Mental Health Alliance

Nearest Relative

House of Lords Report Stage briefing

Definition of the nearest relative

Amendment

After Clause 24 insert new Clause-

"**Named persons**

Insert the following new Clause-

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

(2) In the cross-heading preceding section 26 after "functions of relatives" insert ", persons acting as relatives".

(3) Before subsection (1) insert-

"(A1) In this Part of the Act "named person" means-
(a) any person described in subsection (1) below; or
(b) any person not described in subsection (1) below who is the patient's carer
who has been nominated by the patient in accordance with subsection (1A) below.

(B1) In this Part of the Act "carer" has the same meaning as in section 1(1)(a) of the Carers and Disabled Children Act 2000."

(4) After subsection (1) insert:

"(1A) (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.

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

(1C) 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.

(1D) The nomination of a named person shall be effective notwithstanding the nominator's becoming, after making the nomination, incapable.

(1E) 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 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) In section 26(4) after 'his nearest relative' insert 'under subsection 3(b) above'

(6) In section 26(5) leave out '(3)' and insert '(3)(b)'

Purpose of the amendment

The purpose of the amendment is

(1) to enable a patient to choose their nearest relative (named person) from the current list of eligible relatives – plus their primary carer if this person is not on the list - 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 retain the existing hierarchical list where the patient has not nominated anyone

Briefing

Background

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.

There are important limits to the power of the nearest relative – these include:

- a power for the hospital authorities 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 to ill to act or is using their powers unreasonably

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 section 26 of 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.**1**

What the Bill proposes

The Bill proposes to make it possible for the patient to seek displacement by the court of the person who, according to the statutory formula in section 26, is the nearest relative. Such applications may be made on the grounds that the person is unsuitable to act as the nearest relative. The patient will be able to nominate in their application to the court any person of their choice to act as their nearest relative – but it will be for the court to determine whether a person is suitable to act in this role.

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.

1 For example, JT v United Kingdom [2000] 1 FLR 909

Committee stage

The Alliance put forward an amendment to make it possible for a patient to nominate – using a legal form – any person of their choice to act as their nearest relative. It also sought to add the patient's primary carer to the list of people who can be the patient's nearest relative.

The Government's objections to this amendment were as follows:

- If a patient were able to chose their representative they might choose someone in a crisis with whom they had no connection

- The powers of the nearest relative mean they are not just patient representatives but carry out an independent counterbalancing role. In order to exercise his power the nearest relative must be free to act in a way that represents his understanding of the best interests of the patient. Sometimes this will not concur with the wishes of the patient.

- Someone might be chosen who will simply carry out the wishes of the patient - indeed they may pick someone who would be likely to use their powers to get the patient out of the system.

Alliance response

The Alliance disagrees that a person nominated by someone subject to mental health legislation would be less likely to act in the best interests of the patient. 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. The checks include:

- 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 to ill to act or is using their powers unreasonably

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.

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.

The revised amendment

We have adjusted our amendment to take on board some of the Government's concerns by providing the patient with a more restricted power to choose their nearest relative.

Under our amendment the current list of 'eligible relatives' who can take on the role of nearest relative would be retained.

The patient would have the power to nominate their nearest relative - but he/she would only be able to nominate someone from the current list of nearest relatives (plus their primary carer).

In order to do this, the patient would have to fill out a legal form and a prescribed person (such as a doctor, Approved Mental Health Professional or lawyer) would have to certify that the patient has capacity to make this decision.

This would in effect give a restricted right of choice, so the nearest relative couldn't for example just be anyone the patient knew - but it would retain the list of people who under the current Mental Health Act are deemed to be suitable to carry out this role.

Why choice is important

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

First, 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.

Case study

Mary suffers from bi polar affective disorder. Her nearest relative is her mother – who she has a poor relationship with and only speaks to once a month by phone. One day after an argumentative phone call her mother, upset and hurt by what was said, requests a Mental Health Act assessment.

Mary is frightened that social services may break their way into her flat to make an assessment and therefore leaves home to stay in hostel style accommodation without telling anyone. She contacts her best friend and carer, Tom, to ask if she could stay with him.

Tom agrees and tries to facilitate contact between her and a social worker, but the social worker is determined to try to contact her independently of Tom – because he is not the nearest relative.

In this case the person who knows Mary best and had most contact with was given no role or official recognition – and it illustrates the limitations of an automatic reliance on giving credibility and powers to the nearest relative and none to someone in a carer position.

Second, 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'.

Case study

A man lives with his wife - however their relationship with his wife has deteriorated and she has consulted a solicitor about divorce proceedings.

It is unclear whether or not his wife would be the nearest relative in this case – and the social worker would need to make a judgment by asking very personal questions at a time of crisis – such as

Do the couple still have sexual relations?
Has their relationship permanently broken down?

Are financial matters being handled separately?

The fact that the husband does not want his wife to be his nearest relative – and would rather his father was given this role – is irrelevant in the eyes of the law.

In many such cases – the people involved refuse to answer these type of questions and the patient is left without the protection of a nearest relative.

Third, it would also avoid unnecessary legal costs of requiring the patient to go to court to displace a nearest relative they disagree with.

Finally, 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."* ***2***

The Joint Committee on Human Rights recently reaffirmed the implications of this case – that to ensure compatibility with Article 8, the Approved Social Worker's duty to consult the nearest relative about compulsory admission does not apply if the patient objects to that person being consulted.

> *"Under this Bill, this will remain good law, and the patient can choose who will not be consulted as their nearest relative, but the only way of displacing a nearest relative, and replacing them with someone acceptable to the patient, will be if they are 'unsuitable'."****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***

2 Bennet J at para. 28
3 Fourth Report of session 2006-7 para 37
4 Wendy Andrews evidence DMH 215
5 Mark Capon DMH
6 Victoria Dawes DMH 38

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 flatmate Martin on a daily basis. Martin 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 his 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.

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.

This amendment therefore provides recognition for the role of carers who are not directly related to the patient. It would allow the patient to nominate his or her nearest relative from the existing list – but where his/her carer is not already on the list, the patient would also have the option of nominating their primary carer to act as nearest relative.

This definition would 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"

So therefore in the case studies above Simon could nominate Martin as his nearest relative and Anna could nominate Joan.

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