

Fact sheet

Last Review Date: 10 February 2020

Next Review Date: 1 August 2020

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Nearest Relative S.26 MHA

- The 'nearest relative' is a legal term used in the Mental Health Act. It is not the same as the next of kin. The next of kin has no rights under the Mental Health Act.
- The nearest relative has some rights when someone is, or may be, detained under the Mental Health Act (this is sometimes called 'being sectioned' or 'being held under section').
- Nearest relatives can ask for an assessment to decide if their relative should be detained under the Mental Health Act. They can also request that their relative is discharged from hospital.
- An application can be made to the County Court to have a nearest relative removed or changed if they do not feel that they are the right person for the role.
- The Nearest relative can delegate their duties under the act to someone else if they feel unable to fulfil the role within the best interests of the person
- The nearest relative does not have the right to be told everything about the patient. This could include information about what treatment the patient is taking. This will depend on whether the patient is happy for information to be shared.

What is the nearest relative?

The nearest relative (NR) is a term that is defined under the Mental Health Act. The NR has certain rights under the Mental Health Act. Most people will have a nearest relative.

It is important to be aware that the NR and the 'next of kin' can be two different people. The next of kin is usually a relative or close friend chosen by someone soon after they are admitted to any sort of hospital. The next of kin has no legal powers under the Mental Health Act.

However professionals should aim to identify carers as well as the nearest relative and, if agreed by the patient, involve them in discussions.

Who is the nearest relative?

Section 26 of the Mental Health Act explains who can be the nearest relative (NR). A patient cannot choose their NR. The term relative is defined by the Mental Health Act as a list. The list is below. The general rule is that the NR will be the person who comes highest on the list, however, there are other rules that may affect who the NR will be.

- Husband, wife or civil partner
- Son or daughter
- Father or mother
- Brother or sister
- Grandparent
- Grandchild
- Uncle or aunt
- Niece or nephew

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Men and women are equal. If there are two people who could be the Nearest Relative, for example, mother and father, the eldest person would be the Nearest Relative.

What are the nearest relative's rights?

The nearest relative (NR) has certain rights under the Mental Health Act. These rights are explained below. However, the duty that healthcare professionals have to tell the NR information is not absolute. This means that in almost all cases information will not be shared with the NR if the patient does not want it to be, unless there are specific and justifiable reasons to do so

Right to get information:

The approved mental health professional (AMHP) must let the NR know that an application is going to be made, or has been made, to detain their relative under section 2 (s2) of the Mental Health Act. The AMHP should tell the NR what rights they have to discharge the patient.

The NR may not be told that their relative has been detained under s2 if it would have a negative effect on the patient. Negative affect could mean:

- emotional distress
- mental health getting worse
- physical harm
- Financial or other exploitation.

Hospital Managers should give the NR copies of any information given to the patient in writing. However the patient can block information from being given to the NR. This includes if their judgment or reasoning has been affected by symptoms of mental illness.

Right to consultation:

The AMHP must speak with the NR before someone can be detained for treatment under section 3 (s3), unless:

- it is not reasonably practical. For example the NR cannot be found quick enough which could cause treatment to be delayed, or
- the NR is having difficulty with their own health or mental capacity.

The NR may not be consulted about an application for detention under s3 if it would have a negative effect on the patient. AMHP's should record their reasons if they do not consult with the NR. Detention under s3 or a guardianship cannot go ahead if the NR disagrees with the decision.

However, a County Court can remove the NR if they think that the NR is stopping the application for s3 or guardianship on unreasonable grounds. This is known as 'displacement'.

The NR cannot stop a community treatment order (CTO) being made. A patient may not want the NR to be consulted about an application for detention under s3. In this case the AMHP should give the NR enough information to allow them to do what the Mental Health Act asks them to do.



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Right to ask for assessment:

The NR can ask social services to carry out a mental health assessment. Some families have found this right helpful in a crisis. You need to speak to the approved mental health professional (AMHP) team. You can make your request in writing or over the phone. If they decide not to do an assessment, they have to tell you their reasons why in writing.

Right to apply for admission:

The NR can ask hospital managers to detain a person under s2, s3, or in an emergency. The NR may only be able to apply directly to the hospital if doctors agree that the person should be detained but the AMHP disagrees. Therefore it may be easier to ask the social services department to make an assessment first, before you apply to the hospital managers.

