

MENTAL HEALTH ACT 2007

EXPLANATORY NOTES

COMMENTARY

Part 1 – Amendments to Mental Health Act 1983

Chapter 3 – Safeguards for Patients

Sections 23-26: Patient’s nearest relative

76. Sections 26-29 of the 1983 Act provide for the role of the nearest relative (NR) of patients. The 1983 Act provides a list of persons who may act in this role: the person appointed usually being the highest in that list, starting with any spouse or, if there is none, the eldest son or daughter, and so on. The NR has certain rights in connection with the care and treatment of a mentally disordered patient under the 1983 Act, including the right to apply for admission to hospital, the right to block an admission for treatment, the right to discharge a patient from compulsion and the right to certain information about the patient. NRs may not exercise their rights in respect of patients subject to special restrictions under Part 3 of the 1983 Act.
77. Section 23 introduces a new right for a patient to apply for an order displacing the NR on the same grounds available to other applicants under the 1983 Act as it stands, and on the additional ground that the NR is unsuitable to act as such. The table below summarises possible grounds for applications and who may make them. The provision also amends the basis upon which a court may make such an order. It changes the requirement that the acting NR be, in the court’s opinion, a “proper person” to act as the NR to a requirement that the person is, in the court’s opinion, a “suitable” person to act. Section 23 also amends section 29 of the 1983 Act to provide that where the person nominated by the applicant is, in the court’s opinion, not “suitable” or there is no nomination, the court can appoint any other person it thinks is “suitable”.

	<i>Possible grounds for an application</i>					
	<i>29(3)(a) – the patient has no NR</i>	<i>29(3)(b) – the NR is too ill to act</i>	<i>29(3)(c) – the NR unreasonably blocks admission</i>	<i>29(3)(d) – the NR has or is likely to discharge the patient without due regard</i>	<i>29(3)(e) – the NR is unsuitable to act as such</i>	
Possible applicants	AMHP relatives ASW	Currently provided for	Currently provided for	Currently provided for	Currently provided for	New provision

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(c.12) which received Royal Assent on 19 July 2007*

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	Relative	Currently provided for	Currently provided for	Currently provided for	Currently provided for	New provision
	Someone living with the patient	Currently provided for	Currently provided for	Currently provided for	Currently provided for	New provision
	Patient	New provision	New provision	New provision	New provision	New provision

78. In this way, an NR who has, for example, in the past subjected a patient to physical abuse, may, upon application to the court by the patient, be removed from exercising the rights of the NR by order of the court. In the application, the patient can nominate another person to act as the NR. Unless the court finds that person to be unsuitable, or decides not to displace the current NR, the person will be made the acting NR.
79. An application for displacement can also be made by an AMHP, another relative or anyone living with the patient (or if the patient is an in-patient in a hospital, anyone with whom the patient was living before he was admitted). So long as the court orders the displacement of the current NR, then whomever the applicant nominates will be made the acting NR, unless the court finds that person to be unsuitable to act as such.
80. [Section 24](#) introduces a new right for the patient to apply to discharge - or vary - an order appointing an acting NR. A NR displaced under the new ground will also be able to apply for such an order, but the NR must first obtain leave of the court. The court can currently appoint an acting NR only for a limited period; section 24 will allow the court to make an appointment for an indefinite period.
81. A person who has been made the acting NR retains the right to apply to have that order ended. The order displacing the NR - and appointing an acting NR - continues even when the displaced NR ceases to be the first person in the list of relatives. In these circumstances, the patient can apply to have the court order discharged. The new person at the top of the list will then become the NR.
82. A NR displaced on the new grounds that he is unsuitable to act as such can apply for the discharge of the order which displaced him as NR. However, the application will only be heard if the court first agrees. Spurious or malicious applications can therefore be stopped before the patient is brought into the process.
83. [Section 25](#) will limit applications to the MHRT from displaced NRs, to those NRs displaced on grounds set out in sections 29(3)(c) or 29(3)(d) of the 1983 Act (see table above). A person who has been displaced as the NR because he or she is too ill to act, or unsuitable to act, will not have the right to apply to the MHRT.
84. [Section 26](#) amends the list in sections 26 and 27 of the 1983 Act of those persons who may act in the role of NR of a patient, by giving a civil partner equal status to a husband or wife.

