



# MCA Guidance

## Executive Functioning

Quick Guide and links to support practitioners when undertaking capacity assessments relating to executive decision making

## Version control

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## Document control/revision history

Version	Author	Revision date	Summary of changes
1	LSAB MCADOLS Subgroup	N/A	N/A
2	LSAB MCADOLS Subgroup		<ul style="list-style-type: none"><li>• Disclaimer strengthened - not legal advice</li><li>• The order of the MCA assessment</li><li>• Live links updated</li></ul>
3	MCA Task and Finish Group	May 2024	Changed to Information Sheet
4			
5			

This information sheet is intended to provide guidance to your Mental Capacity professional practice. Your scope of practice is the **limit of your knowledge, skills and experience** and as a health or social care professional, you must ensure that you work within this. Whilst your scope of practice is likely to change over time as your knowledge, skills and experience develop, any area of mental capacity assessment that falls outside of this, must be escalated via your line of authority to ensure adequate support and expertise is provided to both you as a practitioner and the assessment. **This guidance cannot take the place of legal advice, and please remember that case law can change and develop over time.** Workers should check for any significant changes to case law since this guidance has been written.

## Introduction

Detecting executive impairment and assessing the effect on mental capacity can be very challenging. The main aim of this information sheet is to increase the practitioner's awareness and detection of these issues, so that more specialist advice and support can be sought if required. Please see the below information and links which may help you when undertaking a capacity assessment around **executive decision making**. Please pay particular attention to the relevant case law and what has now been determined by the courts as being **salient** information to this decision. As with all MCA situations, the **MCA Code of Practice** is key guidance.

## Mental Capacity – basic principles

Those undertaking capacity assessments need to remember the importance **of applying Principle 2 of the Act**. Even if someone is assessed as lacking capacity to make a decision, their capacity could improve with additional support to understand the decision to be made. Whilst it is acknowledged that some decisions cannot wait and a determination on capacity and a best interests decision needs to be concluded, there may be some situations where, for example with time, additional information/education, the person could gain or regain capacity at a later date. This is particularly important when assessing capacity around life changing or personal decisions.

## Section1: The five statutory principles are

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.

## **Sections 2 and 3 define what is meant by lack of capacity**

Section 2 MCA 2005 states that

(1) a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or the brain

It does not matter whether the impairment or disturbance is permanent or temporary.

A lack of capacity cannot be established merely by reference to—

- (a) a person's age or appearance, or
- (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

Section 3 provides that:

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
- (a) to understand the information relevant to the decision,
  - (b) to retain that information,
  - (c) to use or weigh that information as part of the process of making the decision, or
  - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
- (a) deciding one way or another, or
  - (b) failing to make the decision

The MCA Code of Practice refers to a two-stage capacity test, however, the Supreme Court's decision in *JB v A Local Authority* [2021] UKSC 52 confirms the appropriate 3 stage test which should now be applied;

- (1) Functional: Is the person able to make a decision? If they cannot:
- (2) Impairment: Is there an impairment or disturbance in the functioning of the person's mind or brain? If so:

(3) Causation: Is the person's inability to make the decision because of the identified impairment or disturbance?

In all cases all three elements of the above test must be satisfied in order for a person properly to be said to lack capacity for purposes of the MCA 2005

### **The Functional Test**

#### **(1) Is the person able to make a decision?**

Broadly speaking, a person is able to make a decision if they have a general understanding of what decision they need to make, why they need to make it and the likely consequences of making, or not making, the decision.

As outlined above Section 3(1) states that P is unable to make a decision for himself if he is unable to:

- understand the information relevant to the decision; or
- retain that information; or
- use or weigh that information as part of the process of making the decision; or
- communicate his decision (whether by talking, using sign language or any other means).

### **Impairment**

#### **(2) Is there an impairment or disturbance in the functioning of the person's mind or brain?**

The impairment or disturbance in the functioning of the mind or brain can be temporary or permanent, and the MCA Code gives some examples of what may amount to an impairment or disturbance in the functioning of the mind or brain. can include confusion, drowsiness, concussion, and the symptoms of drug or alcohol as well as formally diagnosed conditions. This is sometimes referred to as the 'diagnostic test' but this a little misleading, as a formal diagnosis is not always necessary, as long as there is clear evidence that there is an impairment or disturbance.

