Department of Health

health

A new Mental Health Act for Victoria

Summary of proposed reforms

State Government Victoria

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October 2012

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Ministerial foreword

Comprehensive reform of Victoria's mental health legislation is a central element in the Victorian Government's agenda for mental health. Our objective is a legislative framework that promotes recovery-oriented practice, minimises the duration of compulsory treatment, safeguards the rights and dignity of people with mental illness and enhances oversight while encouraging innovation and service improvement.

The government has undertaken extensive public consultations to understand the strengths and weaknesses of the *Mental Health Act 1986* and what the community expects of new mental health legislation for Victoria.

Over 200 submissions were received on an exposure draft of a new Mental Health Bill. The submissions identified a number of key policy areas as issues of particular concern to the community.

The Victorian Government then held round-table public meetings and targeted consultations to discuss the issues identified in the submissions. These meetings were extremely productive, with the community and government working in partnership to identify practical policy solutions for the future of Victoria's mental health legislation.

We have now reshaped the policy to incorporate the community's views and drafting of a new Mental Health Bill has commenced. The government anticipates introducing a Bill in Parliament in 2012–13, with the new legislation planned to commence approximately 12 months later to allow time for implementation.

Commencement of the new legislation will require thorough implementation planning and preparation. This will be undertaken in partnership with consumers, carers and the mental health sector to ensure a coordinated and smooth transition.

This document presents the major reforms that the government intends to incorporate in Victoria's new mental health policy framework. At the heart of these reforms is a supported decision-making model of treatment and care. The new legislation will promote recovery-oriented practice through the establishment of various mechanisms that will 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.

These reforms will result in significant changes to Victoria's mental health system. They will continue to build on the excellent work already being undertaken in services to establish best practice. I am excited by the opportunities and challenges that these reforms offer for improved outcomes for people with mental illness and a re-invigorated 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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The purpose of mental health legislation

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

Mental health legislation includes checks and balances to ensure that compulsory treatment is only used where necessary. It is designed to ensure that compulsory treatment is given in the least possible restrictive manner and to minimise limitations on rights.

Purpose of this paper

This paper outlines the government's intentions for Victoria's new mental health legislation. It details key elements of the legislative reforms and provides the community and mental health services with an opportunity to begin planning for implementation. Planning for implementation will involve people with mental illness, families and carers, mental health services and the community.

Structure

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 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.

