**ECT administered on grounds of necessity**

*In 2017, the National Preventive Mechanism (NPM) has especially examined the practice at mental health care institutions where ECT is administered without the patient’s consent. Administering ECT without consent is prohibited, but in some cases, the treatment is given on grounds of necessity. Findings were made during a number of visits in 2017 that highlight that patients are subject to a high risk of inhuman or degrading treatment.*

**Background**

Electroconvulsive therapy (ECT, also known as electroshock therapy) is a form of treatment whereby short, low-voltage electric shocks are administered to the patient’s brain. The treatment is administered 2–3 times a week (the total number of ECT treatments is usually between six and twelve), and it is administered under anaesthetic together with a muscle relaxant. Although the treatment is permitted in Norway, experts in the field disagree about the use of ECT and whether it can lead to permanent brain damage.[[1]](#footnote-1) Some patients have experienced serious side effects after ECT (such as memory loss), and a number of them have been awarded compensation from the Norwegian System of Patient Injury Compensation (NPE).[[2]](#footnote-2)

As ECT is considered to be a serious intervention, it may not be administered without the patient’s consent.[[3]](#footnote-3) The Norwegian authorities nonetheless allow ECT to be administered without consent on grounds of necessity in special situations.

In the preparatory works to the Mental Health Care Act of 1999, the Ministry stated that the principle of necessity can constitute grounds for administering ECT without the patient’s consent, if the patient’s life is at risk, or if there is a risk of serious harm to the patient's health.[[4]](#footnote-4) The Ministry made reference to the provision on the principle of necessity in the General Civil Penal Code (Section 47 of the General Civil Penal Code of 1902). Pursuant to Section 17 of the current General Civil Penal Code, an act that would otherwise constitute a criminal offence is lawful when it is done to save life, health, property or another interest from a danger that cannot be averted in any other reasonable manner, and the danger far exceeds the risk of harm from the action.

**Criticism on human rights grounds and the health authorities’ measures**

ECT administered on the basis of the principle of necessity provision in the General Civil Penal Code has incurred criticism from international human rights bodies. In its Concluding Observations to Norway in 2013, the UN Committee on Economic, Social and Cultural Rights advised Norway to stop administering ECT without consent.[[5]](#footnote-5) Following a country visit to Norway in 2015, the Council of Europe Commissioner for Human Rights questioned whether administering ECT on the basis of the legal principle of necessity was in keeping with human rights standards.[[6]](#footnote-6) The Commissioner also highlighted the importance of obtaining an accurate overview of the scope of ECT therapy, and making it publicly available.

In a letter to the Ministry of Health and Care Services of June 2016, the Directorate of Health questioned whether the principle of necessity is a sufficient legal basis, pointing out that repeated treatments are required for ECT to be effective.[[7]](#footnote-7) The directorate recommended that the use of ECT on grounds of necessity be considered further by the committee appointed by the government to conduct an overview of the regulation of coercion in Norwegian legislation (Tvangslovutvalget). The committee will submit its recommendations in September 2018.[[8]](#footnote-8)

The Norwegian Directorate of Health published national guidelines on the use of ECT in June 2017. It was emphasised that it is only relevant to consider administering ECT on grounds of necessity in situations where a patient with a serious mental disorder is in an acute situation, and there is an immediate and serious risk to the patient’s life, or a serious risk of harm to their health if they do not receive adequate health care.[[9]](#footnote-9) According to the directorate, ECT must be seen as the only satisfactory treatment option available to avert acute risk, and no other less invasive treatments are considered to be options, and the intervention must be in accordance with proportionality requirements. The directorate has also set out documentation requirements for each case in which ECT is administered without consent. Patients who believe that ECT was administered unlawfully on grounds of necessity, can submit a complaint to the County Governor pursuant to the Patient and User Rights Act Section 7-2.

In the Ombudsman’s opinion, the current application of the principle of necessity as an independent legal basis for intervention/competence base for administering ECT without the consent of the patient is problematic in relation to the Norwegian Constitution’s requirement that infringement of the authorities against the individual must be founded on the law.[[10]](#footnote-10) The legal authority requirement is stricter for very invasive measures.[[11]](#footnote-11)

**ECT administered on grounds of necessity entails a high risk of inhuman or degrading treatment**

Findings made during the NPM’s visits in 2017 have shown that ECT administered on grounds of necessity is a very invasive form of treatment. The Ombudsman has identified cases where mental health professionals have found that patients have suffered serious cognitive side effects following ECT, and where the patients cannot remember having had the treatment. One clear finding was that patients who had undergone ECT on grounds of necessity are also subject to other invasive coercive measures during their treatment, such as the use of a restraint bed for the administration of ECT. The NPM also found cases where the use of force had escalated following a course of ECT on grounds of necessity. The overall scope of the use of force in connection with the administration of ECT on grounds of necessity leads to a high risk of patients being subject to inhuman and degrading treatment.

**Problematic aspects of necessity assessments**

Problematic findings were made at several of the hospitals visited by the NPM, in relation to the documented assessments of whether grounds of necessity applied. In several cases, ECT had been administered on grounds of necessity although it was unclear whether and why the strict conditions that apply were met. The cases concerned patients with serious conditions, e.g. described as suffering from severe catatonia[[12]](#footnote-12) or experiencing serious side effects of neuroleptics. However, in a number of cases it was not made clear that there was an acute risk to the patient’s health that could not be averted by other means. In several cases, it was not documented whether lawful treatment measures had been attempted or considered first. Where ECT had been administered on grounds of necessity because of e.g. the serious side effects of medication or low nutritional intake, there was no explanation of why intravenous fluid and nutrition administration had not been considered sufficient to avert the risk to the patient’s life and health. In one case, an ECT treatment based on grounds of necessity was postponed because the patient had eaten and ECT must be administered on an empty stomach. In another case, the documentation stated that there was a high risk of the patient developing pneumonia, without any explanation of why ECT was considered a suitable measure for averting this risk.

