

Alternative ECT consent pathway for adults who lack decision-making capacity

Chief Psychiatrist's Clinical Practice Advisory Notice
9 February 2018

Medical Treatment Planning and Decisions Act 2016

Changes made to the *Mental Health Act 2014* (MHA) by the *Medical Treatment Planning and Decisions Act 2016* (the MTPDA) on 12 March 2018 create a new, alternative pathway to consent to ECT for adults who lack decision making capacity and are not already compulsory patients under the MHA.

This notice provides advice to public and private hospitals about the implications of these changes for consent to electroconvulsive therapy (ECT). For advice about other aspects of the MTPDA, see *A guide to the Medical Treatment Planning and Decisions Act 2016: For health practitioners*.

The MTPDA, and the changes it allows, are part of a broader shift within the community towards empowering and supporting people to make their own treatment decisions. The new ECT provisions offer the opportunity in certain circumstances for a person to have a trusted individual give consent to ECT on their behalf and for a person in a private hospital to receive ECT in familiar surroundings.

Current ECT consent requirements

At present, if a person lacks capacity to consent to ECT, treatment may be administered on a compulsory basis following approval by the Mental Health Tribunal. Since compulsory treatments cannot be administered in a private hospital, the person must be transferred to a public mental health service.

New legal provisions

The new provisions amend the consent process for the administration of ECT in a public or private setting to an adult who lacks the capacity to consent. The provisions permit ECT to be administered, with the approval of the Mental Health Tribunal, on a *voluntary* basis under the following circumstances:

- the psychiatrist is satisfied that there is no less restrictive way for the person to be treated *and*,
- the person has an instructional directive (within the meaning of the MTPDA) giving informed consent to ECT *or*,
- the person's medical treatment decision maker (appointed or otherwise, within the meaning of the MTPDA) gives informed consent in writing to ECT.

Instructional directives

An instructional directive is a type of advance care directive made under the MTPDA consenting to or refusing specific medical treatment, including ECT. If a person does not have capacity to make a medical treatment decision and they have a relevant instructional directive consenting to or refusing that treatment, the directive is determinative and there is no need to defer to a medical treatment decision maker.

The other type of advance care directive is known as a 'values directive.' A values directive is not determinative.

An instructional directive need not be in a prescribed form, but must meet a range of formal requirements to be considered valid. These include that it must be witnessed by two adults, one of whom must be a medical practitioner. The witnesses must certify that the person:

- appeared to have decision-making capacity in relation to each statement in the directive
- appeared to freely and voluntarily sign the document
- signed the document in the presence of the two witnesses
- appeared to understand the effect of each statement in the directive.

An instructional directive differs from an advance statement which sets out a person's preferences in relation to treatment in the event of a compulsory admission. An advance statement cannot be taken as providing consent to non-compulsory treatment.

Medical treatment decision maker

A medical treatment decision maker is a person who has power under the MTPDA to make medical treatment decisions for a person where they lack capacity to do so themselves and have no relevant instructional directive. A decision by a medical treatment decision maker has the same effect as if the person had capacity and made the decision themselves.

A person can appoint one or more persons under the MTPDA to make medical treatment decisions. Again, there is no prescribed form for the appointment but it needs to meet a range of formal requirements to be considered valid. Appointees must accept their appointment on the document appointing them. The acceptance must include a statement that the appointee:

- understands the obligations of an appointed decision maker
- undertakes to act in accordance with any known preferences and values of the person making the appointment
- undertakes to promote the personal and social wellbeing of the person making the appointment, having regard to the person's individuality
- has read and understood any advance care directive (an instructional directive or values directive) that the person has given before, or at the same time as, their appointment.

Where the person appoints more than one medical treatment decision maker, they must list them in the order in which they wish them to act. The first appointee who is available and willing will be the decision maker.

Once a medical treatment decision maker is required to make a decision, they may access the necessary medical records to make a properly informed decision.

Where the person has not appointed a decision maker, the medical treatment decision maker will be the first available and willing person from this list:

- a guardian appointed by VCAT
- the first of the following with a close and continuing relationship with the person: the spouse or domestic partner; the primary carer; the oldest adult child; the oldest parent, or the oldest adult sibling.