[Sections 27-31](#): Consent to treatment

Overview of consent to treatment provisions in the 1983 Act

85. Part 4 of the 1983 Act deals with the medical treatment of patients, other than (for most purposes) patients subject to a community treatment order (a CTO) who have not been recalled to hospital. Treatment of such patients is generally dealt with under Part 4A. See section 32 below for an explanation of a CTO.
86. Section 57 of the 1983 Act provides that certain treatments may not be given to any patient for mental disorder (whether or not they are otherwise subject to the 1983 Act) unless the patient consents, a SOAD and two other people appointed by the Mental Health Act Commission (MHAC) have certified that the patient is capable of giving that consent (and has done so), and the SOAD has additionally certified that the treatment should be given. The treatments in question are any surgical operation for destroying brain tissue or its functioning (sometimes called “psychosurgery”) and, by virtue of regulations under subsection (1)(b) of section 57, surgical implantation of hormones for the purpose of reducing male sex drive (a procedure which is no longer used).
87. Section 58 of the 1983 Act provides that patients who are liable to be detained under the 1983 Act (subject to certain exclusions set out in section 56) may not, in general, be given certain treatments unless they consent and that consent is certified by their RMO (in future the AC in charge of the treatment) or a SOAD, or alternatively, unless a SOAD certifies that they either cannot or will not consent to the treatment, but that it should nonetheless be given. Section 34 of the 2007 Act also applies section 58 to patients who are subject to a CTO and who have been recalled to hospital (subject to certain exceptions).
88. Section 58 of the 1983 Act also applies to the administration of medication once three months have passed since the patient was first given medication while detained – or, in future, subject to a CTO – under the Act. At present and by virtue of regulations under subsection (1)(a), it also applies to electro-convulsive therapy (ECT), without any initial period however this will be overtaken by the amendments made by section 27 of the 2007 Act (see below).
89. **Sections 57 and 58** are subject to the following sections of the 1983 Act:
- section 59, which provides that consent or a certificate under either of those sections may relate to a plan of treatment instead of an individual treatment
 - section 60, which provides that a patient who withdraws consent to treatment or to all or any part of a plan of treatment, is to be treated from that point onwards as being someone who does not consent to the treatment(s) in question
 - section 61, which imposes requirements on RMOs (in future the AC in charge of treatment) to report to the Secretary of State (in practice MHAC) on treatment given on the basis of a SOAD certificate and permits the Secretary of State (MHAC) to withdraw such a certificate
 - section 62, which dis-applies sections 57 and 58 where treatment is immediately necessary and meets certain criteria, and in certain cases where the discontinuance of treatment would cause the patient serious suffering.
90. Section 63 of the 1983 Act provides that patients liable to be detained (and not excluded by section 56) may be treated by or under the direction of their RMO (in future the AC in charge of the treatment) without their consent, where the treatment concerned is not one to which sections 57 or 58 apply.

Section 27: Electro-convulsive therapy, etc

91. **Section 27** inserts a new section 58A into the 1983 Act. That new section provides that ECT and any other treatment provided for by regulations made under subsection (1) (b), can only be given when the patient either gives consent, or is incapable of giving

consent. This provision is subject to the provisions about emergency treatment in section 62 of the 1983 Act (as amended by section 28 of the 2007 Act). This is to ensure that a patient, including one who is not consenting, can still receive treatment in the urgent circumstances set out in section 62 if there is insufficient time to apply the requirements at section 58A.

92. Where a detained patient 18 years of age or older consents to treatment with ECT (or any other treatment provided for by regulations), that consent must be certified by either the AC in charge of the patient's treatment or a SOAD. Where a child patient under 18 years of age who is either a detained patient or an informal patient who is not subject to a CTO consents to such treatment, a SOAD must certify that consent and that it is appropriate for the treatment to be given.
93. Where a detained patient is incapable of consent, the SOAD must certify that the patient is not capable of understanding the nature, purpose and likely effects of the treatment and that it is appropriate for the patient to receive the treatment. Before doing so, the SOAD must first consult two other persons - one must be a nurse concerned with the patient's medical treatment and the second must be another person professionally concerned with the patient's medical treatment who is neither a nurse nor a doctor. The patient's RC (if they have one) and the person in charge of their treatment (if they are not the RC) are excluded from being a person the SOAD has a statutory duty to consult.
94. Where an informal child patient (who is not subject to a CTO) is incapable of consent and there is authority to treat such a patient, the SOAD must similarly certify that the patient is not capable of understanding the nature, purpose and likely effects of the treatment and that it is appropriate for the patient to receive the treatment. Before doing so, the SOAD must first consult two other persons - one must be a nurse concerned with the patient's medical treatment and the second must be another person professionally concerned with the patient's medical treatment who is neither a nurse nor a doctor. The person in charge of the patient's treatment is excluded from being a person the SOAD has a statutory duty to consult.
95. The SOAD is not able to give such a certificate if giving the treatment would conflict with:
 - a valid and applicable advance decision of the patient not to receive the treatment as provided for by the Mental Capacity Act 2005, or
 - a decision made by a deputy or donee as defined by the Mental Capacity Act 2005, where the deputy or donee has the authority to refuse such treatment on behalf of the patient, or
 - an order of the Court of Protection.
96. Before making regulations regarding section 58A, the Secretary of State for England and the Welsh Ministers for Wales shall consult any such bodies as appear to them to be concerned.

