



Principles Underlying Mental Health Legislation

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A position paper developed by the Canadian Psychiatric Association's Standing Committee on Professional Standards and Practice and approved by the Canadian Psychiatric Association's Board of Directors in June 2010.

Introduction

According to the World Health Organization (WHO) the fundamental aim of mental health legislation is "to protect, promote and improve the lives and mental well-being of citizens."^{1, p 1} Mental health legislation must balance the interests of a person with mental illness with the interests of society. However, mental health legislation must also balance conflicting interests of a person who suffers from mental illness. Every Canadian citizen has the right to liberty, autonomy, and procedural fairness; however, citizens, including those who suffer from a mental illness, also have the right to be protected from harm. Moreover, when health care is publicly funded, citizens have a right to equal access to that health care. Lack of resources sometimes limits access to both physical and mental health services. However, for some people with mental illness, the effects

of that illness, particularly impaired appreciation of the need for treatment, is an additional major barrier to accessing health care. An essential function of mental health legislation is to ensure that these people receive necessary treatment when specific criteria are met.

In Canada, mental health legislation typically includes statutes that oversee involuntary hospitalization and, in many jurisdictions, community treatment orders.² In some Canadian jurisdictions, consent and capacity provisions are also considered under the rubric of mental health legislation, whereas other jurisdictions have consent and capacity legislation that is not specific to mental illness. Whether consent and capacity legislation is separate from, or integrated with, mental health legislation, it is critical to the functioning of mental health legislation.

In some international jurisdictions, mental health legislation outlines standards for mental health services.

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This type of service legislation can play an important role in improving access to mental health care. For example, service legislation may be designed to ensure that underserved areas or specific populations receive the necessary level of resources. While the Canadian Psychiatric Association (CPA) recognizes the potential benefits of this type of service legislation, it is an approach that has not been adopted in most Canadian jurisdictions and will not be considered in this paper. It is important to note that service legislation does not obviate the need for legislation authorizing involuntary hospitalization and treatment.

The introduction of mandatory outpatient treatment—often referred to as community treatment orders or, in the United States, as outpatient committal—has stimulated considerable academic and public debate. As noted elsewhere, the CPA views mandatory outpatient treatment as a valuable tool to ensure that some people, with severe mental illness who lack insight, receive a comprehensive plan of treatment while living in the community.³

Legislation is not static and as it evolves it must take into account advances in medical science, the availability of effective treatments, and changes in the service system.

The CPA recognizes that different jurisdictions will adopt different legislative models. There are no perfect solutions, and attempts to balance conflicting interests inevitably lead to compromises. However, mental health legislation should adhere to numerous basic principles. In this paper, the CPA outlines 10 important principles that should guide the development of mental health legislation.

The CPA is aware that there are other controversial issues that are unresolved, and comments on 2 of these issues at the end of this paper.

Principles

1. *Reciprocity*

Involuntary hospitalization results in a loss of liberty for a citizen who, in most instances, has not committed a crime. This restriction of liberty should result in benefits for the person. The benefits most frequently provided to people who are hospitalized against their wishes are protection from various types of harm and treatment of their mental illness.

When a person is involuntarily hospitalized, the treatment that person receives should be paid for by the state and should be consistent with recognized best clinical practices.

2. *Least Restrictive and Least Intrusive*

Mental health legislation should ensure that interventions limiting people's liberty and autonomy are the least restrictive and intrusive that will meet the primary goals of the legislation. This principle is sometimes articulated as the "least restrictive alternative."⁴ However, it is important to add a rider indicating that the intervention is the "least restrictive alternative that is appropriate." It is often possible to identify approaches that are less restrictive but are unsuitable for a person who requires treatment and ongoing supervision.

3. *Appropriate Procedural Safeguards*

Involuntary hospitalization results in the loss of liberty for a vulnerable group of citizens. Similarly, citizens who are found to be incapable of making treatment decisions lose autonomy. These citizens must be provided with appropriate procedural safeguards. These procedural safeguards must be easily accessed and available in a timely fashion to the person or, when appropriate, to the person's family or substitute decision maker.

