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Background

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. 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-up information, and this may be due to impaired executive functioning. Executive function refers to skills that you use to manage everyday tasks like making plans, solving problems and adapting to new situations. The three main skills are working memory, cognitive flexibility and inhibition control. Disorders of the mind or brain widely recognised to be associated with executive dysfunction include acquired brain injury (ABI), dementia, delirium, learning disability, ADHD, autism, addiction, mood disorder and personality disorder.

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Why it matters

“A person is not to be treated as unable to make a decision merely because they make an unwise decision.” 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, note that ‘unwise decisions’ where 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’. This applies even if that decision may lead to risk to the person or others.

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Information

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), and 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 when complexity or risk is rising. Ensure that escalation and professional challenge become part of everyday practice without prejudice.

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It is important to seek expert or legal advice where it is considered that a person may be subject to coercion/control by others, and/or is misusing substances such as drugs and alcohol, and there is grave concern regarding the decisions they are making/risks they are taking that raises questions about their executive functioning. Professionals should ensure advice is sought by those agencies involved in undertaking mental capacity assessments where there are questions impaired executive functioning affecting ability to make an informed decision.

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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. 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; and consider how vicarious trauma might be affecting you and seek support as soon as possible. Consider the challenges of assessing a person’s decision-making capacity when they appear to make an informed decision but cannot action that decision.

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Questions to consider

Always ensure the principles of the Mental Capacity Act (MCA) & relevant sections of the Code of Practice are applied.

Always record the outcome of any mental capacity assessments, and legal advice.

Useful Resources:

[When mental capacity assessments must delve beneath what people say to what they do - Community Care](#)

[Mental-capacity-act-code-of-practice.pdf \(publishing.service.gov.uk\)](#)

[Executive Function - YouTube](#)

[executive-functioning-grab-sheet-mca-guidance-v2may2024.pdf \(lancshiresafeguarding.org.uk\)](#)

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What to do

Ensure all relevant professionals have access to, and contact details for, legal advice in your organisation. Review and update your policies and procedures to include seeking advice and guidance regarding executive functioning and capacity. Include in team meeting agendas and supervisions 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.

Details can be found at [Lancashire Safeguarding Adults Board - MCA](#)