The current practice of administering ECT on grounds of necessity without clear regulation in law also creates a risk of misunderstandings arising with respect to the legislation. The NPM found examples of health professionals who had initiated a course of ECT on the grounds of necessity asking the patient’s next of kin for consent to the treatment. Next of kin cannot consent to health care on behalf of a patient, including on grounds of necessity.

**The principle of necessity does not confer legal authority for a course of compulsory treatment**

 In most cases, ECT administered on grounds of necessity was repeated over several days or weeks. One patient underwent 12 ECT treatments over a period of a month. The apparent grounds for this was that there an ongoing acute risk throughout the period the treatment was administered. The information in the patient record indicated, however, that the patient’s condition was not acute during the whole period. In another case, a decision was made to administer a course of ECT therapy on grounds of necessity because the patient had recently interrupted ECT on grounds of necessity after four treatments, which resulted in a deterioration in the patient’s health.

Such findings mean that it is important to emphasise that grounds of necessity are never, under any circumstances, a sufficient legal basis for implementing a course of treatment that extends beyond what is strictly necessary to avert an acute risk to a patient’s health. The government decided not to adopt legal provisions for administering ECT by force when the Mental Health Care Act was adopted in 1999. The way in which the practice of administering ECT on grounds of necessity has developed can be seen as a circumvention of the legislators' clear intention.

**Grounds of necessity or consent?**

In many cases, the documentation did not make it clear whether each individual treatment was based on grounds of necessity or not. It was found, among other things, that patients who had initially undergone ECT on grounds of necessity, were subsequently deemed to have given their consent, on the basis that they had not actively refused the treatment. Examples were also found of voluntarily admitted patients undergoing ECT after being subject to a range of other coercive measures, without any documentation of the significance of this for the validity of the original consent.

Findings were also made at a number of hospitals that led to concerns that patients who had formally consented to ECT did not receive sufficient verbal and written information about the treatment, including about the expected effect and possible side effects.

**The patient’s right to file a complaint**

Poor documentation of the decision to initiate ECT on grounds of necessity makes it difficult for patients to exercise their right to complain. It is important that patients are given sufficient verbal and written information about the grounds for and the intervention itself. This is particularly important with respect to this type of intervention, because some patients have difficulty remembering the circumstances surrounding the treatment.

**Inadequate overview of the scope**

During the NPM’s visits this year, it also emerged that local hospitals have inadequate overviews of the scope of ECT administered on grounds of necessity. Prior to the visits, the Ombudsman requested documentation of all the cases, within a specific period, in which ECT was administered on grounds of necessity. Several hospitals had to manually go through patient records and/or resort to health professionals’ memory to obtain this information. During one of its visits, it emerged that the actual scope of ECT administered on grounds of necessity was higher than that initially stated. In light of the very invasive nature of ECT, the hospitals should ensure that they have an adequate overview of all cases in which ECT is administered on grounds of necessity.

The hospitals are not obliged to notify national health authorities if ECT is administered on grounds of necessity. There is therefore no national overview of the scope. The Ombudsman has pointed out that it is a cause for concern that the national health authorities are not informed when ECT is administered on grounds of necessity. This means that the health authorities are denied access to important information about a practice with far-reaching effects for the patients who undergo such treatment. An overview of the scope of this practice is a precondition for any critical review thereof. The Ombudsman has raised this issue in its dialogue with the national health authorities, most recently at a meeting with the Ministry of Health and Care Services in October 2017.

1. Aslak Syse, Gyldendal Rettsdata annotated version of the Mental Health Care Act, Section 4-4, last revised on 5 November 2016. [↑](#footnote-ref-1)
2. See overview: https://www.npe.no/nn/pasientsikkerhet-og-statistikk/Temaartiklerogfaktaark/Psykisk-helsevern. [↑](#footnote-ref-2)
3. The Patient and User Rights Act Section 4-1 and the Mental Health Care Act Section 4-4 second paragraph. [↑](#footnote-ref-3)
4. Proposition No 11 (1998–1999) to the Odelsting page 108–109. [↑](#footnote-ref-4)
5. UN Committee on Economic, Social and Cultural Rights, Concluding Observations – Norway, 13 December 2013, E/C.12/NOR/CO/5. [↑](#footnote-ref-5)
6. Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, following his visit to Norway, 19 to 23 January 2015, CommDH (2015) 9. [↑](#footnote-ref-6)
7. The Directorate of Health, Concerning use of ECT in grounds of necessity, letter of 4 July 2017 to the Ministry of Health and Care Services. [↑](#footnote-ref-7)
8. On 17 June 2016, the Government appointed a legislative committee to conduct an overall review of the regulation of coercion in the health and care services sector. The committee is chaired by professor Bjørn Henning Østenstad. [↑](#footnote-ref-8)
9. The Directorate of Health (June 2017): National guidelines for the use of electroconvulsive therapy (ECT), page 26–28. [↑](#footnote-ref-9)
10. Article 113 of the Norwegian Constitution. [↑](#footnote-ref-10)
11. See, inter alia, Norwegian Supreme Court Reports Rt. 1995 p. 530 and Rt. 2001 p. 382. [↑](#footnote-ref-11)
12. Catatonia is a state of motor immobility, in which people maintain rigid and unnatural poses, often for hours at a time. Some of them can seem completely withdrawn and communicate very little or not at all. This condition can lead to insufficient fluid and nutrition intake (Malt, Andreassen, Melle and Årsland, Lærebok i psykiatri 2012, Gyldendal Norsk Forlag AS). [↑](#footnote-ref-12)