Medical Treatment Planning and Decisions Bill 2016

Introduction Print

EXPLANATORY MEMORANDUM

Clause Notes

Part 1—Preliminary

Clause 1 sets out the main purposes of the Bill.

Clause 2 is the commencement provision. The provisions of the Bill will come into effect on a day or days to be proclaimed, or on 12 March 2018 if not proclaimed earlier.

Clause 3 is the definition section.

Clause 4 defines the meaning of decision-making capacity and sets out how to determine whether a person has decision-making capacity to make a decision to which the Bill applies. A decision to which the Bill applies encompasses a medical treatment decision, the creation of an advance care directive and the making of an appointment under the Bill. If a person does not have decision-making capacity in relation to a medical treatment decision, a health practitioner who proposes to administer treatment must follow any relevant instructional directive, and if there is no relevant instructional directive, seek a decision from a medical treatment decision maker in accordance with the process set out in the Bill. The definition of decision-making capacity acknowledges that a person's capacity to make decisions may fluctuate, and that a person may have capacity to make some decisions and not others. The clause provides that there is a rebuttable presumption in favour of capacity in relation to an adult but not a child.
Clause 5 provides for the Victorian Civil and Administrative Tribunal (VCAT) to make an order in relation to the decision-making capacity of a person. VCAT may declare that a person has, or does not have, decision-making capacity in relation to any decision to which the Bill applies. This includes a medical treatment decision, the appointment of a medical treatment decision maker or the creation of an advance care directive.

Clause 6 defines the types of statements that can be included in an advance care directive given under the Bill by a person with decision-making capacity. An advance care directive may contain either or both of an instructional directive or a values directive (or plurals thereof). The type of directive is determined according to whether it is expressly identified as an instructional directive. Clause 13 provides that some statements must be interpreted as a values directive, even if they are identified as an instructional directive.

Clause 7 sets out the principles which a person and VCAT must have regard to when exercising a power or performing a function under the Bill. The principles clarify that a person's preferences, values and social wellbeing should be considered first and should direct medical treatment decisions being made under the Bill.

Clause 8 provides that nothing in the Bill authorises the making of a statement in an advance care statement or a decision of a medical decision treatment maker that purports to compel a health practitioner to administer a particular form of medical treatment or medical research procedure to a person. A person may either consent to or refuse medical treatment that is offered by a health practitioner, but a health practitioner will continue to use their expertise to determine whether medical treatments are clinically indicated. The clause also provides that nothing in the Bill can require a health practitioner to administer futile or non-beneficial medical treatment or a medical research procedure to a person.

**Part 2—Advance care directives**

Clause 9 provides that in Part 2 of the Bill, medical treatment includes a medical research procedure.

Clause 10 provides that a person's common law or other rights to refuse medical treatment are not affected or limited by the Bill.
Clause 11 is included in order to ensure that an advance care directive which refers to a particular medical treatment can be interpreted as referring to any other medical treatment which is of substantially the same kind or only distinguishable on technical grounds not likely to be understood by the person who gave the advance care directive. The clause recognises that many people executing an advance care directive cannot be expected to be able to refer to various kinds of medical treatment in precise and technical terms, and seeks to avoid an advance care directive being considered irrelevant or not applicable on the grounds it is not expressed specifically enough in a medically precise way.

Clause 12 sets out what an advance care directive is for the purposes of the Bill. The clause provides that an advance care directive may contain an instructional directive or a values directive or both of these directives. The clause also clarifies that any statement in an advance care directive about palliative care must be interpreted as a values directive. The Bill does not require a health practitioner to obtain a medical treatment decision for palliative care either by a person in advance via an instructional directive or by the medical treatment decision maker for a person. Furthermore, the clause provides that a statement in an advance care directive purporting to consent to a special medical procedure within the meaning of the Guardianship and Administration Act 1986 must be interpreted as a values directive. The process for obtaining consent for the administration of a special medical procedure is set out in the Guardianship and Administration Act 1986 and not this Bill. See also clause 54A in relation to special medical procedures and Division 5 of Part 4 in relation to palliative care.

Clause 13 provides that any person, including a child, can make an advance care directive if they have decision-making capacity in relation to, and understand the nature and effect of, each statement in the directive. The clause also establishes that the formalities under Part 2 must be complied with in order for an advance care directive to be valid, despite the fact that there is no prescribed form.

Clause 14 creates an offence to induce the giving of an advance care directive by dishonesty or undue influence. Subclause (2) voids an advance care directive in these circumstances.
Clause 15 creates an offence for a person to knowingly make a false or misleading statement in relation to another person's advance care directive, or an attempt to give an advance care directive by another person.

Clause 16 sets out the formal requirements which must be met in order for an advance care directive to be valid. There is no prescribed form. The clause provides that a person may sign an advance care directive at the direction of the person giving the directive if the person is an adult and not a witness. This is intended to apply in situations where a person with capacity to give an advance care directive is not physically able to do so.

Clause 17 provides the witnessing and certification requirements for the giving of an advance care directive.

Clause 18 establishes that if an advance care directive contains one or more of the types of statements set out in the clause, the entire directive is not necessarily invalidated just by reason of the inclusion of statement.

Clause 19 provides that an advance care directive is in force from the time it is signed in accordance with Part 2 and that it remains in force until the first occurring of the circumstances set out in subclause (2).

