

31 July 2012



Our ref: L/1/4/5A

Dear Consultee

DISCUSSION PAPER ON ADULTS WITH INCAPACITY (DP NO 156)

I enclose, for your consideration, a copy of the above mentioned Discussion Paper on Adults with Incapacity which has been published today. This paper is also available on our website, together with a news release, a separate summary and further details.

The Discussion Paper addresses the issue of possible deprivation of liberty of adults with incapacity living in residential care. It follows extensive changes to the law of England and Wales, which were perceived as necessary after the decision of the European Court of Human Rights in the case of *HL v United Kingdom* (2005) 40 EHRR 32. That case determined that a person living in restrictive conditions in a long-stay psychiatric hospital had suffered a breach of his right to liberty under Article 5 of the Convention because, despite lacking the capacity to consent to hospital admission as an informal patient, he had not been admitted under a formal procedure. In this area of law, the characterisation as deprivation of liberty of what may be care necessitated by a person's disabilities generates significant conceptual and practical problems.

The Commission's function is to recommend ways of simplifying, updating and improving Scots law. The outcome of any law reform project is the submission to the Scottish Ministers – or the UK Government where the area of law in question is a matter for the Westminster Parliament – of a report setting out in detail our recommendations for reform. We usually append a draft Bill which offers a basis for any legislation implementing our recommendations.

In order to ensure that our recommendations, if implemented, would result in law which is just, principled, responsive and easy to understand, it is critical for the Commission to engage in a thorough and open process of consultation. We therefore welcome the views of as many people as possible, whether from an academic perspective or based on a day-to-day practical experience of the area under review.

Our usual approach to consultation – and to a law reform project in general – involves the preparation of an initial discussion paper. This sets out the current law on the topic in question, describes and analyses any problems with it, details possible options for change and seeks to elicit views from consultees on the preliminary proposals made. Discussion papers are circulated to those identified as having an interest in the topic and are also published on our website (www.scotlawcom.gov.uk).



News releases are also issued to draw attention to the consultation. Once the deadline for responding has passed, a careful analysis of all responses is carried out. The proposals in the discussion paper are measured against the public response and this can lead to a period of further thought and research before final decisions are made and the report published.

Accordingly, we invite your views on any or all of the proposals in this Discussion Paper. Even if you agree with our proposals but do not wish to make any further comments, a brief note to that effect would also be most helpful as an indication that our proposals are on the right lines. Where possible, we would prefer the electronic submission of comments. An electronic response form is available on our website at <http://www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/2010-present/>. Please note that the consultation process for this project will conclude on **31 October 2012**; accordingly, we would be grateful if comments were submitted by then.

PLEASE NOTE THAT information about this Discussion Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act. We may also attribute comments and publish a list of respondents' names.

Finally, should you wish to offer any comments on the way in which we conduct our consultation exercises, we would be pleased to hear from you.

Yours sincerely

MALCOLM MCMILLAN
CHIEF EXECUTIVE