SUBMISSIONS TO - Electro Convulsive Therapy
Review Committee

FROM - Canadian Civil Liberties Association
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On the basis of our society's commitment to human dignity, there must be a very strong presumption that free and informed consent is a prerequisite to any encroachments on the human person. Indeed, so strong is this presumption that it enables us to refuse medical treatment even though such refusal is deemed to be contrary to our own best interests.

Electro convulsive therapy is a particularly intrusive form of encroachment on the person. In preparation for it, the patient must be subdued. During the course of the treatment, the patient's body is subjected to currents of electricity causing convulsions. In the aftermath of the treatment, patients have been known to experience short term as well as long term losses of memory. Obviously, therefore, the encroachments accompanying ECT are often quite unpleasant. And, to the extent that such treatment is compulsory, it could be frightening as well.

In consequence, the Canadian Civil Liberties Association objects to the breadth of the powers of compulsory treatment in the current Mental Health Act. Treatment may be imposed upon involuntarily committed patients on the authority of a regional review board. The Act lacks both a definition of treatment and a limitation on its duration. While psycho surgery cannot be the subject of compulsory treatment, ECT apparently is not so encumbered. What is of special significance is that this intrusive and unpleasant encroachment can be imposed upon competent as well as incompetent persons.

The Canadian Civil Liberties Association is unable to conceive of a justification for permitting this level of compulsion in the case of competent persons. Competent patients with physical disorders are not required, for example, to take medicine for pneumonia, radiation for cancer, diet for strokes, or even rest for heart disease. No matter how much medical experts or even the patients themselves may agree that such treatments would be helpful, compulsion cannot be exercised. We cannot appreciate, therefore, why competent patients with <u>mental</u> disorders should be treated any differently, even if they have been involuntarily committed.

The purpose of involuntary civil commitment is to provide protection against serious bodily injury. The question of competence to accept or reject treatment is nowhere an issue in the commitment process. Thus, it is possible for competent persons to be involuntarily committed. But, once the requisite protection against serious injury has been secured, the purpose of the commitment will have been served. Apart from certain emergencies involving imminent peril to life or limb, compulsory treatment performs functions beyond those for which committal was designed. Committal aims at preventing injury in the short run; treatment aims at producing a cure in the longer run. It's one thing to invade a person's autonomy to avert an imminent peril. It's another thing entirely to do so in order to produce what others believe is in that person's long run interests. Accordingly, we propose that the Act should be amended so as to remove the power to impose ECT on competent patients.

The only arguable justification for compulsory treatment is the case of the incompetent patient. In this area too, the Act is unacceptably defective. Virtually any physician is empowered to determine this issue for the purpose of estate management. While the Act does not explicitly address how competence is to be determined for the purpose of consent to treatment, it appears that in practice hospital staff regularly make such judgments. In any event, the Act provides neither a right to a hearing nor a right of appeal where hospital assessments of competence to consent are concerned. Certain next of kin are empowered to consent to treatment on behalf of those who are deemed incompetent. If no next of kin can be found or if they refuse to provide the requisite consent, the attending physician and relevant hospital personnel may take the matter to the board of review.

These arrangements cannot fulfil the "due process" requirements of our legal system. Since physicians and their colleagues are concerned primarily with treating what they consider to be disease, they are likely to lack the requisite appearance of impartiality. While their desire to cure disease is certainly laudable, it renders them susceptible to the perception that they will find incompetence where a patient refuses medical advice. Similarly, where a patient seems prepared to accept medical advice, the health care providers will be believed more ready to judge the patient competent, free, and informed.

To whatever extent such intrusive treatment as ECT continues to be given, the procedures for authorizing it should be changed. It should require the approval of a tribunal independent of both the health care providers who wish to treat and the patients whom they wish to treat. In addition to the existing statutory criteria, it should also require a finding by the tribunal that such patients are incompetent or, if competent, are prepared to provide a free and informed consent. For these purposes, the tribunal might be a court, the review board, or some other independent adjudicator. Where such intrusive treatment is involved, next of kin should be divested of the power to consent on the patient's behalf. Only the independent tribunal should be empowered to authorize the treatment at issue.

Moreover, the treatment to be imposed on anyone found incompetent should be limited as much as possible to what is reasonably necessary to restore competence. The goal of the exercise should be to enable the patients to decide for themselves what encroachments they wish to sustain. Since incompetence is what made compulsion permissible, the promotion of competence, wherever possible, should be its articulated purpose.

In summary, the Canadian Civil Liberties Association makes the following recommendations for amending the Mental Health Act:

1. To whatever extent ECT remains permissible, it should require the approval of a tribunal independent of the health care providers who wish to treat and the patient whom they wish to treat.

2. In addition to the current statutory criteria, permission to administer such treatment should require that the tribunal make the following findings:

   (a) the patient is competent and provides a free and informed consent or
   (b) the patient is not competent.

3. Where incompetence is found, the treatment to be imposed should be limited, as far as possible, to what is reasonably necessary to restore competence.