Clause 20 provides that an advance care directive may be amended or revoked by the person who gave it by complying with the formal requirements set out in Part 2 for the giving of an advance care directive. An advance care directive must be amended on the face of the original directive it is amending to ensure accurate version control and certainty.

Clause 21 sets out the effect of non-compliance with the formal requirements set out in Part 2. The clause provides that if a person attempts to give, amend or revoke an advance care directive in a way that does not comply with the formal requirements set out in Part 2, a document does not take effect as an advance care directive but nevertheless may be taken into account as an expression of the person's values. The clause also gives VCAT the power to cure a non-compliance with the formal requirements by way of an order made under clause 22(2)(b)(ii).
Clause 22 provides that VCAT can make certain orders in relation to advance care directives, or attempts to make, vary or revoke a document purporting to be an advance care directive. One of the orders that can be made is in relation to a statement in an advance care directive where the circumstances have changed such that the practical effect of the statement is no longer consistent with the preferences and values of the person who gave it. It should be noted that the circumstances referred to are not intended to encompass a purported change in the person's preferences alone. Instead, it is intended to refer to a change in circumstances which would have the practical effect that a person's preferences and values would not be adhered to if the directive was complied with. An example may be where a person has stated in an advance care directive that they refuse antiviral treatment for their chronic hepatitis C because the side effects cause poor quality of life. However, more recent developments in antiviral medications have improved their effectiveness in 90 per cent of all cases and have shown to significantly improve quality of life.

Another example might be a person who has made an instructional directive refusing any emergency treatment if they have a stroke because the information at the time showed that the treatment for stoke was not effective at returning bodily functioning and the person did not want treatment that meant they would live but be paralysed. However, a few years later there is a medical breakthrough in emergency treatment for stroke which means that treatments are now effective at preventing paralysis. Alternatively, a person may have given an advance care directive refusing all treatment based on a prognosis that they were terminally ill and would have a poor quality of life before dying. However, their prognosis may have improved and their disease is now manageable to a point where their quality of life is acceptable to them, meaning the statements in the instructional directive no longer reflect the reality of the person's prognosis.

Clause 23 sets out the matters which VCAT must be satisfied of before making an order revoking, varying or suspending an advance care directive or a document purporting to be an advance care directive. One of the matters is where the circumstances have changed such that the practical effect of the instructional directive is no longer consistent with the preferences and values of the person who gave it. It should be noted that the
circumstances referred to are not intended to encompass a purported change in the person's preferences alone. It is intended to refer to a change in circumstances which would have the practical effect that a person's preferences and values would not be adhered to if the directive was complied with.

Clause 24 provides that if an application is made under clause 21, the person who gave, or purported to give, the advance care directive is a party to the proceeding.

Part 3—Medical treatment decision makers and support persons

Division 1—Preliminary

Clause 25 provides that in Part 3 of the Bill, medical treatment includes a medical research procedure.

Division 2—Appointed medical treatment decision makers

Clause 26 provides that an adult who has decision-making capacity may appoint another adult as the person's appointed medical treatment decision maker. There is no prescribed form for such an appointment, but this Part does set out formal requirements in order for the appointment to be valid. An adult is defined in clause 3 as being a person of or above the age of 18. The clause provides that an adult can appoint a medical treatment decision maker at the same time as making an advance care directive or at any other time.

Clause 27 provides that a medical treatment decision maker has the powers set out in Part 4 and Part 5 or in any other Act, however, the clause has the effect that the person appointing the appointed medical treatment decision maker may place any limitation on the appointment in the document of appointment and the power will be limited by that.

Clause 28 sets out the formal requirements for the valid appointment of an appointed medical treatment decision maker. The clause provides that a person may appoint more than one medical treatment decision maker, and that each appointee must accept the appointment in accordance with clause 29. The clause clarifies that while more than one medical treatment decision maker can be appointed, only one medical treatment decision maker may have decision-making power at any one time and
this is determined by the first person listed in the appointment who available and willing and able to act at the time a decision needs to be made. Furthermore, the requirement that the appointed medical treatment decision maker be reasonably available and willing and able is essentially a requirement that the appointed medical treatment decision maker themselves have decision-making capacity in relation to the particular medical treatment proposed to be administered (among other things).

Clause 29 sets out the formal requirements for the acceptance of an appointment as appointed medical treatment decision maker.

Clause 30 provides that a person who appointed a medical treatment decision maker may revoke that appointment by complying with the formalities set out in this Part and if they have decision-making capacity in relation to the revocation decision.

Division 3—Support persons

Clause 31 provides that a person, including a child, who has decision-making capacity may appoint another person, including a child, as the person's support person. Only one support person may be appointed by a person.

Clause 32 sets out the role of the support person in relation to the person making the appointment. While a support person may in some circumstances also be a person's medical treatment decision maker, a support person does not have the power to make a medical treatment decision in respect of the person making the appointment. There may be circumstances where a person has both a support person and a medical treatment decision maker.

Clause 33 sets out the formal requirements for the appointment of a support person.

Clause 34 sets out the formal requirements for acceptance of an appointment as support person.

Clause 35 provides that a person who appointed a support person may revoke that appointment by complying with the formalities set out in this Part and if they have decision-making capacity in relation to the revocation decision. The appointment of a support person is taken to be revoked by the later appointment of a support person.
**Division 4—Procedural requirements**

Clause 36 sets out the witnessing and certification requirements common to the appointment and revocation of both a medical treatment decision maker and a support person under Part 3.

