

Conditions: Guidance for Managing Authorities

1. introduction: Conditions and the Role of the Managing Authority (MA)

This guidance focuses on Managing Authorities (MAs) that are care homes. The MA in relation to a care home means the person registered (or required to be registered) under Chapter 2 of Part 1 of the Health and Social Care Act 2008 in respect of the provision of residential accommodation together with nursing or personal care.ⁱ The person registered is generally the care home manager.

A MA is responsible for applying for authorisation of deprivation of liberty (DoL) for any person (P) who may come within the scope of the Deprivation of Liberty Safeguards (DoLS)ⁱⁱ. When it receives an application, the Supervisory Body (SB) will generally instruct a Best Interests Assessor (BIA) and a Mental Health Assessor (MHA) to undertake a number of assessments. The SB will use the reports arising from these assessments to decide whether to authorise the DoL.

In their report, the BIA may propose that an authorisation should be given subject to conditions. If the matters covered by the conditions are not complied with, the DoL will cease to be in P's best interestsⁱⁱⁱ i.e. the DoLS criteria for authorisation will no longer be met. The MA must not deprive P of their liberty without authorisation^{iv}.

MAs must therefore ensure that conditions are complied with^v. This requirement is in primary legislation (the Mental Capacity Act 2005 (MCA), Schedule A1) and reiterated in the DoLS Code of Practice. Compliance must form a part of the MA's regular care planning/ review considerations.

2. Aim of this guidance

This guidance aims to provide MAs with greater understanding of, and a checklist to help them comply with, conditions. It is intended to align with and support legal compliance, champion the rights of those subject to a DoL and maximise use of resources.

3. What are conditions for?

- To oblige a MA to undertake an action which is:
 - within its control/ ability to achieve
 - directly related to the DoL
- To clearly set out:
 - a specific objective (what the condition is intended to achieve/ what the MA must do to meet it)
 - how compliance will be measured (how the MA and those monitoring conditions will know the objective is achieved/ the condition is satisfied)
 - a realistic timeframe within which the objective must be achieved
- In general terms, conditions aim to:
 - reduce the intensity/ severity of a DoL and/ or lessen the impact of restrictions (or perhaps, work towards avoiding the DoL altogether^{vi})
 - stipulate something that, if not dealt with, would mean that the DoL would cease to be in P's best interests^{vii}.

Conditions should be **SMART** (specific, measurable, achievable, relevant, time-specific).

4. What are conditions not for?

- Anything which does not relate directly to the DoL^{viii}

- Care planning via an ‘alternative’ route/ a substitute for a properly drafted care plan^{ix} (but see ‘the link with recommendations’ below)
- Unnecessarily inhibiting MA staff from retaining flexibility to respond appropriately to P’s needs^x.

5. What are the implications of conditions not being complied with?

- Authorisations are subject to compliance with any conditions. MAs have no defence to liability if they do “anything which does not comply with the conditions (if any) included in the authorisation”^{xi}
- Whilst there is no specific sanction in the MCA for lack of compliance with conditions, failure to comply could ultimately be challenged via the Court of Protection^{xii}
- The Ombudsman has taken action against MAs for failure to comply with conditions^{xiii}
- CQC has deemed that failure to comply with conditions amounts to a breach of Regulation 13 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, and listed failure to comply as reason for an inadequate rating^{xiv}
- Those MAs which have a contract with the North East Lincolnshire Integrated Care Board are bound by that contract to comply with the MCA and related local policy. This guidance is intended to form a part of local policy
 - More information about monitoring and non-compliance can be found at Appendix One.

6. Who is responsible for their oversight?

- Case law confirms that “[T]here is a duty on the supervisory body... to monitor compliance with conditions”^{xv}
- The Business Services Team at Focus approaches MAs for updates on conditions compliance, to ensure that such are met, or if not met, that follow up action is taken (see Appendix One).

7. What are the responsibilities of P’s RPR (Relevant Person’s Representative)?

- The RPR has “a legal status to protest, should these conditions need to be investigated”^{xvi} and could choose (for example) to trigger a review if they consider conditions are not met
- P’s RPR must represent and support P in all matters relating to their DoL. That means “there is an obligation upon the RPR so far as he/ she is able to ensure that conditions are complied with”^{xvii} but this does not absolve the supervisory body from monitoring compliance^{xviii}
- Neither “the statute, or schedule within it, sets out in any way that it is the function of the RPR to monitor compliance and to report back to the supervisory body, because that, in effect, would be putting an agency-type duty on the RPR to act on behalf of the supervisory body, and that is not right; the RPR is to act on behalf of P”^{xix}.

