

# Executive capacity

February 2020

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# 'Executive capacity' or 'executive functioning'

(with thanks to James Codling Mental Capacity Act and Deprivation of Liberty Safeguards Training and Development Manager Cambridgeshire County Council)

## 1. Working Memory

Being able to keep information in mind and then use it in some way.



## 2. Flexible Thinking / Cognitive Flexibility

Being able to think about something in more than one way.



## 3. Self-control / Inhibitory Control

Being able to ignore distractions and resist temptation. This is how people regulate their emotions and keep from acting impulsively



## Executive function is responsible for these 5 skills:



- Paying attention
- Organising and planning
- Initiating tasks and staying focused on them
- Regulating emotions
- Self-monitoring (keeping track of what you are doing)

## Linking the phenomena to the law

- Need to explain **how** a person's difficulties with executive functioning mean that they cannot make the decision for purposes of the MCA
- If this is not explained, then it's not a capacity determination
- Suggest a key question is whether the person is aware of their own deficits – can they understand (or use and weigh) the fact that there is a mismatch between their ability to respond to questions in the abstract and to act when faced by concrete situations

# Case study - ABI

*Neuropsychological Rehabilitation*, 2015  
<http://dx.doi.org/10.1080/09602011.2015.1053948>



## **Clinical assessment of decision-making capacity in acquired brain injury with personality change**

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## “Online awareness”

- Interviewer: I mean, for example, in the restaurant you had somebody kind of shout at you after you got irritated and you kind of got into an argument which had got a bit out of hand, and it sort of started because, whereas before you would have managed the situation, now you lose your temper?
- ABI3: Yeah.
- Interviewer: Can you think of examples like that?
- ABI3: Yeah it does happen. It does happen. [*Noise from another patient in background.*] I’ll go out there and punch her on the f\*\*\*ing nose in a minute if she don’t shut up!

# PRACTICAL STEPS: THE CLINICAL PERSPECTIVE (with thanks to Dr Gareth Owen)



# Practical steps

- What's the concern? Is it adequate to rebut the presumption of capacity?
  - Repeated “unwise” decisions or failure to learn from mistakes
  - Discrepancies between a patient's self-evaluation of ability and those of others
  - Collateral history of a “change in personality”
  - Measures of executive impairment
- What is it that the person needs to decide about?
- Do I understand what needs deciding about well enough to communicate relevant information?
- Who supports the person make decisions?

# What to probe (1)

Probe the relevant abilities:

- Awareness of deficit – including online awareness
- Disengagement and detachment

# What to probe (2)

## Awareness of Deficit:

Is the person unaware of deficits relevant to the decision that needs to be made? Does unawareness mean they are unable to understand the relevant information? If the person does have awareness of relevant deficits, is the awareness engaged or disengaged from the deliberative process? Is the person able to *make use* of their awareness in the context of deliberating?

# What to probe (3)

## Disengagement and detachment:

How does the person respond to their impulses in the context of decision-making and action? Does the person show an ability to “disengage” an impulse in order to consciously reflect? Does the person have the ability to resolve conflicting impulses that may arise in a decision situation? Is the person able to use a detached position in deliberation.

# After the interview

- Consult others to support or refute the evidence obtained on the abilities during the interview or to highlight areas of uncertainty
- Be willing to have another go
- One stops assessment when there is enough evidence to form a judgement when a judgement needs to be made.

# Capacity – further help

- The capacity assessment guide: <http://www.39essex.com/mental-capacity-law-guidance-note-brief-guide-carrying-capacity-assessments/>
- [www.mhj.org.uk](http://www.mhj.org.uk)
- Maudsley Capacity Masterclasses: <https://maudsleylearning.com/courses/approaching-complex-capacity-assessments/>

# Keeping yourself up-to-date

- <http://www.39essex.com/resources-and-training/mental-capacity-law/>
- [www.mentalhealthlaw.co.uk](http://www.mentalhealthlaw.co.uk)
- <http://www.scie.org.uk/mca-directory/>
- <https://www.mentalcapacitylawandpolicy.org.uk>
- [www.courtofprotectionhandbook.com](http://www.courtofprotectionhandbook.com)

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