

Executive Function: Practice Note for Mental Capacity Assessments

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Introduction/Context

Executive Function (and dysfunction) is a clinical term that is becoming increasingly used in the health and social care lexicon, particularly in relation to the Mental Capacity Act 2005. It has been discussed in Safeguarding Adult Reviews (SARs) with recommendations for improved practitioner awareness and understanding and is also emerging and reflected upon increasingly in Court of Protection judgements. The term 'executive capacity' is sometimes used alongside executive function as a way of applying the many components of executive function to the decision-making application context of the Mental Capacity Act. Neither term appears in the Mental Capacity Act or the associated Code of Practice but have been referred to in relevant case law.

This document is produced as a response to the increasing use of executive function as a term alongside the Mental Capacity Act to provide some background information and suggested practice notes for practitioners. Practitioners need to be mindful of how to work with executive function difficulties in practice whilst also being mindful of the limits of application. These considerations are particularly pertinent when high risk levels are present. Given the emerging use, practitioners need to be mindful that different professionals may cite executive function slightly differently and it is important to check definitions before sharing information to support assessments.

Executive function is mentioned in National Institute for Health and Care Excellence (NICE) guidance NG108¹ highlighting additional considerations that may be applicable when completing assessments with those with executive dysfunction. Paragraph 1.4.19 states "*Practitioners should be aware that it may be more difficult to assess capacity in people with executive dysfunction – for example people with traumatic brain injury. Structured assessments of capacity for individuals in this group (for example, by way of interview) may therefore need to be supplemented by real-world observation of the person's functioning and decision-making ability in order to provide the assessor with a complete picture of an individual's decision-making ability. In all cases, it is necessary for the legal test for capacity as set out in section 2 and section 3 of the Mental Capacity Act 2005 to be applied.*"

Social care leads from ADASS South West networks were asked to contribute to the draft of this document and appropriate amendments have been included. ADASS South West members are permitted to include this document alongside the rest of

¹ Available: [Overview | Decision-making and mental capacity | Guidance | NICE](#)

their current practice guidance, adapt or adopt from it and share with connected stakeholders.

What is Executive Function/Dysfunction?

Executive function is an umbrella term relating to the broad range of cognitive skills that help us function in day-to-day life allowing us to stay safe, manage day-to-day tasks, and get things done. These include normally automatic abilities such as decision making, problem solving, planning and organising, multi-tasking, generating motivation, retrieval of information, emotional control, flexibility in thinking, being able to switch tasks, and applying these in the decision-making moment. Generally, these functions are thought to be controlled by the frontal lobe sections of the brain.

Problems with carrying out any of these cognitive abilities can make everyday life difficult as engagement and undertaking roles in work/education and interaction with others can become problematic. This has been called executive dysfunction.

Difficulties with executive function can be a contributory factor towards someone's vulnerability. Those with acquired damage to the frontal lobe, neurodivergent conditions such as ADHD and autism, deterioration from neurodegenerative conditions such as dementia or substance misuse, and certain disorders such as Prader-Willi syndrome and obsessive-compulsive disorder can present with symptoms leading to difficulties with executive function. Inhibitions around appropriate decision-making and reduced problem-solving skills can result in a person putting themselves at risk.

Individuals may mask their executive function difficulties, for example by high performance in other areas and cognitive tests. Those with difficulties with executive function may be able to provide coherent verbal responses during interview about decisions and the associated risks, but their 'in-the-moment' decisions may not be congruent with their verbal responses due to impaired executive functioning. Some individuals may also struggle to reflect on this mismatch when asked about it after the event, perhaps repeatedly saying "I don't know" or "I can't remember" when asked their reason for changing their mind, or by avoiding the question altogether. This separation between actions and communicated understanding can make it difficult for practitioners when assessing mental capacity. Nonetheless, it is important that practitioners feel they can complete mental capacity assessments with people who have executive function difficulties.

What may appear on the surface as an 'unwise decision' in line with principle 3 of the Mental Capacity Act could, if there are repeated instances, be evidence of executive dysfunction. The mental capacity assessment can act as a framework for a conversation about risks with the person. If the person is established as not having the mental capacity to make the decision, the best interests process provides a legal framework for decision making with the person at the centre.

