

13 October 2021

Adults with Incapacity: supporting discharge from hospital

The Mental Welfare Commission and Scottish Government have today issued this joint statement on supporting discharges from hospital for adults with incapacity.

The statement outlines actions that can be taken to support this vulnerable group on discharge from hospital, and highlights key points of the law to ensure individuals' rights are respected. It is issued at this time of pressure on the hospital system and consequent focus on delayed discharge.

We hope health and care services find the statement useful and informative.

Purpose

1. The purpose of this note is to highlight actions that can be taken to support the discharge of adults with incapacity from hospital, whilst respecting and protecting their human rights.

The Adults with Incapacity (Scotland) Act 2000

2. The Adults with Incapacity (Scotland) Act 2000 (AWI Act) introduced a system for safeguarding the welfare and managing the finances and property of adults who lack capacity to make some or all decisions for themselves.
3. This legislation is underpinned by principles of benefit to the adult, taking account of the person's wishes and the views of relevant others. Any action must be the least restrictive option necessary to achieve the benefit and importantly to encourage the adult to exercise whatever skills he or she has in relation to their welfare, property or financial affairs and develop new skills where possible recognising issues of capacity are not 'all or nothing', they are decision specific.

The Impact of the Coronavirus (Scotland) Act 2020

4. The Coronavirus (Scotland) Act received Royal Assent on 6 April 2020. Provisions in relation to the AWI Act have since expired or been suspended.
5. There is no plan for previous AWI provisions to be enacted in any future wave of this pandemic. It is also the case that there has been a return to pre-existing guidance relating to adult social care and adult carers.

Existing Statutory Framework: Lawful authority

6. Services are required to operate within the existing statutory framework. The Mental Welfare Commission's 'Authority to Discharge: Report into decision making for people

in hospital who lack capacity' May 2021 makes recommendations to ensure that this happens. People who lack capacity to make some or all decisions relating to their welfare, including community care provision, must have their rights protected and respected.

7. The principles of the AWI Act must inform consideration in each case of the action to be followed. As well as applying to decisions under the AWI Act, it is explicit in s.13ZA of the Social Work (Scotland) Act 1968 (1968 Act) that the general principles of the AWI Act apply to whatever steps are taken by the local authority under the 1968 Act, in relation to the provision of community care services for an adult with incapacity.
8. Due legal process ensures the adherence of the European Convention of Human Rights (ECHR) and regard for the United Nations' Convention on the Rights of Persons with Disabilities (UNCRPD).

Hospital Discharge

9. When people are clinically well enough to leave hospital, they should receive all necessary information and support to return to their home, whether that is their own house or an alternative community setting which is their home. It is not in anyone's interests to stay in hospital when there is no clinical reason to do so.
10. For those people who do not have the capacity to fully participate in discharge planning processes, legal frameworks must be considered to ensure appropriate lawful authority and respect for the person's rights.
11. Helpful prompts to navigate discharge planning are included in the Scottish Government's guidance on key actions Adults who lack capacity - discharge process: key actions - gov.scot (www.gov.scot)
12. Using video technology to undertake assessments should be the exception, rather than the default position and AWI orders should be applied for on the basis of the needs of the person rather than on a 'just in case' basis (principles of least restrictive and benefit).
13. When an application is lodged in court, interim orders can be requested at that specific time, and the sheriff will consider the necessity of such interim powers based on the individual needs and circumstances of the person. Interim orders can expedite a legally authorised discharge from hospital for an individual who lacks capacity to consent to the move.
14. Once an AWI application is lodged in court, no other application can be made in respect of the same individual and no decisions should be taken in relation to moving the individual until the application has been concluded. A statement of intent to apply is not the same as the application being lodged.
15. Whilst recommendations cannot be made to prospective applicants regarding where to seek legal advice, local authorities can hold a prescribed list of solicitors who have confirmed that they are willing and able to support private applications in the field of AWI in their area. Such lists have assisted applicants to progress actions timeously.
16. It is entirely possible for the local authority to make AWI applications and name a relative as the proposed guardian.

Concluding Remarks

17. No-one should stay in hospital longer than is necessary and there are actions that can be taken to speed up discharge based on the individual needs and circumstances of the person. Any move of an adult lacking capacity from hospital should have appropriate legal authority and respect the principles of the Adults with Incapacity Act.

For further information, please also see the report from earlier this year, [Authority to discharge](#), published by the Mental Welfare Commission for Scotland.