

Medical Treatment Planning and Decisions Act 2016

Frequently Asked Questions for Mental Health Services

What does the Medical Treatment Planning and Decisions Act do?

The *Medical Treatment Planning and Decisions Act 2016* (the MTPD Act) governs medical treatment decisions for people who do not have capacity to make their own decisions.

The MTPD Act enables people who do have capacity to make decisions to:

- Make an advance care directive, which may include:
 - an instructional directive giving specific directives about treatment they consent to or refuse and which health practitioners must comply with, for current or future conditions; and/or
 - a values directive which will describe their views and values. A medical treatment decision maker and health practitioners will be required to give effect to a values directive as far as reasonably possible when making treatment decisions.
- Appoint a medical treatment decision maker to make decisions on behalf of the person if they no longer have decision-making capacity. These decisions should reflect the person's values and preferences in as much as they are known.
- Appoint a support person who will assist them to make decisions for themselves, by collecting and interpreting information or assisting them to communicate their decisions.

The MTPD Act creates a process for decision making when people do not have capacity to make a decision about a treatment:

- If there is an advance care directive with a relevant instructional directive consenting to or refusing the treatment, this decision must be followed.
- If there is not a relevant instructional directive, the decision to consent to or refuse treatment must be made by a medical treatment decision maker. This will be the first person who is willing and available of:
 - an appointed medical treatment decision maker;
 - a guardian appointed by VCAT with the power to make medical treatment decisions;
 - the first of the following with a close and continuing relationship:
 - spouse or domestic partner
 - primary carer
 - adult child
 - parent
 - adult sibling.

Does the Medical Treatment Planning and Decisions Act apply to treatment for mental illness?

Yes, the definition of medical treatment in the MTPD Act includes treatment for mental illness.

The MTPD Act aims to ensure that people receiving mental health treatment will have the same rights and protections as those making decisions about other forms of medical treatment. By enabling people to make an advance care directive and appoint a medical treatment decision maker to make mental health decisions, they can to continue to receive their treatment on a voluntary basis even when they do not have capacity to give informed consent.

If the criteria for a compulsory treatment order apply and the person lacks the capacity to make decisions about treatment, this approach provides an alternative to being placed on a compulsory order under the *Mental Health Act 2014* and may offer a less restrictive means to receive treatment.

How does the Medical Treatment Planning and Decisions Act affect the Mental Health Act 2014?

MTPD advance care directives will have no effect, and medical treatment decision makers will not be able to make decisions about treatment for mental illness, while a person is a patient under the *Mental Health Act 2014*.

Advance statements and the role of the nominated person under the Mental Health Act are not changed by the MTPD Act. These will continue to support and guide decision making for compulsory treatment under the Mental Health Act.

For all other treatment, the *MTPD Act* will apply. This means that a person may need to make an advance care directive and an advance statement if they think they may become a patient under the *Mental Health Act 2014*.

Can a person have an advance care directive under the Medical Treatment Planning and Decisions Act and an advance statement under the Mental Health Act?

Yes, an advance care directive under the MTPD Act will guide decisions about treatment in the event a person loses decision-making capacity but is not a patient under the *Mental Health Act 2014*.

An advance statement under the Mental Health Act will guide decisions about compulsory treatment for mental illness in the event a person becomes a patient under the *Mental Health Act 2014*.

An advance care directive will guide decisions about medical treatment in all other circumstances.

What happens if a person has refused all treatment for mental illness in an instructional directive and subsequently becomes unwell, loses capacity and requires treatment for mental illness?

Generally an instructional directive in an advance care directive must be respected. However, treatment for mental illness may be provided if the criteria for compulsory treatment in the Mental Health Act apply to the person and they are made a patient under that Act. This may occur when a person:

- has mental illness and
- because the person has mental illness, the person needs immediate treatment to prevent serious deterioration in their mental or physical health or to prevent serious harm to themselves or another person and
- the immediate treatment will be provided if the person is made subject to a Temporary Treatment Order or Treatment Order and
- there is no less restrictive means reasonably available to enable them to receive the immediate treatment.

If the person is made a patient under the Mental Health Act, the authorised psychiatrist may still have regard to the MTPD instructional directive as evidence of the patient's views and preferences about treatment.

Can a person make a binding instructional directive in relation to consent to, or refusal of, treatment for mental illness?

Yes, but a MTPD instructional directive will not be binding in the event the person becomes a patient under the Mental Health Act.

Can a carer or family member consent to treatment for mental illness?

If a person has consented to a treatment in an instructional directive in an advance care directive under the MTPD, further consent from a carer or family member is not required.

If there is not a relevant instructional directive and the person is not a patient under the *Mental Health Act 2014*, consent must be obtained from a medical treatment decision maker (the list above must be used to identify who this is).

Consent to the treatment by a carer or family member may cause distress to the person and impact negatively on their relationship with the person. In these circumstances, treatment on a compulsory basis, which offers independent oversight by the Mental Health Tribunal, may be preferable.

What happens if a medical treatment decision maker ceases to act in accordance with a person's preferences and values?

The MTPD Act permits an application to VCAT if there are concerns about the decisions being made. VCAT can limit the authority of a medical treatment decision maker or remove them from this role.

Must existing enduring medical attorneys be re-appointed under the Medical Treatment Planning and Decisions Act?

No, existing attorneys transition automatically to become medical treatment decision makers.

What efforts must clinicians make to determine if a person who lacks capacity has completed an advance care directive?

Health practitioners must make reasonable efforts in the circumstances to locate a MTPD advance care directive. If a directive is subsequently located, even though reasonable efforts were made, a health practitioner will not be held liable if treatment decisions were made in good faith in ignorance of the directive. Persons who complete an advance care directive are advised to inform family members, health practitioners and significant others of the document's existence.

How does the Medical Treatment Planning and Decisions Act manage ECT decision making for people receiving voluntary treatment?

A medical treatment decision maker, whether appointed in advance by the person themselves or who becomes a decision maker because they are a guardian able to make treatment decisions or because of their relationship with the person, will be able to consent to ECT for a person who does not have capacity to consent to it themselves. A person may also consent to ECT in their advance care directive.

However, as an additional safeguard, the Mental Health Tribunal must approve the ECT. In these circumstances, the treating psychiatrist (either an authorised psychiatrist or a private psychiatrist) will be required to make an application to the Mental Health Tribunal before ECT may be performed.

In deciding whether to approve the application for the performance of ECT, the Mental Health Tribunal must be satisfied that ECT is the least restrictive treatment and that the person does not have capacity to consent to ECT themselves.

Even if the adult person has consented to ECT in their MTPD advance care directive, the Tribunal will still need to approve ECT prior to it being administered to that person if they have lost decision making capacity.

Once the person improves to the point of regaining capacity to make a decision about ECT, they can agree to receive further treatment or refuse it.

This is similar to the approach legislated under the Mental Health Act for the approval of ECT for young people.

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Authorised and published by the Victorian Government, 1 Treasury Place, Melbourne.

© State of Victoria, Department of Health and Human Services March, 2018.

ISBN/ISSN 978-1-76069-297-1

Available at <http://www2.health.vic.gov.au>