Clause 37 provides for a person to sign at the direction of a person who is making or revoking an appointment under Part 3 and is intended to apply in situations where a person with capacity to give an advance care directive is not able to physically do so.

Clause 38 provides that an appointment of a medical treatment decision maker or a support person under Part 3 is in force from the time it is signed in accordance with this Part and that it remains in force until the first occurring of the circumstances set out in subclause (2).

Clause 39 provides that an appointee under Part 3 may resign from the appointment, and sets out the persons whom the resigning appointee must take all reasonable steps to inform. The clause clarifies that a failure to inform the specified persons does not affect the validity of the resignation. The clause also outlines the formalities required to effect the resignation.

Clause 40 requires a person who revokes the appointment of an appointee under Part 3 to take reasonable steps to inform the appointee that the appointment has been revoked. The clause clarifies that failure to inform the appointee does not affect the validity of the revocation.

**Division 5—Offences**

Clause 41 creates the offences of purporting to act as an appointed medical treatment decision maker and purporting to act as a support person.

Clause 42 creates an offence of using dishonesty or undue influence to induce a person to appoint a medical treatment decision maker or a support person.
Division 6—Applications to VCAT

Clause 43 provides that VCAT can make certain orders in relation to certain matters regarding appointed medical treatment decision makers and support persons. The matters in relation to which a person can apply to VCAT include validity, any failure to comply with formalities, and with the permission of VCAT, any other matter regarding an appointment under Part 3.

Clause 44 sets out the matters which VCAT must be satisfied of before making an order under clause 43 that an appointment or revocation of appointment of an appointed medical treatment decision maker or support person is invalid.

Clause 45 provides that VCAT may declare valid an attempt to make an appointment despite non-compliance with Part 3 if the person attempting to make the appointment's intention was sufficiently clear.

Clause 46 sets out the matters which VCAT must be satisfied of before making an order under clause 43 that an appointment is revoked or varied.

Clause 47 sets out the parties to a proceeding in a matter the subject of an application under clause 43.

Part 4—Medical treatment decisions

Division 1—Preliminary

Clause 48 provides that Part 4 does not apply in relation to medical treatment that is treatment for mental illness for a person who is a mental health patient or for neurosurgery. These matters are all governed by the Mental Health Act 2014.

The clause also clarifies that that the decision-making process provided for in this Part does not affect the operation of section 24 of the Human Tissue Act 1982. Section 24 of the Human Tissue Act 1982 provides that, where the consent of a parent or other person with decision-making authority in relation to a child is refused or not obtained, a registered health practitioner who delivers a blood transfusion to the child does not face any criminal liability for doing so. It should be noted that the Bill provides that a child with decision-making capacity may make an instructional advance care directive. If there is
an instructional directive relevant to the circumstances health practitioner is required by the Bill to comply with such a directive. However, if there was no such directive in existence the health practitioner would be required to turn to the child's medical treatment decision maker (being a person with parental responsibility for the child in accordance with clause 55(4)), and section 24 of the Human Tissue Act 1982 would apply by virtue of this clause.

Clause 49 establishes that nothing in this Part affects any duty of care owed by a health practitioner to a patient.

Clause 50 provides that before administering medical treatment to a person who does not have decision-making capacity in respect of that treatment, a health practitioner must make reasonable efforts in the circumstances to ascertain if the person has an advance care directive or a medical treatment decision maker or both. The clause provides that a failure to take these steps will amount to unprofessional conduct. Under the Health Practitioner Regulation National Law, unprofessional conduct may be referred to the National Board within the meaning of that Law.

Clause 51 sets out the circumstances in which a health practitioner may refuse under Part 4 to comply with an instructional directive. If a health practitioner does not comply with an instructional directive under this clause, medical treatment will still need to be administered in accordance with Division 2 of Part 4.

Clause 52 provides that a health practitioner who acts in good faith and without negligence is not liable for the matters outlined in subclause (1) if they believe on reasonable grounds that they have complied with the requirements of Part 4.

Clause 53 provides that a health practitioner may administer medical treatment (other than electroconvulsive treatment) or a medical research procedure to a person without consent under Part 4 or without authorisation under Part 5 if the health practitioner reasonably believes that the circumstances constitute an emergency. The clause sets out what circumstances are considered to constitute an emergency. The clause contains a limitation that the health practitioner may not administer the medical treatment without consent or authorisation, despite the fact it is an emergency, if the health practitioner is aware that the person has refused the particular treatment. However, the clause
provides that a health practitioner is not required to search for an advance care directive in an emergency.

Clause 54 provides that a health practitioner may administer palliative care to any person who does not have decision-making capacity without consent in certain circumstances, but still having regard to any preferences and values of the person and in consultation with the medical treatment decision maker.

Clause 55 sets out who a person's medical treatment decision maker is. An adult will only have one medical treatment decision maker for a medical treatment decision. An appointed medical treatment decision maker in respect of an adult is the person's medical treatment decision maker if reasonably available and willing and able to make the decision. If there is no appointed medical treatment decision maker, the decision maker may be a VCAT appointed guardian, if any, or the first of the persons listed in subclause (3). The clause provides that the medical treatment decision maker in relation to a child is the child's parent, guardian or person with parental responsibility for the child who is reasonably available, willing and able to make the medical treatment decision for the child. A guardian or person with parental responsibility may include any person granted parental responsibility by the Family Court of Australia under the Family Law Act 1975 of the Commonwealth or by order of the Children's Court under the Children, Youth and Families Act 2005.

