



**Mental Health Alliance**

## Nearest Relative

House of Lords Committee Stage briefing

### **Definition of the nearest relative**

### **Nominated persons**

### **Amendment**

After Clause 24 insert new Clause-

### **“ Nominated persons**

(1) Section 26 of the 1983 Act (“definitions of relative” and “nearest relative”) is amended as follows

(2) In the heading of section 26 after “functions of” insert “persons acting as”.

(3) Before subsection (1) insert

“( ) In this Part of the Act “named person” means any person nominated by the patient in accordance with subsection ( ) below.”

( ) In this Part of the Act “primary carer“ has the same meaning as in section 1 of the Carers and Disabled Children Act 2000.”

(4) After subsection (1) insert:

“( ) (1) A person is a named person in accordance with this subsection if—

(a) the nomination is signed by the nominator;

(b) the nominator’s signature is witnessed by a prescribed person;

(c) the prescribed person certifies that, in the opinion of the prescribed person, the nominator –

(i) understands that the effect of nominating a person to be the named person will give him the role of nearest relative; and

(ii) has not been subjected to any undue influence in making the nomination.

(2) A nomination under subsection (1) above may be revoked by the nominator in accordance with subsection (3) below.

(3) The nomination of a named person is revoked in accordance with this subsection if—

(a) the revocation is signed by the nominator;

(b) the nominator’s signature is witnessed by a prescribed person;

(c) the prescribed person certifies that, in the opinion of the prescribed person, the nominator—

- (i) understands the effect of revoking the appointment of a person as named person; and
- (ii) has not been subjected to any undue influence in making the revocation.

(4) The nomination of a named person shall be effective notwithstanding the nominator's becoming, after making the nomination, incapable.

(5) A person nominated under subsection (1) above may decline to be the nominator's named person by giving notice to—  
(a) the nominator; and  
(b) the local authority for the area in which the nominator resides, to that effect."

(4) For subsection (3) substitute

"(3) In this Part of this Act, subject to the provisions of this section and to the following provisions of this Part of this Act, the "nearest relative" means , in descending order,

- (a) the named person
- (b) the primary carer
- (c) the person first described in subsection (1) above who is for the time being surviving, relatives of the whole blood being preferred to relatives of the same description of the halfblood and the elder or eldest of two or more relatives described in any paragraph of that subsection being preferred to the other or others of those relatives, regardless of sex."

(5) Leave out subsection (4).

(6) In subsection (5) leave out "or (4)" "

### **Purpose of the amendment**

The purpose of the amendment is

- (1) to provide for a named person to be added to the list of people selected to be a nearest relative and to provide for his/her ranking at the top of the list
- (2) to provide for a mechanism for the patient to choose the named person
- (3) to add a primary carer to the list of people to be selected as a nearest relative and to provide for his/her ranking in the list

## **Briefing**

Under the Mental Health Act 1983 the 'nearest relative' is one of the major safeguards for the patient's rights. The person who is identified as the nearest relative has extensive powers in relation to the decision to impose compulsion – including the right to:

- apply for admission to hospital and for guardianship;
- block compulsory admission for treatment;
- require an ASW to consider the need for admission to hospital;
- discharge the patient from section; and
- be consulted about any decision to detain.

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 area where mistakes are made. The nearest relative is normally identified by reference to a list of 'relatives' in the 1983 Act, ranked in order of

priority, and the 'nearest relative' is the person nearest to the top of the list. The nearest relative will not necessarily be the person identified by the patient as their next of kin, and indeed the patient has little control over who will be seen in law as the nearest relative. He or she may be someone the patient dislikes and does not want involved in their life, let alone decisions about hospitalisation – and the patient has no power to apply for the displacement of an unsuitable nearest relative. This inflexibility has been upheld, in different decisions, as incompatible with Article 8 of the Human Rights Act 1998.<sup>1</sup>

The Bill proposes to address this by merely adding the patient to the list of those who can apply to displace the nearest relative. It also inserts a new ground to the reasons for displacement: that the person is "not suitable" to act in this role. Therefore a patient can nominate their nearest relative only through making a court application to the County Court and declaring that the person identified through the hierarchical list as 'not a suitable person'.

The Alliance believes it is unrealistic and unreasonably onerous first, to expect the patient to go to Court for the displacement. Access to the court and the procedures that accompany it are daunting to many people, let alone a person with mental illness who is most likely to be unwell and possibly in hospital.

Secondly to expect the person to make a case to a court that their closest relative (the one first on the list) is 'unsuitable' is harsh and unreasonable in any circumstance - but in a situation in which they may be at their most vulnerable, and dependent on them to some extent, is simply impractical. It is clear that the Government does not intend displacement to take place - except in the most extreme situation perhaps of proven abuse or risk to health. It would not for example cover antipathy between the patient and his/her Nearest Relative – and rather ominously the Code of Practice states that a Nearest Relative cannot be rendered unsuitable on the basis that another person is more suitable. We believe that the concept of 'suitability' is too restrictive and fails to pay sufficient regard to the patient's wishes.

