HEMPSONS

Deprivation of Liberty: Practical Decision Guide

1. Start with the concrete situation

Focus on the individual's real-life circumstances, not just labels or settings.
Ask: what does the care plan/placement actually look like in practice?

2. Objective element – is there confinement?

This is a multi-factorial assessment. No single factor is decisive.

- Nature of restrictions and manner of implementation
- Degree of supervision and control
- Ability to leave in practice
- Level of isolation / social contact
- Relative normality of the placement
- Purpose of restrictions
- Duration of restrictions - material period of time
- Effect on the individual
- Presence or absence of objection
- How far removed the situation is from prison cell detention

Do these restrictions amount to confinement?

NO → **NO DEPRIVATION OF LIBERTY**

YES

3. Subjective element – is there valid consent?

Even if there is confinement, there is no deprivation of liberty if the person validly consents.

What counts as valid consent?

Consent under Article 5 is not the same as decision-making under the MCA.

The person may validly consent if they:

- Are aware of their situation, and
- Have a basic understanding of their living circumstances, and
- Can express a view and show acceptance

*NB a person can provide valid consent to their confinement even if they do not have capacity to make decisions regarding residence and care

How can consent be given?

Consent does not need to be explicit.

It can be:

- Expressed (clearly stated), or
- Implied (e.g. consistent contentment or cooperation)

When should consent not be inferred?

Do not treat consent as valid if there is serious doubt, including where:

- The person shows objection or resistance
- Behaviour suggests lack of acceptance
- Compliance may be influenced by sedative medication

In these cases, no valid consent should be inferred and further advice should be sought

Is there valid consent?

YES → **NO DEPRIVATION OF LIBERTY**

NO → **DEPRIVATION OF LIBERTY**

This document is provided as a general guide and does not constitute legal advice - users are advised to seek case-specific advice as needed