

London Borough Of Havering

# Mental Capacity Act Procedure

Mental Capacity Act 2005 Procedure 2019

## Document Control

### Sign off and ownership details

<b>Document Name</b>	Mental Capacity Act Procedure
<b>Version number</b>	V0.1
<b>Approved by</b>	Operational Management Group
<b>Date Approved</b>	December 2019
<b>Date for Review</b>	December 2022
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<b>Document Location</b>	TBC

### Revision history

<b>Version</b>	<b>Change</b>	<b>Date</b>	<b>Dissemination</b>

## Equality & Health Impact Assessment record

		Mental Capacity Act Procedure		
		<i>Review of the procedure</i>		
		<i>Procedure for acting and making decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves.</i>		
		Yes / No	If the answer to <u>any</u> of these questions is 'YES', please continue to question 5.	If the answer to <u>all</u> of the questions (4a, 4b & 4c) is 'NO', please go to question 6.
		Yes / No		
		Yes / No		
		<b>Please complete the EqHIA in Section 2 of this document.</b> Please see Appendix 1 for Guidance.		
		<i>Please provide a clear and robust explanation on why your activity does not require an EqHIA. This is essential in case the activity is challenged under the Equality Act 2010.</i>		
		<i>Please keep this checklist for your audit trail.</i>		

Date	Completed by	Review date

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## Introduction

This Procedure should be read in conjunction with the [Mental Capacity Act 2005](#), The Mental [Capacity Code of Practice](#), [the Pan London Multi-Agency Safeguarding Policy and Procedures](#) and [The Havering Mental Capacity Toolkit](#).

## Mental Capacity Act 2005

The Mental Capacity Act (MCA) provides the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves. Everyone working with or caring for an adult who may lack capacity must comply with the Mental Capacity Act (2005) and associated codes of practice when making decisions or acting for that person.

## Duties under the MCA

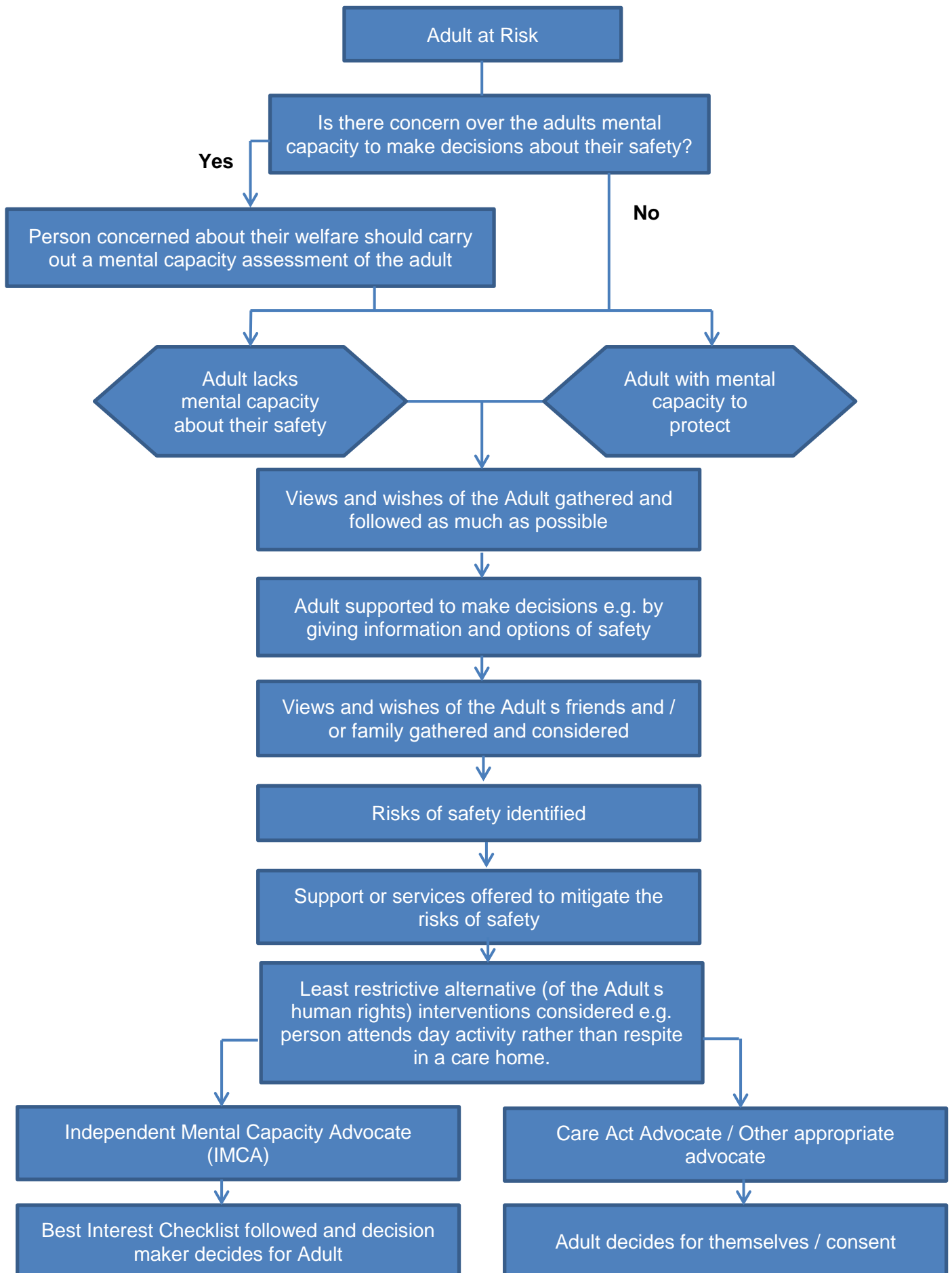
These include:

