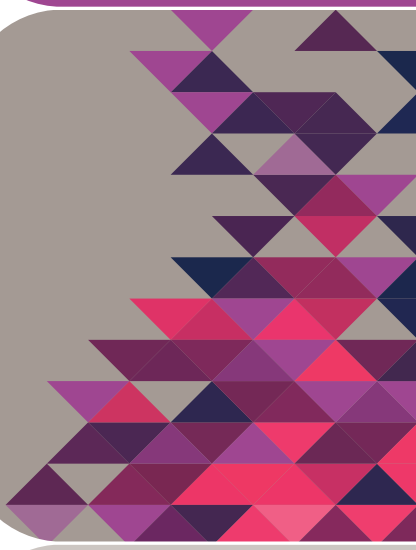
Department of Health

health

The Mental Health Bill 2014

An explanatory guide



State Government Victoria

The Mental Health Bill 2014

An explanatory guide

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Ministerial foreword

A new Mental Health Act for Victoria is a central element in the Government's mental health reform agenda. The Mental Health Bill 2014 (the Bill) has been drafted in light of consultations with the community, in particular with consumers, carers and clinicians. The Bill has now been introduced into Parliament for debate and passage in 2014.

The legislative framework in the Bill promotes recovery-oriented practice, minimises the use and duration of compulsory treatment, safeguards the rights and dignity of people with mental illness and enhances oversight while encouraging innovation and service improvement.

Stakeholders have been planning for the new legislation for 12 months based on the broad policy directions that were described in *A new Mental Health Act for Victoria – Summary of proposed reforms.*

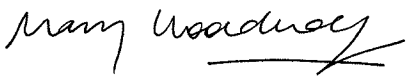
The introduction of the Bill into Parliament and the release of this paper *The Mental Health Bill 2014 – An explanatory guide* will provide stakeholders with the opportunity to direct their planning towards ensuring compliance with the specific requirements of the Bill.

Prior to the Bill being passed by Parliament and becoming law the government will continue conversations with the community about the Bill to promote the reforms and explain how the legislation will facilitate supported decision making and strong partnerships between patients and practitioners, carers and families. This paper will aid these community conversations and is intended to provide an outline of the reforms.

At the heart of these reforms is the establishment of a supported decision-making model of treatment and care. The Bill requires that compulsory treatment is given with the least possible restriction on the rights of persons with mental illness. The Bill establishes various mechanisms that will promote recovery-oriented practice and facilitate strong partnerships between patients and practitioners. At the same time there will be greater focus on supporting public sector clinicians and public mental health service providers to deliver quality mental health services.

The Bill will result in significant changes to Victoria's mental health system. The reforms contained in the Bill will enable mental health services to continue to build on the excellent work already being undertaken to embed supported decision making and recovery-oriented practice. I am excited by the opportunities and challenges that these reforms offer for improved outcomes for people with mental illness and to re-invigorate the service system.

I look forward to working with you to ensure the success of the new approach for people with mental illness, their families and carers.



The Hon. Mary Wooldridge MP
Minister for Mental Health

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Introduction

Purpose of mental health legislation

Mental health legislation provides for the assessment, detention and compulsory treatment of people with severe mental illness.

Mental health legislation includes checks and balances to ensure that compulsory treatment is only used where necessary to prevent serious harm to the person or another person.

Purpose of this paper

This paper outlines the key reforms in the Bill. The Bill has been introduced into Parliament for debate and passage in 2014.

The government recognises that involving people with mental illness, families and carers, mental health services and the community in implementation planning for commencement is essential to the success of these reforms. This paper provides stakeholders with the opportunity to direct service planning towards the specific requirements of the Bill and to prepare for commencement of the new Mental Health Act 2014.

Structure of this paper

The paper outlines the key reform objectives, actions and outcomes and is structured into four themes as follows:

- **Recovery framework** – establish a recovery-oriented framework and embed supported-decision making
- **Compulsory treatment orders** – minimise the use and duration of compulsory treatment
- **Safeguards** – increase safeguards to protect the rights and dignity of people with mental illness
- **Oversight and service improvement** – enhance oversight and encourage service improvement.

Terminology used in this paper

There is continuing debate about the most desirable or acceptable terminology to describe people who have mental illness and receive compulsory treatment.

Diverse views on terminology are acknowledged. However, for the purpose of this paper, it has been necessary to settle on a descriptor that is clear and easily understood by the reader.

