

REPORT

Adults with Incapacity

Edinburgh Integration Joint Board

22 April 2024

Executive Summary

1. The Mental Welfare Commission for Scotland (MWC) carried out a study based on data provided by Local Authority Health and Social Care Partnerships (including Edinburgh) of 457 patients affected by incapacity issues who were discharged during the COVID-19 pandemic from hospitals between 1/3/2020 and 31/5/2020.
2. The study identified that a number of those patients were discharged without all the appropriate legal safeguards or lawful authorities required under the Adults with Incapacity (Scotland) Act 2000 (AWI) having been in place.
3. MWC published a report in May 2020 outlining their findings and suggested a number of improvements that Health and Social Care Partnerships might consider along with a warning that the Care Inspectorate and Scottish Government would be looking for signs of implementation within 2 years.
4. In response the Edinburgh Health and Social Care Partnership (EHSCP) prepared an action plan and also instructed an internal review of all transfers of patients with incapacity issues from Hospitals to Care Homes between 1/3/2020 and 4/8/2021.
5. The internal review initially identified 83 potentially unlawful transfers over that period by reference to 268 instances of discharge.
6. The 83 transfers were then looked at in considerable detail and consideration was given to what remedial steps might be required.
7. Issues of particular concern were identified in 11 of the transfers, which resulted in further direct engagement with the affected individuals and their families.
8. The engagement began in late 2022 with significant follow up work undertaken including apologies and/ or



	<p>explanations and in some instances either in person meetings or follow up calls.</p> <p>9. The concerns arising from 10 of the 11 cases of concern have at this time been followed up and resolved to the satisfaction of the families involved.</p>
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Recommendations	<p>It is recommended that the Edinburgh Integration Joint Board (EIJB)</p> <ol style="list-style-type: none"> 1. notes the content of this report including: <ol style="list-style-type: none"> a. Investment in social work services to enable them to meet the recommendations of the inspection reports and the needs of their communities. b. Training programmes which are vital in providing an informed workforce. c. Local auditing systems are in place which can inform practice, and gaps in service, however they are limited so current information systems need updating / replaced. d. Updating policy and procedures will also require investment as they set direction, guide and influence practice and decision making. e. Recruitment and retention of staff is an issue across Scotland, however without sufficient investment in human resources it will be difficult for social work to take forward the change agenda and should be considered an area of priority. 2. To note the legal considerations contained in the B Agenda report – Legal Considerations.
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Directions

Direction to City of Edinburgh Council, NHS Lothian or both organisations		
	No direction required	
	Issue a direction to City of Edinburgh Council	
	Issue a direction to NHS Lothian	
	Issue a direction to City of Edinburgh Council and NHS Lothian	✓



Background

1. A Quality assurance review highlighted that during the period 1 March 2020 and 4 August 2021, approximately 83 out of 268 instances of discharge of a person who lacked capacity from a hospital to a care home was carried out unlawfully and earlier reports have been presented to Full Council only and not the EIJB on this matter.
2. It is important to understand that the term “unlawful” is not being used in a strictly legal sense, but instead as a more general descriptive term for transfers that were not done in full accordance with AWI requirements.
3. The earlier review was undertaken in response to a national report on Authority to Discharge, undertaken by the MWC which found instances of unlawful practices in several areas of Scotland, including Edinburgh.
4. In a wider context, transfers that were not done in full accordance with AWI requirements arose primarily as a consequence of the intense pressure on staff and resources brought about by the Covid-19 pandemic. The EHSCP confirmed that the practice is not ongoing and service improvements continue to be implemented to mitigate any future risk of repetition and embed lessons learned.
5. A large scale communication exercise to affected families and contacts via Mental Health Officer colleagues was undertaken to provide a clear picture of the likelihood for civil proceedings in relation to the alleged unlawful discharge of patients from hospital to care homes during the Covid-19 pandemic.
6. An independent review was further instructed by the City of Edinburgh Council Chief Executive to establish all relevant facts and understand and inform next steps in relation to the issues identified. Independent expert Eileen Niblo undertook the review. The legal and practical implications of this work have now been considered. Details of the biography for Eileen Niblo are contained in the B Agenda report, Appendix 1.

Main Report

7. The AWI legislation 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.
8. This legislation is underpinned by principles of benefit to the adult, taking account of the person’s wishes and the views of relevant others.