Clause 56 requires a health practitioner to record certain matters in relation to medical treatment, administered under Part 4 to a person without decision-making capacity for that treatment, in the person's clinical records.

Division 2—Medical treatment decision-making process

Clause 57 outlines the application of this Division. The Division does not apply in respect of palliative care or a special medical procedure.

The process for obtaining VCAT's consent to a special medical procedure is set out in the Guardianship and Administration Act 1986. The Bill makes a consequential amendment to the Guardianship and Administration Act 1986 providing that a person can refuse a special medical procedure via an instructional advance care directive. See also clause 13. The process for
decision-making in respect of palliative care is set out in clause 54.

Clause 58 provides that, if a health practitioner proposes to administer medical treatment to which Division 2 applies to a person who does not have decision-making capacity for that treatment, a medical treatment decision must be obtained or ascertained in accordance with the Division.

Clause 59 sets out the circumstance in which a health practitioner may administer medical treatment to a person who does not have decision-making capacity but is likely to recover within a reasonable time. This may only be done if the medical treatment is in accordance with any relevant instructional directive, or has been consented to by the person's medical treatment decision maker, and the health practitioner reasonably believes that a further delay in treatment would result in a significant deterioration of the person's condition.

Clause 60 requires a health practitioner proposing to administer medical treatment to a person who does not have decision-making capacity in respect of that treatment to, as far as reasonably practical, give effect to any relevant instructional directive, and consider any values directive. If the person has an advance care directive without a relevant instructional directive, the practitioner must refer any medical treatment decision to the person's medical treatment decision maker. A contravention of this requirement is unprofessional conduct. Under the Health Practitioner Regulation National Law, unprofessional conduct may be referred to the National Board within the meaning of that Law.

Clause 61 outlines the framework for the making of a medical treatment decision by a medical treatment decision maker on behalf of a person who does not have decision-making capacity in respect of the medical treatment.

Clause 62 requires a health practitioner to notify the Public Advocate if the medical treatment decision maker of a person refuses significant treatment and the health practitioner reasonably believes that person's preferences or values are not known or are unable to be known or inferred by that decision maker.
Clause 63 provides for a process of medical treatment decision-making where there is no advance care directive and no medical treatment decision maker. The process depends upon whether the treatment is significant or routine. This clause does not apply to mental health patients as section 75(1)(e) of the Mental Health Act 2014 provides that the authorised psychiatrist is to be the default medical treatment decision maker for mental health patients.

Division 3—Applications to VCAT

Clause 64 provides that this Division does not apply in respect of a special medical procedure. The process in relation to a special medical procedure is set out in Part 4A of the Guardianship and Administration Act 1986.

Clause 65 provides that an eligible person may apply to VCAT for an order under this Division.

Clause 66 provides that VCAT can make certain orders about the authority of a medical treatment decision maker to consent to or refuse treatment on behalf of a person.

Clause 67 outlines the Public Advocate's obligations if they have received a notification from a health practitioner under clause 62.

Clause 68 provides that VCAT can make any other order it considers necessary, if it makes an order under this Division.

Clause 69 sets out the matters which VCAT must be satisfied of before making an order under this Division.

Clause 70 provides that a person's medical treatment decision maker or health practitioner may apply to VCAT for directions or an advisory opinion on any matter relating to an advance care directive or the medical treatment of the person.

Clause 71 sets out the parties to a proceeding in a matter the subject of an application under this Division.
Part 5—Medical research

Division 1—Preliminary

Clause 72 outlines that this Part applies to the administration of a medical research procedure to an adult who does not have decision-making capacity in relation to the procedure. Subclause (2) provides that if a person has decision-making capacity or is likely to recover decision-making capacity within a reasonable time in relation to a medical research procedure, a registered practitioner must not administer the medical research procedure to the person under this Part. Subclause (3) outlines what is meant by a reasonable time.

Clause 73 outlines the steps a registered practitioner must take before administering a medical research procedure to a person who does not have decision-making capacity in respect of that medical research procedure. The clause provides that if a health practitioner contravenes this requirement, that contravention is unprofessional conduct. Under the Health Practitioner Regulation National Law, unprofessional conduct may be referred to the National Board within the meaning of that Law.

Clause 74 provides protection to a medical research practitioner from certain civil or criminal liability or liability for unprofessional conduct or professional misconduct in certain circumstances set out in the clause. The clause states that nothing in the clause affects any duty of care owed by a medical research practitioner to a person.

Division 2—Approval and consent

Clause 75 outlines the circumstances in which a medical research practitioner may administer a medical research procedure to a person without decision-making capacity in relation to that procedure. The process set out in this clause is subject to clause 53, which governs the administration of medical treatment and medical research procedures in an emergency.

Clause 76 requires that a medical research procedure must be administered in accordance with the relevant human research ethics committee approval.
Clause 77 provides the decision-making framework that a medical treatment decision maker must use in deciding whether to consent to a medical research procedure on behalf of a person who does not have decision-making capacity in respect of the procedure. The clause provides protection from civil or criminal liability for a medical treatment decision maker who fails to comply with the process. Further, the clause provides that the consent must be consistent with any requirements for consent specified in the relevant human research ethics committee approval for the relevant research project.