8. The link with recommendations

Where a matter is not suitable for inclusion as a condition (for example, because it does not relate directly to the DoL), the matter may be reflected in a recommendation instead. For example, recommendations might be used to:

- highlight care management issues/ positively impact the care planning or delivery process
- address apparent omissions, such as by recommending a review of P’s DNACPR notice where the MCA has not been followed (e.g. P’s family have not been consulted about it)^{xx}
- task other professionals involved in P’s care, such as by suggesting what they should consider when planning P’s care or undertaking their reviews
- task P’s lead care practitioner with considering compliance with conditions as part of the care planning/ reviews (where conditions are not complied with, P’s lead care practitioner could (for example) be asked to consider requesting a Part 8 review).

Conditions and recommendations should work together coherently to support P. For example, BIAs identifying issues with P's care which directly relate to the level of restrictions, might include conditions AND related recommendations. Both should assign responsibility for addressing the identified issues within a realistic timeframe. These must be tailored to P's circumstances.

9. The link with Part 8 reviews

- A DoLS authorisation is reviewable on a number of grounds including the 'variation of conditions' ground. This means that –
 - (a) there has been a change in P's case, and
 - (b) because of that change, it would be appropriate to vary the conditions to which the standard authorisation is subject^{xxi}
- As part of the review, BIAs can recommend to the SB whether — and, if so, how — it would be appropriate to vary the conditions^{xxii}. Conditions can be amended, existing conditions omitted, or new conditions added^{xxiii}
- A variation of conditions does not automatically mean that the best interests requirement should be reconsidered. Whether this is necessary will depend on the significance of the changes in P's case, having regard to the nature of the change and how long the change is likely to last for^{xxiv}. Whether anyone is contesting the nature of the conditions should also be considered in deciding whether the best interests requirement should be reconsidered^{xxv}.

10. What is expected of MAs? A checklist

- a) **Understand expectations:** BIAs should discuss any proposed conditions with the MA before including it. Use this opportunity to check you understand what is asked of you, and that it's achievable^{xxvi}. If misunderstanding arises after the BIA's departure, ask the DoLS Team
- b) **Ensure accessibility:** ensure that you know where to find the conditions you are expected to comply with^{xxvii}. Be clear that, whilst conditions are addressed to the care home manager as the person registered, a range of care home staff may be involved in supporting compliance. This means that information about conditions will need to be accessible to all relevant staff
- c) **Have a plan:** consider *how* you will comply with the condition. For example, conditions will often require you to work with others who you will need to contact to make arrangements, usually more than once. Consider at the earliest stage how you will ensure that you keep on top of any actions and plan to review regularly whether actions are on track. You may have to be persistent when working with others
- d) **Evidence compliance:** ensure that you record your efforts to comply with conditions, supply evidence as required by the condition (or as a minimum, at the time the authorisation is reviewed or considered for renewal). Be able to evidence that the conditions are met
- e) **Respond promptly:** the Business Services Team will contact you to identify whether conditions are being complied with. Please respond to them in a timely way
- f) **Ask for help:** if your efforts to comply with a condition don't result in their purpose being achieved (for example you repeatedly request an assessment/ review from a team or professional without that assessment/ review taking place), please highlight this to the DoLS Team in your condition compliance response. You should also raise any concerns with P's lead care practitioner where they have one, and consider placing the matter on the portal.

Although not necessarily directly connected with conditions compliance, please remember to let the DoLS Team know if the RPR is not fulfilling their functions, e.g. has stopped having regular contact with P. You can learn more about the RPRs role here: [Deprivation of Liberty - LiveWell \(nelincs.gov.uk\)](https://www.nelincs.gov.uk).