Refusal of ECT

If the person has an instructional directive refusing ECT, or the medical treatment decision maker refuses ECT on the person's behalf, the psychiatrist cannot proceed with the alternative consent pathway. If all conditions are met, the psychiatrist may apply to the Mental Health Tribunal for authority to administer ECT on a compulsory basis. For this to happen, patients in private hospitals must be transferred to a public facility.

The psychiatrist's responsibilities

A psychiatrist proposing to administer ECT on this alternative, voluntary basis must apply in writing to the Tribunal for approval to administer ECT. Prior to applying to the Tribunal for approval, the psychiatrist must be satisfied that:

- there is no less restrictive way for the person to be treated, bearing in mind:
 - the views and preferences of the person in relation to ECT and any beneficial alternative treatments that are reasonably available and the reasons for those views and preferences, including any recovery outcomes the person would like to achieve
 - any values directive of the person (a written statement of views, preferences and values)
 - the views of the person's medical treatment decision maker or support person (if any)
 - the views of the person's carer, if the decision to perform ECT will directly affect the carer and the care relationship
 - the likely consequences for the person if the ECT is not performed
 - any second psychiatric opinion that has been obtained by the person and given to the psychiatrist.
- the person lacks the capacity to give informed consent to ECT as judged by an inability to understand the information they are given about ECT; to remember this information; to use or weigh this information, and to communicate their decision by speech, gestures or any other means. In making this judgement, the psychiatrist must provide information about ECT in a way and at a time when the person is best able to understand, remember and weigh it.
- either:
 - the person has an instructional directive consenting to ECT, or
 - the person's medical treatment decision maker has given informed consent to ECT.

The medical treatment decision maker provides informed consent if they have been given sufficient information about ECT including:

- the purpose of ECT
- what kind of treatment will be used
- how long the course might take
- the advantages and disadvantages of ECT
- the discomfort, risks and common or expected side effects of ECT
- the advantages and disadvantages of other reasonably available treatments.

Mental Health Tribunal

The Tribunal must grant the psychiatrist's application for approval to administer ECT if it is satisfied that:

- the person does not have decision-making capacity to give informed consent to ECT
- there is no less restrictive way for the person to be treated and
- either the person has given informed consent in an instructional directive or the person's medical treatment decision maker (appointed or otherwise) has given informed consent in writing.

Form MHA 132A (Application for ECT with voluntary consent, either by instructional directive or medical treatment decision maker) must be submitted to the Tribunal who will schedule a hearing at the treating facility, including private hospitals, within five working days of receiving the application.

The psychiatrist may request an urgent hearing to save the life of the person; prevent serious damage to the person's health, or prevent the person from suffering or continuing to suffer significant pain or distress. Urgent hearings will usually be convened within one day. Urgent applications limit the opportunity of decision makers to seek further advice or support and should be kept to a minimum.

The Tribunal division will be constituted by a legal member, psychiatrist member and community member. The psychiatrist making the application is expected to attend the hearing which typically takes one hour. The subject of the application and the medical treatment decision maker are invited to attend.

The Tribunal will refuse the application if it is not satisfied that any of the above criteria have been met. If the Tribunal is satisfied, it will specify a maximum number and duration of treatments.

Treatment progress

Even if the Tribunal approves the treatment, ECT cannot be performed if, at any time before or during the course of ECT, the person develops capacity to give informed consent and does not consent to treatment. The person's medical treatment decision maker may also withdraw consent at any time.

As before, if all conditions are met, the psychiatrist may apply to the Mental Health Tribunal for authority to administer ECT on a compulsory basis.

People under the age of 18 years

There is no change to the provisions concerning ECT to young people under the age of 18 years. Legislative provisions are described in the *Chief Psychiatrist's guideline: Electroconvulsive treatment*.

More information

A guide to the Medical and Treatment Planning and Decisions Act 2016: For health practitioners (Department of Health and Human Services, September 2017). Available at <http://health.vic.gov.au/acp/>.

Chief Psychiatrist's guideline: Electroconvulsive treatment (Department of Health and Human Services, December 2015). Available at <http://health.vic.gov.au/chiefpsychiatrist/>.

Medical and Treatment Planning and Decisions Act 2016 at <http://www.legislation.vic.gov.au>.