



Statement of Reasons

This is an edited version of the statement of reasons issued pursuant to section 756 of the *Mental Health Act 2016*. The patient and persons attending the hearing have been de-identified and, in some cases, may be allocated pseudonyms for privacy reasons. Other details that may lead to the identification of the patient may have also been modified or omitted. The modification or omission of these details does not affect its decision or its reasons for the decision.

Matter:	Application to Approve Electroconvulsive Therapy
Attendees	
Patient:	Did Not Attend
Patient's Legal Representative:	Attended
Psychiatrist:	Attended
Decision	
Date of decision:	2020
Decision:	The Application to perform Electroconvulsive Therapy is REFUSED.

The patient is a woman with a diagnosis of treatment resistant schizophrenia with catatonic features. Secondary to that diagnosis, she has a severe cognitive impairment.

The patient has been provided with '24 hour' care for most of her life. She enjoyed activities such as walking, swimming, singing and music when she was younger. She has been successfully treated with clozapine for the last 15 years. She remained stable until earlier this year when she experienced a decline in her mental state which required a transfer to nursing home care.

The patient has been subject to a treatment authority since earlier this year. Her treating team apply for approval to perform electroconvulsive therapy (ECT). The basis for that application is made out in the clinical report. Three treating psychiatrists are listed on the face of the application as being responsible for the patient's treatment. Only one of those psychiatrists attended the hearing.

By way of second opinion, a page of handwritten notes was provided. They are difficult to read, but appear to be signed. The psychiatrist specified who he thought that the author of the second opinion might have been, though he did not have a copy of the notes in his possession.

The application includes an assessment of the patient's mental state. It noted that the patient was being fed by a naso-gastric tube. The patient did not speak but communicated in gesture and noise. Her insight and judgement were assessed as chronically impaired in the setting of severe communication difficulties and cognitive deficits.

Statutory Framework and Issues to be determined by the Tribunal

Set out in Appendix A to these Reasons is a summary of the principal provisions of the *Mental Health Act 2016 (Act)* that are relevant to the Tribunal's consideration of an application to perform ECT. Further reference will be made to these under "Application of evidence before the Tribunal to relevant provisions".

The issue for determination at the review was whether the Tribunal should approve the application to perform ECT.

Application of evidence before Tribunal to relevant provisions

Under section 509(3), the Tribunal may give approval to perform ECT only if the Tribunal is satisfied:

- (a) the performance of the therapy on the person is in the person's best interests;
- (b) evidence supports the effectiveness of the therapy for the person's particular mental illness;
- (c) if the therapy has previously been performed on the person – of the effectiveness of the therapy for the person; and
- (d) if the person is a minor – evidence supports the effectiveness of the therapy for persons of the minor's age.

Section 509(2) states:

In deciding whether to give, or refuse to give, the approval, the Tribunal must have regard to-

- (a) if the application relates to an adult who is unable to give informed consent to the therapy - any views, wishes and preferences the adult has expressed about the therapy in an advance health directive; or
- (b) if the application relates to a minor:
 - (i) the views of the minor's parents; and
 - (ii) the views, wishes and preferences of the minor.

1. What were the views, wishes or preferences of the person (and/or their parent if they are a minor) expressed at the hearing?

The patient was not well enough to express her own views and wishes as to this application. Her legal representative appeared without instructions, acting in her client's best interests.

After hearing from the psychiatrist that the patient had developed septicemia, the patient's legal representative explored the team's plan as to the commencement of treatment. It became clear that the treating team were of the view that the patient was not well enough to receive ECT at the time of the hearing.

Consequently, the patient's legal representative's position was that the approval should not be given until her client was well enough to receive ECT. Notwithstanding the psychiatrist's assurance that ECT would obviously not commence until the patient was well enough to tolerate it, the patient's legal representative submitted that it was more appropriate for another application (emergency or otherwise) to be made once the patient was medically cleared for ECT.

2. Did the adult have an advance health directive expressing their views, wishes or preferences regarding ECT? If so, what were these and what weight did the Tribunal give to these in deciding the application to perform ECT?

The patient does not have an advance health directive.

3. What evidence supports the effectiveness of the therapy for the person's particular mental illness?

The application outlines that there is strong well-established evidence that ECT is an effective treatment for catatonia, treatment resistant schizophrenia as well as psychotic depression.

The psychiatrist shared such an opinion. He gave oral evidence that the use of ECT was well supported in literature to save the lives of persons experiencing the same illness as the patient.

There was no conflicting evidence on this criterion, nor any submission to the contrary by the patient's legal representative. The Tribunal accepted, on balance, that ECT was supported as an effective treatment for the patient's diagnosed illness and her particular symptomology, namely the catatonic features.

4. Has ECT previously been performed on the person? If so, what was the effectiveness of the therapy for the person?

This application was for the patient to essentially 'restart' ECT. She had commenced ECT earlier this year pursuant to an emergency approval. The Tribunal then approved 12 treatments over 120 days. The application records that this treatment had good effect and that the patient subsequently received 11 maintenance ECT treatments in the community.

Approximately one month following the expiry of the last ECT approval, the patient experienced a rapid deterioration of her mental state. That of course prompted the current application to effectively 're-start' ECT.

The Tribunal was satisfied, on balance, that the previous ECT received by the patient had been effective and of great benefit to her. Indeed, her response was sufficient to see her discharged from hospital.

5. Is the performance of ECT in the best interests of the person? Why or why not?

The Tribunal found that the performance of ECT is very likely to be in the patient's best interests, once she is medically fit to tolerate the treatment safely.