9. 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.
10. The "Authority to Discharge" report published by the MWC in May 2021 focused on unlawful practice by health and local authority staff discharging patients affected by incapacity issues from hospital to care homes without appropriate application of the AWI legislation and/or consideration of the European Convention on Human Rights and the United Nations Convention of the Rights of Persons with Disabilities. The MWC report covered all local authorities in Scotland and made recommendations.
11. Considering the findings of the MWC report a further Quality Assurance Review was commissioned by the Chief Officer of the EHSCP and Chief Social Work Officer for the City of Edinburgh Council on behalf of the Policy and Sustainability Committee, for the purpose of exploring the practice of hospital discharge to care homes for those affected by incapacity issues in Edinburgh.
12. EHSCP also completed and submitted an improvement plan to the MWC outlining how they would address the areas identified in their report.
13. As a result of the findings from the Quality Assurance Report an independent review was additionally commissioned by City of Edinburgh Council and EHSCP. Both Clyde & Co Solicitors and independent expert Eileen Niblo were asked to consider matters and report as appropriate to the Chief Executive and Chief Officer.
14. The work instructed required a professional overview in respect of the social care and social work aspects concerning: -
 - 14.1 The likely causes and overall themes relating to the unlawful discharges, where possible.
 - 14.2 An appraisal of the remedial steps by the Council/ EHSCP in response to the MWC report and the findings of the subsequent CEC review.
 - 14.3 Any changes required in practice, policies and procedures to be additionally recommended in order to ensure legal parameters are adhered to in future.
15. The aim of the independent review was to examine the likely causes and overall themes relating to the unlawful discharges, where possible, an appraisal of the remedial steps by City Edinburgh Council in response to the MWC report, the findings of the subsequent City of Edinburgh Council review and to recommend any changes



required in practice, policies, and procedures to ensure legal parameters are adhered to in future.

16. There are several causes relating to the unlawful discharge of adult from hospital to care home settings. These were not issues specific to City of Edinburgh Council and the EHSCP but were also experienced by several other Health and Social Care Partnership (HSCP) areas. The MWC report also confirmed that unlawful moves took place across eleven other HSCP areas.
17. As a result of the findings from the independent review by Eileen Niblo several recommendations have arisen, in particular: -
 - 17.1 Investment in social work services to enable them to meet the recommendations of the inspection reports and the needs of their communities remains important. Failure to do so will leave the Council in a vulnerable position if their statutory duties are not met.
 - 17.2 Training programmes are vital in providing an informed workforce. Relying on practitioners who are trying to balance workload commitment as well as develop and deliver training is a challenge. A lack of investment in a dedicated training team will take the improvement plans longer to fulfil and delay meeting the needs of the workforce.
 - 17.3 Local auditing systems are in place which can inform practice, and gaps in service, however they are limited. Current information systems need updating / replaced to provide the level of scrutiny that managers need to consider future service provision and support staff do their work. The Quality Assurance Team was actively involved in the HSCP audit and will play a key role in the change agenda.
 - 17.4 Updating policy and procedures will also require investment as they set direction, guide and influence practice and decision making.
 - 17.5 Recruitment and retention of staff is an issue across Scotland, however without sufficient investment in human resources it will be difficult for social work to take forward the change agenda and should be considered an area of priority.
18. The EHSCP improvement plan has been approved by the MWC and EHSCP are continuing to work to those requirements which have been put in place.
19. The EHSCP have an Oversight Board for the Adult Social Work and Social Care Improvement Plan and has incorporated the Authority to Discharge Improvement Plan to ensure that the actions arising from the improvement plan remain in place and are adhered to.

20. The work of the EHSCP is currently subject to further management oversight via a Mental Health Services Audit which is underway.
21. The EHSCP fully accept the extracted recommendations made by Eileen Niblo in her independent report (as captured above) and are grateful for the careful consideration and expertise provided.
22. Due to the issues of social work practice identified in 2020/21, alongside the findings of the Adult Support and Protection and Adult Social Work and Social Care Inspections published in 2023m it is important that the EIJB are aware of the recommendations made by Eileen Niblo and the improvement activity required.

Implications for Edinburgh Integration Joint Board

Financial

23. The recommendations from the independent review required investment in several key areas, including social work services, training, quality and HR. It should be noted that, in this current climate, the ability of the Integration Joint Board and partners to fund this will be severely limited. In this context, the pace of improvement will be impacted.

Legal/ Risk implications

24. As set out in the separate B Agenda paper.

Equality and integrated impact assessment

25. Overall, it is considered that the implementation of the recommendations will have positive equality, human rights, and socio- economic implications.
26. The changes proposed are unlikely to be considered strategic under the Fairer Scotland Duty but, in any event, as part of the implementation of the recommendations, consideration requires to be given to whether the matters arising would or could reduce inequalities of outcome caused by socio-economic disadvantage.
27. It is considered that as part of our public sector equalities duties, we want to foster a culture that encourages people to adhere to best practice to ensure that lessons are learned so as to continue to create a culture of openness where no one is above reproach.

Environment and sustainability impacts

28. Not relevant.

Quality of care

29. The contents of this report affect members of the public, but it is noted that direct engagement has been undertaken with those families affected.

Consultation

30. See background reports.

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Background Reports

1. City of Edinburgh Council – Monitoring Officer Report – B agenda, Thursday 27 October 2022.
2. City of Edinburgh Council – Monitoring Officer Report – Adults with Incapacity, Thursday 24 November 2022.

Appendices

Appendix 1 B Agenda - Legal Considerations.