Mental Capacity

The Mental Capacity Act 2005 is a legislative decision-making framework to support and protect the decision-making abilities of vulnerable individuals aged 16 and over. If after a mental capacity assessment, the individual is found to lack mental capacity for a specific decision at that moment in time, a decision can be made by the most appropriate person on their behalf in their best interests in a manner outlined by the Act. The Mental Capacity Act has five principles that set the approach when working with those with suspected impaired mental capacity:

1. *A person must be assumed to have capacity unless it is established that they lack capacity.*
2. *A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.*
3. *A person is not to be treated as unable to make a decision merely because he makes an unwise decision.*
4. *An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.*
5. *Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.*

It is important to state that the Act refers to the ability to make a specific decision i.e. as narrow and specific to the issue at hand as possible and that decision making relates to the *material time* that the actual decision needs to be made. This means that the mental capacity assessment should evidence decision making ability as close to the actual time of the decision as possible.

The Causative Nexus and 2 Stage Test. The Supreme Court in *A Local Authority v JB [2021] UKSC 52* made clear that to determine mental capacity, first a determination of whether the person can make the decision themselves or not is required. If not, the second question is then whether there is a “*clear causative nexus between P's inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of, P's mind or brain*” (paragraph 78). This causal nexus is important to keep in mind particularly when working with complex interactions with mental capacity such as executive function.

The functional test of mental capacity states that an individual must be able to do all four of the following in relation to the decision. An inability to do one (or more) of these is the first step in assessing mental capacity. The second stage is then to evidence whether these difficulties can be linked to a cognitive impairment or not (the diagnostic test).

1. Understand information relating to the decision.
2. Retain information relating to the decision.
3. Use or weigh up information relating to the decision.

4. Communicate the decision.

It can be hard for those doubting mental capacity to establish evidence that people with executive function difficulties may find it hard to use or weigh up information for 'in-the-moment' decision making due to P's ability to provide appropriate reports in verbal interviews. However, to establish a lack of mental capacity for someone with executive function difficulties, the practitioner needs to be able to explicitly link difficulties with decision making in terms of understanding, retaining, using/weighing up information and communicating the decision directly to the executive function impairment. This guidance note aims to be supportive to this process.

Relevant Case Law

The scope of application in practice of executive function considerations when it comes to the Mental Capacity Act should follow closely within the boundaries set through relevant Court of Protection rulings i.e., case law. Pertinent case law in respect to executive function is presented below along with a summary of what it means for practice.

WBC v Z [2016] EWCOP 4, MHLO 27

- Z (diagnosed with Asperger's syndrome and an IQ in the range 70-75) was engaging in risky behaviour including concerns of sexual exploitation.
- The psychiatrist report stated Z was unable to identify risks to herself and over-estimated her own ability to keep herself safe.
- Z received additional support which she engaged with between the Court application and hearing resulting in a reduction of risky behaviour. The Court also heard from Z directly in proceedings.
- The Judge cautioned themselves against being paternalistic and that Z should be allowed space with support to grow in maturity and confidence.
- Court found Z to have mental capacity for the decision.

Consideration for executive function: Unwise decisions do not necessarily mean that the person lacks mental capacity. Assessments of mental capacity should take place and P engaged fully as part of the process. Support should be provided to P to develop cognitive skills to support decision making.

TB v KB and LH (Capacity to Conduct Proceedings) [2019] EWCOP 14

- The neuropsychological report stated that TB (who misused substances) experienced executive dysfunction resulting in an inability to recall important information in the moment to make the relevant decision.
- TB was declared by the Judge as being unable to use or weigh up information on the basis of executive dysfunction. Examples of previous repeated instances were shared during the proceedings as well as evidence that the support provided to TB to overcome their cognitive deficits did not work.