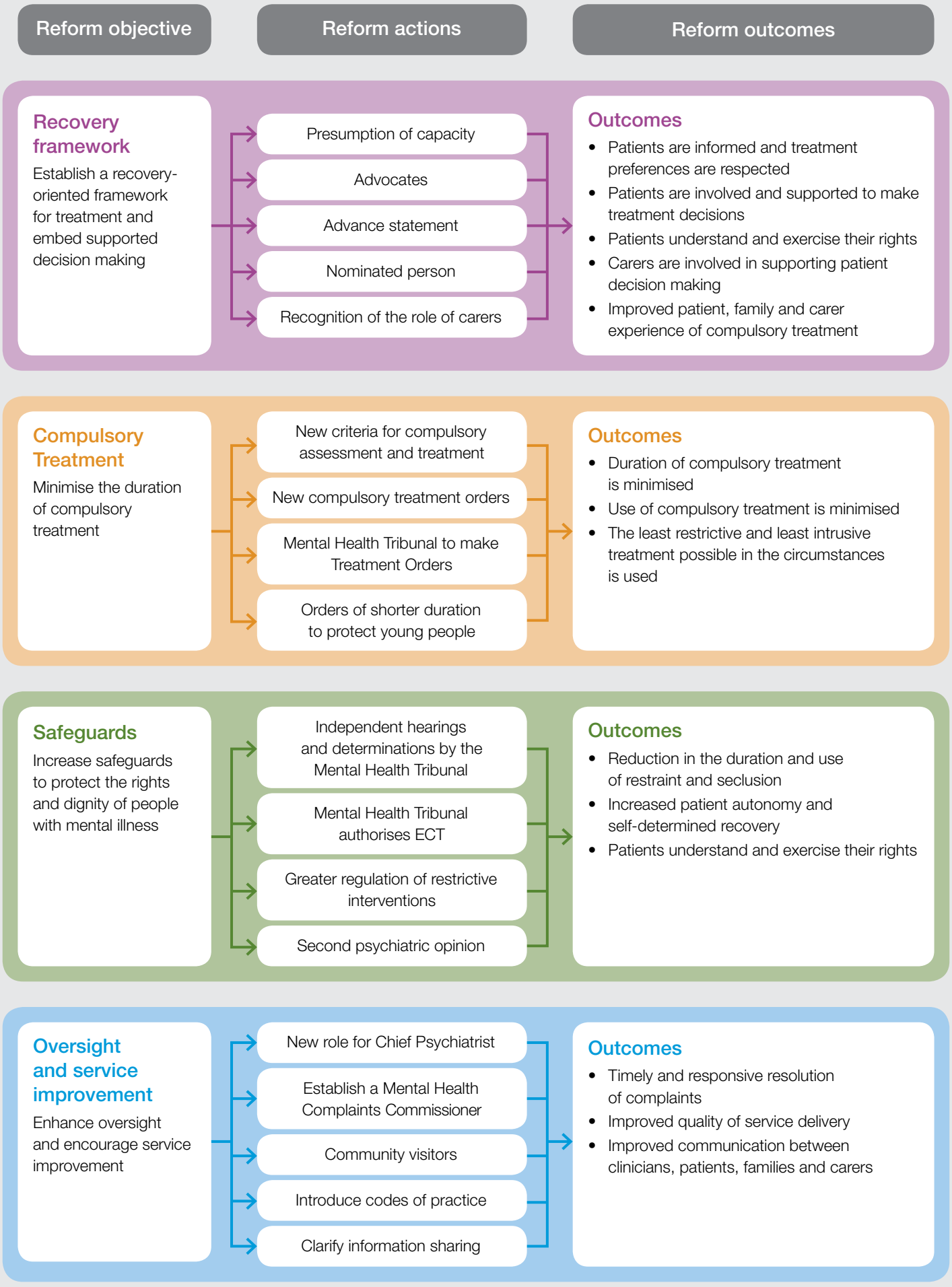
Terminology

There is continuing debate about the most desirable or acceptable terminology to describe people who have mental illness and receive compulsory treatment. The government acknowledges that there are diverse views on terminology. 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.

This paper uses the terms 'patient' and 'compulsory patient' when describing a person subject to compulsory treatment. Otherwise wherever possible, it uses the terms 'person', 'young person' and 'person with mental illness'.

Disclaimer

This paper describes the government's policy intentions for new mental health legislation. It should be noted that as the legislation is developed and the Bill is drafted, specific words, phrases and terminology may change. Further change may also occur when the Bill is considered by the Parliament.


Reform objective
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Improved quality of service delivery
Improved communication between clinicians, patients, families and carers

1. 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 legislation. This model will enable and support compulsory patients to make decisions about their treatment and determine their individual path to recovery. The model will be informed and guided by a new set of legislative principles reflecting the *Charter of Human Rights and Responsibilities Act 2006,* the United Nations Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child.

Legal mechanisms to be included in the legislation that will enable supported decision making include a presumption of capacity, advance statements and nominated persons. These tools will promote best practice and facilitate optimal communication between practitioners and people with mental illness, 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 new legislation will provide that all patients receiving treatment are presumed to be able to make decisions about their own treatment.

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 decision about a course of treatment at a particular point in time, but may regain capacity to make that decision at another point in time.

Under the legislation, compulsory patients will be provided with information and support to make decisions about their treatment. The legislation will establish a capacity test to assist clinicians to determine whether a patient can or cannot consent to treatment at the time the decision needs to be made. Where a compulsory patient is unable to consent, they will be supported to be involved in the decision-making process to the greatest extent possible.