Clause 78 requires a medical research practitioner to record certain matters in relation to a medical research procedure administered under this Part to a person without decision-making capacity for that procedure, in the person's clinical records.

**Division 3—Medical research procedures without consent**

Clause 79 sets out the circumstances in which this Division applies.

Clause 80 provides that a medical research practitioner may administer a medical research procedure under this Division to a person who does not have a medical treatment decision maker if the test set out in the clause is met. The clause also provides that a medical research practitioner must continue to take reasonable steps to identify and contact the person's medical treatment decision maker.

Clause 81 requires a medical research practitioner to sign a certificate before or as soon as practicable after administering a medical research procedure, and thereafter at intervals no greater than 30 days, certifying as to the matters set out in the clause. The clause also sets out the matters of which the medical research practitioner must, as soon as reasonably practicable, inform a medical treatment decision maker (if one is subsequently identified) and the person (if they subsequently recover capacity).

The clause requires the medical research practitioner to provide a copy of the certificate to the Public Advocate and the relevant human research ethics committee and ensure the certificate is kept in the person's clinical records.
The clause also makes it an offence for a medical research practitioner to sign a certificate under this clause that the practitioner knows to be false.

Division 4—Applications to VCAT

Clause 82 sets out who may apply to VCAT in relation to any matter, question or dispute under this Part. Notably, a medical research practitioner who is involved in the relevant research project cannot apply in relation to refusal of a medical research procedure by a medical treatment decision maker.

The clause also sets out matters in relation to the requirement for the principal registrar of VCAT to provide notice of proceedings and the orders VCAT can make on application under this clause.

Clause 83 provides that a medical treatment decision maker may seek directions or an advisory opinion from VCAT on any matter relating to their authority to consent to a medical research procedure on behalf of a person. The clause also provides that VCAT may, on its own motion, direct or give an advisory opinion to the medical treatment decision maker in respect of any matter. The clause sets out VCAT's powers on application and the requirement for the principal registrar of VCAT to give notice of proceedings under this clause.

Division 5—Offences

Clause 84 creates an offence of administering a medical research procedure to a person who does not have decision-making capacity in relation to that procedure unless the research project has been approved by the relevant human research ethics committee.

Clause 85 creates an offence of administering a medical research procedure to a person who does not have decision-making capacity in relation to that procedure unless the person has consented to the procedure via an instructional directive, or the person's medical treatment decision maker has consented, or if the procedure is authorised under Division 3 of this Part or otherwise by law.
Part 6—VCAT jurisdiction

Division 1—Applications in first instance

Clause 86 provides a requirement for the principal registrar of VCAT to give notice of an application in first instance under the Bill, the hearing of an application in first instance and of any order, direction or advisory opinion of VCAT to certain persons.

Clause 87 provides that VCAT, in an application under this Bill, may make any interim orders or temporary orders considered necessary.

Division 2—Rehearings

Clause 88 sets out which persons, and in what circumstances and regarding which matters those persons, may apply to VCAT for a rehearing of an application under the Bill. The clause allows the Public Advocate to apply for a rehearing without the leave of VCAT even if the Public Advocate was not a party in the first instance.

Clause 89 provides that VCAT must rehear a matter on application under clause 88, and sets out VCAT’s powers on a rehearing.

Clause 90 provides that, in addition to any other parties, each person who was a party to the hearing at first instance is a party to a rehearing. The clause also requires the principal registrar of VCAT to provide notice of certain matters to certain people.

Clause 91 has the effect that, unless VCAT makes an order staying the operation of an order to which an application for rehearing relates, an application for rehearing under this Part does not affect the operation of any order to which the application relates.

Clause 92 provides that the Victorian Civil and Administrative Tribunal Act 1998 applies to a rehearing under this Part as if it were a hearing under that Act, subject to any contrary provision in the Bill.

Part 7—General

Clause 93 provides that if a body corporate commits an offence against certain clauses of the Bill, an officer of the body corporate also commits an offence against the provision if the officer failed to exercise due diligence to prevent the commission of the offence by the body corporate. The clause provides guidance regarding
what matters a court may have regard to in determining whether an officer exercised due diligence. Without limiting any other defence available to the officer, the clause provides that the officer may rely on a defence that would be available to the body corporate, and in doing so, bears the same burden of proof that the body corporate would bear. The clause provides that an officer of a body corporate may commit an offence against certain clauses whether or not the body corporate has been prosecuted for, or found guilty of, an offence against the clause under which the officer is being prosecuted.

Clause 94 authorises a person's medical treatment decision maker or support person to access or collect health information about the person, if relevant to a medical treatment decision to be made. The clause also authorises corresponding disclosure of health information to and by the medical treatment decision maker or support person.

Clause 95 provides for recognition of an advance care directive made in another State or a Territory whether made before or after the commencement of this clause. In order to be recognised or partially recognised by operation of this clause, the advance care directive must comply with the requirements of the State or a Territory in which it was made and is only recognised to the extent the powers it gives could validly have been given by an advance care directive made under the Bill. If an advance care directive made in another State or a Territory is not recognised, or is partially not recognised, it can nevertheless be taken into consideration as an expression of the person's preferences and values.

Clause 96 provides for recognition of an appointment of a medical treatment decision maker or support person made in another State or a Territory, provided the appointment complies with the requirements of that State or a Territory, whether made before or after the commencement of this clause. The recognition applies to the extent that the powers of the instrument could validly have been given by an appointment under Part 3.