- All those working within Havering have a duty and commitment to protect vulnerable adults. Where an adult may lack capacity to make a specific decision, a formal assessment of capacity may be necessary to determine capacity. If an adult lacks capacity, specific decisions or actions may need to be taken on their behalf. Such decisions must be made in their best interests and follow the [principles laid out in the Mental Capacity Act \(2005\)](#).
- Interagency working is essential if the interests of vulnerable adult are to be safeguarded. The MCA has implications for all aspects of the work with adults who may lack capacity and for all policies.
- All agencies within Havering, including the Local Authority, Health agencies (CCGs, acute and community service providers), private hospitals, care homes and nursing homes should identify a named professional lead that will be responsible for ensuring the effective implementation of the Mental Capacity Act within their respective organisation and their compliance with this LBH MCA and DoLS Procedures.
- All agencies MUST ensure that all those working with adults (aged 16 and over) who may lack capacity are informed and aware of the Mental Capacity Act and comply with the LBH MCA Procedures.
- All agencies must ensure they provide support for all professionals with responsibilities for assessing capacity through supervision.
- All agencies providing care or treatment for adults who may lack capacity must ensure all staff having contact with service users have received training in MCA.

## Making Safeguarding Personal

Havering is committed to supporting and empowering each adult to make choices and have control about how they want to live their own life. Making Safeguarding Personal (MSP) is not only for people who have mental capacity. Identifying representatives, independent mental capacity advocates (IMCA) and other advocates or Best Interests Assessors, where relevant, is a key part of working with people to enable their voice to be heard.

## Assessment of Mental Capacity Flowchart



## Assessment of capacity

Where it is believed that a person may lack capacity, an assessment of capacity is required before making any decisions about the Person's everyday care, or major decisions which affect the Person's welfare and liberty. A Person's capacity must be assessed specifically in terms of their capacity to make a particular decision at the time it needs to be made.

It is prohibited under the legislation to express any opinion or make any assumption about the Person's capacity to make decisions about their own care without a proportionate assessment of their capacity at the point at which the decision is to be made.

## Who is able to assess the Person's capacity?

Those who can assess a person's capacity include:

- An individual or group of individuals who will take some action in relation to the Person's everyday care, e.g. Care Home staff; or
- an individual or Group of individuals who intend to make a major decision on the Person's behalf, e.g. a social worker who has concluded through assessment that a move to a residential care home is the only option available to meet the Persons' needs stated in their Care Plan.

Depending on the circumstances, e.g. in the case of a significant decision, the following input should be sought:

- Staff from agencies involved in the Person's care and support;
- Family, friends and / or carers
- The individual with Lasting Power of Attorney; and
- An independent advocate, which may be an Independent Mental Capacity Advocate (IMCA).