Procedural safeguards should generally include, but not be limited to, provision of rights information, the right to retain counsel, the right to an independent review of committal, or a finding of incapacity, and appropriate review by the courts. Safeguards might also include such things as a requirement to provide a second opinion on a plan of treatment, if requested.

4. *Right to Treatment*

All citizens have the right to access publicly funded treatment. This right is no less compelling for people with psychiatric illness than it is for those with medical illness. Access to treatment must not be denied to a defined group in society. Thus access to psychiatric treatment should not be denied to a person simply because that person does not have the capacity to recognize his or her illness. Capacity may be impaired by cognitive deficits, for example, in dementia or by deficits in the ability to appreciate the likely consequences of treatment or lack of treatment, as can happen in psychotic illness.

While the CPA recognizes that health care resources are not limitless, there should be special considerations for people who are hospitalized involuntarily or who are required to follow a plan of treatment in the community. Society restricts the liberty of these people and, in some cases, compels them to take specific treatments. In these circumstances, treatment should not be constrained by limited resources, and the best available medical and nonmedical treatments should be made available.

5. Timely Treatment

The right to treatment is often meaningless if the treatment is not provided in a timely fashion. Delayed access to medical treatment increases the risk of morbidity and mortality. The same is true for psychiatric treatment. As already noted, legal review of involuntary hospitalization and findings of incapacity is an important safeguard. However, this review must be available in a manner that does not unnecessarily prolong a person's involuntary detention in hospital or unnecessarily delay the initiation of psychiatric treatment when it is appropriate.

In the 1970s and 1980s, many North American jurisdictions introduced legislation that required that a person must pose a risk of physical harm to themselves or others before the person could be involuntarily hospitalized.⁵ This restrictive approach prevented many people with serious illness, who were not dangerous, from receiving beneficial treatment in hospital. The failure to provide treatment in turn resulted in unnecessary homelessness, criminalization, and deaths in situations where these people continued to deteriorate to a point where they were suicidal or unable to provide the basics for life or, in a smaller number of cases, where they acted violently toward others. Many jurisdictions subsequently amended their legislation to allow involuntary hospitalization to prevent serious harm or mental or physical deterioration. This approach is consistent with research that has demonstrated that delay in initiating treatment for the first episode of psychotic illnesses is associated with an impairment of the long-term prognosis of those illnesses.^{6,7}

6. Consistent With Scientific Evidence

The development of effective antipsychotics, antidepressants, and mood stabilizing medications has greatly improved the treatment of the major psychiatric illnesses. Rapid progress in the neurosciences holds the potential for further major advances in the treatment of mental illness. However, some people with mental illness do not show clinical improvement on the currently available medications or develop side effects that limit the use of these treatments. A realistic appraisal of the effectiveness of available psychiatric treatments is important when developing mental health legislation.

Aspects of mental health legislation itself should also be studied to determine their effect on various clinical and liberty outcomes, and this information should be used to guide the development of legislation.

7. Compatible With Professional Standards

There should be no dissonance between mental health legislation and professional standards of care. Psychiatrists should be able to practice as ethical physicians. Government should consult with professional bodies

when drafting mental health legislation to ensure that mental health professionals can follow the standards outlined by their licensing authorities and provincial and national associations. Psychiatrists have important responsibilities under mental health legislation and should be consulted when amendments to legislation are being considered.

8. Compliance With the Charter of Rights and Freedoms

Mental health legislation must incorporate the rights laid out in the Charter of Rights and Freedoms.⁸ For example, the Charter, s. 7, states "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Importantly, courts have found that involuntary admission does not breach this right. This is because the deprivation of liberty is made in accordance with the principles of fundamental justice.

9. Privacy of Personal Health Information

The right to privacy is a fundamental value in all democratic societies. Apart from exceptional circumstances, people receiving health care have a right to confidentiality of their health information. This information should not be disclosed to third parties without the patient's consent. People receiving treatment for mental illness, including involuntary hospitalized patients have the same right. However, because mental illness can sometimes impair the capacity to make decisions about the release of personal health information, a mechanism must be in place to allow this capacity to be assessed and, where necessary, to transfer responsibility to consent to the release of records to others.