Clause 97 clarifies that despite clauses 95 and 96, a term of an instrument in the nature of an advance care directive or appointment of a medical treatment decision maker or support person that would be unlawful under the Bill is taken to be void and of no effect.
Clause 98 places on obligation on the operator of a health facility to take reasonable steps to ascertain whether any patient in the facility has an advance care directive or an appointed medical treatment decision maker or support person. If the patient has either or both of these, the health facility must take reasonable steps to ensure a copy is stored on the patient’s clinical file, including a copy of an amendment of the advance care directive.

Clause 99 requires an interpreter assisting a person in the preparation of a document under this Bill to certify that on the relevant document that the person appeared to understand the document.

Clause 100 provides the Governor in Council with the power to make regulations as required or permitted by the Bill or necessary to give effect to the Bill.

Part 8—Repeal and savings and transitional provisions

Division 1—Repeal

Clause 101 repeals the Medical Treatment Act 1988.

Division 2—Savings and transitional provisions

Clause 102 sets out the savings and transitional arrangements to apply following the repeal of the Medical Treatment Act 1988. The clause preserves a refusal of treatment certificate in force under that Act immediately before its repeal as in force until such time as it is revoked or otherwise ceases to have effect in accordance with that Act. The clause also provides that a relevant provision of the Medical Treatment Act 1988 is taken to continue in operation in relation to the refusal of treatment certificate despite the repeal of that Act.

The clause also provides that the appointment of an agent under an enduring power of attorney (medical treatment) under the Medical Treatment Act 1988 is taken on and after that Act's repeal to be an appointment of an appointed medical treatment decision maker.

Clause 103 provides that an attorney under an enduring power of attorney who continues to have the power to make medical treatment decisions for a person under the Powers of Attorney Act 2014 is taken to be the person’s appointed medical treatment decision maker, and may make decisions in accordance with
their appointment under that Act. The clause also provides that a guardian under an enduring power of guardianship who continues to have power to make medical decisions under the **Powers of Attorney Act 2014** is taken to be the person's appointed medical treatment decision maker, and may make decisions to the extent that the enduring power of guardianship provides.

Clause 104 provides that on and after the commencement of clause 77, the consent of a person responsible under the **Guardianship and Administration Act 1986** to the administration of a medical research procedure is taken to be the consent of the medical treatment decision maker under clause 77. Like provision is made in relation to authorisation to administer medical research procedures under clause 80(1).

Clause 105 provides the Governor in Council with the power to make regulations containing provisions of a transitional nature.

**Part 9—Amendment of Mental Health Act 2014**

**Division 1—Electroconvulsive treatment amendments**

Clause 106 inserts an additional defined term, an **other applicable person**, into Division 5 of Part 5 of the **Mental Health Act 2014**. An **other applicable person** is a person who is not a patient under the **Mental Health Act 2014** and is not a young person.

Clause 107 amends section 91 of the **Mental Health Act 2014** to provide for a course of electroconvulsive treatment being performed on an "other applicable person."

Clause 108 inserts a new provision in section 92 of the **Mental Health Act 2014** to provide that electroconvulsive treatment may be performed on an other applicable person if the Mental Health Tribunal (Tribunal) has granted an application for the performance of a course of electroconvulsive treatment.

Clause 109 amends section 94(3)(d) of the **Mental Health Act 2014** to correct a typographical error.

Clause 110 inserts a new section 94A in the **Mental Health Act 2014** that allows a psychiatrist to apply to the Tribunal to perform a course of electroconvulsive treatment on an other applicable person who does not have capacity to give informed consent,
if electroconvulsive treatment is the least restrictive way to treat the person. An application may only be made with the other applicable person's consent through an instructional directive or the consent of their medical treatment decision maker. There are also a number of factors the psychiatrist must have regard to in determining whether there is no less restrictive way for the person to be treated.

Clause 111 inserts reference to the new section 94A of the Mental Health Act 2014 in section 95, to provide that the Tribunal must list an application for the performance of a course of electroconvulsive treatment as soon as possible and within 5 days of receiving the application. It also provides that a psychiatrist may request an urgent hearing in certain circumstances.

Clause 112 inserts a new subsection into section 96 of the Mental Health Act 2014 to provide that the Tribunal may grant an application to perform a course of electroconvulsive treatment on an other applicable person or may refuse to grant the application. The clause further amends section 96 of the Mental Health Act 2014 to provide for matters the Tribunal must consider in determining whether there is no less restrictive way to treat the other applicable person.

Clause 113 amends section 97 of the Mental Health Act 2014 to provide that the Tribunal may grant an application for the performance of electroconvulsive treatment, and may specify the number of electroconvulsive treatments to be performed and the date by which they must be completed.

Clause 114 inserts a new subsection into section 98 of the Mental Health Act 2014 to provide that if at any time during a course of electroconvulsive treatment an other applicable person develops capacity and does not consent or the person who consented withdraws consent under section 96(2A)(a)(ii), electroconvulsive treatment must not be performed.