Advocates

Supported decision making is fundamental to recovery-oriented practice. 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 provide information and assist people to understand and exercise their rights. The advocates may also make representations on behalf of people receiving mental health services. 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.

Advance statements

The legislation will enable 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 substitute treatment decisions that better align with the patient's wishes.

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 appointment of a nominated person will ensure patients have greater control over who receives their health information. It will make information sharing clearer for patients, carers, family members and the authorised psychiatrist.

Carers and families

The legislation will recognise the importance, value and challenges of the role undertaken by carers and families, and encourage greater opportunities for partnership between carers, consumers and clinicians.

The support of carers and families is significant to patient recovery. The legislation will enable mental health services to assist patients to maintain supportive relationships during treatment and recovery.

The legislation will involve carers and families in supporting patients to make decisions about their assessment, treatment and recovery wherever possible.

2. Compulsory treatment orders – minimise the duration of compulsory treatment

The legislative framework will promote voluntary treatment in preference to compulsory treatment wherever possible.

The legislation will seek to minimise the use and duration of compulsory treatment and aim to ensure that it is provided in the least restrictive and least intrusive manner possible. This will be achieved by introducing clear compulsory-treatment criteria, treatment orders that operate for a fixed duration, and timely independent oversight by the newly established Mental Health Tribunal.

The new legislation will establish compulsory treatment orders comprising:

- an Assessment Order
- a 28-day 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 Assessment Order will last for a maximum of 24 hours but may be extended up to a maximum of 72 hours in exceptional circumstances.

28-day 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 28-day Treatment Order.

The criteria for a 28-day Treatment Order will require that the authorised psychiatrist determine that the person **has** a mental illness and needs treatment to prevent serious harm to the person or serious deterioration in their mental or physical health or serious harm to another person. The 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 voluntarily.

It is intended that the criteria set a high threshold because compulsory treatment imposes a serious limitation on personal autonomy. The criteria will send a clear message that a person is not to be placed on a compulsory treatment order simply because they have a history of mental illness and as a result there may be a harm that manifests in the future.

The authorised psychiatrist must also specify the category of the order, which 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 or 'community' if they consider the treatment can be provided while the person lives in the community.

The authorised psychiatrist must regularly review the patient and discharge the patient from the 28-day Treatment Order if the criteria no longer apply.

Treatment Order

If a patient remains on a 28-day 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 Mental Health Tribunal within the period of the 28-day 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 category of the order (either inpatient or community) and the duration of the order: up to six months for inpatient category or up to 12 months for a community category.

The authorised psychiatrist will be responsible for providing treatment during the period of the Treatment Order and will be able to vary the category of the Treatment Order 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 Mental Health Tribunal within the period of the order the Treatment Order will expire.

The authorised psychiatrist must regularly review the patient and discharge the patient from the Treatment Order if the criteria no longer apply.

Treatment Order for young persons under 18 years of age

During assessment of a person under 18 years of age, if the authorised psychiatrist determines that the criteria for compulsory treatment apply to the young person, the authorised psychiatrist may make a 28-day Treatment Order.

The authorised psychiatrist must also specify the category of the order, which must be 'inpatient' if the authorised psychiatrist considers that the only way to provide the treatment is by detaining the young person in an inpatient unit or 'community' if they consider the treatment can be provided while the young person lives in the community.

The Mental Health Tribunal may make a Treatment Order (either inpatient or community category) for a young person if it considers that the criteria for compulsory treatment continue to apply to the young person.

A young person may only be placed on a Treatment Order for a maximum of three months, although the tribunal will be able to make further orders if the criteria still apply. This shorter timeframe will ensure that there is greater oversight of compulsory treatment decisions for young people.

The authorised psychiatrist must regularly review the young person and discharge him or her from the Treatment Order if the criteria no longer apply.

3. Safeguards – increase safeguards to protect the rights and dignity of people with mental illness

The legislation will establish a comprehensive suite of safeguards to protect the rights of compulsory 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 built into the legislation. Additional mechanisms are described below.