### **Causation**

#### **(3) Is the person's inability to make the decision because of the identified impairment or disturbance?**

It is not sufficient to simply say that the person has a disturbance or impairment of mind, the assessor has to show why and how the disturbance or impairment of mind is causing the inability to make the decision(s) in question. This is sometimes referred to as the 'causal nexus'.

Executive dysfunction generally affects the person's ability to use or weigh the relevant information as part of the process of making the decision

### **Executive function and mental capacity**

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. Professionals assessing capacity in this patient group are faced with a number of obstacles that make determination of capacity more challenging.

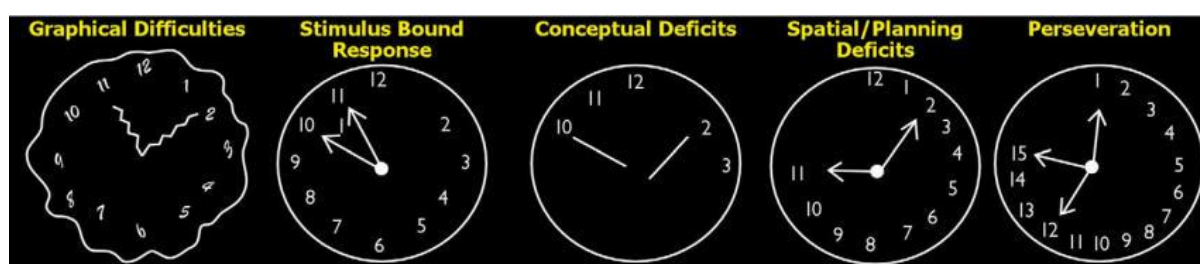
This can have significant implications because failing to carry out a sufficiently thorough capacity assessment in these situations can expose a vulnerable person to substantial risk.

## **Screening for possible executive impairment**

The clinical history will often provide clues suggestive of executive impairment. A pre-existing mental health diagnosis may raise the suspicion of executive impairment. The person with executive impairment may show the following signs:

- Unable to translate intention into action
- 'Full of promises' and plausible
- Apathetic
- Inability to initiate, plan and sequence activities
- Struggling with new situations (better with familiar)
- Behaviour is aimless, impulsive, and fragmented
- Unable to monitor and evaluate their own actions
- Unable to think flexibly or abstractly
- Less able to adapt to change
- Black and white thinking style
- Lack of a filter in social situations

If you suspect a person may have impaired executive function, there are also number of quick and easy screening tests that can be performed at the bedside (Ismail et al 2010). The clock drawing test (Rouleau et al 1992) is probably of the simplest to use and most effective. Common errors are shown below. People with impaired executive function often demonstrate errors such as stimulus bound response (putting the long hand pointing towards 10 for '10 past 11', planning deficit (a tendency to bunch all of the numbers together) and perseveration (continuation beyond 12 or repeating the same numbers). Crucially, a person with any significant executive impairment will struggle to draw a clock without errors.



**(Rouleau et al 1992)**

Other tests are available to determine frontal lobe disfunction, please contact your local safeguarding leads who can link to neuropsychology as appropriate.

## **Frontal lobe paradox**

People with executive impairment can often present very well in a formal assessment of cognition and capacity. They can often mask their deficits, and often unaware they are doing so. Despite this, there is often signs that they still struggle in day to day life. This is known as the 'frontal lobe paradox'.

An example of this difficulty: *'is where a person with an acquired brain injury gives superficially coherent answers to questions, but it is clear from their actions that they are unable to carry into effect the intentions expressed in those answers.* In other words, they are **good in theory but poor in practice**.

Two of the main reasons for this are that people with executive impairment are often not aware of any cognitive deficit (problems with **awareness of deficit**) and are unable to think about or reflect on their own cognitive processes (problems with **metacognition** or 'thinking about thinking').

Problems with executive function might be suspected if someone seems, in theory, to appreciate and understand their situation, but is then struggling to elicit the relevant bits of information and use them in the right context. They may also struggle to act upon or execute a decision.

## **Overlap and continuum challenges**

To further complicate the picture, many of the traits and behaviours observed in executive impairment vary in degree, (they exist on a continuum) and are also observed in the normal healthy population (they overlap with health population). This means it can be difficult to know if the behaviour or trait is pathological and therefore likely to be impairing capacity.

