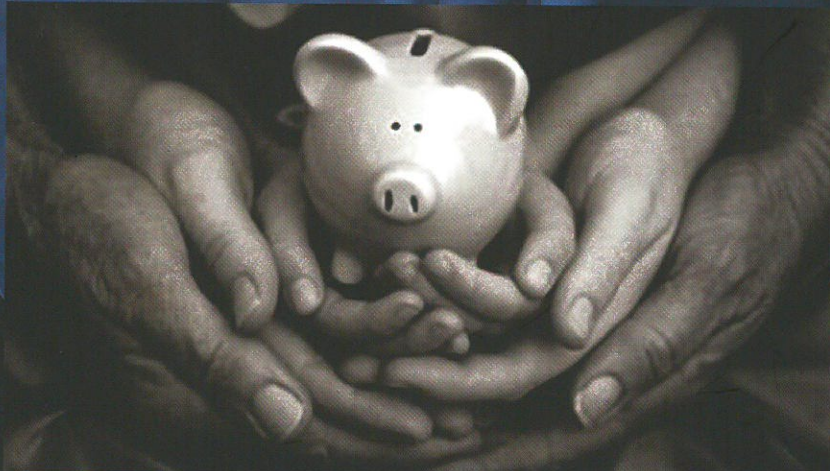


# LAW GAZETTE



An Official Publication of The Law Society of Singapore | January 2016

PLANNING FOR SUCCESSION  
PLANNING FOR SUCCESSION  
PLANNING FOR SUCCESSION  
PLANNING FOR SUCCESSION

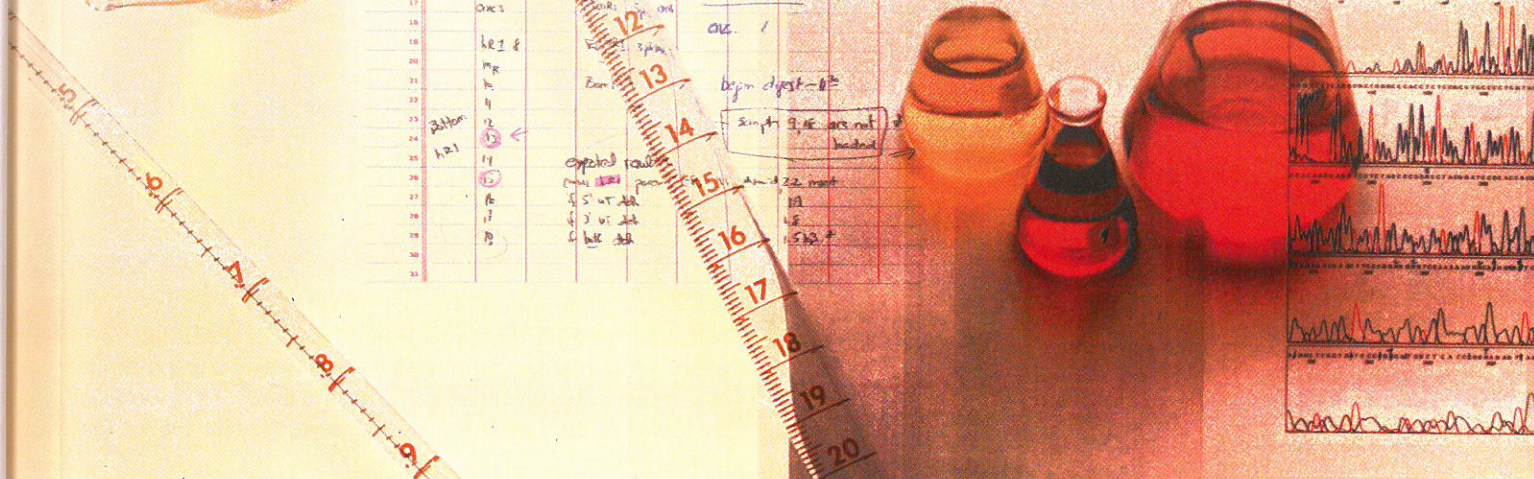


MCI (P) 138/10/2015

 LexisNexis®

[www.lawgazette.com.sg](http://www.lawgazette.com.sg)

