



Definition: Executive Functioning refers to the cognitive skills needed to manage daily life such as planning and organisation, problem solving, judgement and decision-making. When executive functioning is impaired it can be difficult to convert intentions into actions. Executive functioning problems are not always easy to identify as the person can appear to have a good understanding of their situation. This presents challenges for health and social care professionals when determining whether the person has capacity to make a decision.

The Legal Framework

The [Mental Capacity Act \(2005\)](#) is a key piece of legislation for health and social care professionals. It is intended to empower people to make decisions for themselves whenever possible and to provide safeguards for times when they are unable to.

The functional test of capacity requires the person to:

- 1) understand the information relevant to the decision
- 2) retain that information for long enough to make the decision
- 3) use or weigh the information as part of the decision-making process
- 4) be able to communicate their decision.

The diagnostic test must evidence a temporary or permanent disturbance of the mind or brain and how this disturbance directly causes problems with decision making.



Why it matters.

The [MCA Code of Practice](#) advises that for someone to have capacity they must be able to use the information to reach a decision. It is not enough to understand it. For context it gives the example of a person with an eating disorder who understands that they need to eat but the compulsion not to do so is too strong hence they are unable to "use" the information (COP 4.21).

Capacity assessments of this nature must focus on how the person "uses and weighs" information including consideration of the pros and cons associated with the decision. This weighing up process is the part of decision making that people with executive functioning difficulties often find challenging.

Assessors need to determine whether the person is taking risks with an understanding of the consequences or whether they lack capacity.

To have capacity the person must be able to make the decision in the material time when they need to make it (not just when they are being assessed).



How to Assess

Assessments of capacity with a person who has executive functioning difficulties can rarely be concluded during a single discussion.

This conversation needs to be balanced against reports from those who know them well as they can provide valuable information on behaviour and decision making over time.

Reviewing past records can also help to identify any patterns or inconsistencies around decision making that warrant further scrutiny.

If it becomes apparent that there is a repeated mismatch between what the person says they plan to do and what they do in real time, this will need to be explored directly with them. Their explanation of the conflict between what they say and do is likely to be key when drawing conclusions on their capacity.



How to Record

Clearly define both the decision being assessed and what the relevant information is.

Always evidence the practicable steps taken to support the person to make the decision including how the relevant information has been shared.

The person's account of why they are not putting what they say into practice is vital. The court recommends recording verbatim discussions where possible as this provides the strongest evidence of the person's thought processes.

Discussions or information gained from other sources can be included in the assessment if this informed the outcome of the assessment.

When drawing conclusions, opinions must be supported by facts.

For more information on recording assessments:

[Mental Capacity Guidance Note: Assessment and Recording of Capacity | 39 Essex Chambers](#)