Consideration for executive function: Repeat and recorded examples of being unable to apply key information in the moment supported the outcome of TB being found to not have mental capacity. This includes evidence of support provided to overcome any deficits from executive dysfunction. It is important to record evidence over time and not rely on speculation particularly if repeat examples of being unable to use key information in the moment are observed.

A Local Authority v AW [2020] EWCOP 24

- AW (diagnosed with a mild learning disability and autistic spectrum disorder) was described as having the presentation of someone more cognitively able than he was due to a keenness to be social, relatively good self-presentation skills, verbal skills, and an ability to learn phrases.
- It is easy to underestimate AW's vulnerability and difficulty applying abstract concepts of safety in relationships due to his autism.
- AW often put himself at risk from sexual relationships, disclosing personal information and generating financial debt from internet and mobile use.
- The judgment makes links to executive functioning and relates it back to one of the principles of the Mental Capacity Act, "the ability to think, act, and solve problems, including the functions of the brain which help us learn new information, remember and retrieve the information we've learned in the past, and use this information to solve problems of everyday life."
- In this case example, AW had problems with executive functioning which prevented them from understanding the information relevant to residence and care.

Consideration for executive function: The judgement provides a definition of executive function that links back to the legislation. AW's case provides a pertinent example of an individual who presents as cognitively able through verbal reports but puts themselves at risk repeatedly due to their executive dysfunction preventing cogent decision making in the moment.

Warrington Borough Council v Y & Others [2023] EWCOP 27

- Following a road traffic accident, Y (diagnosed with autistic spectrum disorder) sustained serious injuries including brain injury. Y had good verbal reasoning but had a mismatch with actions.
- Residence and care – The consultant neuropsychiatrist and consultant neuropsychologist had different opinions over Y's mental capacity.
- One argued that Y presented with dysexecutive syndrome consequent from traumatic brain injury highlighting the 'frontal lobe paradox' – Y did well in interview and test settings but presented with marked impairments in everyday life.
- The other argued that Y was impulsive resulting in risk taking which was confined to times of high arousal and linked to Y's autism spectrum disorder traits rather than brain injury.

- The Judge was keen to state that the frontal lobe paradox in itself is not synonymous with the functional test for mental capacity.
- In Y's circumstances, the judge agreed with the view that the reduction in cognitive capacity for problem solving was associated with frontal lobe damage and that is why Y was unable to satisfactorily understand, retain and weigh up information to make the decision. This met both the functional and diagnostic test.
- The Judge provided further comment of the need to support Y to maximise capacity and provide scaffolding support around decision taking with a view to revisiting mental capacity when appropriate.

Consideration for executive function: The clinical phenomenon of executive dysfunction needs to be addressed specifically in relation to the criteria of the Mental Capacity Act and the facts of the specific individual circumstances of the individual. A full and robust mental capacity assessment is required to evidence the causative nexus between impairment and decision-making difficulty. There also continues to be a need to support the individual to maximise capacity and develop skills to help mitigate for any executive function difficulties.

Summary of what case law tells us about approaching mental capacity and executive function difficulties:

- Remember that difficulties with executive function or a diagnosis of executive dysfunction is not in itself evidence of a lack of mental capacity. Evidence for the functional and diagnostic tests are required.
- Evidence needs to be collated of whether the individual can (or not) implement what they verbally report in the abstract in relation to the decision.
- This includes evidence that the individual is able (or not) to bring to mind information in the moment. This provides evidence of whether the individual has any awareness of their impulsivity whilst making the active decision and if there are any mismatches between verbal reports and practical action.
- Any difficulty with the above must be linked back to a cognitive impairment for a lack of mental capacity to be determined.
- Practitioners also need to evidence that all practical support has been provided to the individual to maximise capacity through scaffolding, providing small chunks of information and other person-centred means. Mental capacity can also be assessed again at a later date once support has been provided.
- Remember to follow the best interest checklist if you establish the individual lacks mental capacity e.g. giving weight to any preferences and views of the individual, least restrictive option to manage risks etc.

Practice Considerations

The assessment of mental capacity for someone with executive function difficulties requires some careful consideration. As raised earlier in this practice note, if difficulties are suspected by the practitioner, reflection on whether the individual is

diagnosed with an impairment that may cause difficulties in this area is required so the mental capacity assessment is approached in the most appropriate way.