## **Impulsive decision making**

**Impulsivity** is a good example of a behaviour that can affect decision making and is often observed in those with executive dysfunction. Yet it is also a widely recognised character trait or behaviour in the normal healthy population. Deciding when an impulsive decision is *pathological* and indicating a lack of capacity can therefore pose a challenge to the assessor. Crucially, a link (or causative nexus) needs to be established between the apparent impulsive decision and any underlying impairment of the mind or brain.

Signs that impulsivity is more likely to be related to an underlying mental disorder and therefore may result in impaired capacity might be:

- Evidence of a mental disorder commonly associated with executive impairment or impulsivity.
- Other signs of executive dysfunction.
- The impulsivity is a new change in behaviour
- A more severe degree of impulsivity e.g. *marked* variability and inconsistency in the impulsive decision reached moment to moment, an obvious disassociation between the impulsive decision made and the impulsivity is present even in the context of more significant, complex and high stakes decisions i.e. the person cannot not adapt their behaviour in keeping with the gravity of the decision.

- Deficit in self-awareness and 'metacognition' - lack of self-awareness of their impulsivity, for example, a person with capacity will be able to self-reflect on their impulsive tendencies and incorporate that into their decision making.
- Pervasiveness of impulsive behaviours -evidence of marked impulsivity in other aspects of daily life causing significant social and functional impairment.

## **Unwise decision making**

Distinguishing between **unwise** decision making and decisions affected by executive impairment can also pose a challenge. Firstly, the assessor must not inadvertently use an **outcome test** for capacity i.e. deciding a person lacks capacity based on the unwise or risky nature of the decision. However, particularly in executive impairment, it is often the risky or unwise decision or behaviour that trigger closer scrutiny of a person's capacity. What remains important is that the assessor uses the **functional test**, looking at the **process** of how the person reached that decision. Fundamentally, 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 impairment, the person cannot access and integrate the correct pieces of information and use them in a meaningful way to make the decision.

## **General considerations: re-assess and take a more holistic approach**

Mental capacity law emphasises the need to balance paternalism (protecting a person who lacks capacity from harm) against autonomy (allowing the person to make their own decisions) wherever possible. In these particular cases it is good practice to regularly re-assess capacity to ensure that a person has the opportunity to learn and grow despite the effects of their executive impairment. With the benefit of additional practicable steps (Principle 2) the person may well be able to improve their decision-making capacity. Also, repeated assessment help to get a better sense of any repeated mismatch between the person's words and actions.

Although there is no case that is determinative of this point, Essex Chambers<sup>1</sup> guidance states that:

- You can legitimately conclude that a person lacks capacity to make a decision if they cannot understand or 'use and weigh' the fact that they cannot implement in practice what they say in assessment they will do.

### **BUT**

- You can only reach such a finding where there is clearly documented evidence of **repeated mismatch**. This means, in consequence, that **it is very unlikely ever to be right to reach a conclusion that the person lacked capacity for this reason on the basis of one assessment alone**. The application of this professional curiosity is fundamental in situations where executive functioning is questioned. (Allen, 2019)

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<sup>1</sup> Essex Chambers is a barrister chambers concerned with Mental Capacity law, regularly producing case reports, articles, newsletters and seminar across a range of areas.



George and Gilbert (2018) also recommend that:

- **Collateral information** should be sought from clinicians who have conducted functional assessments and family members.
- In the same way, MCA assessors should check the veracity of an individual's self-report by ensuring that it is congruent with their **performance in everyday life**.

This more longitudinal and holistic assessment of capacity is essential in detecting the more subtle effects of executive impairment on decision making. It is clear however that this approach does not sit neatly with the very distinct legal definition of a determination of capacity being **decision and time specific**, highlighting one of the difficulties with the current legal standards.

## **Is Mental Capacity Law fit for purpose?**

It can be very difficult in these cases to identify whether the person in fact lacks capacity as defined by the MCA 2005. This may partly be due to problems with the current legal standards. One criticism of the current legal standards for capacity is that they focus too narrowly on specific cognitive functions, to the exclusion of other factors that play a significant role in human decision making. For example, the current legal standard places value in reasoned and reflective decision making over spontaneity i.e. there is a strong **rationalist bias**. For more discussion in this area please see Charland (2006), Tan (2006), Craigie, (2011) and Whiting, (2020).

