

MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 17 – Patient Representation

Chapter 1: named persons

Sections 250 to 257: named persons

469. These sections deal with appointing or identifying a named person to represent the interests of and support a patient subject to proceedings under the 2003 Act. Broadly speaking, the named person has similar rights to the patient to appear and be represented at Tribunal hearings concerning compulsory treatment orders, and to appeal against short-term detention. The named person is also entitled to be given information concerning compulsory measures which have been taken or are being sought where this is provided for in the 2003 Act.
470. Unlike, for example, a welfare guardian (depending on their powers), a named person does not “step into the shoes” of the patient. The named person and the patient are each entitled to act independently of the other.

Nomination of named person

471. A patient aged 16 or over may choose an individual to be his or her named person. The nomination may be made whether or not the patient is, at the time, the subject of compulsory measures. Section 250 sets out the process of nomination of a named person.
472. To be valid, a nomination must be signed by the patient and witnessed by a prescribed person. The prescribed person must certify that the patient understands the effect of making a nomination and has not been subject to any undue influence, for example that the patient has not been pressed into nominating when he or she clearly does not wish to (subsection (2)).
473. A nomination may be revoked, provided the conditions in subsection (3) are met. (These are similar to the conditions for the making of a valid nomination).
474. Subsection (5) provides that a nomination remains valid even if the person who made it subsequently becomes incapable.
475. A person nominated may refuse act as the named person. This must be done by giving notice to the patient and the local authority for the area where that patient lives (see subsection (6)).
476. Subsection (7) explains the meaning of the terms “incapable” and “prescribed person”.

Named person where no person nominated or nominated person declines to act

477. Where no named person is nominated under section 250, or the nominated person declines to act, section 251 determines who is to be the named person for a patient who is 16 or over.
478. Subsection (1) provides that the patient's primary carer, if aged 16 or over, is to be the named person. (The primary carer is defined in section 329).
479. Where the primary carer is under 16, but another carer is 16 or over, that carer is the named person (subsection (2)).
480. Where a patient has no primary carer, but has two or more carers of at least 16, those carers may agree which of them is to be the named person (subsection (3)(a)). Where the primary carer is under 16, but there are two or more carers aged 16 or over, those carers may agree which of them is to be the named person (subsection (3)(b)).
481. A named person may decline to act by giving notice in accordance with subsection (6).
482. Where a patient does not have a named person (or if the named person declines) the nearest relative, as defined in section 254, is to be the named person.

Named person in relation to child

483. [Section 252](#) provides that a named person for a patient under 16 shall be determined in accordance with subsection (1). A person, unless under the age of 16, who has parental rights and parental responsibilities in relation to that child, will ordinarily be the named person. (Parental rights has the meaning given by section 2(4) of the Children (Scotland) Act 1995 and parental responsibilities has the meaning given by section 1(3) of that Act.)
484. Where there are 2 or more persons of the relevant age with parental rights and parental responsibilities in relation to a child, subsections (2) and (3) operate so as to determine who will be the named person.
485. Where the child is in the care of a local authority by virtue of section 31 of the Children Act 1989, the authority is to be the named person.
486. Where neither of the situations in the preceding paragraphs applies, subsection (1)(c) provides that, where the child's primary carer is 16 or over, that person is the named person.

Declaration in relation to named person

487. As well as the right to nominate a named person, a patient who is 16 or over also has the right under section 253 to specify someone whom he or she would not wish to be their named person.
488. This right is to be exercised by a declaration made in accordance with subsection (2). Such a declaration remains valid even if the patient making it subsequently becomes incapable (subsection (3)). It may be revoked in accordance with subsections (4) and (5).

Meaning of "nearest relative"

489. The nearest relative of a patient is identified in accordance with section 254.
490. Subsection (2) lists the persons who may be the nearest relative. This list should be read along with subsections (7) and (8) which explain the entries at paragraphs (b) and (j). The patient's spouse is disregarded for these purposes where the couple are separated or there is a continuing desertion (subsection (3)). Similarly disregarded, are those under 16 years old and, where a patient is ordinarily resident in the UK, Channel Islands or

*These notes relate to the Mental Health (Care and Treatment) (Scotland)
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the Isle of Man, relatives living elsewhere. Subsection (6) provides that half-relations are generally treated in the same way as whole relations (so, for example, a half-sister is included in paragraph (e) of subsection (2)) and a step-child is treated as a child.

491. Where, in relation to a patient, only one person falls within the list, that person is the nearest relative (see subsection (1)).
492. Where, however, two or more persons fall within the list, the nearest relative is, ordinarily, the person who appears in the first paragraph in the list (e.g. where the person has a spouse and a child, the named person would be the spouse). Where two or more persons fall within the first paragraph of the list, subsection (4) determines which of them is the nearest relative.

Section 255: named person: mental health officer's duties

493. This section places a duty on a mental health officer, in discharging a function under the 2003 Act or the 1995 Act, where it is necessary for that purpose to establish whether the patient has a named person, to take steps to find out whether a person has a named person and if so, who it is (subsections (1) and (2)).
494. Subsections (3) to (5) address the situation where the officer is unsuccessful. The officer is required to record the steps taken to identify the named person and must then give a copy of the record to the Tribunal and the Commission.
495. Where the officer does identify the named person but considers that the person is inappropriate, the officer must apply to the Tribunal for an order under section 257 appointing another person to be the named person (subsection (6)).
496. Subsection (7) empowers a mental health officer, when discharging any function under the 2003 Act in relation to a patient who has no named person, or where the named person seems inappropriate, to apply to the Tribunal for an order under section 257.

Section 256: named person: application by patient

497. Certain persons, other than the mental health officer, have a power apply to the Tribunal for an order under section 257 by virtue of section 256. Those persons are listed in subsection (2) (as read with subsection (3)). Such persons may apply where: the patient has no named person (subsection (1)(a)); the nominated named person appears to the applicant to be inappropriate to act in that role (subsection (1)(b)); or in such other circumstances as may be prescribed in regulations made by the Scottish Ministers (subsection (1)(c)).

Section 257: named person: Tribunal's powers

498. **Section 257** gives the Tribunal power to make certain orders about named persons. Subsection (1) deals with applications in respect of patients who have no named person. The Tribunal may make an order appointing a specified person to be the patient's named person. Subsection (2) deals with applications in respect of inappropriate named persons. The Tribunal may make an order declaring that the acting named person is not the named person or substituting the person specified in the application as the named person for the acting named person. In relation to applications made under section 256(1)(c), the Tribunal may make such order as it thinks fit, although it cannot appoint a person under 16 years of age to be a patient's named person (subsection (4)).