



Improving the Nominated Person provision for children and young people

Briefing for Committee Stage

Summary

- Following the recommendation in the Independent Review of the Mental Health Act, the Mental Health Bill will replace the role of the nearest relative with the new role of the Nominated Person.
- The Nominated Person will be able to exercise all the statutory functions that the current nearest relative can, along with new rights and powers set out in the Bill.
- The NP provision will apply to all children and young people aged under 18, and they will be able to appoint someone other than one of their parents (or others with parental responsibility) to act as their NP.
- It is important that children and young people are able to choose who they want to be their NP when they have the capacity or competence to make that decision.
- Where a patient lacks competence or capacity to choose a Nominated Person, an Approved Mental Health Professional (AMHP) can appoint someone on their behalf.
- We are concerned that the Bill fails to consider how the AMHP is to choose between the differing people who may have parental responsibility as outlined in the Children Act 1989 when appointing on behalf of a child or young person who lacks competence/capacity.
- The Joint Committee on the Draft Mental Health Bill also expressed concern regarding how the Nominated Person provision will apply to under 18s in regard to potential conflicts with other legislation affecting children, such as the Children Act 1989.
- The failure to consider the various orders relating to parental responsibility as outlined in the Children Act 1989 is a serious omission and is likely to give rise to confusion and uncertainty in practice.
- We consider that the Bill should be amended to include a hierarchy of individuals who could be appointed, depending on the child or young person's circumstances, in order to provide a clear and consistent framework for AMHPs when appointing on the child or young person's behalf.
- More information on parental responsibility can be found in Appendix A.

Background

Under the Mental Health Act 1983, those who are admitted to hospital under the Act will have a "nearest relative". Usually, but not always, the nearest relative will be a relative of the patient. For many aged under-18, their nearest relative will be their parents, however, this will depend on the child or young person's personal circumstances. For example, if they are subject to a care order (or interim care order), the relevant local authority will be the nearest relative. The nearest relative has various rights and can also seek to discharge their family member from hospital.

The Independent Review highlighted concerns with the role of the nearest relative and recommended that the patient should be able to choose their own nominated person in order to support patient choice and autonomy. The Mental Health Bill therefore replaces the nearest relative with the new role of the Nominated Person (NP).

Under the Mental Health Bill, a patient with capacity/competence will be able to select a 'Nominated Person'. That person would be able to exercise all the statutory functions that the current nearest relative can, along with new rights and powers set out in the Bill.ⁱ

The NP provision will apply to all children and young people aged under 18, and they will be able to appoint someone other than one of their parents (or others with parental responsibility) to act as their NP. Where a patient lacks competence or capacity to choose a Nominated Person, an Approved Mental Health Professional (AMHP) can appoint someone on their behalf.

Whilst we welcome these changes and the right of children and young people to have autonomy over who they chose as their NP, we are concerned about how this provision will operate in practice for under 18s, particularly in relation to the role of parental responsibility. This was a concern shared by the Joint Committee on the Draft Mental Health Bill who recommended that the Government consult on how the NP provision will apply to under 18s in regard to potential conflicts with other legislation affecting children, such as the Children Act 1989. The Committee called on the Government to come forward with new proposals to address this issue at an early stage in the Bill's process.ⁱⁱ

However, this issue has seemingly been left unaddressed within the new Mental Health Bill. As a result, the Bill fails to recognise and address how the role of the Nominated Person will interact with parental responsibility, particularly in scenarios where an Approved Mental Health Professional (AMHP) is appointing a NP for a care-experienced child or young person.

What change is needed?

If the child or young person has not appointed an NP previously and lacks the capacity or competence to do so, the AMHP has the power to appoint an NP in certain circumstances, including when the AMHP is considering making an application for the person to be admitted to hospital under section 2 or section 3 of the MHA 1983.

- If the under 16 year old is subject to a care order, the AMHP must give preference to the relevant local authority before "any other person with parental responsibility".
- If there is no care order, the AMHP can choose from anyone who has parental responsibility.