### ***The nominated person***

We are disappointed that the Government has decided to abandon its plans to replace the nearest relative with a 'nominated person'. This was originally contained in the 2004 Draft Bill which provided that where a patient has capacity to make this decision, they should have the right to choose their nominated person – who would represent their interests. Instead the Government admits to the intention of doing the bare minimum to comply with the decision in *JT v UK2* and the resulting 'friendly settlement' and being opposed to 'choice as a concept'.

We understand that the Government is concerned that if a patient were able to choose their representative they might choose someone in a crisis with whom they had no connection or someone who would not act in their best interests. Indeed they may pick someone who would be likely to use their powers to get the patient out of the system.

However the amendment stipulates in subsection (2) that the patient would need to have the capacity to make this decision and go through a formal mechanism to name someone. It would involve a written document and witness.

Furthermore there are already checks and balances in the law to deal with the nearest relative's misuse of power - and these would also apply to the named person. Under this amendment the named person has no special protection but is simply the first in the list to be selected as nearest relative. The checks include:

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<sup>1</sup> For example, *JT v United Kingdom* [2000] 1 FLR 909

<sup>2</sup> This case involved a patient who didn't want her mother to be her nearest relative on the grounds that she was living with her step father who she claimed had abused her.

- a power to block the nearest relative's discharge of the patient - if it is likely that the patient would act in a dangerous manner
- a power to displace the nearest relative if he/she is too ill to act or is using their powers unreasonably

However our fundamental concern with the Government's argument is that they appear not to trust people with mental health problems to make their own decisions and to appoint someone to act in their best interests – even if they have the capacity to do so.

We believe that the Bill must be amended to allow a patient to nominate their representative – for the following reasons:

- The nominated person is more likely to be someone in whom the patient has trust and confidence, someone who s/he believes will safeguard his/her best interests and someone who can provide emotional support at a time of crisis.
- This would also provide greater legal clarity about who is the patient's representative and would avoid the need for intrusive questioning during the sectioning process – such as 'who is your eldest parent' or 'were your parents married when you were born'.
- It would also avoid unnecessary legal costs of requiring the patient to go to court to displace a nearest relative they disagree with.
- The Government is laying themselves open to future embarrassing litigation. For example in the recent case, *R (E) v Bristol City Council 2005* – the Court held that these provisions should be interpreted in accordance with a patient's Article 8 ECHR rights so as to take into account her wishes and/or her health and well being.

This case considered the circumstances in which an approved social worker is not legally obliged to consult a nearest relative:

*"Is the approved social worker really bound to inform /consult the nearest relative of a patient who may intensely dislike a patient and/or would, or might, not act in the patient's best interests? The answer, in my judgment, is of course not and particularly so where the patient, as here, is competent and has strongly expressed her wish that her nearest relative...is not informed or consulted."* **3**

Service users welcomed the 2004 Bill's provisions for a nominated person and are clear of the importance of the role for them:

*"I feel it would be better for all concerned that an agree carer be authorised by the patient when they are well – to have the power to make certain decisions which would secure the right treatment if they became unwell."***4**

*"It important for me to be able to chose the person who knows me best to look after my best interests when I am ill and make sure I get the best care and treatment."***5**

*"I believe it infringes on my human rights as an individual y denying my right to fair representation by an informed person of my choosing."***6**

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3 Bennet J at para. 28

4 Wendy Andrews evidence DMH 215

5 Mark Capon DMH

6 Victoria Dawes DMH 38

A similar system already operates under the Scottish Mental Health Act which provides for the patient to appoint a 'named person' who is given specific rights and powers in relation to the patient.

### ***The primary carer***

Under the 1983 Act a carer has a limited recognition. The list of 'relatives' in section 29 is based primarily on blood ties and on marriage, de facto relationship or civil partnership and the carer does not have a place except in so far as he/she falls into one of those categories. Under section 26(4) where the patient resides with or is cared by one or more of his' 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 1*

*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.*

#### *Case Study 2*

*Anna lives alone, has no living relatives and suffers from early onset dementia. She is looked after by her neighbour Joan who makes sure all the bills are paid, takes her shopping and liaises with social services when she has concern's that Anna's health is deteriorating.*

*In this example Anna has no nearest relative – even though she has a primary carer.*

This amendment therefore deletes from the 1983 Act the provision for carers in subsection (4) and replaces it with a simple provision for the carer to be the second default position thus expanding its scope to cover all people who would be considered a primary carer as defined 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.

Where there is no nominated person, we believe that the patient's primary carer should assume the role of default nominated person. A person's carer is often the best informed source of advice and assistance during that person's mental health crisis and as such has an independent role. S/he also has a vital interest in the person's welfare and recovery. Currently the Mental Health Act fails to give adequate recognition to the position and expertise of carers, and to their key role in a person's recovery.

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.

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."