# Medical Reports Supporting Deputy Applications – Encouraging the Good, Rescuing the Bad



## Introduction – the Deputy Application

The Mental Capacity Act (Cap 177A) (“MCA”) allows the Court to appoint a deputy to act and make decisions on behalf of a person who lacks mental capacity<sup>1</sup> (“P”), where P has not made a Lasting Power of Attorney<sup>2</sup> (“the deputy application”). The application will ask for, *inter alia*:

1. a declaration that P lacks capacity in relation to his personal welfare, or his property and affairs, or both,<sup>3</sup> and
2. the applicant to be appointed as P’s deputy in relation to his personal welfare, or his property and affairs, or both.

## The Medical Report

The deputy application is made by way of an originating summons (“OS”). A supporting affidavit and a doctor’s affidavit exhibiting a medical report attesting to P’s lack of capacity must be filed together with the OS. All these documents must be consistent as to whether P lacks capacity in relation to his personal welfare, or his property and affairs, or both.<sup>4</sup> They must also be in the standard form templates prescribed by the Court.<sup>5</sup> The doctor’s affidavit

and medical report must be in Form 224 of Appendix A of the Family Justice Courts Practice Directions (“the PD”).<sup>6</sup>

The medical report must comply with the requirements of the PD,<sup>7</sup> and contain sufficient details and information to assist the Court in determining whether P lacks capacity in the relevant areas covered by the OS. If the medical report is not adequate, the Court will reject the deputy application, and the applicant will have to obtain a clarification on the medical report, or even a supplementary or fresh medical report. This incurs needless costs for the applicant and is a waste of his time. It could also have potentially serious consequences for P’s family if P is the sole breadwinner and the family does not have much in savings since P’s assets are all frozen and any insurance monies cannot be paid to him until a deputy is appointed.

Hence, the lawyer filing the deputy application should review the medical report to ensure that it is adequate, and is not in danger of being rejected by the Court. If the medical report is not adequate, he should ask the doctor to clarify or re-write it, re-examining P if necessary.

## Questions to Determine P’s Mental State

There are various tests that can be used to assess P’s mental state. Common tests are the Abbreviated Mental Test

("AMT") and the Mini-Mental State Examination.<sup>8</sup> However, there is no Court-prescribed test that the doctor must follow in order to carry out the mental state examination on P. The doctor is supposed to use his professional judgment to work out the most appropriate test to administer and questions to ask based on the facts and circumstances of each case. If P is in a comatose state, for example, there is no point asking him any questions at all.

It would be advisable for the doctor to cover the following topics in his mental state examination of P:

### 1. Orientation as to person, time and place

Examples of such questions are: "What is your name?", "What time is it?", "Do you know who I am?", "Where are we now?", and "Who is this here with you?" (if a caregiver has accompanied P to the examination).

### 2. Basic information, both personal and external

These questions test P's long-term memory of basic information, which a person with mental capacity would be expected to know and remember. Examples of personal basic information questions would be: "What is your age?", "What is your date of birth?", and "What is your home address?" Examples of external basic information questions would be: "Who is the Prime Minister of Singapore?" and "Who is the President of Singapore?"

### 3. Memory tests

These questions test P's short-term memory. Examples of such memory tests are asking him to remember a phrase like "37 Bukit Timah Road", or to remember three items (eg pen, book and table), and then to recall the information some moments later.

### 4. Simple arithmetic, finance-related questions

P could be asked simple addition and subtraction questions (eg 2 plus 3, or to minus 7 from 100 continuously), or if he can recognise different types of dollar notes and coins and understand their relative values.