Mental Health Tribunal

The legislation will establish a Mental Health Tribunal to replace the Mental Health Review Board and the Psychosurgery Review Board.

The Mental Health Tribunal will make Treatment Orders for patients. As an independent body, the tribunal is best placed to make the decision that a person requires compulsory treatment. The tribunal must be satisfied that the criteria for compulsory treatment apply to the patient before making the order. In coming to this decision, the tribunal will take a holistic approach that considers a range of factors including the patient's goals, preferences and aspirations.

This will leave 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 Mental Health Tribunal is considering an application for electroconvulsive therapy or neurosurgery for mental illness, the registered medical practitioner must be a psychiatrist.

Electroconvulsive therapy

Electroconvulsive therapy (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 legislation will include the following new safeguards.

The legislation will provide that ECT may only be performed on a compulsory patient or a person under 18 years of age with the approval of the Mental Health Tribunal.

Where the tribunal determines that a compulsory patient or young person has capacity to consent to ECT, the tribunal may only approve ECT if the patient or young person gives informed consent.

Where a compulsory patient or young person does not have capacity to consent to ECT, the tribunal must decide whether the ECT will be for the 'benefit of the person'. 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 legislation.

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 legislation will introduce regulation of physical restraint in addition to the existing regulation of mechanical restraint and seclusion. It will improve the safety of restraint and seclusion by increased oversight of and accountability for these restrictive practices.

In addition the legislation will specify that restrictive interventions must only be used as a last resort after all other less restrictive options reasonably available have been tried or considered and found unsuitable in the circumstances.

Second psychiatric opinion

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

Second opinions may be provided by a psychiatrist in a public mental health service or in the private sector. Some additional state funds will be available for second opinions provided by private psychiatrists. Access to these funds will be subject to criteria to be developed by the department 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 contribute to 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.

4. Oversight and service improvement – enhance oversight and encourage service improvement

The legislation will develop and enhance oversight of public mental health services through the establishment of an independent and accessible Mental Health Complaints Commissioner.

The role of the Chief Psychiatrist will be redefined to focus on clinical leadership for the public mental health sector.

The legislation will enhance service improvement through the publication of codes of practice that will improve understanding of, and consistency with, the new legislation.

Information-sharing provisions will be clarified in order for patients, clinicians and carers to better understand their rights and obligations in relation to the sharing of information.

Mental Health Complaints Commissioner

The establishment of a Mental Health Complaints Commissioner responds to community calls for a specialist mental health complaints body in Victoria. The commissioner will receive, conciliate, investigate and resolve complaints about public sector mental health service providers.

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

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

Chief Psychiatrist

Community consultations identified strong support for the Chief Psychiatrist to continue to provide clinical leadership and advice to the sector. However, some stakeholders noted that there is a perceived conflict in the role of the Chief Psychiatrist responding to complaints by people receiving mental health services while giving advice to the sector about the delivery of mental health services.

The establishment of the Mental Health Complaints Commissioner provides an opportunity to refocus the role of the Chief Psychiatrist on providing support and clinical leadership to public sector mental health clinicians.

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 investigations and may issue directions to public mental health services to improve patient safety and wellbeing.

Community visitors

The role of community visitors will be reaffirmed in the new legislation.

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.

Codes of practice

The legislation will provide for the development and implementation of codes of practice. Codes provide practical guidance to clinicians, people with mental illness, families and carers about the application of the law.

The codes will provide a greater level of detail than would generally be included in legislation or regulations and can be more readily updated to reflect new developments in interpretation of the law and clinical practice.

A breach of the code will not give rise to an enforceable right, however the codes can be used by tribunals and courts to assist them in interpreting the law and to guide decision making.

Disclosure of health information

The legislation will clarify when a person's mental health information may be disclosed so that people with mental illness, clinicians, families and carers can better understand their rights and responsibilities.

The legislation will provide 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 individual and for other reasons as described in the legislation.