Section 28: Section 27: supplemental

97. Section 28 of the 2007 Act amends section 62 of the 1983 Act (urgent treatment) so that, where the treatment is ECT, urgent treatment can only be given where it is immediately necessary to save life or to prevent a serious deterioration in the patient's condition. Where the treatment is another form of section 58A type treatment (to be determined by regulations under section 58A), the Secretary of State for England and the Welsh Ministers for Wales, may make regulations regarding which of the criteria in section 62(1) of the 1983 Act for urgent treatment are to apply to that treatment. Section 28 of the 2007 Act also makes consequential amendments to sections 58, 59, 60, 61, 62 and 63 of the 1983 Act, and to section 28 of the MCA, to take account of the new section 58A.

Section 29: Withdrawal of consent

98. Section 29 of the 2007 Act amends section 60 of the 1983 Act (withdrawal of consent), which sets out the effect on a certificate issued under Part 4 of the 1983 Act by either the approved clinician in charge of the treatment or a SOAD when the patient, having given consent, withdraws that consent. The amendment clarifies the position when a patient who has been certified as unable to understand the nature, purpose and likely effects of the treatment becomes able to so understand. It also clarifies the position when a person, having consented, loses the ability to understand the nature, purpose and likely effects of the treatment. In both cases the certificate is no longer valid.

Section 30: Independent Mental Health Advocates

99. Section 30 places a duty on the appropriate national authority to make arrangements for help to be provided by independent mental health advocates (IMHAs). IMHAs must be made available to certain “qualifying patients” subject to the powers or safeguards in the 1983 Act as amended, to provide support in the ways specified in the provisions.
100. Qualifying patients will be informed that they are eligible for the services provided by an IMHA as soon as is practicable. An IMHA will meet with a patient on the request of the patient, the nearest relative, the responsible clinician or an AMHP.
101. Where a patient has the capacity to consent and does so, an IMHA has a right to see any hospital or local authority records relating to him. If a patient lacks the capacity to consent, the record holder can still allow access to such records if it is appropriate and relevant to the help the advocate will provide to the patient. IMHAs have a right to meet patients in private and to visit and interview anyone professionally concerned with the patient’s medical treatment.
102. The appropriate national authority can make regulations setting out, for example, the standards and qualifications that will need to be met by an individual in order to be approved as an IMHA. These regulations can make different provision for different cases. This will allow them to take account of the different needs of different groups of patients.
103. Section 30 also amends section 134 of the 1983 Act, to ensure that hospital managers cannot withhold correspondence between patients and their advocates.

Section 31: Accommodation etc

104. Section 31 adds new section 131A to the 1983 Act. This places hospital managers under a duty to ensure that patients aged under 18 admitted to hospital for mental disorder are accommodated in an environment that is suitable for their age (subject to their needs). In determining whether the environment is suitable, the managers must consult a person whom they consider to be suitable because of their experience in child and adolescent mental health services cases.
105. Section 31 also amends section 39 of the 1983 Act (information as to hospitals) to provide that a court may request information from a primary care trust (PCT) (in England) or local health board (LHB) (in Wales) when dealing with a person aged under 18 in certain cases. Those cases are where the court is minded to make a hospital order or interim hospital order, to remand the person to hospital for a report on their mental condition (section 35) or for treatment (section 36), or (in the case of a magistrates’ court) to order detention in hospital when committing an offender to the crown court (section 44). The information will be about the availability of accommodation or facilities designed to be specially suitable for patients under 18. The purpose of this provision is to ensure that courts do not place a child in a prison setting when a suitable hospital bed would be a more appropriate option.
106. Section 31 also amends section 140 of the 1983 Act (notification of hospitals having arrangements for reception of urgent cases) to place a duty on PCTs and LHBs to advise

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local social service authorities in their area of hospitals providing accommodation specially suitable for patients aged under 18.