Adults with Incapacity (Scotland) Act 2000: Capacity and Consent

Doctor D Lusman Consultant Psychiatrist
What does the Act do?

- The Act provides the mechanism for safeguarding the personal welfare, and managing the finances and property of adults who lack the capacity to take some or all decisions for themselves.
- It allows other people to make decisions on behalf of these adults, subject to safeguards.
Who can the Act help?

- People over the age of 16 who lack capacity to make some or all decisions for themselves
- It also covers people who are unable to communicate due to a physical condition
- It can support families and carers in managing and safeguarding the individuals’ welfare and finances
- People over the age of 16 who are planning ahead of possible future incapacity
The legislation also affects

- Professionals – social work staff, mental health officers, health staff, managers of residential establishments, doctors, dentists, lawyers and bankers
How can the Act help?

The Act provides the following ways for managing and safeguarding a person’s welfare, financial affairs or both:

- Power of Attorney
- Access to funds scheme
- Guardianship Order (Welfare +/- financial)
- Intervention Order (Welfare +/- financial)
- Management of resident funds (Care home or hospital)
- Medical treatment decisions
- Medical research decisions
Power of Attorney

- Appointed by person with capacity
- Usually a relative, but may be lawyer
- Welfare and/or financial attorney
- Can have wide ranging powers
- Welfare powers can only be used when person loses capacity
Guardianship Order

- as for POA, but appointed by court when person lacks capacity
- Applicant is relative or SWD
- Financial and/or welfare powers
- Intervention Order – one off decisions
Medical Treatment decisions

- S47 – doctor (or other professional) certifies that patient is not capable of understanding treatment, but that specific treatment should be given.
- Not necessary in emergency situation
- Does not cover refusal of treatment
- Must follow principles of the act
General Principles

- Benefit
- Least restrictive option
- Past and present wishes of the adult
- Consultation with others
- Encourage the adult to use or develop whatever skills they possess
The practical approach to assessing capacity

“There is no all-purpose test for incapacity. The test depends on the decision to be taken ….or task to be done. The principle of least restrictive of alternatives and maximising the person’s capacity underline the importance of not making blanket assessments of incapacity and recognising any residual capacity an adult has”

Hilary Patrick. Solicitor, Honorary Fellow, School of Law at Edinburgh University
What is capacity?

- The ability to make decisions for yourself
- AWIA adds the concept of being able to communicate these decisions
Key Points

- The law of Scotland generally presumes that adults are capable to make decisions.
- General ethical principal of an adult having autonomy.
- This presumption can be overturned in relation to particular matters or decisions on evidence of impaired capacity.
Assessment of capacity

- An adult does not have impaired capacity simply by virtue of:
  - Having a psychotic illness/addiction
  - Dementia, particularly in early stages
  - Being vulnerable or at risk from self/others
  - Behaving irrationally
  - Disagreeing with treatment or those offering it
What is Incapacity?

- For the purposes of the Act, “incapable” means incapable of
  - Acting on decisions; or
  - Making decisions; or
  - Communicating decisions; or
  - Understanding decisions; or
  - Retaining memory of these decisions

(AMCUR)
Four components of capacity

- Receive and retain information (cognitive process)
- Believe it (thought processes /delusions, cognition)
- Weigh up choices to arrive at decision (softer concepts, mood states, etc)
- Communicate the decision
Capacity and Consent

- Capacity + information = understanding
- Understanding + volition = decision

- Capacity required varies with the gravity of the decision – not a ‘one size fits all’ concept
Decision making capacity

- Presence or not of mental disorder or communication problem?
- Nature of decision?
- Presence or not of capacity to make decision?
- Can capacity be improved?
- If incapable, what intervention will be of benefit to the adult?
Steps to assessing capacity – a legal perspective.