In this paper the terms ‘patient’ and ‘compulsory patient’ are used when describing a person subject to compulsory treatment. Otherwise wherever possible, the terms ‘person’, ‘young person’ and ‘person with mental illness’ are used.

The term ‘compulsory treatment order’ when used in this paper is a collective term for an Assessment Order, Temporary Treatment Order, and a Treatment Order as well as orders that apply to security and forensic patients.

Disclaimer

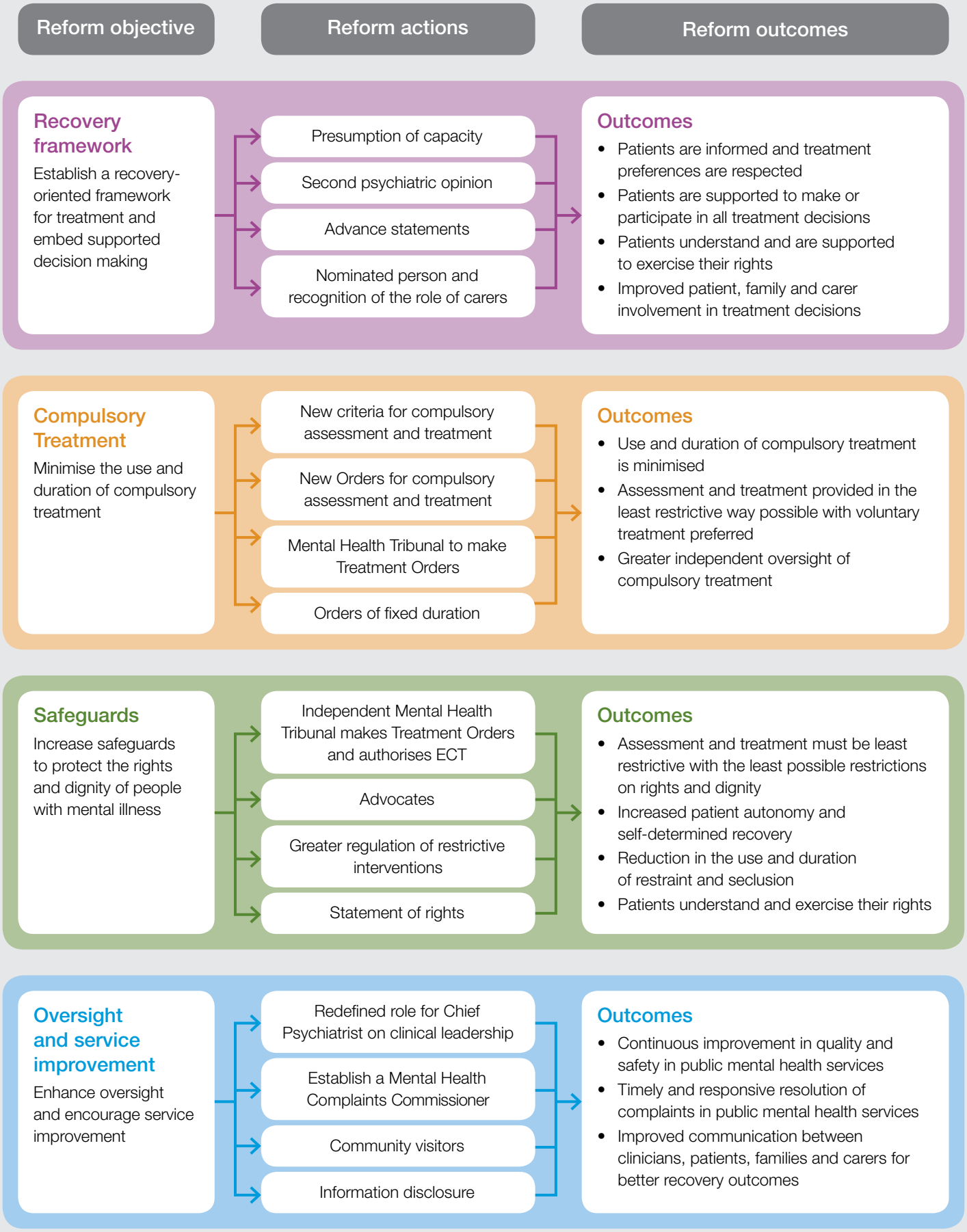
This paper describes the government’s key reforms as set in the Bill introduced into Parliament. It should be noted that changes may be made to the Bill during the Parliamentary debates.

