

Practice Considerations for Executive Function and Mental Capacity

The Mental Capacity Act states that to have mental capacity for a specific decision at a specific time, a person must be able to understand the information relevant to the decision (including the reasonably foreseeable consequences of making or not making the decision at all); and retain that information (long enough to make the decision); and use or weigh that information (as part of the process of making the decision); and communicate the decision. **Executive Capacity is about the ability to use or weigh information. The Code of Practice (para 4.21) notes: ‘For someone to have capacity, they must have the ability to weigh up information and use it to arrive at a decision. A person must accept the information and take it into account. A person may appear to be able to weigh facts while sitting in an interview setting but if they do not transfer those facts to real life situations in everyday life (executing the plan) they may lack mental capacity. 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.

Executive function is an umbrella term used to describe a set of mental skills that are controlled by the frontal lobes of the brain. When executive function is impaired, it can inhibit appropriate decision-making and reduce a person’s problem-solving abilities. Planning and organisation, flexibility in thinking, multi-tasking, social behaviour, emotion control and motivation are all executive functions. Assessing a person’s capacity where executive function is impaired is a challenging area for professionals and can have significant implications because failing to carry out a sufficiently thorough capacity assessment in these situations can expose individuals to substantial risk. This separation between actions and communicated understanding can make it difficult for practitioners when conducting capacity assessments. Nonetheless, it is important that practitioners feel they can complete mental capacity assessments with people who have executive function difficulties.

The assessment of mental capacity for someone with executive function difficulties requires some careful consideration. The following are practical considerations that can be applied when completing mental capacity assessments with someone with executive function difficulties (*Executive Function: Practice Note for Mental Capacity Assessments* 19 February 2024, ADASS). Please note that all circumstances are individual and as such not all the below will necessarily be applicable to all situations:

Practicable support

- Always consider whether practicable support can be provided to someone experiencing difficulties with their executive functioning to enable them to make the decision in question. Evidence what support has been tried and the impact of this.

Reflective discussion

- Include a reflective discussion about the mismatches of communication with actions to help evidence this, particularly if the same mismatch occurs repeatedly.

Record effectively

- 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.

Breakdown information

- 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

- Assessments may need to be repeated so the individual has a chance to process and integrate new information. It can be difficult to evidence an inability to use information in the moment, but revisiting the conversation at appropriate times and supporting them to reflect on events can help achieve this.

Speak to others

- Gather information from those who know the person well to understand the context of any decisions. MDT meetings provide opportunities for professionals to share their views and experiences to help form a clearer picture.

Observations	<ul style="list-style-type: none"> • Observations will give an idea of whether the individual is following through on the descriptions and actions described during the interview. Repeated 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.
3D Capacity Assessment	<ul style="list-style-type: none"> • The combination of conversations with the person, with those around the person and observations is referred to as a '3D Capacity Assessment' – a necessary requirement for robust mental capacity assessments for people with actual or suspected executive dysfunction. (39 Essex Chambers)
Use of historical evidence	<ul style="list-style-type: none"> • You cannot conclude that an individual lacks capacity for a decision today based exclusively from historical evidence. However, it can be used as a reason to doubt someone's capacity to trigger an MCA and can be referenced within the functional test.
Clinical support	<ul style="list-style-type: none"> • Executive function is a clinical diagnosis and a complex area of neuropsychology, so expert views from suitably qualified clinical practitioners may be helpful. This could also support how as a practitioner you may be able to best support decision making. This may not be required or appropriate in all cases.
If the person has capacity	<ul style="list-style-type: none"> • If established that a person has capacity, practitioners need to consider other supportive mechanisms. For example, completing person-centred risk assessments/Welfare and Safety Plans.
Best Interest Decisions	<ul style="list-style-type: none"> • Remember that the person's wishes and feelings often carry significant weight in the determination of best interests. • Think about how risks might be managed in a safe way, rather than seeking to remove all risks at all costs.

Relevant Case Law

AW [2020] EWCOP 24 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.

<https://www.39essex.com/information-hub/case/local-authority-v-aw>

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

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.

<https://www.39essex.com/information-hub/case/warrington-borough-council-v-y-ers>

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.

<https://www.39essex.com/information-hub/case/tb-v-kb-and-lh-capacity-conduct->

Further reading/resources

Swindon Safeguarding Partnership [Executive dysfunction and fluctuating mental capacity session 4 040225](#)

Executive Function: Practice Note for Mental Capacity Assessments Date: 19 February 2024 ADASS
https://www.proceduresonline.com/swindon/adults/local_resources.html

7 Minute Briefing (Enfield Council) <https://mylife.enfield.gov.uk/media/34489/executive-capacity-7-minute-briefing.pdf>

Executive Function grab sheet (Lancashire Council)
https://www.lancshiresafeguarding.org.uk/media/19288/executive-functioning-grab-sheet-mca-guidance_v10_apr2021.pdf

Signs of Executive Dysfunction, Headway <https://www.headway.org.uk/about-brain-injury/individuals/brain-injury-and-me/7-signs-of-executive-dysfunction-after-brain-injury/>

Executive Functioning and the Mental Capacity Act, Community
Care <https://www.communitycare.co.uk/2023/12/19/executive-functioning-and-the-mental-capacity-act-2005-points-for-practice/>