- Presume capacity
- Have a decision in mind
- Provide relevant information
- Use appropriate communication tools
- Assess understanding
- Consider relevant assessments/reports

(Nicola Smith . Solicitor, Enable Scotland)
David was diagnosed with dementia around two years ago. He lives alone, although his family visit at weekends, and is not currently receiving any services. His son is concerned about his father. David has lost a lot of weight, is not washing or eating and recently there have been times where family have arrived to find the front door has been unlocked overnight. He becomes quite upset and aggressive if the family suggest they provide help with some personal support and they think he is forgetting to take medication. He is clear he is managing fine. He is very clear that under no circumstances does he want any one interfering.
Ann has slightly impaired capacity due to brain injury and has recently been diagnosed with bipolar disorder. She is not currently receiving services although an assessment has been carried out in the past. A police report to social work advises that they have been called to her house in relation to disturbances on several occasions during the last few weeks. This has normally involved issues caused by visitors to the property including loud music, shouting and vandalism. The previous night her partner was arrested for breach of the peace and neighbours have expressed concerns that he is dealing drugs from the house, although this has not been substantiated. The police advise she appeared to have suffered injuries to her face although she refused any treatment. She presents as vulnerable.
Susan has a moderate learning disability and physical disabilities that mean she needs support with personal needs. She lives in a supported tenancy with two other women. There are 24-hour care packages in place. Susan’s GP has advised she should have a flu vaccination. She is also complaining of a sore mouth and seems to be in constant pain. Her dentist suspects an abscess. However, Susan is terrified of needles and refuses to discuss or consent to either treatment. You are approached for advice on what can be done.
John had a stroke last year and as a result he has significantly reduced capacity and communication difficulties. His physical needs mean he requires assistance with eating, washing and dressing. His wife is currently his main carer and is now unable to cope at home. She has reluctantly approached you to investigate John moving to a nursing home where he would receive the care he needs. You are aware a room is available near to where John lives. John’s wife has visited and is happy for him to move in on a trial basis.
Mary is 78 and lives on the ground floor of a block of flats. She is a widow with one daughter, Isobel, who lives a complicated bus journey away. The daughter is the breadwinner for her own household and has a husband who is long term sick and is unemployed. Mary is suffering from a long standing and increasingly severe dementia with consequent serious neglect to herself and her flat and some nuisance to her neighbours. She is reluctant to accept the help of anyone except her daughter and will not eat meals-on-wheels though she seems to keep quite healthy on a diet of bread, cheese and tea. A small fire which was caused by airing her clothes too close to the heater has brought the neighbours up in arms saying ‘Something must be done!’ Mary is fiercely independent and does not want to leave her home but she retains a deep respect for the authority of officialdom and would not actively resist being moved.
Case Discussion 6

- John aged 59 has muscular sclerosis and suffered a stroke two years ago. His nephew, Mike, lives with him. Mike has a diagnosis of schizophrenia and admits to smoking cannabis in his past. Concerns regarding John’s welfare are longstanding and attempts to support him in the community are largely declined. He lives in poor conditions and is not managing his finances or personal hygiene. The support offered by Mike is inconsistent. Following a recent respite break, John would like more regular breaks, but worries about leaving Mike alone. However, there is a clear bond between the men and they want to continue living together.

- Another man, with a current drug habit, seems to be living with them. He does not contribute to household expenses and other people seem to now frequent the house. John and Mike want him to leave but feel unable to ask him to do so.
Anne is 24 years old and lives with her mother, older sister and her sister’s 2 year old child. Anne and her sister have mild learning disabilities.

Anne appears independent in many aspects of her life. She has a part-time job, does voluntary work, goes to the gym and adult literacy classes. However, she is clearly emotionally immature and there are concerns about her vulnerability.

The current concern is that Anne has become unexpectedly engaged to a man known to be subject to immigration controls. She has advised work colleagues that they went to Glasgow together to sign papers giving them permission to marry. She has also spoken to her GP about her intention to get pregnant. Her sister’s partner, who is also the father of her child, is known to be currently appealing deportation and introduced Anne to the man she is engaged to.