Mental health principles

The Bill contains a number of principles to guide the provision of mental health services as follows:

- Persons receiving mental health services should be provided assessment and treatment in the least restrictive way possible with voluntary assessment and treatment preferred
- Persons receiving mental health services should be provided those services with the aim of bringing about the best possible therapeutic outcomes and promoting recovery and full participation in community life
- Persons receiving mental health services should be involved in all decisions about their assessment, treatment and recovery and be supported to make, or participate in, those decisions and their views and preferences should be respected
- Persons receiving mental health services should be allowed to make decisions about their assessment, treatment and recovery that involve a degree of risk
- Persons receiving mental health services should have their rights, dignity and autonomy respected and promoted
- Persons receiving mental health services should have their medical and other health needs, including any alcohol and other drug problems, recognised and responded to
- Persons receiving mental health services should have their individual needs (whether as to culture, language, communication, age, disability, religion, gender, sexuality or other matters) recognised and responded to
- Aboriginal persons receiving mental health services should have their distinct culture and identify recognised and responded to
- Children and young persons receiving mental health services should have their best interests recognised and promoted as a primary consideration, including receiving services separately from adults, whenever this is possible
- Children, young persons and other dependents of persons receiving mental health services should have their needs, wellbeing and safety recognised and protected
- Carers (including children) for persons receiving mental health services should be involved in decisions about assessment, treatment and recovery, whenever this is possible
- Carers (including children) for persons receiving mental health services should have their role recognised, respected and supported.

The Bill provides that a mental health service provider must have regard to the mental health principles in the provision of mental health services. A person must have regard to the mental health principles in performing any duty or function or exercising any power under or in accordance with the legislation.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Recovery framework – Establish a recovery-oriented framework and embed supported decision making

The government is committed to a legislative framework that promotes recovery-oriented practice in the public mental health service system. This approach to patient wellbeing builds on the strengths of the individual working in partnership with the treating team. It encompasses the principles of self-determination and individualised treatment and care.

Central to these reforms is the establishment of a supported decision-making model in the Bill. This model will enable and support compulsory patients to make decisions about their treatment and determine their individual path to recovery.

Legal mechanisms included in the Bill that enable supported decision making include a presumption of capacity, advance statements, nominated persons and the right to seek a second psychiatric opinion. These tools will promote best practice and facilitate optimal communication between practitioners and people with mental illness and their families and carers, leading to improved treatment outcomes and recovery.

Presumption of capacity

A presumption of capacity is the foundation of the supported decision-making model. The Bill provides that all people are presumed to be able to make treatment decisions.

People with serious mental illness may have fluctuating capacity to make decisions about treatment. A person with mental illness may not be able to make a treatment decision at a particular point in time, but may regain capacity to make that decision at another point in time.

Under the Bill, patients and young people will be provided with information and support to make decisions about their treatment. This support may include the support of a carer, a nominated person or a parent of a young person. The Bill contains a capacity test and principles to assist clinicians to determine whether a person can or cannot give informed consent to treatment at the time the decision needs to be made. Where a patient or young person is unable to consent, they will be supported to be involved in the decision-making process to the greatest extent possible.

Second psychiatric opinion

The Bill provides a right for patients to seek a second psychiatric opinion at any time about their treatment and whether the treatment criteria still apply to the patient.

Second psychiatric opinions may be provided by a psychiatrist in a public mental health service or in the private sector. The government has committed some funding for second psychiatric opinions provided by psychiatrists working in private practice. Access to these funds will be subject to criteria to be developed by the Department of Health in consultation with stakeholders.

Second psychiatric opinions are intended to promote self-determination for patients by providing them with information about their treatment and possible alternative treatments. The information will enable patients to better understand their illness and is intended to empower them to make decisions or participate in decision making about their treatment. This is central to the implementation of recovery-oriented practice.

It is expected that the second psychiatric opinion report will promote a dialogue between the authorised psychiatrist, the treating team, the patient and family and carers regarding the patient's treatment.

The authorised psychiatrist will be required to consider the second psychiatric opinion report provided to them but will not be required to change the course of treatment if they disagree with the recommendations.

A patient will be entitled to apply to the Chief Psychiatrist for a review of their treatment in the event that the authorised psychiatrist does not adopt any or all of the recommendations contained in the second opinion report. The Chief Psychiatrist may direct the authorised psychiatrist to make changes to the patient's treatment if they believe alternative treatment is more appropriate in the circumstances.

