

Executive Functioning and Mental Capacity

**Solihull
Safeguarding
Adults Board**
Protecting Adults Together



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1. Introduction

Executive Function (and dysfunction) is a clinical term that is becoming increasingly used in the health and social care vocabulary, 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 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 brief guide has been 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 relevant 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.



2. What is Executive Functioning?

Executive function relates to the ability to put into practice knowledge and information about a decision in the moment that a decision or action is required. It is a clinical term and relates to a set of cognitive skills pertaining to working memory, planning, attention focus, remembering instructions, self-control and juggling multiple tasks. Generally, these functions are thought to be controlled by the frontal lobe sections of the brain and executive function can impact individuals with a wide range of diagnoses including dementia, acquired brain injury, and autism. These issues sometimes come to the fore in relation to mental capacity assessments when there is a disconnect between rational verbal answers and in the moment functioning. For example, an individual may be able to verbally detail the risks of a decision and that they would make a 'wise' decision but when in the moment they take an alternative risky decision. Colloquially, this can be described as the person being able to 'talk the talk', but unable to 'walk the walk'.

The term 'executive capacity' is sometimes used alongside executive functioning. The concept of executive capacity is normally used as a way of translating executive functioning

for the specific purposes of the Mental Capacity Act 2005 (MCA). In other words, executive capacity is a way of defining how executive functioning can be understood in the context of decision-making capacity.

The terms executive functioning and executive capacity are not referenced in the Mental Capacity Act or the MCA Code of Practice, but there is recognition of these concepts in case law.



3. What Does the MCA Code of Practice Say?

The MCA is a vital aspect of the legal framework for social care professionals working with individuals experiencing executive functioning difficulties. Applied correctly, the MCA should empower and protect such individuals.

But applying the MCA is often not straightforward, not least because practitioners are faced with making difficult determinations in situations where an individual's actions may be disconnected from their understanding.

The MCA code of practice gives guidance on using or weighing information as part of the decision-making process. It states in paragraphs 4.21-4.22 that: "For someone to have capacity, they must have the ability to weigh up information and use it to arrive at a decision. Sometimes people can understand information, but an impairment or disturbance stops them using it. In other cases, the impairment or disturbance leads to a person making a specific decision without understanding or using the information they have been given.

"For example, a person with the eating disorder anorexia nervosa may understand information about the consequences of not eating. But their compulsion not to eat might be too strong for them to ignore. Some people who have serious brain damage might make impulsive decisions regardless of information they have been given or their understanding of it."

While the code does not use the term executive functioning, this is clearly what it has in mind in these paragraphs.



4. The Capacity Assessment

Section 3(1) of the Mental Capacity Act sets out that a person is unable to make a decision if they are unable to:

- Understand the information relevant to the decision;
- Retain that information;
- Use or weigh that information as part of the process of making the decision; or
- Communicate their decision

The most relevant element when it comes to executive functioning is the ability to use or weigh the information.

When working within the Mental Capacity Act, we also need to be mindful of the third principle and not treating the individual as lacking mental capacity because they have made an unwise decision/s. However, particularly in executive dysfunction, it is often the risky or unwise decision or behaviour that trigger closer scrutiny of a person's capacity. Repeated unwise decisions where a person is telling you they would reach a different decision, may be an indication of difficulties with executive function. **Therefore, a one-off assessment may not be sufficient; it may be necessary to demonstrate evidence of repeated occasions of an inability to bring to mind relevant information at the point it was necessary.**

In an assessment this would typically be considered as part of the 'sufficiently weigh up and use information to make a decision' assessment criteria. What remains important is that the assessor uses the functional test, looking at the process of how the person reached that decision.

In unwise decision making, the person is fully aware but consciously disregarding or giving less weight to certain facts relevant to the decision. In executive dysfunction, the person cannot access and integrate the correct pieces of information and use them in a meaningful way to make the decision.

