

1 Executive Functioning and Mental Capacity

Mental Capacity should be assessed whenever there is ‘reason to believe’ the person may lack capacity to make a specific decision; the person must be supported to undertake the assessment and to communicate their decision. Always ensure the Principles of the Mental Capacity Act (MCA) & relevant sections of the Code of Practice are applied.

A common area of difficulty is where a person with, for example, an acquired brain injury gives coherent answers to questions, but it is clear from their actions that they are unable to give effect to their decision. This is sometimes called an impairment in their executive function. The executive functions comprise those mental capacities necessary for formulating goals, planning how to achieve them, and carrying out the plans effectively.

If the person cannot understand (and /or use or weigh) the fact that there is a difference between what they say and what they do when required to act, it can be said that they lack capacity to make the decision in question. However, this conclusion can only properly be reached when there is clear evidence of repeated difference between what the person says and what they do. This means that in practice it is unlikely to be possible to conclude that the person lacks capacity as a result of their impairment on the basis of one single assessment.

A person who makes a decision which others consider to be unwise should not be presumed to lack capacity. However, a series of unwise decisions may indicate an inability to use or weigh information. Impulsivity arising from, for example, some Personality Disorders (often seen in people who have a history of trauma) or an inability to control one’s actions, where issues of chronic alcohol or substance misuse are present, may also indicate an issue of executive functioning. The challenge is one of assessing a person’s decision making capacity when they can seemingly ‘**talk the talk**’ (**decisional capacity**), but can’t ‘**walk the walk**’ (**executive capacity**), especially when we believe that this inability to ‘walk the walk’ may be *‘because of an impairment of, or a disturbance in the functioning of, the mind or brain’*.

2 Unwise Decisions

In line with the five statutory Principles of the MCA: **“A person is not to be treated as unable to make a decision merely because they make an unwise decision.”**

COERCION - It may be that the real reason is the influence of someone else, threat, coercion or fear of the consequences of a decision. If this is the case and there are concerns about the person’s safety or well-being, then safeguarding procedures should be followed.

Along with needing to have a ‘proper reason’ to consider a person’s capacity, it is important to note that ‘unwise decisions’ if made without coercion may remain valid **if the inability to make a particular decision is NOT ‘because of an impairment or disturbance of the mind or brain’** even if that decision may lead to risk to the person or others.

3 Legal Literacy

Professionals must understand the legal processes and be confident in applying the law to cases they work on; including specific use of the Mental Capacity Act (2005), underpinned by the Human Rights Act 1998.

Other areas which may need to be considered include; [The Care Act \(2014\)](#), [Domestic Abuse, Crime and Victims Act \(2004\)](#), [Domestic Abuse Act \(2021\)](#) & [Homeless Reduction Act \(2017\)](#).

Always seek legal advice via appropriate avenues within your organisation when complexity or risk is rising. Ensure that escalation and professional challenge become part of everyday practice without prejudice.

4 Communicate and Collaborate

It is important to seek expert or legal advice where it is considered that a person may be subject to coercion or control by others, and/or is misusing substances such as drugs and alcohol, and there is grave concern regarding the decisions they are making that raises questions about their executive functioning.

Professionals should ensure that legal representation and advice is sought by those agencies involved in undertaking mental capacity assessments where there are questions about executive capacity; it is important that relevant information is shared with legal representatives to enable them to provide robust advice.

Always clearly record the outcome of any mental capacity assessments and decisions including any concerns regarding executive capacity.

5 What to do now

Reflect on how the above points link with your direct work with adults, families and other professionals.

Think about how you can adapt your practice based on this learning.

Discuss within your team meetings and consider any team learning and development needs

It is good practice to seek and offer peer support across agencies; attend multi-agency supervision and debriefing whenever offered; suggest this in multi-agency meetings if it would be helpful and consider how vicarious trauma might be affecting you and seek support as soon as possible.

6 Next Steps

Ensure all relevant professionals have access to and contact details for legal advice in your organisation.

Review and update your policy and procedure to include seeking advice and guidance regarding executive functioning and capacity.

Include in team meeting agendas or supervision identifying and seeking more specialist information and resources to support the development of your practice.

Ensure you remain up to date with emerging case law.

7 Resources

Mental Capacity Act Code of Practice 2005: <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>

Community Care Article: <https://www.communitycare.co.uk/2020/10/28/mental-capacity-assessments-must-delve-beneath-people-say/>

NICE Guideline Decision Making and Mental Capacity: [Overview](#) | [Decision-making and mental capacity](#) | [Guidance](#) | [NICE](#)

TSAB Mental Capacity Act Guidance: [Local Policies, Strategies and Procedures](#) | [Teeswide Safeguarding Adults Board \(tsab.org.uk\)](#)