Advance statements

The Bill enables a person to make an advance statement to record their treatment preferences in the event that they become unwell and require compulsory treatment.

Advance statements facilitate a collaborative treatment approach at times where a patient is so unwell that they are unable to communicate their treatment preferences.

They will assist the authorised psychiatrist to understand the patient's treatment preferences and enable the authorised psychiatrist to make treatment decisions that better align with the patient's treatment and recovery goals.

Advance statements will improve communication, give patients greater control over their treatment when they are subject to a compulsory treatment order and promote an improved patient experience.

Nominated person

A patient will be able to nominate a person to receive information and to support the patient for the duration of the compulsory treatment order.

The nominated person will assist a patient to exercise their rights and represent the patient's views and preferences. They will be consulted at critical points in the patient's treatment such as intake and discharge planning and will be able to express their views. The nominated person is not able to make treatment decisions on behalf of the patient.

The appointment of a nominated person will make information disclosure clear for patients, family members, carers and the authorised psychiatrist.

Advocates

Supported decision making is fundamental to recovery oriented practice. While not in the Bill, the government will fund advocacy and support services for people receiving public mental health services as an integral part of the reforms.

On request, advocates will visit mental health services or provide telephone advice to assist people to participate in decisions about their assessment, treatment and recovery. These supports will empower patients to self-advocate as well as make choices about their treatment and recovery.

In addition, the advocates will give information and assist people to understand and exercise their rights. It is expected that advocates will talk with people receiving mental health services about any concerns about their treatment and support them to find solutions and to make decisions. The advocates may also make representations on behalf of people receiving mental health services.

Compulsory treatment orders – Minimise the use and duration of compulsory treatment

The Bill promotes voluntary treatment in preference to compulsory treatment wherever possible.

The Bill seeks to minimise the use and duration of compulsory treatment to ensure that the treatment is provided in the least restrictive and least intrusive manner possible. The Bill achieves this by introducing specific criteria for compulsory treatment, creating Treatment Orders that operate for a fixed duration and requiring timely oversight by an independent Mental Health Tribunal.

The new legislation will establish compulsory treatment orders comprising:

- an Assessment Order
- a Temporary Treatment Order
- a Treatment Order.

Assessment Order

A registered medical practitioner or a mental health practitioner will be able to make an Assessment Order for a person if they believe the person 'appears to have a mental illness' and needs compulsory treatment.

The criteria for an Assessment Order will require that the practitioner examining the person will need to determine that the person appears to have a mental illness and needs treatment to prevent serious harm to the person, serious deterioration in their mental or physical health or serious harm to another person. The practitioner must be satisfied that there is no less restrictive means reasonably available to assess the person, including whether the person can be assessed on a voluntary basis.

The purpose of an Assessment Order is to enable an authorised psychiatrist to assess the person to determine whether they 'have a mental illness' and require compulsory mental health treatment. Assessment may be conducted in an inpatient setting or in the community.

An Inpatient Assessment Order enables the transport of a person to a designated mental health service within 72 hours. Once the person is received at the designated mental health service, an Assessment Order will last for a maximum of 24 hours but may be extended up to a maximum of 72 hours in exceptional circumstances.

A Community Assessment Order will last for a maximum of 24 hours but may be extended up to a maximum of 72 hours in exceptional circumstances.

Temporary Treatment Order

At the assessment, if the authorised psychiatrist determines the criteria for compulsory treatment apply to the person, the authorised psychiatrist may make a Temporary Treatment Order.

A Temporary Treatment Order has a maximum duration of 28 days.

The criteria for a Temporary Treatment Order require that the authorised psychiatrist determine that the person has mental illness and needs immediate treatment to prevent serious deterioration in their mental or physical health or serious harm to the person or to another person. The authorised psychiatrist must be satisfied that there is no less restrictive means reasonably available to ensure the person receives the treatment, including whether the person can receive treatment on a voluntary basis.

The criteria set a high threshold because compulsory treatment imposes a serious limitation on personal liberty and autonomy. The criteria make it clear that a person is not to be placed on a compulsory treatment order simply because they have a history of mental illness.

Where the authorised psychiatrist has determined that the treatment criteria apply to the person and makes a Temporary Treatment Order, the authorised psychiatrist must also specify the setting where compulsory treatment is to be provided. The setting must be 'inpatient' if the authorised psychiatrist considers that the only way to provide the treatment is by detaining the person in an inpatient unit. The setting must be 'community' if the authorised psychiatrist considers the treatment can be provided while the person lives in the community.