### 5. Personal welfare, property and affairs related questions

Whether the doctor asks personal welfare or property and affairs related questions, or both, depends on the scope of the deputy application. Hence, it is important to inform the doctor of whether the deputy application covers personal welfare only, property and affairs only, or both.

Examples of personal welfare questions would be: "Are you taking any medication now?", "Do you know what medical conditions you have?", and "Where would you like to stay once you leave hospital?" Examples of property and affairs questions would be: "Do you own any property?", "Do you

want to rent it out or sell it?", "How much for?", and "What would you buy if you had \$1,000 to spend?"

If the application is for very specific and limited powers only, for example to empower the deputy to claim P's Dependents' Protection Scheme insurance monies, or to sell P's flat under the SERS (Selective En Bloc Redevelopment Scheme) then the doctor should be informed accordingly, so that he can ask questions to ascertain P's mental capacity in relation to this specific issue. This could be very important in borderline cases where P's condition is mild (meaning that he appears to have mental capacity to decide basic things), and the deputy application does not ask for general and extensive powers, but only one or two limited and specific powers. The Court will want to be satisfied that P does not have the mental capacity to make decisions in these specific areas.

### 6. Form 224

As stated earlier, the doctor must write his medical report using the standard Court template, in Form 224.

He must type his report, not hand-write it. He must fill in every section of the form, and not leave any section blank<sup>9</sup> or remove any part of the form. A Word copy of the form can be found at the Legal Aid Bureau's website at [www.mlaw.gov.sg/lab](http://www.mlaw.gov.sg/lab).

Form 224 comprises five sections, namely:

#### *Section 1: Patient's Particulars*

This contains P's name, identification number and age. To assist the doctor, the lawyer can send him a Word copy of the form with P's particulars filled in.

#### *Section 2: Doctor's Particulars*

This contains the doctor's full name, identification number, MCR number, hospital/clinic name and address, the doctor's qualifications and experience, and details of the doctor-patient relationship.

The following details of the doctor-patient relationship should be stated:

1. Whether the doctor has been seeing P regularly over a period of time, or whether he has only seen P for the purpose of doing the report on P's mental capacity.
2. If the former, then it should be stated:
  - a. when the doctor first saw
  - b. when the doctor last saw

- c. how regularly the doctor saw P in between these dates

For example:

"I have been the doctor in charge of Mr Tan Ah Kow since November 2010. I have seen Mr Tan regularly since then, on average once or twice a year. For the purposes of this medical report, I re-examined Mr Tan on 20 June 2015".

### ***Section 3: Patient's Medical Information***

This section contains:

1. an account of P's clinical history (ie an account of P's medical conditions and the treatment that he has received.) (The source of the information should be stated, ie whether the information was obtained from medical records, P's own account, P's caregiver's account etc);
2. findings from P's physical examination/mental state examination (see paragraph under the heading "Evidence to Support Conclusions");
3. relevant investigation results (eg the results of any CT (computerised tomography) brain scan, MRI (magnetic resonance imaging) brain scan and other investigations ordered for P); and
4. the diagnosis (eg dementia, stroke)

### ***Section 4: Opinion on Patient's Mental Capacity***

1. The first part of this section contains two sets of checkboxes. One set of checkboxes is titled "Opinion on patient's mental capacity in relation to personal welfare", and the other set is titled "Opinion on patient's mental capacity in relation to property and affairs". The doctor is required to tick "Yes" or "No" in response to questions on whether P can understand, retain, and weigh information relevant to decision-making in personal welfare/property and affairs, whether he can communicate his decision, and whether P has mental capacity in respect of personal welfare/property and affairs. Whether the doctor ticks the checkboxes in both sets of checkboxes or only one set depends on the scope of the deputy application. Hence, as stated earlier, it is important for the doctor to be informed on whether the scope of the deputy application covers personal welfare only, property and affairs only, or both.
2. The doctor also has to state the basis of his opinion (as set out in the checkboxes) in respect of P's mental capacity. In this regard, he has to link the findings he

has made from his physical/mental state examination of P (ie what P said and did, or failed to say and do) to his conclusion on P's mental capacity (ie that P was not able to understand, retain, use or weigh information relevant to decision-making, or not able to communicate his decision).