The following are practice considerations that can be applied when completing mental capacity assessments with someone with executive function difficulties based on the information already outlined above. All circumstances are individual and as such not all the below will necessarily be applicable to all situations.

- **Practicable support.** The case law outlined above is very clear about the importance of providing all practicable support to the person to make capacitated decisions for themselves. The case law also reflects the need to evidence what support has been tried and the impact of this. Taking all practicable steps to support the individual is also in line with Principle 2 of the Act and should be part of any relationship building plan with someone with executive function difficulties.
- **Reflective discussion.** A key part of the mental capacity assessment for someone with executive function difficulties is in respect to using and weighing up information. To change one's mind in the moment is a common human decision but for someone with executive functioning difficulties they may find it difficult to explain why they changed their mind in the moment. The mental capacity assessment can include a reflective discussion about the mismatches of communication with actions to help evidence this, particularly if the same mismatch occurs repeatedly.
- **Record effectively.** Doubting someone's mental capacity can be a subjective conclusion so it's important to record the reason to doubt (and therefore complete a mental capacity assessment) or not doubt someone's mental capacity. This can then be used to support a longer-term chronology, vital for completing a robust assessment for someone presenting with potential executive dysfunction or fluctuating capacity. The present decision-making concern may be the first time this has been considered but evidencing repeated examples will help draw later conclusions and support risk management. Any mismatch between the individual's reports during verbal interview and what the individual does in practice should also be recorded on an ongoing basis to help form a chronology that can be relied upon at a later date. The historic and present mismatches between verbal and actual decision making should be recorded and referenced in the use and weigh up part of the functional test to support evidencing of present decision making (see *Use of historical evidence* below).
- **Breakdown information.** Individuals with executive function difficulties may have limited working memory and are therefore more likely to be able to use and understand information presented to them if it is broken down into smaller pieces. These can then be presented to the individual in a way that supports and scaffolds their decision making. This becomes increasingly pertinent as the complexity of the decision increases. The identification of the salient factors for the decision is helpful here to identify one aspect at a time to

deliver and present salient information to the individual to prevent them becoming overwhelmed.

- **Number of assessments.** Following on from above, if individuals are being supported by being given smaller pieces of information regularly over time, assessment of their mental capacity may also need to be completed iteratively so the individual has a chance to process and integrate new relevant information over each iteration. Additionally, if there are concerns about an individual's repeated risky decision making, each episode of decision making can provide more material for the individual to use in reflection during the mental capacity assessment. This is particularly pertinent to establish the level of insight the individual has into their decision making. It can be difficult to evidence an inability to use information in the moment for those with executive function difficulties, but revisiting the conversation at appropriate junctures and supporting them to reflect on events can help achieve this.
- **Collect information from others and compare to the past.** It is important to understand the context for decision making to establish if the individual's decision making is in keeping with their historic and ongoing presentation or whether there has been a change in demeanour and the type of decisions the individual makes and how. This is particularly pertinent if the executive function difficulties have emerged from a condition acquired in the life course such as dementia or acquired brain injury. Gathering information from those close to the individual such as family, friends and carers who know them well is therefore helpful to understand the context of any decisions and particularly the individual's risk tolerance that may be new and emerging. Those who know the individual well are also able to share how the difficulty with executive function impacts them in their day to day lives beyond the decision at hand. The same is true of professionals around the person, it is important in multi-disciplinary meetings to be able share views and experiences of the individual's mental capacity. Different professionals may observe and work with different types of decisions and at different times and being able to draw on these professional views will help form a clearer picture of the individual's executive functioning and mental capacity for the contemporary decisions creating risk and concern.
- **Observations.** It is important to draw from observations to help support mental capacity assessments of those with executive function difficulties and not rely exclusively on verbal interview. Those with executive function difficulties may overestimate their abilities and underestimate their care needs. Observations (alongside good recording as outlined in this document) will give an idea of whether the individual is following through on the descriptions and actions described during the interview. All people may sometimes change their mind in the moment but repeated observational and recorded examples of mismatches combined with an inability to provide a rationale for the changes in decisions is potentially indicative of executive

dysfunction and cause to doubt mental capacity as well as provide evidence for the assessment.