The authorised psychiatrist must regularly review the patient and immediately revoke the Temporary Treatment Order if the criteria no longer apply to the patient.

Treatment Order

If a patient remains on a Temporary Treatment Order at the end of the period of the order, the Mental Health Tribunal must conduct a hearing to determine whether the criteria for a Treatment Order apply to the person. If the matter is not heard by the Tribunal within the 28 day period of the Temporary Treatment Order, the Order will expire.

The Mental Health Tribunal can make a Treatment Order if it determines that all the criteria for compulsory treatment apply to the person. The Tribunal must also determine the setting where compulsory treatment is to be provided (either inpatient or community) and the duration of the order: up to six months for an Inpatient Treatment Order or up to 12 months for a Community Treatment Order.

A young person may only be placed on a Treatment Order for a maximum of three months regardless of whether the young person is receiving treatment in an inpatient unit or in the community. This shorter timeframe will ensure that there is greater oversight of the compulsory treatment provided to young people.

The authorised psychiatrist will be responsible for providing treatment during the period of the Treatment Order and will be able to vary the setting where treatment is to be provided if required.

At the end of the period of the Treatment Order, the authorised psychiatrist may make an application to the Mental Health Tribunal for a further Treatment Order if the criteria for compulsory treatment still apply to the patient. The Tribunal will hear and determine the matter in the same way as described above. If the matter is not heard by the Tribunal within the period of the order, the Treatment Order will expire.

The authorised psychiatrist must regularly review the patient and immediately revoke the Treatment Order if the criteria no longer apply to the patient.

A patient can make an application to the Mental Health Tribunal to have the Temporary Treatment Order or Treatment Order revoked at any time.

A patient may apply to the Victorian Civil and Administrative Tribunal for review of any decision made by the Mental Health Tribunal at any time.

Safeguards – Increase safeguards to protect the rights and dignity of people with mental illness

The Bill establishes a comprehensive suite of safeguards to protect the rights of patients.

A number of the legislative mechanisms discussed elsewhere in this paper, such as nominated persons, Mental Health Complaints Commissioner and the framework of compulsory treatment orders, form part of this integrated suite of safeguards in the Bill. Additional mechanisms that protect the rights and dignity of people with mental illness are described below.

Mental Health Tribunal

The Bill establishes a Mental Health Tribunal as an independent body to replace the Mental Health Review Board and the Psychosurgery Review Board.

The Tribunal will make Treatment Orders for patients. The Tribunal must be satisfied that all the treatment criteria apply to the patient before making a Treatment Order. In coming to this decision it is expected that the Tribunal will take a holistic approach that considers a range of factors including the patient's recovery goals and treatment preferences and the views of the nominated person, carer, guardian or parent of a young person and take into account any second psychiatric opinion report.

By assigning responsibility to the Tribunal for making Treatment Orders, the Bill leaves the authorised psychiatrist and other members of the treating team free to engage with the patient in a collaborative treatment relationship consistent with recovery-oriented practice.

Each division of the Tribunal will consist of three members: a lawyer, a registered medical practitioner and a member of the community. Registered medical practitioner members will be qualified psychiatrists wherever practicable. Where the Tribunal is considering an application for electroconvulsive treatment or neurosurgery for mental illness, the registered medical practitioner must be a psychiatrist.

Electroconvulsive treatment

Electroconvulsive treatment (ECT) is considered an effective treatment for some mental illnesses. However the public consultations identified that the community expects greater oversight of the performance of ECT on compulsory patients and young persons. In response, the Bill includes the following new safeguards.

The Bill provides that ECT may only be performed with the approval of the Mental Health Tribunal on a patient who does not have capacity to give informed consent to ECT or a young person under 18 years of age.

The Bill seeks to maximise the patient's autonomy wherever possible. Consistent with this intention, an adult patient (18 years of age or over) with capacity may consent to or refuse ECT without requiring Tribunal approval. The authorised psychiatrist will not be able to compulsorily perform ECT on a patient with capacity who is refusing ECT.

Where the Tribunal determines that any young person under the age of 18 has capacity to consent to ECT, the Tribunal may only approve ECT if the patient or young person gives informed consent.

