



Mental Health Alliance

Nomination of carer as nearest relative

(1) The 1983 Act is amended as follows.

(2) After section 26(4) insert—

(4A) Where a person has made an advance nomination with regard to the choice of a relative or other person to be his nearest relative, his nearest relative shall, subject to the power of the court under section 29 to appoint an acting nearest relative be determined by giving preference to that choice.

(4B) 'Advance nomination' means a nomination made by a person ('P'), after he has reached 18 and when he has capacity to do so and in contemplation that he shall become subject to any act or decision exercisable under the provisions of this Act that his choice of nearest relative shall take precedence over the provisions of subsection (3).

(4C) For the purposes of subsection (4B) P's nomination must be his carer as defined by section 1(1)(a) of the Carer's and Disabled Children Act 2000

(4D) For the purposes of section (4B) nomination cannot be made or withdrawn if P is subject to an order under this Act

(4E) An advance nomination is not valid if P—

(a) has withdrawn the decision at a time when he had capacity to do so, or

(b) has done anything else clearly inconsistent with the advance nomination remaining his fixed decision.

(4F) An advance nomination is valid only if—

(a) it is in writing,

(b) it is signed by P or by another person in P's presence and by P's direction,

(c) the signature is made or acknowledged by P in the presence of a witness, and

(d) the witness signs it, or acknowledges his signature, in P's presence.

(4G) The court may make a declaration as to whether an advance nomination—

(a) exists; and

(b) is valid;

Purpose of amendment

The amendment would enable a person with capacity to nominate their carer to be their nearest relative. They would not be able to do this if they were sectioned.

To do this they would need to fill out a legal form (similar to an Enduring Power of Attorney) which would need to be signed and witnessed by a mental health professional.

Briefing

Under the Mental Health Act 1983 the nearest relative is one of the major safeguards for the patient's rights – for example he/she can stop a patient from being sectioned and discharge a patient from section against the views of the medical team. The nearest relative is identified by reference to a list of 'relatives' in the 1983 Act, ranked in order of priority. The patient therefore has no choice over who is selected.

We believe that the patient should be able to choose their nearest relative – but that this choice should be restricted to their carer.

Why choice of nearest relative is important

1. Representing the patient's best interests

A 'nominated nearest relative' who is also their carer is more likely to be someone in whom the patient has trust and confidence - and someone who knows the patient and can safeguard his/her best interests.

Under the 1983 Act the nearest relative can easily be someone the patient hardly knows at all – for example a nephew/niece that the patient speaks to once a year.

2. Patients left without a NR

It would help to avoid the common situation where patients are left without a nearest relative – for example if their nearest relative is a brother/sister who is known to exist but is uncontactable.

3. Legal certainty

The issue of who is identified as the nearest relative is one of the most complex in the 1983 Act and one of the commonest areas where mistakes are made – and if a mistake is made the section will be invalidated. For example:

- Where a patient has relationship problems or is splitting up with their husband/wife it is legally unclear whether they still count as a nearest relative.
- A relative who provides substantial care for the patient automatically goes to the top of the list – but the definition of what is 'substantial care' is unclear.

4. Costs

It would also avoid unnecessary legal costs of requiring the patient to go to court to displace a nearest relative they disagree with or who is unacceptable.

5. Human rights case law

In *R (E) v Bristol City Council 2005* – the Court said that a patient with capacity can choose that their nearest relative must not be consulted by health professionals. However the only way a patient can choose a nearest relative who can be consulted is to go to court. The Bill is therefore likely to face legal challenge in the near future.

Evidence from Diane Hackney – service user

“My mother is my nearest relative but she is 76 years old and lives 150 miles away from me. My sister has an eating disorder and is currently in hospital receiving treatment for it - she is likely to be there for at least 6 months. For these reasons, I have changed my next-of-kin to someone who lives close to me, someone who knows me well and with whom I have a good relationship. This person not related to me in any way.

My mortgage provider and other financial institutions have accepted this change as indeed has my GP. Therefore as far as anything to do with my financial assets, my property and my physical health is concerned this non-blood relative will be contacted, but when it comes to my mental health and my nominating the same person to be contacted and consulted about my care and treatment should I become unwell and/or sectioned is impossible. This is just not logical.”

Why some carers are excluded from being a nearest relative

Under the 1983 Act a carer has a limited recognition. The list of ‘nearest relatives’ is based primarily on blood ties and on marriage or civil partnership - and the carer does not have a place except in so far as he/she falls into one of those categories.

However if the patient resides with or is cared by one or more of his/her ‘relatives’ that person takes priority over the others on the list. The person who lives with the patient and has done so for 5 years may also become the nearest relative but only as the last choice.

This formulation of ‘relatives’ in the 1983 Act is based on a narrower view of kinship than is socially accepted today. Patterns of living arrangements have changed and with it ways in which people are cared for. The carer may not be a relative and may not reside with the patient.

Case study:

Simon suffers from schizophrenia and is cared for by his long term partner Alison who he does not live with. Alison makes sure that Simon takes his medication and also cooks his meals, cleans the house and takes him shopping. Simon’s only living relative is a nephew who he speaks to once a year.

In this example the nephew would be the nearest relative even though the primary carer is Martin.

This amendment therefore provides recognition for the role of carers who are not directly related to the patient.

The definition of carer is the same legal definition used in the Carers and Disabled Children Act 2000:

An individual over 16 who “provides or intends to provide a substantial amount of care on a regular basis for another individual aged 18”

It is important to note that this definition also specifically excludes paid carers or carers from a voluntary agency.

Government concerns

The government is concerned that patients who are unwell may keep changing their nomination – and that someone who is nominated by the patient may be more likely to discharge the patient or block admission.

We believe that as a compromise a patient should be able to nominate their nearest relative but only with the following safeguards:

- a person can only make a nomination if he or she is well enough to make this decision – and is not detained under the 1983 Act
- a person can only nominate their existing carer to be their nearest relative
- the nomination must be signed and witnessed by a mental health professional
- the nearest relative can be displaced by a court if he or she does not act in the patient’s best interests

Diane Hackney

“I’m not asking for huge, radical changes in the legislative or psychiatric system - advance statements and nearest relative/nominated person practices already exist in other legislation - but I am asking you to look at what is simple common sense; a common sense that will undoubtedly enable thousands of people like myself feel comfortable and confident when seeking treatment for our mental illness.”