## Refusal by the Person to be assessed

The Person is under no obligation to undertake an assessment of their capacity, unless required to do so by a court. If the Person refuses to undertake an assessment of the capacity, you must explain the consequences of the refusal.

Even where a court has mandated an assessment, entry to the person's home cannot be forced and you must employ other methods to encourage the Person's consent for assessment, e.g. through the appointment of an independent advocate.

## Consent

In order for a person to give **valid** consent in relation to any care or treatment decisions they must:

- Have **capacity** in relation to the particular care or treatment decision. The person understands the nature (what), purpose (why) and consequences (risks) of a social care intervention /action.
- Have been given any relevant **information** in a way that they understand.
- Have given consent **voluntarily** and free from the influence of others – they are not coerced.

Section 11 of the Care Act 2014 provides guidance around actions that should be taken when an assessment is refused.

## How to assess capacity

Capacity must be assessed in relation to each specific decision, at the time the decision needs to be made and not in relation to the Person's ability to make wider decisions. Assessment of their capacity must therefore be proportionate to the decision in question. You should always start from the assumption that the person has the capacity to make the decision in question.

You must apply a two-stage test to assess capacity:

Stage 1: To have mental capacity a person must at a specific time and for a specific decision, be able to do the following:

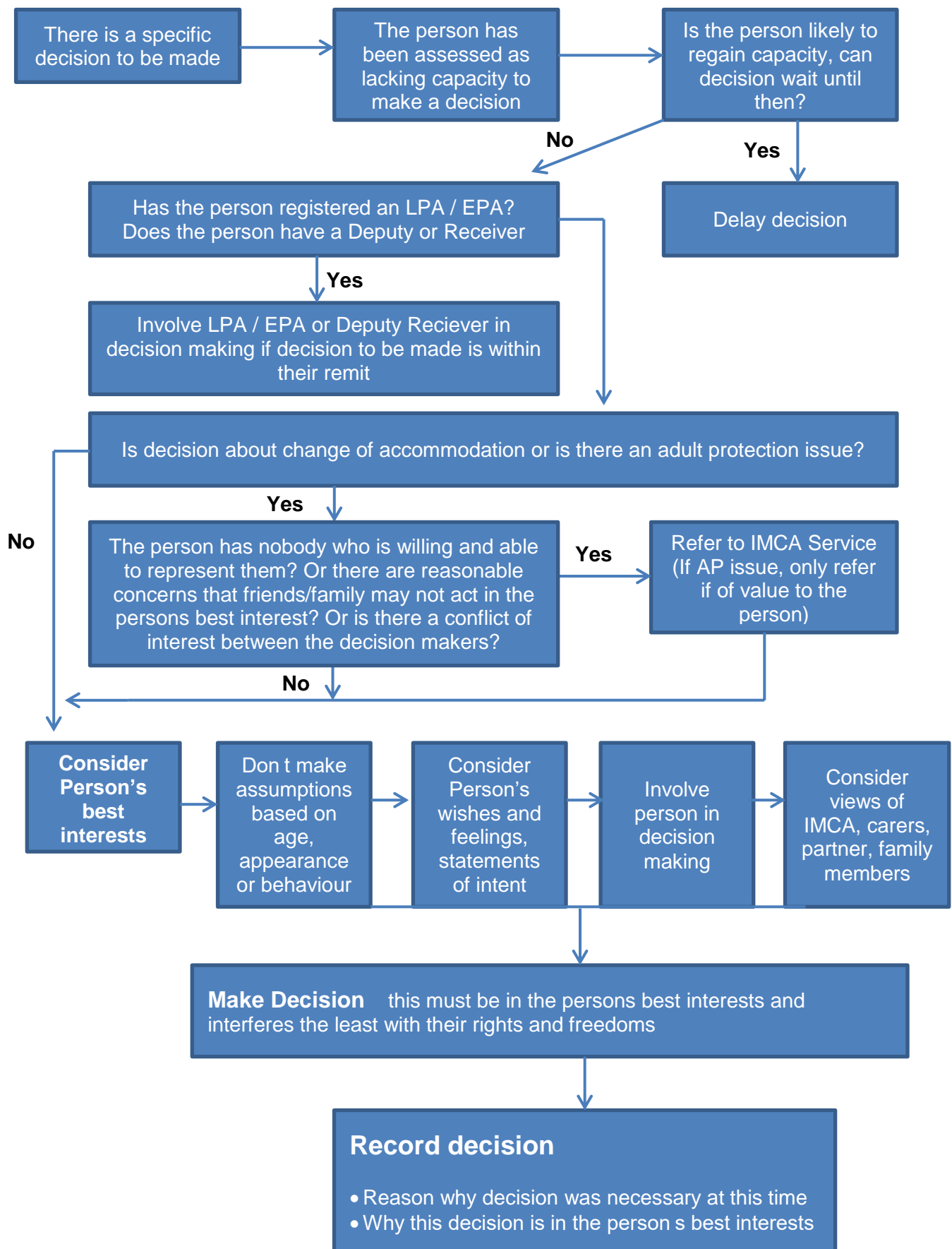
1. Understand the information relating to the specific decision

