# Duration of authorisations: practice guidance for Best Interest Assessors (BIAs)

## 1. Aim of this practice guidance

This practice guidance aims to offer BIAs a checklist for consideration when deciding what period of authorisation to recommend. It is intended to align with and support legal compliance, champion the rights of those subject to a deprivation of liberty (DoL) and maximise use of resources.

BIAs act as individual professionals and are personally accountable for their decisions. Those appointing them must not dictate or seek to influence their decisions[i]. However, BIAs can be subject to challenge where their practice may fall outside of recognised national and local best practice.

This practice guidance is not intended to constrain BIA decision making. However, BIAs are asked to have regard to this practice guidance when making their decisions.

## 2. The basics

- DoL authorisation relates solely to the issue of deprivation of liberty[ii]
- BIAs should only recommend authorisation for as long as P (the person deprived of liberty) is likely to meet all qualifying requirements[iii]
- The maximum duration for an authorisation is 12 months
- The period of authorisation (up to and including that maximum) should be decided by considering P's situation holistically, on an individual basis. **A blanket approach must never be taken**
- All decisions as to duration should be well reasoned and evidenced
- BIAs may make their recommendation as to authorisation subject to conditions[iv]. Managing Authorities (MAs) must comply with conditions[v] and are not authorised to take any action which does not comply with the conditions[vi]
- Signatories can select a shorter duration than the one recommended by the BIA[vii]. Signatories may wish to discuss the recommended duration with BIAs to ensure they have sufficient information to make their decision[viii].

## 3. What should be taken into account when recommending a duration?

The DoLS Code stipulates that decisions about duration should be based on the information obtained during the BIA's consultation, regarding P's:

- history
- prognosis and
- the effect of treatment on P[ix].

The duration of P's authorisation should result from proper consideration of:

- **Well settled care**
  Whether P's care is well established, taking into account periods of care before P's current or previous DoL was authorised. P may be considered settled, even where their care arrangements are relatively new; for example, P quickly adjusts to and appears content with their new care home placement. A 12-month authorisation is likely to be appropriate where

established/ settled arrangements are clearly meeting P's needs (taking into account their wishes and feelings) and are unlikely to need to change

- **Continuity of qualifying requirements**
  The likelihood of P continuing to meet all the qualifying requirements. If P is likely to continue to meet all qualifying requirements for 12 months, a 12-month authorisation is likely to be appropriate *unless* the nature of P's situation is temporary in some way. Temporary situations could include (by way of example) –
  - The DoL is *only* necessary because of a *temporary* change to or breakdown in P's usual care arrangements that is unlikely to last as long as 12-months[x]
  - There are likely to be changes to P's mental disorder in the relatively near future, for example, P is being rehabilitated following a brain injury and may recover capacity[xi]
  - P's arrangements can *only* be suitable if they last for less than 12 months, for example, whilst an alternative more suitable arrangement is urgently sought for P.
- **Best interests**
  When considering whether P is likely to continue to meet the qualifying requirements for 12-months, BIAs should identify whether there are any magnetic factors which, if not addressed, could alter the BIA's view that arrangements are in P's best interests. For example, if restrictions are not reduced, or P's medication is not reviewed, the placement will cease to be in P's best interests and alternative arrangements must be made for P. Where identified, BIAs should clearly record that their view as to best interests is contingent upon proper management of these magnetic factors, and select appropriate conditions and/ or recommendations (see conditions guidance)[xii].
- **Less restrictive approaches**
  What period is proportionate i.e., is the least necessary to achieve the intended objectives for P (as set out in P's care plan, including arrangements amounting to DoL). For example, if P's care arrangements are necessary and proportionate to prevent harm to them, for what period are the arrangements likely to need to keep them from this harm? Could P be kept safe in any other available way?

## 4. Addressing concerns about P that might prompt a short authorisation

- If inclined towards a shorter authorisation, BIAs must be clear what is to be gained/ achieved for P by a shorter authorisation. Is there any available way to achieve this for P, without utilising a shorter authorisation, for example by use of a condition or recommendation? Can P's lead care practitioner help drive forward any required change in P's arrangements which would make P's situation more satisfactory?
- A short authorisation should clearly achieve a specific purpose and be connected to a relevant condition(s) designed to support achievement of that purpose. BIAs should clearly set out what material change should be brought about in P's circumstances which the shorter authorisation is designed to effect
- Where P is subject to unusual or high levels of restriction such as covert medication, robust consideration should be given to best mechanisms for ensuring that such is kept under review, for example via conditions or recommendations (including in particular triggering a Part 8 review if conditions and/ or recommendations are not met). Regular reviews may increase confidence that a longer duration can be justified[xiii]
- Where recommending an authorisation shorter than 12 months, BIAs may particularly wish to consider selecting the option on Form 3 which reads *'I would like to be consulted again since this may affect some of the other conclusions that I have reached in my assessment'.* Selecting this option may make it clearer that if (for example) conditions designed to reduce restrictions are not met, the arrangements will not be proportionate and therefore the authorisation should fail.

## 5. The impact of disagreements

- There may be disagreements between P and their family, or P/ their family and commissioners or the MA, for example. The impact of a disagreement on the duration of an authorisation may depend on the nature of the disagreement. For example, it may be that disagreement can be mitigated by the use of carefully crafted conditions to (say) reduce the restrictions to which P is subject. It may be that recommendations can be utilised to ensure that P's lead care practitioner vigorously pursues resolution of the disagreement
- Where it appears that P wishes to apply to the Court of Protection to challenge their arrangements, or would wish to if they were able to, prompt action must be taken in accordance with local guidance on the management of s21A. Where the BIA is unclear whether or not P wishes (or would wish) to apply, a short authorisation is recommended in accordance with local guidance, to allow time to establish the position.

## 6. 'Default' approaches

- There should be no assumptions – each P's situation should be considered on its own facts. Whilst this guidance is intended to – amongst other things – prompt careful consideration of resources, it should NOT be read as an intention to suggest that the starting point for all authorisations is a 12-month duration
- It is likely to be desirable to keep assessments of P to no more than is necessary to ensure that P's rights are preserved. However, it should not be assumed that less assessments are *automatically* a good thing for all Ps – not all Ps may find the experience of assessment distressing or unsettling, for example[xiv]
- A short authorisation should not be used *solely* because this is P's first authorisation (there may be other reasons why a short authorisation is appropriate, but a first authorisation alone is insufficient to warrant a short duration).

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[i] MCA DoLS Code of Practice, paragraph 4.16
[ii] DoLS Code paragraph 5.10
[iii] DoLS Code paragraph 5.9
[iv] MCA, Schedule A1 paragraph 43 and 53
[v] MCA, Schedule A1 paragraph 53(3)
[vi] MCA, Schedule A1 paragraph 4(3)
[vii] DoLS Code, checklist
[viii] London Borough of Hillingdon v Neary and Anor [2011] EWCOP 1377, referenced in Deprivation of Liberty Safeguards Handbook, Second Edition, AF Mughal and S Richards
[ix] Referenced in Deprivation of Liberty Safeguards Handbook, Second Edition, AF Mughal and S Richards, p116
[x] DoLS Code paragraph 5.9
[xi] DoLS Code paragraph 5.9
[xii] Dols Code paragraph 4.74
[xiii] Re AG [2016] EWCOP 37. See also local guidance on covert medication available in the local MCA policy https://www.northeastlincolnshireccg.nhs.uk/publications/
[xiv] P v Surrey County Council and Surrey Downs CCG [2015] EWCOP 54