The child or young person will be able to appoint their own nominated person when they are competent to do so.

The legal concept of parental responsibility (PR) and who has PR is set out under the Children Act 1989. There are a number of ways by which somebody who is not a parent or stepparent

can acquire parental responsibility for a child. There could potentially be a number of people within a child or young person's life that have parental responsibility (e.g. mother & father; people having PR through a court order (such as special guardianship order; child arrangement order). We have outlined further information on parental responsibility and different orders in the appendix.

We are concerned that the Bill makes no provision on how the AMHP is to choose between the differing people who may have parental responsibility as outlined in the Children Act 1989.

There are also specific issues based on the age of the child or young person:

Under 16s with no competence

There could potentially be a number of people within an under 16's life that have parental responsibility.

Where there is a care order, the Bill does not provide that the relevant local authority **will be** the nominated person. It provides that the local authority will only be the nominated person if "willing to act" as such. This therefore includes an unnecessary procedural stage in that the AMHP will need to find out whether the local authority is willing to act as the nominated person. The MHA Act 1983 provides that where there is a care order, the relevant local authority will be the nominated person.

AMHPs are not always familiar with the Children Act 1989 (many work in the main with adults) so, for example may not be aware of the relevance of a special guardianship order or the difference between a "lives with" child arrangement order and a "time spent with" child arrangement order. The Bill therefore needs to set out a hierarchy of people to be choose from so that the AMHP has clarity on who to nominate not just where there is a care order, but also where there is a special guardianship order, child arrangement order that names the person with whom the child is to live ("lives with order").

16/17 year olds with no capacity

When the AMHP appoints a nominated person for those aged 16 and 17, those with parental responsibility are not mentioned as an option in the same way as for under 16 year olds. The current clauses for appointing a nominated person treat 16 and 17 years old as if they were adults which is not the case. The Mental Capacity Act 2005 makes this clear by providing that only adults can make advance decisions to refuse treatment or appoint lasting powers of attorney.

This part of the Bill also overlooks the Children Act 1989 provisions that might be relevant. For example, the young person might be subject to a care order/ interim care order or other Children Act 1989 provisions may apply (special guardianship, guardians, child arrangement orders). The Bill makes no provision for such orders in relation to the AMHPs appointment for 16/17 year olds.



We consider that the Bill should be amended to include a hierarchy of individuals who could be appointed, depending on the child or young person's circumstances. For example, such a list would ensure that if a special guardianship order was in place, the AMHP should choose the special guardian (the elder, if there are more than one), rather than a parent. The failure to consider the Children Act 1989 orders and their relevance to parental responsibility is a serious omission. These omissions are likely to give rise to confusion and uncertainty in practice

Potential scenario

We have drafted the following potential scenario to demonstrate how this issue will play out in practice if not addressed.

Child S:

- Child S is 15 year old.
- Her grandmother and grandfather are special guardians as S has experienced neglect in the care of her birth mother.
- S is in crisis, so she is assessed as requiring admission to hospital for assessment of her mental disorder. This will be S's first admission.
- S has not appointed a nominated person.
- The AMHP reasonably believes S lacks competence and therefore decides to appoint a nominated person on S's behalf.
- The AMHP notes that S has expressed her strong preference for her birth mother to be involved in her care
- The AMHP checks the MHA provisions and as there is no local authority with parental responsibility (i.e. no care order or interim care order), the AMPH notes that the AMHP may appoint "any other person who has parental responsibility" for S.
- S's birth mother has parental responsibility, therefore the AMHP appoints S's birth mother to be S's nominated person on the basis that this is in accordance with S's wishes and there is nothing in the nomination provisions that the AMHP should do otherwise.