2. Retain the information long enough to make the decision
3. Use or weigh the information as part of the decision making process
4. Communicate a decision

Stage 2: If they are unable to do any of the above because of a disturbance or functioning of the mind or brain they would be assessed as lacking capacity for that specific decision at that time.



## Making a decision for a person who lacks capacity



## Independent Mental Capacity Advocate (IMCA)

The decision-maker must instruct an IMCA if a decision is to be made in relation to serious medical treatment, NHS accommodation, Local Authority Accommodation, Deprivation of Liberty Safeguard (DoLS), reviews of care and Safeguarding Adult cases where the person lacks capacity and they have no appropriate relative, friend, lasting power of attorney, enduring power of attorney, deputy or nominated individual to support them in. The IMCA will express views about the proposed decision, which must be taken into account by the decision-maker. The IMCA will provide a report to the decision-maker, which must be filed in the person's electronic social care record on LLAS.

Referrals to an IMCA in Havering can be made via:

### **Mind in Tower Hamlets and Newham**

Harrow Lodge House

Hornchurch Road

RM11 1JU

**Phone:** 01708 560660 (Mon-Fri 9am-5pm)

**Email:** havering.advocacy@mithn.org.uk

## The Court of Protection

The Court of Protection rules on all matters related to the Mental Capacity Act. It can make judgements on healthcare, social care and finances. If the Court is satisfied that the person does lack capacity the Court can make decisions on their behalf or they can appoint a Deputy to manage the affairs of the person on their behalf under the Mental Capacity Act 2005.

The Office of the Public Guardian ('The OPG') carries out the administrative functions of the Court of Protection, including dealing with queries, promoting and protecting the service user's financial and social wellbeing and supervising deputy's to ensure they are operating in the best interests of the service user.

More information on The Court of Protection and Deputyship can be found in the Havering Protection of Property Procedures 2016.

## Lasting Power of Attorney

A Lasting Power of Attorney allows a person to plan ahead when they have capacity to nominate a person whom they trust to act as "attorney" on their behalf should they lose capacity. The person will specify what decisions the power of attorney will make in regards to care, treatment and or finances. It may entitle the attorney to do almost everything or it may be limited to certain defined decisions.

The practical purpose of a Power of Attorney is to invest the attorney with power to act for the donor and also to give the attorney a document defining the extent of the attorney's authority.

## Confidentiality, disclosure and sharing of information

**Lasting Power of Attorney-** You must normally consult with them prior to sharing any information with other parties. LPA are entitled to request any information, as if they were the Person about whom the decision is being made, so long as it is within the remit of the LPA.

**Court Appointed Deputy-** They must apply to the Court of Protection for any information outside their remit.

## Recording

Record in the Mental Capacity Toolkit on LLAS, the reasons for establishing a lack of capacity and the decisions this relates to.

A copy of the Toolkit must be provided to the Person's and any representative, e.g. LPA and significant family members.

Your recording needs to:

- State the decision made.

- Explain the grounds upon which this decision is made.
- Evidence that you have applied to two-stage test.
- Demonstrate assessment in all aspects of the first stage of the two-stage test (can they understand, retain and weigh relevant information, and can they communicate their decision?)