Where a patient or any young person under the age of 18 does not have capacity to consent to ECT, the Tribunal must decide whether the ECT is the least restrictive treatment. For this purpose, the Tribunal will consider the person's views and preferences about the ECT, whether the ECT is likely to remedy the mental illness or lessen the ill effects, and a range of other factors described in the Bill.

In addition, where a young person under 18 years of age does not have capacity to consent to ECT, a parent will be required to consent to an application being made to the Tribunal. The Tribunal must take the views of the parent into account when determining whether to approve ECT for a young person.

The Bill will require services to report to the Chief Psychiatrist about the performance of ECT in the public system. The Chief Psychiatrist, whose role is outlined on page 8 of this paper, has an important role in improving safety and quality of ECT performed in public mental health services.

Restrictive interventions

The use of restrictive interventions (bodily restraint and seclusion) will be subject to improved safety and accountability requirements.

Restraint and seclusion are highly intrusive practices that tragically have been linked to patient deaths. Accordingly in 2005 the Mental Health Working Group of the Australian Health Ministers' Advisory Council committed to reduce and wherever possible eliminate the use of restraint and seclusion.

The Bill regulates physical restraint in addition to the existing regulation of mechanical restraint and seclusion. This will improve the safety of bodily restraint and seclusion by increased oversight of and accountability for these restrictive practices.

In addition the Bill specifies that restrictive interventions must only be used after all reasonable and less restrictive options have been tried or considered and have been found to be unsuitable.

Statement of rights

The Bill sets out the requirements for informing patients about their rights. Central to the reforms introduced by the Bill is the right of patients to make or participate in decisions about their treatment and care. This remains the case even where a patient does not have the capacity to provide informed consent to treatment.

A patient has a right to be legally represented and be supported by a carer, family member or friend at a hearing of the Mental Health Tribunal.

The Bill establishes a right to communicate lawfully and specifies that right may only be restricted in limited circumstances.

Patients subject to compulsory treatment orders will have the right to apply to an independent body, the Mental Health Tribunal, at any time if they consider the criteria for compulsory treatment no longer apply to them.

The Bill continues the right of patients to discuss their treatment and care with community visitors, who will routinely visit designated mental health services.

Oversight and service improvement – Enhance oversight and encourage service improvement

The Bill develops and enhances oversight of public mental health services through the establishment of an independent and accessible Mental Health Complaints Commissioner.

The Bill redefines the role of the Chief Psychiatrist to focus on supporting mental health service providers to improve the quality and safety of the mental health services they provide and promoting the rights of people receiving mental health services, in particular people receiving compulsory assessment or treatment.

The Bill enhances service improvement through the publication of Codes of Practice that will improve understanding of, and consistency with, the new legislation.

Mental Health Complaints Commissioner

The government has responded to community calls for a specialist mental health complaints body by establishing a Mental Health Complaints Commissioner in the Bill. The Commissioner will accept, assess, manage, investigate and endeavour to resolve complaints about public sector mental health service providers.

The Commissioner will provide an accessible, supportive and timely complaints mechanism that is responsive to the needs of people with mental illness, in particular compulsory patients.

After receiving a complaint, the Commissioner will have broad powers to investigate services, make recommendations and issue compliance notices for breaches of the legislation.

Chief Psychiatrist

Community consultations identified strong support for the Chief Psychiatrist to continue to provide clinical leadership and advice to public mental health service providers.

The role of the Chief Psychiatrist will focus on supporting public sector clinicians and public mental health service providers to deliver quality mental health services. This will be achieved through the provision of expert clinical advice and other leadership functions, including the development of clinical guidelines, specialist clinical information, training and education.

The Chief Psychiatrist will also analyse data, undertake research and publish reports about the provision of public mental health services.

The Chief Psychiatrist will monitor services and conduct clinical audits and reviews and may issue directions to public mental health services to improve patient safety and wellbeing.

Community visitors

The role of community visitors is reaffirmed in the Bill.

The public consultation process identified strong support for community visitors to continue to monitor the adequacy and appropriateness of public mental health services provided to people with mental illness.

Information disclosure

The Bill mandates when patient's mental health information must be disclosed and to whom that information must be provided. The Bill provides that mental health information about a person may be disclosed where the person consents to the disclosure, where the disclosure is required for treatment purposes, to carers where the information is reasonably required to provide support or care to the patient and for other reasons as described in the Bill.

These provisions will assist patients, clinicians and carers to understand their rights and responsibilities in relation to the disclosure of patient information.