Right to discharge:

The NR can discharge someone from detention under s2 or s3, a community treatment order (CTO) or guardianship. However, is not possible if the person has been detained after a judge or magistrate has made a court order. The responsible clinician is able to stop the discharge in certain circumstances. The NR must be told of the patient's discharge from detention. However the NR may not be told if:

- it is not practicable to tell the NR, or
- either the patient or the NR has requested that information about the discharge should not be given.

Right to get notice of Discharge:

The NR should be given 7 days' notice of the end of a section if possible.

Right to be told about:

- renewal of a patient's detention,
- extension of a CTO, and
- transfer from one hospital to another.

Right to contact the Independent Mental Health Advocacy service (IMHA):

Patients detained under the Mental Health Act are entitled to get support from an IMHA. Patients do not have to have help from an IMHA if they do not want it. An IMHA should visit and talk to the patient if the NR asks them to. An IMHA is there to make sure that the patient is heard and understands what their rights are whilst under the Mental Health Act. IMHA's can talk to staff on the patient's behalf to help them understand why certain decisions have been made. They can also help healthcare professionals to understand any concerns that the patient has.



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How can the nearest relative discharge their relative from the Mental Health Act?

The nearest relative (NR) must give the hospital managers 72 hours written notice if they want to discharge their relative from a section of the Mental Health Act. There is not a specific form that the NR needs to fill in to discharge the patient. If the person's responsible clinician (RC) thinks that the patient should not be discharged they can issue a 'barring report' within 72 hours. This will stop the discharge. If a barring report is issued the NR will have the right to apply to the tribunal for discharge if the patient is detained under section 3. The NR will not be able to discharge the patient from detention at any time in the 6 months that follow the date of the barring report. A discharge should not be stopped unless the patient is likely to be dangerous to themselves or others. The NR does not have a right to discharge their relative if the patient is detained in hospital under a forensic section. A forensic section is a section that a patient is put under as a result of being involved with the police, court or prison.

What is a mental health tribunal?

This is an independent panel made up of a judge, tribunal doctor a Patients can apply to the tribunal for a hearing to be discharged. An independent mental health advocate (IMHA) and solicitor will be able to help a patient apply for a hearing and help during the hearing. The nearest relative (NR) can only apply for a tribunal if:

- discharge has been stopped by the responsible clinician (RC), and
- the patient is on section 3 or a community treatment order (CTO).

The NR must apply within 28 days of the RC stopping discharge. The NR may be able to represent their relative or attend and speak at the hearing and give a written statement, if the NR applied for the tribunal. However a tribunal would need to agree. A friend or advocate can address the tribunal on the NR's behalf and mental health expert. They hear the case for and against discharge and decide if it can go ahead.

Nearest relative points to remember

Information sharing

Information is unlikely to be shared with the nearest relative (NR) if the patient does not give their consent. The NR does not have any extra rights to be given information about their relative's mental health care or treatment when they are detained under the Mental Health Act. The hospital will still have a duty of confidentiality to the patient and will need their permission to share information. The Mental Health Act Code of Practice says that the progress of the patient should also be discussed with carers, if the patient consents.

Patient decisions

The NR doesn't have any right to make decisions on behalf of the patient. This includes both financial decisions and welfare decisions. If you are concerned that your relative lacks mental capacity to make decisions that are in their best interest speak to the patients Social Worker or the local AMHP Team for further information and advice.



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Compulsory medication

A patient detained under the Mental Health Act can be treated without their consent. The NR has no rights to stop this. For example, the patient may be given their medication by injection, even if they do not want this. This is usually if the person is very unwell.

Community Treatment Order

The NR cannot stop a community treatment order from being made. A NR may not be told if a CTO is being made. This may happen when the patient does not want their NR to be told. However the NR can order the discharge of a CTO by giving 72 hours' notice in writing. The Responsible Clinician can prevent the discharge by issuing a 'barring notice'.

Hospital leave, under section 17

The NR has no rights to request that the hospital gives someone leave.

Nearest relative removal

The NR can be displaced if they:

- stop a patient from being detained under section 3 without good reason, or
- use their power to discharge the patient without thinking about the patient's welfare and the welfare of others.



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