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Key actions on managing the end-to-end discharge process of adults who lack capacity including legal measures

Key Actions

Once a person's treatments have been concluded, remaining in hospital is not considered to be to their physical and mental benefit. Ideally, everyone discharged from hospital would be able to return home, with support as needed.

This document identifies the key actions gathered from adults with incapacity (AWI) peer support sessions run between a number of health and social care partnerships and local operational guidance in place for managing adults who lack capacity and who are preparing for discharge. It is designed to augment existing guidance and assist in sharing good practice and learning.

Links to existing guidance

Discharging Adults with Incapacity (March 2019)

Involving Carers in Discharge Planning (March 2019)

Guidance for Local Authorities: Provision of Community Care Services to Adults with Incapacity-March 2007

Key Actions:

1 Identifying early a person in hospital who may lack capacity

Early identification of a person in hospital who may lack capacity, particularly at ward level, is fundamental to discharge planning. It means any required application for legal decision-making powers can be made in good time and appropriate professional expertise, such as that provided by a Mental Health Officer, sought to support this.

2 Ensuring proper legal authority for adults who lack capacity

Where a person has been formally assessed as lacking capacity, a discharge from hospital cannot be arranged until there is proper legal authority to do so.

3 Promoting Power of Attorney

Health and social care practitioners should:

1. encourage early discussion with families and service users through routine social work and NHS contacts about capacity and legal options
2. ensure they are able to provide all the information required – if powers of attorney are already held by a relative or friend, a copy should be made to determine the exact nature of powers held
3. establish whether the individual, with appropriate support, could have capacity to appoint an attorney with welfare powers.

Multidisciplinary meetings with individuals and families is the context within which information relating to the outcome of assessments of capacity and individualised plans for discharge must be agreed. Health and social care practitioners should:

4. support the person who lacks capacity to participate in any way – independent advocacy worker involvement should be sought in each case
5. identify staff to escalate and report on issues when timescales are not met
6. encourage and support anticipatory care planning where appropriate, with explicit clarity created on the person's wishes if/when capacity is lost.

4 Supporting families to consider Guardianship at an early stage

Where Power of Attorney is not an option, and prior to an acute admission, families should be supported to consider Guardianship at an early stage. Health and social care practitioners should:

7. use opportunities offered when providing services such as post-diagnostic support, clinic services and carer support to share information with families about the need for Guardianship

8. use the vulnerable adults list to review cases where it would be appropriate to initiate discussions around the potential need for legal powers.

The local authority has a duty to apply for a guardianship order in cases where a person has been formally assessed as lacking capacity and there is no other way to safeguard their property, financial, health and/or welfare interests. There may be no one else related or known to the person who is in a position to make this application.

Relatives or friends of the adult may oppose local authority applications. This is likely to result in additional court hearings, adding to the time taken to get a Guardianship order. Health and social care practitioners should:

9. ensure this possibility is reflected in timescales

10. initiate discussions to prevent opposition occurring in the first place.

There is no single action that alone will have a significant effect on the numbers or speed-up the processes associated with Guardianship. Small marginal gains within each of the areas identified above will have a cumulative effect.

5 Seeking interim powers

It may be necessary to seek interim powers to support discharge where a placement has been identified, prior to a full order being made. This is done through an interim order application to the local Sheriff Court.

The local authority can seek interim powers, using the same report as for a full application. This depends entirely on individual circumstances and will be granted only if the Sheriff considers there is sufficient evidence to support the request.

6 Facilitating supported decision-making

The purpose of supported decision-making is to ensure that the individual's will and preferences are central to, and fully respected in, decisions that concern them. Adults who lack capacity should be given the maximum support to assist with decision-making. Health and social care practitioners should:

11. seek guidance from speech and language therapy services on communication needs

12. utilise independent advocacy services

13. develop informal circles of support.

7 Ensuring consistent communication

A standard suite of letters and information should be used across the health and social care partnership with the appropriate professionals taking the lead for this to ensure that messaging and communication are clear.