Clause 115 amends section 99 of the Mental Health Act 2014 to require the use of electroconvulsive treatment on an other applicable person at a designated mental health service to be reported to the chief psychiatrist.
Division 2—Other amendments

Clause 116 inserts a new definition of *medical treatment* into the *Mental Health Act 2014*. The definition provides that *medical treatment* has the same meaning as it has in the Bill, but does not include treatment for mental illness. This will ensure that *medical treatment* is defined consistently across different Acts, but as there are different requirements for treatment for mental illness under the *Mental Health Act 2014*, this must be excluded. Other defined terms from the Bill are also inserted.

Clause 117 repeals section 7 of the *Mental Health Act 2014*. A definition of *medical treatment* is inserted in section 3 of the *Mental Health Act 2014* that is consistent with the definition in the Bill.

Clause 118 amends section 69 of the *Mental Health Act 2014* to recognise that a person may also give informed consent to medical treatment in an instructional directive.

Clause 119 amends section 75(1) of the *Mental Health Act 2014* to replace a person appointed by the patient under section 5 of the Bill with a person appointed as a medical treatment decision maker under the Bill. Section 75(1)(d) is also repealed, as a person can no longer appoint an enduring guardian under the *Guardianship and Administration Act 1986*. An enduring guardian or enduring attorney with medical treatment decision-making power is recognised as an appointed medical treatment decision maker under the Bill. A note is also inserted under section 75 of the *Mental Health Act 2014*, noting that a health practitioner may provide medical treatment in an emergency without consent under clause 53 of the Bill.

Clause 120 amends section 76 of the *Mental Health Act 2014* to require an authorised psychiatrist to also consider a values directive and the views of a support person when they are consenting to medical treatment for a patient.

Clause 121 repeals section 77 of the *Mental Health Act 2014*. Clause 53 provides for medical treatment to be provided in emergency.

Clause 122 amends section 346(2)(p) of the *Mental Health Act 2014* to recognise medical treatment decision makers and support people under the Bill, and to omit an agent appointed under the *Medical Treatment Act 1988*, as that Act is being repealed.
Part 10—Consequential amendments and repeals

Division 1—Guardianship and Administration Act 1986

Clause 123 repeals certain definitions and inserts new definitions into the Guardianship and Administration Act 1986. The term special procedure has been changed to special medical procedure and the definition for the term has been amended to reflect that medical and dental treatment is now governed under the Bill.

Clause 124 amends the objects of the Guardianship and Administration Act 1986. The effect of the amendment is that it is no longer an object of the Guardianship and Administration Act 1986 to provide for consent to medical research procedures and medical and dental treatment on behalf of a person incapable of giving consent to those procedures or treatments. The decision-making process in relation to these matters in respect of persons who do not have decision-making capacity is provided for in the Bill.

Clause 125 amends the functions of the Public Advocate as set out in section 15 of the Guardianship and Administration Act 1986 to reflect the powers that are provided to the Public Advocate by any other Act including this Bill.

Clause 126 repeals section 16(1)(ja) of the Guardianship and Administration Act 1986 as this objective is no longer relevant given that VCAT’s power to issue guidelines for special medical procedures is to be repealed by clause 140.

Clause 127 amends the Guardianship and Administration Act 1986 to reflect that a plenary guardian may consent to any health care that is in the best interests of the person except as otherwise provided for in the Bill.

Clause 128 inserts a new section 28A into the Guardianship and Administration Act 1986. New section 28A provides that a guardian who makes a medical treatment decision for a person in accordance with the Bill is not required to consider the best interests of the person in accordance with section 28 of the Guardianship and Administration Act 1986. This is because, if the guardian is a medical treatment decision maker under the Bill by operation of clause 55, the guardian will be making the medical treatment decision in accordance with the process set out
at clause 61. The guardian must still have regard to section 28 of the Guardianship and Administration Act 1986 in making any decision under that Act.

Clause 129 substitutes the heading to Part 4A of the Guardianship and Administration Act 1986 so that the heading reflects the new operation of Part 4A of that Act.

Clause 130 amends sections 36(1)(b) and 36(2) of the Guardianship and Administration Act 1986 to reflect that Part 4A now only relates to special medical procedures.

Clause 131 repeals section 37 of the Guardianship and Administration Act 1986. The medical treatment decision maker hierarchy set out in clause 55 replaces this section and adds the additional requirement that the person have a close and continuing relationship to the person on behalf of whom the medical treatment decision is being made. The list of potential medical treatment decision makers is also more limited, to ensure that distant relatives will not be making medical treatment decisions.

Clause 132 amends section 38 of the Guardianship and Administration Act 1986 to remove "medical or dental treatment." Decisions in relation to medical treatment (which includes dental treatment) are to be made in accordance with the Bill. Decisions regarding the administration of a special medical procedure are to be made in accordance with the Guardianship and Administration Act 1986.

Clause 133 substitutes a new section 39 of the Guardianship and Administration Act 1986 to clarify that VCAT may consent to a special medical procedure under that section, subject to Division 4 of that Act, but not to medical or dental treatment. Decisions in relation to medical treatment (which includes dental treatment) are to be made in accordance with the Bill.

Clause 134 amends section 40 of the Guardianship and Administration Act 1986 to remove medical research procedures or any medical or dental treatment from the operation of section 40 of that Act. The decision-making process in relation to medical research procedures and medical treatment (which includes dental treatment) is provided for in the Bill.
Clause 135 substitutes a new section 41 of the **Guardianship and Administration Act 1986** to provide that a registered practitioner must not seek to carry out a special medical procedure under Part 4A if the patient has refused the procedure under an instructional directive given in accordance with the Bill.