Appendix One: process for monitoring DoLS Conditions and pursuing non-compliance

1. Once a BIA has included DoLS Conditions, the Focus Business Services Officer (BSO) processing the DoLS inputs them on the DoLS Conditions spreadsheet and highlights agreed dates that each condition must be complied with by (these then form the dates to chase-up any conditions with the MA).
2. DoLS Condition chase emails are sent to the MA (as required) by the Senior Business Services Officer (SBSO) and these are monitored thereafter – profile notes are entered on SystmOne to record this.
3. Once a reasonable response has been received from the MA, SystmOne and the Conditions spreadsheet are updated as required – should any additional information be required from the MA, the MA is chased again.
4. Should a response not be received, a period of seven days would elapse before a further chase-up email is sent to the MA (keeping the email thread) – a total of three emails are sent to the MA before a follow up telephone call is made to the MA.
5. Should a response not be received at all from the MA, this is identified on the conditions spreadsheet and recorded on SystmOne as required. An entry is also made on to the Intelligence Portal, with the SBSO and the BIA informed (if the BIA indicated in their assessment that they wished to be consulted following the DoLS process). Recording on the Portal in this way allows the contract officer for the MA to follow up with the MA directly.
6. Depending on the nature of the condition, the period during which the condition has not been complied with and the implications of non-compliance for P, the Business Services Manager will consider:
 - a) alerting any lead care practitioner which P may have, who may offer additional support to secure compliance
 - b) alerting P's RPR, who may offer additional support to secure compliance
 - c) whether instigating a Part 8 review is appropriate
 - d) whether making a safeguarding referral is appropriate.
7. Where conditions pertain to objections, further information is generally requested (if not already provided) by the SBSO around the frequency of objections and how these are being evidenced (including any outcomes), how P displays objections (verbally or physically exit seeking etc.), if there are any known triggers etc.
8. Where no recent IMCA reports have been received for any P with a paid RPR, contact is made with the advocacy service by the SBSO to obtain relevant IMCA reports and to confirm whether there are concerns and/or likelihood of a s21A challenge being considered/ pursued.

When conditions are not complied with or their purpose is not achieved

Reports made via the Intelligence Portal of a failure to comply with conditions (see 5 above), are considered via the NEL Integrated Care Board (ICB) incident meeting. Depending on the nature of the condition that is not complied with, the circumstances and implications for P, ICB staff may:

- make enquires with/ representations to the MA where the failure to comply results largely from the MA's failure to act
- make enquiries with/ representations to any other relevant provider, where the failure to comply results largely from that provider's failure to cooperate with the MA/ the condition has been complied with but the intended purpose has not been achieved for P (for example, the MA has complied with the condition to seek a medication review, but the review has not been carried out as requested)
- take any other action set out at 6 above, or request that the Business Services Team undertake that action.

A combination of actions may be taken. Actions will be informed by matters such as: the severity of P's restrictions which the condition is designed to address, the level of external support P receives (e.g. from an advocate or RPR), previous non-compliance with conditions by the MA, the MA's CQC rating, and the presence of safeguarding considerations^{xxviii}.

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- ⁱ Mental Capacity Act 2005 Schedule A1, paragraph 179 (a)
- ⁱⁱ MCA DoLS Code of Practice, paragraph 3.1
- ⁱⁱⁱ MCA DoLS Code of Practice, paragraph 4.74
- ^{iv} MCA DoLS Code of Practice, paragraph 5.20
- ^v Mental Capacity Act 2005 Schedule A1, paragraph 53(1)/(3)/ Deprivation of Liberty Code of Practice, checklist for managing authorities
- ^{vi} MCA DoLS Code of Practice, paragraph 4.74
- ^{vii} MCA DoLS Code of Practice, paragraph 4.74
- ^{viii} MCA DoLS Code of Practice, paragraph 4.74
- ^{ix} MCA DoLS Code of Practice, paragraph 4.75
- ^x MCA DoLS Code of Practice, paragraph 4.74
- ^{xi} Mental Capacity Act 2005 Schedule A1, paragraph 4(3)
- ^{xii} Mental Capacity Act 2005 s21A
- ^{xiii} Deprivation of Liberty Safeguards (DoLS) Handbook, second edition, AF Mughal and S Richards, p119
- ^{xiv} Deprivation of Liberty Safeguards (DoLS) Handbook, second edition, AF Mughal and S Richards, p119
- ^{xv} Re W [2016] EWCOP 58, paragraph 15
- ^{xvi} Re W [2016] EWCOP 58, paragraph 11
- ^{xvii} Re W [2016] EWCOP 58, paragraph 11
- ^{xviii} Re W [2016] EWCOP 58, paragraph 6
- ^{xix} Re W [2016] EWCOP 58, paragraph 12
- ^{xx} Deprivation of Liberty Safeguards (DoLS) Handbook, second edition, AF Mughal and S Richards, p118
- ^{xxi} Mental Capacity Act 2005 Schedule A1, paragraph 107(1)/(2)
- ^{xxii} Mental Capacity Act 2005 Schedule A1, paragraph 113(3)
- ^{xxiii} Mental Capacity Act 2005 Schedule A1, paragraph 107(3)
- ^{xxiv} Mental Capacity Act 2005 Schedule A1, paragraph 111(4)/(5)
- ^{xxv} MCA DoLS Code of Practice, paragraph 8.14
- ^{xxvi} MCA DoLS Code of Practice, paragraph 4.75
- ^{xxvii} The Best Interest Assessors Practice Handbook, second edition, R Hubbard and K Stone, p100
- ^{xxviii} Deprivation of Liberty Safeguards (DoLS) Handbook, second edition, AF Mughal and S Richards, p120