The evidence of the psychiatrist at the hearing was that his team planned to wait until the week after the hearing to assess whether the patient was well enough to be 'medically cleared' for ECT, or more precisely the associated anesthetic procedure.

When queried as to this, the psychiatrist was of course unable to predict an appropriate start date to the Tribunal's approval of ECT. Such an attempt could have indeed been dangerous. A delayed approval would risk denying the patient's appropriate ECT in circumstances where she had recovered faster than expected, or otherwise breach the objects of the relevant legislation in circumstances where her health did not improve.

The sole issue concerning the Tribunal's approval was the fact that the patient was not medically fit to tolerate the associated anesthetic procedure. The psychiatrist's evidence was that she would not receive ECT until she recovered sufficiently from septicemia.

The Tribunal invited submissions from both the psychiatrist and the patient's legal representative regarding whether it was more appropriate to approve ECT with a condition requiring medical clearance prior to commencement, or to refuse the application, albeit with the expectation that another application would be made the following week.

The psychiatrist explained that an emergency application could be made within the day, should the patient recover quickly. The patient's legal representative submitted that the Tribunal should refuse the current application, and that another application should be made (emergency or otherwise) once the patient is well enough. That is, once ECT becomes in the patient's best interests taking a global view of her treatment and care needs.

The test in section 509(3)(a) of the Act applies at the time the Tribunal provides approval. The legislation does not permit this Tribunal to circumvent the requirement in section 509(3)(a) with conditions that, once complied with, would then make the treatment in the patient's best interests.

On balance, the Tribunal decided that on the day of this hearing, ECT was not in the patient's best interests as she was not well enough to receive it.

Human Rights

The Tribunal considered the relevant human rights set out in the *Human Rights Act 2019*. Sections 17(c), 25, 31 and 37 were potentially engaged and limited by the Tribunal's decision. Taking into account the following, the Tribunal is satisfied that any limits imposed by its decision are reasonable and justified in accordance with section 13 of the *Human Rights Act*:

- one of the criteria of the relevant test under the Act was not met; and
- the human rights engaged have been considered along with the risk that is likely to eventuate if the patient was approved to receive the treatment at the time of the hearing.

Conclusions of the Tribunal

The Tribunal considered the patient's evidence that an emergency application could be made within a day, should the patient recover quickly and become medically fit to tolerate ECT.

The Tribunal also had regard to the patient's legal representative's submissions that the Tribunal should refuse the current application, and that another application should be made (emergency or otherwise) once the patient is well enough.

The Tribunal was of the view that the test in section 509(3)(a) of the Act was not met at the time of the hearing, and that it was not appropriate in the circumstances to impose conditions on the approval that, once complied with, would then make the treatment in the patient's best interests.

On balance, the Tribunal decided that on the day of this hearing, ECT was not in the patient's best interests as she was not well enough to receive it.

Therefore, the Tribunal has decided to refuse this application for approval.

Presiding Member

APPENDIX A

Statement of the law regarding applications to perform Electroconvulsive Therapy

The main objects of the *Mental Health Act 2016 (Act)* are set out in section 3(2) and must be achieved in the way outlined in sections 3(2) and 3(3).

The term **electroconvulsive therapy (ECT)** is defined in Schedule 3 to the Act (**Dictionary**) as meaning “*the application of electric current to specific areas of the head to produce a generalised seizure that is modified by general anaesthesia and the administration of a muscle relaxing agent for the treatment of a mental illness.*”

Section 235 provides that a person must not perform ECT on another person other than under the Act. Section 236(1) authorises a doctor to perform ECT on a patient at an authorised mental health service (**AMHS**) if:

- (a) *the patient is an adult and has given informed consent to the treatment; or*
- (b) *the patient is an adult, who is unable to give informed consent to the treatment, and the tribunal has approved under section 509 the performance of the therapy on the adult; or*
- (c) *the patient is a minor and the Tribunal has approved under section 509 the performance of the therapy on the minor.*

Section 233 sets out the requirements for informed consent and section 234 provides that before informed consent can be given, the doctor proposing to provide the treatment must give the person a full explanation. The contents of that explanation are detailed in section 234.

Section 237 permits a doctor to perform ECT on an involuntary patient subject to a treatment authority, forensic order or treatment support order at an AMHS in circumstances of emergency, that is, where a doctor and the senior medication administrator of the patient’s treating health service have certified in writing that performing ECT on the patient is necessary to save the patient’s life or to prevent the patient from suffering irreparable harm. It is also necessary for an application to perform ECT to have been made to the Tribunal at the time the emergency ECT is administered and that the application is undecided at that point in time.

Section 509(2) provides:

In deciding whether to give, or refuse to give, the approval, the tribunal must have regard to:

- (a) *if the application relates to an adult who is unable to give informed consent to the therapy - any views, wishes and preferences the adult has expressed about the therapy in an advance health directive; or*
- (b) *if the application relates to a minor:*
 - (i) *the views of the minor’s parents; and*
 - (ii) *the views, wishes and preferences of the minor.*

Under section 509(3), the Tribunal may give approval to perform ECT only if the Tribunal is satisfied:

- (a) *the performance of the therapy on the person is in the person’s best interests; and*
- (b) *evidence supports the effectiveness of the therapy for the person’s particular mental illness; and*
- (c) *if the therapy has previously been performed on the person – of the effectiveness of the therapy for the person; and*

- (d) *if the person is a minor – evidence supports the effectiveness of the therapy for persons of the minor's age.*

If the Tribunal approves the performance of ECT, the approval must state the number of treatments that may be performed in a stated period and the approval may be made subject to the conditions the Tribunal considers appropriate.