For example:

"The patient's failure to remember where he was (ie in the hospital) and the day and date, despite being told a short while ago, shows his inability to retain information. His failure to tell the time from a watch or to recognise notes and coins shows his inability to understand simple information. He could not do basic arithmetic, which shows that he is not able to weigh and use information. Since he is unable to understand, retain, use or weigh simple information, due to his memory deficits and cognitive failures, he will not be able to make decisions about his personal and financial affairs, which would require being able to process such information ...."

3. There is a box entitled "Prognosis" where the doctor has to state his opinion (by ticking on the relevant "Yes"/"No"/"Not sure" check-box) on whether P is likely to regain mental capacity. If he says yes or is not sure, then he has to state when another assessment of P's mental capacity should be carried out.
4. Next, the doctor has to state, by ticking the relevant "Yes"/"No" check-box, whether P would understand if he were to be informed of the deputy application.
5. Finally, the doctor has to state whether he is aware of any other doctor who holds a different professional opinion regarding P's mental capacity. This section must be filled in. One doctor, whose report had been received by the author's department, had written in this section: "There are thousands of doctors in Singapore. It is quite possible that a few could have a differing opinion from mine although I suspect the vast majority would concur with me". This statement was unnecessary. If the doctor does not know of any other doctor who holds a different opinion from him regarding P's mental capacity, then he should just write "No". The doctor does not have to actively seek or divine the opinion of any other doctor regarding P's mental capacity in order to fill this section.

### ***Section 5: Declaration***

This section requires the doctor to declare that:

1. he has read and understood the provisions in ss 3 to 5 of the MCA (which are set out in full at the end of Form 224);

2. that he believes in the correctness of his opinion set out in the report; and
3. he understands that in giving the report, his duty is to the Court and he confirms that he has complied with this duty.

This is to ensure that the doctor is aware that his role in relation to P is not a therapeutic role, but that of a medical examiner, and his responsibility is to give a frank and accurate assessment of P's mental capacity to the Court, and not be influenced by feelings of compassion towards P or P's family, in the writing of the report.

### Key Issues

This section sets out some issues the lawyer should look out for when reviewing the medical report.

#### *Time Lapse*

Time lapse between the date of the last examination of P and the date of the report ("the lapse").

(Please note that the issue of the lapse discussed in this section is a separate issue from the time lapse between the date of the report and the date of the deputy application, which must be no longer than six months, under s 54(9)(c) of the PD.)

What is an acceptable lapse depends on:

1. whether P's condition is temporary or permanent
2. the closeness of the doctor-patient relationship.

If P's condition is temporary, then the Court's concern would be whether P could have recovered mental capacity in the period between when the doctor last saw P and the date of the medical report, or even after this period. Thus, it is important for the doctor to state in the medical report if P's condition is permanent or temporary. In one case handled by the author's department, the doctor had last examined P in May 2014, but the medical report was dated more than a year after this. The Court rejected the medical report as the lapse was too long – and the medical report did not state whether P's condition was permanent or temporary.

If the doctor states that P's condition is permanent, then he needs to provide the basis for his opinion (eg P has vascular dementia, which is a deteriorating condition for which there is no cure). It is not uncommon for doctors to use the term "vegetative state" to mean a person who is **permanently** in a vegetative state. However, it is possible for a person to recover from a vegetative state. Hence if the person is

not able to recover from the vegetative state he is in, for the foreseeable future, then the doctor should state that he is in a "persistent" vegetative state.

