



**24 November 2022**

## **Adults with Incapacity: supporting discharge from hospital**

The Mental Welfare Commission and Scottish Government issued a joint statement on supporting discharges from hospital for adults with incapacity on 13 October 2021.

The statement outlined actions that can be taken to support this vulnerable group on discharge from hospital, and highlighted key points of the law to ensure individuals' rights are respected. This statement has been updated as below and is issued once more at this time of pressure on the hospital system and consequent focus on delayed discharge.

At times of pressure on the hospital system, services must make use of available options in line with the Adults with Incapacity (Scotland) Act 2000 (AWI Act). The Mental Welfare Commission (MWC), the Equality and Human Rights Commission (EHRC) and the Scottish Human Rights Commission (SHRC) emphasise the need for services to meet their human rights obligations, as they adhere to the law.

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 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.

## Existing statutory framework: lawful authority

4. The Coronavirus (Scotland) Act 2020 did **not** enact any emergency legislation in relation to the AWI Act.
5. Services are required to continue to operate within the existing statutory AWI framework. The Mental Welfare Commission's 'Authority to Discharge: Report into decision making for people in hospital who lack capacity' May 2021<sup>1</sup> made 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.
6. 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.
7. Due legal process ensures the adherence of the European Convention of Human Rights and regard for the United Nations' Convention on the Rights of Persons with Disabilities.

## Movements within the NHS estate

8. Some people may move from one registered hospital setting to another hospital setting based on their own individual needs. Such moves will evidence that they are for the benefit of the adult to support recovery pending discharge. An AWI order is not required to support such moves for people assessed as lacking capacity to make some or all decisions.

## 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.

---

<sup>1</sup> [https://www.mwscot.org.uk/sites/default/files/2021-05/AuthorityToDischarge-Report\\_May2021.pdf](https://www.mwscot.org.uk/sites/default/files/2021-05/AuthorityToDischarge-Report_May2021.pdf)

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 \(www.gov.scot\)](https://www.gov.scot/adults-who-lack-capacity-discharge-process-key-actions)
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).

### **Interim orders**

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.

### **Prescribed list of solicitors**

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. Best practice dictates that monitoring of the progress of private applications should be undertaken to ensure there is no delay which negatively impacts on the individual. We are advised by practitioners that where there is no progress (for example no engagement of a solicitor) within 8 weeks of agreement to proceed to private application this is a concern; an alternative applicant/application may be required.

### **Local authority applications**

17. It is entirely possible for the local authority to make AWI applications and name a relative as the proposed guardian.



## Concluding remarks

18. 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 to a setting which is not registered as an NHS setting should have appropriate legal authority and must respect the principles of the AWI Act.

For further information, please refer to the [Authority to discharge](#) report (2021), published by the Mental Welfare Commission for Scotland.