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

## **Key points**

- Executive impairment can affect decision making capacity.
- It is often overlooked, resulting in potential exposure of a vulnerable person to risk.
- It can be very difficult to assess the effect of executive impairment on mental capacity for a number of reasons - repeated assessment of capacity, supported by collateral information and real-life functional assessment are recommended.
- If you have concerns that a person's executive functioning may be affecting their decision-making capacity, it is probably worth seeking a specialist opinion from a psychiatrist or psychologist.

## **Helpful links**

### **Advocacy Focus**

Plenty of easy read resources that may be helpful:

<https://www.advocacyfocus.org.uk/justiceforlb>



## **Acquired brain injury and mental capacity**

Acquired Brain Injury and Mental Capacity Act Interest Group. (2014). *Making the Abstract Real: Recommendations for action following the House of Lords Select Committee Post-Legislative Scrutiny Report into the Mental Capacity Act.*

<https://www.mentalcapacitylawandpolicy.org.uk/wp-content/uploads/2014/10/DoH-MCA-ABI-17-09-14.pdf>

## **Learning disability, autism, mental health, and mental capacity**

Has section on executive function and capacity, with focus on patients with learning disability, autism and acquired brain injury.

*Mental Health Act Restricted Patients and Conditional Discharge: Practice Considerations 2022+08+07+MM+Practice+Guidance+Version+2+FINAL.pdf* ([squarespace.com](https://www.squarespace.com))

## **Care Quality Commission**

Failure to comply with MCA:

<https://www.communitycare.co.uk/2010/06/17/professionals-fail-to-comply-with-mental-capacity-act/>

## **Commentary on a Court of Protection case involving impaired executive function**

<https://www.mentalcapacitylawandpolicy.org.uk/executive-dysfunction-under-the-judicial-spotlight/>

## **Essex Chambers**

Case law review and commentary. Excellent for easy read summaries. Has a key word search which is useful. [Mental Capacity Resource Centre | 39 Essex Chambers](#)

**Frontal lobe paradox explained** Further information on the 'frontal lobe paradox' and relevance to mental capacity [Parliament and the 'Frontal Lobe Paradox' | BPS](#)

<https://www.nrtimes.co.uk/frontal-lobe-paradox-how-can-we-best-help-service-users/>

## **Lancashire Safeguarding Adults Board**

Lots of MCA resources on here, well worth a look.

<http://www.lancshiresafeguarding.org.uk/lancashire-safeguarding-adults/resources/mca-dols.aspx>

<http://www.lancshiresafeguarding.org.uk/lancashire-safeguarding-adults/policies-and-procedures.aspx>

## **Lancashire Self-neglect Framework**

<http://www.lancshiresafeguarding.org.uk/lancashire-safeguarding-adults/what-is-safeguarding-and-abuse/self-neglect.aspx>

## **MCA Code of Practice**

<https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>



## NICE guidance

The 2018 National Institute of Clinical Excellence (NICE) guidelines on assessing capacity make specific reference to executive difficulties and recommend both real life observations and consulting other professionals involved in the individual's care.

<https://www.nice.org.uk/guidance/NG108>

## Office of the Public Guardian

The OPG have recently updated some of their forms:

<https://www.gov.uk/government/publications/search-public-guardian-registers>

<https://www.lastingpowerofattorney.service.gov.uk/home>

## Screening for executive impairment

Open access article on tools used to screen for executive impairment

Ismail, Z., Rajji, T.K. and Shulman, K.I., 2010. *Brief cognitive screening instruments: an update*. International Journal of Geriatric Psychiatry: A journal of the psychiatry of late life and allied sciences, 25(2), pp.111-120.

<https://onlinelibrary.wiley.com/doi/epdf/10.1002/gps.2306>

## 'Where the Frontal Lobes Meet the Mental Capacity Act' by Dr Tracy Ryan

Excellent presentation on the role of the frontal lobes in decision making capacity

<https://projects.swan.ac.uk/sasnos/wp-content/uploads/2020/01/Dr-Tracey-Ryan-Morgan-Decisions-Decisions-Decisions-%E2%80%93-Where-the-Frontal-Lobes-Meet-the-Mental-Capacity-Act.pdf>

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