Clause 136 amends the heading to section 42 of the **Guardianship and Administration Act 1986** to reflect that the offence relates to a special medical procedure and not to medical or dental treatment or a medical research procedure. Matters in relation to medical research procedures and medical treatment (which includes dental treatment) are provided for in the Bill.

Clause 137 repeals Division 3 of Part 4A of the **Guardianship and Administration Act 1986**. Division 1 of Part 4 of the Bill applies to medical treatment, medical research procedures and special medical procedures in an emergency.

Clause 138 substitutes the heading to Division 4 of Part 4A of the **Guardianship and Administration Act 1986** so that the heading more accurately reflects the operation of Division 4.

Clause 139 amends section 42B(1) of the **Guardianship and Administration Act 1986** to refer to a medical treatment decision maker under the Bill rather than a person responsible, as the person responsible concept has been repealed from the **Guardianship and Administration Act 1986**.

Clause 140 repeals section 42C of the **Guardianship and Administration Act 1986** as VCAT will no longer issue guidelines for special medical procedures.

Clause 141 amends section 42E of the **Guardianship and Administration Act 1986** to include the requirement that VCAT be satisfied that the patient has not given an instructional directive under the Bill in relation to the special medical procedure. The clause also requires VCAT to be satisfied that if the patient has given a values directive under the Bill, the carrying out of the special medical procedure would not be inconsistent with that directive.
Clause 142 amends section 42F of the *Guardianship and Administration Act 1986* to refer to a medical treatment decision maker under the Bill rather than a person responsible, as the person responsible concept has been repealed from the *Guardianship and Administration Act 1986*.

Clause 143 amends section 43G of the *Guardianship and Administration Act 1986* to provide that the provision is now subject to clause 53 in relation to emergency treatment. The clause also amends the provision to refer to a medical treatment decision maker under the Bill rather than a person responsible, as the person responsible concept has been repealed from the *Guardianship and Administration Act 1986*.

Clause 144 repeals Divisions 5 and 6 of Part 4A the *Guardianship and Administration Act 1986* as the decision-making process in relation to medical treatment, dental treatment and medical research procedures in respect of persons who do not have decision-making capacity is provided for in the Bill.

Clause 145 repeals the rehearing provisions in section 60A of the *Guardianship and Administration Act 1986* which relate to medical treatment, dental treatment and medical research procedures.

Clause 146 repeals subsection (2) in section 80 of the *Guardianship and Administration Act 1986* as this refers to a contravention of section 42Q which is repealed by clause 144.

Clause 147 repeals section 81A of the *Guardianship and Administration Act 1986* as it deals with sections that are repealed by clause 144.

Clause 148 amends section 82 of the *Guardianship and Administration Act 1986* to remove references to regulations relating to medical treatment, dental treatment and medical research procedures.

Clause 149 repeals the transitional provisions in section 88 of the *Guardianship and Administration Act 1986* dealing with medical research procedures as these are no longer governed by the Act.
**Division 2—Powers of Attorney Act 2014**

Clause 150 inserts new definitions of *medical treatment* and *medical research procedure* into the *Powers of Attorney Act 2014*. The definitions have the same meaning as in the Bill. The clause also amends the definition of *personal matter* to exclude any matter that relates to medical treatment or medical research procedures. This has the effect that medical treatment and medical research procedures will be removed from the scope of matters in relation to which an attorney appointed under an enduring power of attorney may make decisions.

Clause 151 amends section 85 of the *Powers of Attorney Act 2014* to clarify that an appointment under this section cannot be in relation to medical treatment matters or medical research procedures.

Clause 152 provides a saving provision in the *Powers of Attorney Act 2014* to ensure that an enduring power of attorney or a supportive attorney who is appointed before the commencement of the Bill will continue to apply in the same manner.

**Division 3—Victorian Civil and Administrative Tribunal Act 1998**

Clause 153 amends the heading to Part 14 of Schedule 1 to reflect the repeal and replacement of the *Medical Treatment Act 1988*.

Clause 154 provides for the constitution of VCAT in relation to a rehearing under Division 2 of Part 6 of the Bill.

Clause 155 amends clauses 47 to 50 of the *Victorian Civil and Administrative Tribunal 1998* so that these provisions refer to the Bill rather than the repealed *Medical Treatment Act 1988*.

**Division 4—Disability Act 2006**

Clause 156 amends section 39 of the *Disability Act 2006* to allow information to be disclosed to a medical treatment decision maker or a support person under the Bill.
Division 5—Other amendments

Clause 157 amends section 85 of the Health Records Act 2001 to provide that a medical treatment decision maker or a support person under the Bill can consent or make a request or exercise a right of access in relation to a person's health information.

Clause 158 amends section 28 of the Privacy and Data Protection Act 2014 to provide that a medical treatment decision maker or a support person under the Bill can consent or make a request or exercise a right of access in relation to a person's personal information.

Clause 159 amends section 90I of the Road Safety Act 1986 to provide that an authorised representative is to include a medical treatment decision maker under the Bill. The clause removes the references to a person appointed under the Medical Treatment Act 1988 or a person responsible as these concepts have been repealed.

Clause 160 amends section 6(2) of the Severe Substance Dependence Treatment Act 2010 to provide that the Act is to prevail over the Bill.

Clause 161 provides for the repeal of Parts 9 and 10 of the Bill on 12 March 2019.