If P's condition is permanent, then a seven to eight month, or even a year's lapse may be acceptable. If P's condition is temporary, (eg he is recovering from a head injury), then a lapse of no more than three to six months, or even less, would be acceptable, depending on when P's next review is. For example, if P's condition is temporary and he was last examined on 1 February, and his next review is in May, then the medical report should be dated well before May. Alternatively, it should be dated after the review, and the review should be taken into account by the doctor.

If the doctor-patient relationship is close, then the Court may be more prepared to accept a longer lapse. Generally, and subject to P's condition, for cases where the doctor has only seen P once or twice, there should be a lapse of no more than two to three months from the date of the last examination of P to the date of the report ("the lapse"). (Though if the doctor can confidently and with good reason say that P's condition is permanent, from his one and only examination of P, then the longer time-frames set out in the preceding paragraph would be acceptable.) However, if the doctor has been seeing P regularly over a few years, then a lapse of five to seven months may be acceptable, though this is once again subject to P's condition. (Thus, if P's condition is temporary, and there is a chance that he may recover his mental capacity during that five to seven month period, then the Court would require him to be examined more recently.)

#### *Evidence to Support Conclusions*

The "findings" portion of s 3 of Form 224 requires the doctor to state his observations of P (ie P's demeanour, body language, tone of voice and so on, relevant to the mental state assessment), his interactions with P, any tests administered/questions posed, and the date he examined P.

It is not uncommon for doctors to present a conclusion, (eg "P could not understand simple instructions."; "P made mistakes in simple maths."; "P had poor recent and remote memory".), without any supporting evidence. The doctor needs to write down the exact questions he asked P and what P said that made him reach his conclusion on P's mental state. Thus, in the examples given above, the doctor should ideally have written something like:

"P could not understand simple instructions, such as 'Can you come over here?', 'Can you lie down?', 'Can you lift up your arm for me?'"

"P made mistakes in simple maths, saying that  $5 + 2$  was 8 and  $3 + 4$  was 6".

"P had poor recent and remote memory. P could not remember 3 items (table, pen and paper) that he was asked to remember, a few moments later. He also could not remember when his birthday was".

Sometimes, the doctor might have administered a test like the AMT, and will give the score, eg "AMT = 1". He should not just give the test score, but explain what was asked, what the answers were, and the significance of the score.