- **3D Capacity Assessment.** The combination of all the above (conversation with the person, conversation with those around the person and real-world evidence such as observations) has been called by Neil Allen², barrister at 39 Essex Chambers, as a 3D Capacity Assessment – a necessary requirement for robust mental capacity assessments for people with actual or suspected executive dysfunction.
- **Use of historical evidence.** It should be noted that decisions assessed under the Mental Capacity Act are time specific relating to the material time that the decision is to be made within. This means that it is not possible to conclude that the individual lacks mental capacity for a decision today based on evidence exclusively from past decisions. However, recorded evidence of past observations, conversations etc. can be used as a reason to doubt someone's mental capacity to trigger the mental capacity assessment. It can also be referenced in respect to determination about the present situation in relation to the functional test. *E.g. "Based on the above evidence of a P taking this risky decision in the past month despite verbally saying they would not with cogent reasons why the risk was too high and considering P's inability to reflect on the rationale for consistent changes of mind during this period, I conclude that P is unable to sufficiently use and weigh up the relevant information to make this decision. In preparing for this assessment, those around P have informed me that P's decision making has been of similar mismatch to verbal responses in this and other areas of decision making since 2016 when P acquired their brain injury. I am therefore confident in my professional analysis and conclusion today".*
- **Clinical support.** Executive function is a clinical diagnosis and a complex area of neuropsychology, so expert views from suitably qualified clinical practitioners may be supportive in some appropriate cases to ascertain if the individual has the mental capacity to make the decision at hand, and to support awareness of the wider impact of the individual's executive function difficulties. This in turn could also support how as a practitioner you may be able to best support decision making. Clinical intervention and support may not be required or appropriate in all cases.
- **If the person has mental capacity.** If the person has executive function impairments that is resulting in risk but is established as having the mental capacity to make the decision, practitioners need to consider other supportive mechanisms. For example, completing agency person-centred risk assessments, following local self-neglect protocols or considering inherent jurisdiction as appropriate. Expert advice may also need to be sought to respond to the presenting risk.

² During the National Mental Capacity Forum/Essex Autonomy Project webinar on executive function and MCA. Slides: [2023-04-25 NMCF S2E4 Exec Dysf FINAL \(essex.ac.uk\)](https://www.essex.ac.uk/2023-04-25-NMCF-S2E4-Exec-Dysf-FINAL)

Resources

The following resources are helpful for further overviews of executive function and mental capacity and have been influential in the development of this practice note.

7 minute read - [Executive-Capacity-7-Minute-Briefing-V2PDF.pdf \(enfield.gov.uk\)](#)
Written by Enfield Council Strategic Safeguarding Team

Autonomy Project webinar - [NMCF Events - Essex Autonomy Project](#)
Series of webinars exploring in detail aspects of Mental Capacity Act law and practice. Includes a webinar focussed on executive functioning and mental capacity.

Executive function grab sheet - [executive-functioning-grab-sheet-mca-guidance v10 apr2021.pdf \(lancshiresafeguarding.org.uk\)](#)
Detailed practice guidance developed by Blackburn with Darwen, Blackpool and Lancashire Safeguarding Adult Boards.

Headway guide to acquired brain injury and executive dysfunction - [Executive dysfunction | Headway](#)
Specifically related to those with acquired brain injuries.

Mental Capacity Law and Policy - [Mental Capacity Law and Policy](#)
Summaries and comment on latest pertinent Court of Protection caselaw.

NICE guidance NG108 'Decision-making and mental capacity' - [Decision-making and mental capacity \(nice.org.uk\)](#)

Summary of Community Care Inform guidance on mental capacity and executive function – [Executive functioning and the Mental Capacity Act 2005: points for practice - Community Care](#) *Written by Community Care legal editor, Tim Spencer-Lane.*

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