An assessment of a person's capacity must be based on their ability to make a specific decision at the time it needs to be made (the material time). When it comes to executive functioning, it is particularly important to remember that the material time may not be the time when the person was assessed. Instead, the relevant decision will often involve the application of the relevant information outside of the discussion.

Therefore, as part of the assessment it might be helpful to encourage the person both to outline their approach to decision making, and to set out how they will put their solutions into action. An important issue for practitioners to consider is whether and how the individual can be supported to understand that there is a mismatch between what they say and what they do if this is found to be the case.

Section 3(4) sets out that the information relevant to the decision includes information about the “reasonably foreseeable consequences” of a decision, or of failing to make a decision. A key issue for capacity assessments in this respect will be whether the individual understands the foreseeable consequences of deciding one way or another.

Executive function is mentioned in NICE Guidance [Decision-making and mental capacity \(2018\)](#) 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.*”

If you have concerns that a person’s executive functioning may be affecting their decision-making capacity, it is worth seeking a specialist opinion from a psychiatrist or psychologist.



5. Recording Decisions

It is important when a capacity assessment concludes that the person lacks capacity to make the decision, to record a clear explanation of how executive dysfunction relates to the functional tests of the MCA. An explanation will also be needed of how the best interests decision relates to the person’s lack of executive functioning, for instance, setting out how the care plan helps to ensure that, as far as possible, the person can put into effect their stated intention.



6. Key Messages from Case Law

There are a number of key messages that can be drawn from the case law relating to executive function. When it comes to capacity assessments:

- 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.
- Difficulty with executive functioning is not, by itself, evidence of a lack of capacity.
- Be aware that people with executive functioning difficulties may overestimate their skills and abilities and underestimate their need for care and support.
- You may need to consider not just what the person tells you about how they would make an informed decision but also whether this decision will actually be implemented in practice.
- Look for evidence of past behaviour and whether this demonstrates an inability to put into effect their stated intention.
- You may need to consider whether the person understands that there is a mismatch between what they say they will do and how they act when face by concrete situations.
- Consultation with others, such as family, friends and involved professionals, may be an important source of information about the person's ability to carry out their decision.
- Clinical input may be required when assessing executive functioning, for example, from a clinical psychologist.

When it comes to best interests decision:

- Remember that the person's wishes and feelings often carry significant weight in the determination of best interests, and it is wrong in principle to discount the wishes, feelings, beliefs and values of people who lack the relevant capacity (*Wye Valley NHS Trust v Mr B* [2015] EWCOP 60).
- Think about how risks might be managed in a safe way, rather than seeking to remove all risks at all costs.
- Where relevant, it is permissible to take into account risks of harm to others when making best interests decisions.

Please remember that interpretation of case law can change over time. Practitioners should check for any significant changes to case law since this guidance has been written.



7. Resources Used to Inform This Guide

- [Acquired Brain Injury & Executive Dysfunction - \(Headway - The Brain Injury Association\)](#)
- [Decision-Making & Mental Capacity - \(National Institute for Health and Care Excellence\)](#)
- [Executive Capacity 7 Minute Briefing - \(Enfield Council\)](#)
- [Executive Functioning and the Mental Capacity Act 2005: Points for Practice - \(Community Care\)](#)
- [How to Use Legal Powers to Safeguard Highly Vulnerable Dependent Drinkers in England and Wales - \(Alcohol Change UK\)](#)
- [MCA Guidance Executive Functioning Grab Sheet - \(Blackburn with Darwen SAB, Blackpool SAB, Lancashire SAB\)](#)
- [Podcast on Executive Function - \(Worcestershire Safeguarding Adults Board\)](#)
- [Thematic Review of South West Safeguarding Adult Reviews: Mental Capacity | Section Two – Executive Function and Fluctuating Mental Capacity - \(ADASS South West\)](#)
- [West Midlands Adult Safeguarding Policy and Procedures - Section 4.2.1 Executive Capacity and Executive Function](#)
- Executive Functioning and the Mental Capacity Act 2005: Community Care Inform [membership to Community Care required for access to this report]





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