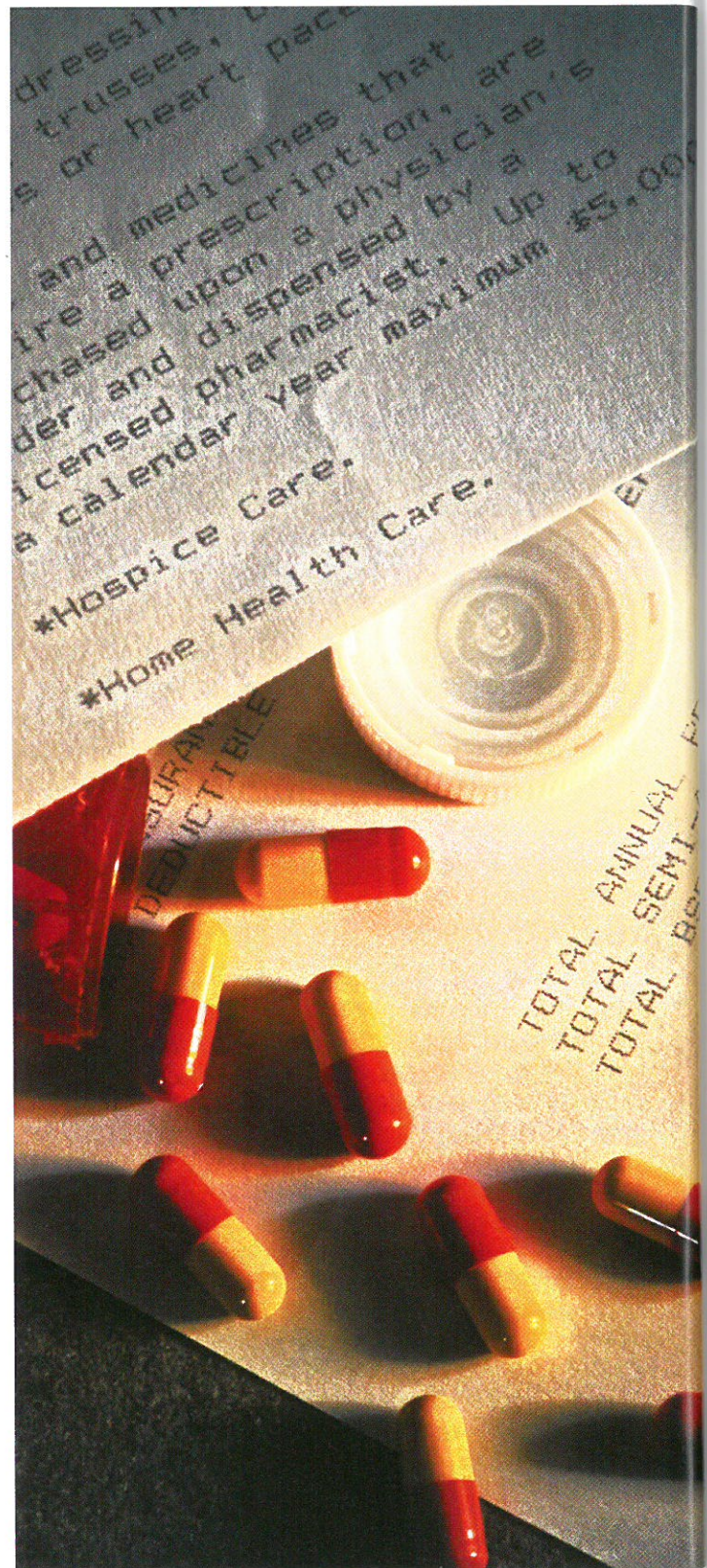
### *Unexplained Medical Terms*

Doctors sometimes use technical medical terms in their report on the assumption that their reports will only be read by other medical professionals. If there are unexplained technical medical terms in the report which are not common knowledge, then you should ask the doctor to provide a written explanation of what they are in simple English if they are critical to the mental state assessment (eg "perseveration",<sup>10</sup> "dysphasic",<sup>11</sup> "GCS E2VtM4"<sup>12</sup>). The doctor's letter or e-mail can then be exhibited in the doctor's affidavit, together with the report.

### Summary

The following is a summary of the issues the lawyer should look out for/things he should do when ordering a medical report to support a deputy application:

1. Send the doctor Form 224 as a Word document (Word copy available at [www.mlaw.gov.sg/lab](http://www.mlaw.gov.sg/lab)).
2. Inform the doctor of the scope of the OS, ie whether it covers personal welfare only, property and affairs only, or both.
3. When reviewing the report, ensure that:
  - a. it is in Form 224;
  - b. it is typed, not hand-written;
  - c. every single section/box is filled up, and none is missing.<sup>13</sup>
4. The doctor should also state:
  - a. Whether P's condition is permanent or temporary and the basis for that opinion; and
  - b. Details of the doctor-patient relationship, ie whether the doctor has seen P for a period of time, or just for the purposes of preparing the medical report, and if the former:



- i. when the doctor first saw P;
  - ii. how regularly P has been seeing the doctor; and
  - iii. the date of the doctor's last examination of P.
5. Check that the lapse of time between the date of last examination of P to date of the report is acceptable (see paragraph under the heading "Time Lapse").
  6. Check that the doctor has asked questions to establish P's mental capacity, and has given sufficient evidence to support his conclusions (see paragraph under the heading "Evidence to Support Conclusions").
  7. Check that technical medical terms are explained in simple English.

