# Briefing note – Medical Treatment Planning and Decisions Bill 2016

## Purpose

This briefing note identifies key issues with the Medical Treatment Planning and Decisions Bill 2016 (the Bill). The Bill was passed by the Legislative Assembly on 27 October 2016 and is yet to pass the Legislative Council.

## Background

If passed, the Bill will repeal the *Medical Treatment Act 1988* and establish new processes and requirements regarding the making of medical treatment decisions where the person being treated does not have decision-making capacity. The Bill would improve current laws and procedures in many respects and is therefore, in general terms, to be welcomed.

However, certain proposed changes represent a significant departure from the current laws and procedures and are likely to prove controversial. Further, it is not clear from the Bill how certain of those changes would operate in practice, or whether they would operate as the drafters of this Bill intend.

## Extension to mental health treatment

Of particular significance is the expanded definition of ‘medical treatment’ to include ‘mental health treatment’. Prior to this Bill, mental health treatment decisions could only be made in relation to a person who does not have decision-making capacity in accordance with the *Mental Health Act 2014* (or its 1986 precursor). This Bill would permit, for the first time, guardians and certain family members to make mental health treatment decisions on behalf of a person who does not have decision-making capacity. Given the sensitive nature of mental health issues and the tensions which conflicting perspectives on treatment can create within families, this is likely to prove controversial in practice.

Furthermore, the Bill does not adequately explain how it will interact with the *Mental Health Act*, for instance:

* the application of Part 4 (Medical Treatment Decisions) in relation to assessments conducted under the *Mental Health Act* to determine whether a person requires compulsory treatment. While clause 48(1)(a) states that Part 4 of the Bill (Medical Treatment Decisions) does not apply to mental health treatment in respect of a person who is already a compulsory patient under the *Mental Health Act*, an assessing psychiatrist will nevertheless be obliged to consider whether mental health treatment could be provided to the person in accordance with the less-restrictive mechanisms in this Bill before making that person a compulsory patient under the *Mental Health Act*
* who determines, and how it is determined, whether a family member is in a ‘close and continuing relationship’ with a person (such that they become the person’s medical treatment decision-maker pursuant to clause 55)
* whether a medical treatment decision-maker can decide to admit a person to a mental health service and consent to their detention there
* whether and in what circumstances a mental health treatment decision made under this Bill can be forced on a person who is resisting that treatment, and
* whether and in what circumstances a psychiatrist can disregard or override a valid mental health treatment decision made under this Bill by recourse to the *Mental Health Act*.

The lack of clarity on these matters is likely to cause considerable confusion in practice, and risks people being subjected to mental health treatment to which they have not given informed consent outside of the safeguards established by the *Mental Health Act*.

## Inadequate safeguards and oversight mechanisms

The Bill provides VCAT with an oversight jurisdiction in relation to various matters. However, it appears that the person asserted to lack decision-making capacity and/or who is subject to medical treatment cannot apply to VCAT themselves for an order about whether they have capacity, about their appointed medical treatment decision-maker or about medical treatment decisions being made in relation to them because they are not included within the definition of an ‘eligible applicant’. It is extremely concerning that the people most affected by the Bill would be denied standing to seek independent oversight of its operation and application in practice.

It is also unclear whether the Mental Health Complaints Commissioner would have jurisdiction to deal with complaints in relation to mental health treatment administered pursuant to this Bill.

## Need for consultation

Unlike the *Mental Health Act*, which was the culmination of five years of sector-wide consultation and development, this Bill has been introduced and is progressing through Parliament with no meaningful public consultation. While many aspects of the Bill relate to matters discussed in chapters 13 and 14 the Victorian Law Reform Commission’s (VLRC) 2012 report, *Guardianship: Final Report 24[[1]](#footnote-1)*, the Bill differs in significant respects from what the VLRC recommended and there has been no opportunity for people affected by the Bill – in particular the people who are likely to be subject to medical treatment decisions – to share their views about the details of the Bill. It is notable that the VLRC stated that fusing mental health and guardianship laws would be a ‘fundamental change’ to the way in which authority is given for people to receive mental health treatment and it ‘encourage[d] further discussion’ about any such proposal.[[2]](#footnote-2)

Recognising the need for broader consultation to ensure that the good intentions of the Bill can be realised effectively and appropriately in practice, the independent MLA for Shepparton, Ms Sheed, proposed that the Bill be ‘withdrawn and redrafted to ensure there are adequate safeguards and clear and effective procedures in relation to the making and implementation of advance care directives and the appointment of and decision making by medical treatment decision makers’.[[3]](#footnote-3) The Legislative Council has the opportunity to ensure these important reforms receive the consultation and consideration they deserve.

## Recommendation

That further consultation be undertaken with people likely to be affected by the Bill to ensure that it provides adequate safeguards and clear and effective procedures.

1. Available at: <http://www.lawreform.vic.gov.au/sites/default/files/Guardianship_FinalReport_Full%20text.pdf> [↑](#footnote-ref-1)
2. VLRC report, p 54, [24.75]. [↑](#footnote-ref-2)
3. Hansard, Legislative Assembly 27 October 2016, pp 4176-4177. [↑](#footnote-ref-3)