A person's right to privacy is not absolute and there are situations in which confidentiality may be justifiably breached. These include situations when there is a life-threatening emergency or where failure to disclose would likely result in harm to the patient or others. In some jurisdictions, the circumstances under which a person's health information can be disclosed are defined in law.

10. Involvement of Patients in Decision Making

People with mental illness should take an active part in the development and implementation of their treatment plan. While mental illness can impair the ability of a person to make a treatment decision, this does not mean that an incapable person should be totally excluded from development of his or her treatment. The incapable person's views on treatment should be sought and the person should be informed of all treatment decisions in an effort to involve the person in the treatment to the extent that this is possible. Where appropriate, people

close to the patient, such as family members who may be involved in carrying out the plan or have valuable information, should also be included in the development of the plan.

Other Important Legislation Issues

Purpose of Civil Commitment

Is the purpose of civil commitment to limit harm through detention or to ensure that people receive treatment? This is probably the most contentious question relating to mental health legislation. The opposing principles can be stated as follows:

No capable person should receive treatment over his or her objections even when involuntarily hospitalized.

or:

When the state takes away a person's freedom because of the effects of a mental illness, the state assumes a responsibility to provide the treatment necessary to ameliorate the effects of that illness and thereby provide the person a realistic prospect of regaining freedom.

The issues underlying the question are expanded in a CPA discussion paper.⁹ The CPA notes that democratic jurisdictions have adopted each of these approaches and that it does not seem possible to privilege one approach over the other.

However, if a jurisdiction adopts a model permitting treatment refusal by an involuntarily hospitalized but capable patient, it is essential that the legislation is written in a manner that will ensure that the person is truly capable of deciding to forgo treatment that is usually required to regain freedom. Research has shown that without standard psychiatric treatment, most involuntarily hospitalized patients will be detained for a prolonged or indefinite period.^{10,11}

Advance Directives and Involuntary Hospitalization

Some jurisdictions accept an involuntarily detained patient's capable wish to refuse treatment but refuse to accept as binding an incompetent patient's previously executed advance directive to refuse treatment.

Advance directives differ from contemporaneous treatment decisions in several important ways. First, the person making an advance directive often makes decisions about future treatment without knowledge of pertinent facts and thus these decisions may not be fully informed.

Second, any doubt about a person's contemporaneous capacity can be resolved by careful re-examination, including assessment by review boards or courts. In contrast, it can be very difficult to retrospectively determine a person's capacity at the time the person executed an advance directive.

Finally, unlike contemporaneous decisions, which can be changed at any time, once a person becomes incapable he or she cannot change their advance directive.

In some jurisdictions a person can make an advance directive not to take psychiatric treatment, even if he or she is involuntarily hospitalized, but that person cannot make an advance directive not to be hospitalized. Thus if the person loses capacity to make treatment decisions and is hospitalized involuntarily he or she cannot change their directive to accept treatment. Without treatment this person may face life-long detention in hospital.

This risk of indeterminate detention can be lessened in several ways. One is to ensure that the person is actually capable of making the treatment decision and understands the implications of the advance directive at the time he or she executes the directive. To achieve this some jurisdictions require that a lawyer or health professional attest that, at the time the advance directive is executed, the person is capable and understands the implications of the directive.

Alternative approaches, used in Canadian jurisdictions, are not to accept advance directives for involuntary patients or, alternatively, not to accept these directives as binding if they endanger the patient's or another person's health or safety.

Summary

People who have a serious mental illness that results in a significant risk of harm and an impaired appreciation of the need for treatment must have access to health care facilitated through mental health legislation. The vulnerability of these people also requires stringent protections of their civil rights. The CPA suggests that the 10 principles outlined above should guide the development of mental health legislation.

Acknowledgements

This paper arose out of discussions at the CPA's Standing Committee on Professional Standards and Practice. The Committee appreciates the assistance from the many psychiatrists who contributed to the development of the paper. Particular thanks go to Dr Simon Brooks, Dr Robert Buckingham, Dr Deborah Elliot, Dr Philippa Moss, Dr Grainne Neilson, Dr Werner Pancratz, Dr Douglas Urness, and Dr Patrick J White.

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