## Resources

If the lawyer wishes, he can send the doctor a sample of a filled in template, and an article written by the author for doctors entitled "Deputy Applications Under the Mental Capacity Act – Writing the Medical Report" (published in the October 2015 issue of SMA News), for his information. Both these documents are available at the Legal Aid Bureau's website at [www.mlaw.gov.sg/lab](http://www.mlaw.gov.sg/lab).

▶ **Lim Hui Min\***  
Director of Legal Aid  
Legal Aid Bureau

\* The author is grateful to District Judge Colin Tan for his comments on the draft of this article, and to Ms Tan Rou'en (Assistant Director, Legal Aid Bureau) for her help with the article. However, any errors and any views expressed are entirely the author's own. In particular, they do not represent the views of the Bureau or the Ministry of Law.

## Notes

- 1 See Part V of the MCA.
  - 2 Persons who have mental capacity can voluntarily make a Lasting Power of Attorney to appoint one or more persons (donees) to act and make decisions on their behalf if and when they lack mental capacity in the future (see Part IV of the MCA).
  - 3 Personal welfare issues would include matters such as where P should live, what he eats, his leisure activities, and his medical treatment. Property and affairs issues would include matters such as the operation of P's bank accounts, the buying and selling of property, the purchasing of items he and his family need, and the payment of bills.
  - 4 See para 54(3) of the Family Justice Courts Practice Directions (the "PD").
  - 5 See para 54 (Applications involving the appointment of deputies) of the PD. The originating summons must be in Form 217 of Appendix A of the PD, and the supporting affidavit must be in Form 218 of Appendix A of the PD.
  - 6 See para 54(9)(e) of the PD.
  - 7 Para 54(9) of the PD sets out certain requirements for the medical report (see (a)-(d) below):
    - (a) Distinguish clearly between observations or conclusions based on information given to the doctor and those that are based on the doctor's examination of P;
    - (b) Contain a clear opinion as to whether P lacks capacity in relation to the matters specified in the application;
    - (c) Be current and shall not be made more than six months before the date of the application; and
    - (d) Contain a clear opinion on P's prognosis.
- The contents of Form 224 (including instructions on how to fill in the various boxes) cover (a), (b) and (d) above.
- 8 Ministry of Health. MOH Clinical Practice Guidelines 3/2007. Pages 22-23; available at: [www.moh.gov.sg/content/dam/moh\\_web/HPP/Doctors/cpg\\_medical/current/2007/CPG\\_Dementia\\_Booklet.pdf](http://www.moh.gov.sg/content/dam/moh_web/HPP/Doctors/cpg_medical/current/2007/CPG_Dementia_Booklet.pdf). The questions covered in the AMT are:
    1. What is the year?
    2. What is the time (within 1 hour)?
    3. What is your age?
    4. What is the date of birth?
    5. What is your home address?
    6. Where are we now?
    7. Who is our country's Prime Minister?
    8. What is the job of the person in the picture? (show picture of a person, eg a nurse, to P)
    9. Memory phrase "37 Bukit Timah Road" – to tell P this phrase, and ask him to recall it some moments later
    10. Count backwards from 20 to 1
- A "passing score" is 7 or more correct answers.
- 9 Save that if the deputy application is for either personal welfare or property and affairs, and not both these items, the doctor need not tick the boxes relating to whether P has mental capacity in respect of the item which is not covered by the deputy application.
  - 10 From [dictionary.com](http://dictionary.com) – Perseveration is the pathological, persistent repetition of a word, or gesture, often associated with brain damage.
  - 11 From [dictionary.com](http://dictionary.com) – Dysphasia is the inability to speak or understand words because of a brain lesion.
  - 12 From [brainline.org](http://brainline.org) – the Glasgow Coma Scale ("GCS") is a scoring system used to describe the level of consciousness in a person following a traumatic brain injury.
  - 13 However, see endnote 9 above.