8 Supporting the role of the Mental Health Officer

The role of the Mental Health Officer (MHO) is recognised as being vital early in the process, when they can discuss options and explain the legalities to families. MHOs are specially trained social workers with enhanced knowledge of legal provisions and procedures, and social care services and supports. They will help expedite any AWI applications, especially if a Guardianship application is required.

Health and social care partnerships should:

14. ensure there is an MHO in the discharge team or that there is access to MHOs to undertake AWI-related work to focus on relationships with hospital-based doctors

15. provide clarity on who is managing the process

16. reduce duplication of work and eliminate multiple streams of communication

17. include the MHO Team Manager and relevant manager from mental health services in the daily management discussion – this has been found to be useful in some partnerships in ensuring that discussions reflect patients across hospital services.

9 Obtaining medical reports within requisite timescales

Medical reports need to be available within the timescales and occasionally can be problematic. Multiple reports should be coordinated so that none of them have to be redone or re-dated at a later stage.

Health and social care partnerships should:

18. consider developing guidance for medical staff around their reports, possibly via clinical directors in acute settings and health and social care partnerships

19. explore the barriers to timeous production of medical reports and consider solutions such as payment for reports if required.

10 Ensuring consultation with, and attendance of, legal departments

Health and social care partnerships should:

20. establish clarity regarding the role of local authority legal services within case conferences

21. consider ensuring legal advisers attend to provide early legal advice, which happens in some health and social care partnerships.

11 Monitoring and tracking progress

Health and social care partnerships should:

22. try and track progress of cases if possible by considering setting up regular case conferences with social workers, MHOs, solicitors and legal aid services to spot timescales slipping and take or prompt action

23. consider the use of an AWI tracker to enable performance to be scrutinised and bottlenecks and blockages to the process to be identified

24. put in place detailed and comprehensive daily and weekly reporting.

12 Supporting and signposting families

Health and social care partnerships should:

25. ensure that appropriate signposting takes place to support families; this can be to care support organisations, or by helping to find a solicitor through the Law Society or seek advice from the Mental Welfare Commission and the Office of the Public Guardian (Scotland).

13 Using video technology to speed up applications

Giving all MHOs access to the Near Me video conferencing technology developed for the Scottish Government and NHS Scotland enables the assessment process and applications for Court to be completed remotely, speeding up processes where deemed appropriate.

Health and social care partnerships should:

26. consider using technology that will allow the assessment process and applications for Court to be completed.

14 Ensuring proper use of Section13ZA

Section 13ZA of the Social Work (Scotland) Act 1968 makes it explicit that following an assessment of an adult's needs and outcomes, if the adult requires a community care service but is not capable of making decisions about the service, the local authority may take any steps they consider necessary to help the adult benefit from the service.

Local authorities, as public bodies, must act in a way that is compatible with European Court of Human Rights case law. The use of Section 13ZA does not allow steps to be taken that would be incompatible with those rights, in particular depriving an adult of their liberty in terms of Article 5 (Right to Liberty and Security). Using Section 13ZA to facilitate a discharge from hospital to a care-home setting provides a level of legal authority for the move, but does not give authority for a person to remain/be held there. Additional powers, such as Welfare Guardianship, are required for this and should be sought as soon as possible.

Section 13ZA **cannot** be used in the following situations:

- the adult has a Guardian or Welfare Attorney with relevant powers
- an intervention order has been granted relating to the relevant care plan actions
- an application has been made (lodged) but not yet determined for an intervention or Guardianship order relating to the relevant care plan actions
- where the adult who has been assessed as lacking capacity is opposed to the actions proposed
- where there is disagreement between health and social work professionals
- where there is disagreement between family members
- where the adult is unable to adhere to the support/care/treatment plan in place.

Health and social care partnerships should:

27. obtain a view from independent advocacy services
28. transfer using Section 13ZA where appropriate (using the relevant guidance)
29. review the patient and consult with the family regularly regarding Section 13ZA use
30. consider using measures such as interim powers and removal orders, ensuring their relevance, application and limitation is well understood by all parties
31. consider the routine use of intervention orders applied by non-MHOs when, for example, tenancy requires to be rescinded; this would involve appointing an intervenor to act on the local authority's behalf.

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