Appendix A – parental responsibility

The legal concept of parental responsibility (PR) and who has PR is set out under the Children Act 1989. It is defined as 'all the rights, duties, powers and responsibilities and authority which by law a parent of a child has in relation to the child and [their] property' (section 3(1) of the CA 1989).ⁱⁱⁱ

The scope of the decision-making powers of those with parental responsibility is not defined in the Children Act. However, parents and others with parental responsibility are recognised as having the power to make a wide range of decisions relevant to the upbringing of their child, including the care and treatment of their child. Importantly though, it is also widely recognised that the decision making powers of those who hold PR will need to adapt in accordance with the child's developing maturity and ability to make decisions for themselves.

Parental responsibility ceases when a child reaches 18 years old.

Being a parent and having parental responsibility are not the same. Legal authority for making decisions relating to an under-18s care and upbringing comes from holding PR, not the fact of being a parent. There are a number of ways by which somebody who is not a parent or stepparent can acquire parental responsibility for a child. These are summarised below.

Child arrangement orders (section 8 of the Children Act 1989)

Where the court orders that a child or young person is to live with someone under a child arrangements order (often referred to as a “lives with order”), that person will automatically acquire parental responsibility. If more than one person is named as being the person with whom the child is to live, each of them will have parental responsibility.^{iv} For example, if the court orders that a child is to live with their uncle and aunt, both being named in the child arrangement order, the uncle and aunt will both have parental responsibility. Such orders do not take away the parents’ parental responsibility. So, in this example, if both parents have parental responsibility, there will be four people with parental responsibility for the child (mother, father, uncle and aunt).

The court may also award parental responsibility to a person whom the child spends time with or otherwise has contact with the child. However, this type of child arrangement order, which is often referred to as a “time spent with” order does not automatically give the person PR.

Special guardianship (sections 14A-14G) of the Children Act 1989)

Where parents cannot (for whatever reason) care for their child, the court may make a “special guardianship order” as an alternative to adoption or the child or young person being cared for by the local authority. The person(s) appointed as the special guardians (who are often someone with a close relationship to the child such as family member) will have parental responsibility for the child as long as the order remains in force. There can be more than one special guardian. For example, a child’s grandparents could both be appointed.

Although such orders do not remove parental responsibility, the special guardians will make all the day to day decisions and do not need to discuss these with the parents. The decisions which would require the parents’ consent are very limited, for example, changing the child’s surname or having non-therapeutic treatment (such as cosmetic surgery).

A special guardianship order can last up until the young person reaches the age of 18.

Care order (section 31 of the Children Act 1989)

When a child is placed under the care of the local authority through a care order, or interim care order (section 38) the local authority has parental responsibility for the child, which it shares with the parents. However, the local authority may limit the extent to which the parents can exercise their parental responsibility if it thinks this is necessary “to safeguard or promote the child’s welfare”.^v

A care order will last up until the young person reaches the age of 18 (unless ended before then).

Guardianship (section 5 of the Children Act 1989)

The court may appoint a guardian for a child or young person where no one has parental responsibility for them, or where the parents (or the person(s) named in a “lives with order” has died). This is separate to guardianship under the Mental Health Act 1983.

About the Children and Young People’s Mental Health Coalition

The Children and Young People's Mental Health Coalition is a collaborative network of over 350 organisations and individuals dedicated to advocating for and influencing policy in relation to the mental health needs of babies, children, and young people. Our coalition consists of diverse stakeholders, including mental health organisations, youth support services, educational institutions, and concerned individuals, all united by a shared commitment to improving the well-being of children. **For more information**, please contact Charlotte Rainer on charlotte.rainer@cypmhc.org.uk

References

ⁱ <https://committees.parliament.uk/publications/33599/documents/182904/default/>

ⁱⁱ <https://committees.parliament.uk/publications/33599/documents/182904/default/>

ⁱⁱⁱ <https://researchbriefings.files.parliament.uk/documents/CBP-8760/CBP-8760.pdf>

^{iv} <https://researchbriefings.files.parliament.uk/documents/CBP-8760/CBP-8760.pdf>

^v <https://childlawadvice.org.uk/information-pages/care-orders/>