

Autonomy, benefit and protection

How human rights can protect
people with mental health
conditions or learning
disabilities from deprivation of
liberty

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INTRODUCTION AND BACKGROUND

The paper considers how Scottish law and practice about the care and treatment of people with mental health issues and learning disabilities respects their right to liberty and security under Article 5 of the European Convention of Human Rights ('ECHR').

Two earlier papers dealt with the use of the Adults with Incapacity Act where an adult was unable to give legal consent to a significant life decision. Although the law has now been clarified, the changes do not apply where care arrangements may constitute a 'deprivation of liberty' within Article 5 ECHR.

The Scottish Government has given guidance on the new law. The paper aims to build on and supplement this. It also highlights the need for further Mental Welfare Commission guidance.

The paper is relevant wherever someone with a mental illness (including dementia), learning disability or personality disorder may require care or treatment in conditions which amount to deprivation of liberty. It generally deals with people unable to consent to care arrangements, but some sections apply to people who can take their own decisions.

The detention of children and young people raises different legal issues and the paper does not deal with this.

Public authorities

Human rights law affects public authorities, such as local authorities and their staff, health boards and hospitals. (Changes in the law mean that private care homes can also now be treated and also have a positive duty to protect individuals against breach of their human rights.

Part 1 looks at the requirements of ECHR law. Parts 2 and 3 discuss issues in hospitals and the community. Part 4 outlines how the law can aid decision making and Part 5 sets out some conclusions.

PART 1: DEPRIVATION OF LIBERTY

Right to liberty and security

The right to liberty and security is one of the most important human rights. No one, whatever their impairments, should lose this right without proper consideration of the alternatives, or without proper legal safeguards.

It is not sufficient justification to say that the aim of any restrictions is to benefit the individual.

Detention and mental disorder

Article 5 permits the '*detentionof persons of unsound mind*', provided this is both '*lawful*' and there is a proper legal procedure.

Detention must respect the law of the country where the detention takes place and ECHR law. ECHR requires (i) reliable medical evidence of mental disorder, (ii) that the nature of the mental disorder justifies detention and (iii) that the detention stops once the disorder stops. There must be regular reviews. The detained person must be told the reasons for detention and have a right of appeal.

'Detention' and 'deprivation of liberty'

The terms 'detention' and 'deprivation of liberty' can be confused. Article 5 protects people against unlawful 'deprivation of liberty' but permits the 'detention' of people of 'unsound mind' in certain circumstances.

A person may be deprived of his or her liberty in a situation other than formal detention, for example, where restrictions in the person's home amount to a deprivation of liberty. In the paper 'deprivation of liberty' generally means this wider concept and 'detention' means detention in hospital or another place.

The ECHR does not define 'detention'. Sometimes it is a matter of legal status. For example, someone in hospital under a Mental Health (Care and Treatment) Act order is 'detained' even if they are cared for on an open ward and able to leave the hospital they please.

Other situations may amount to a deprivation of liberty, for example being under 24-hour escort or suffering clear restrictions on one's freedom of movement within an area. We do not know whether the courts would say that someone living in a care home, where the doors are locked for residents' safety, is detained, or if a voluntary patient receiving care and treatment on a locked ward is detained there. The paper examines the decisions of the European Court of Human Rights' and the UK courts and tries to clarify the position.

Restraint

Restrictions on a person's freedom of movement, such as restraint, do not, of themselves, amount to a deprivation of liberty, but they may become of a '*degree or intensity*' to constitute detention. The use of restraint may indicate that a person's wishes are being overridden. There should be a careful assessment of whether the person is being deprived of his or her liberty

The UK has signed, but not ratified, a Protocol to the ECHR which could have provided a human rights law basis for assessing the legality of restraint.

RECOMMENDATION 1: The Mental Welfare Commission should consider making further enquiries into the status of the Protocol, with a view to urging its ratification.

Degree and intensity of controls

Whether restrictions on a person amount to a deprivation of liberty depends on the effects on him or her. Various factors are relevant, including the type, duration, effects and way of making the arrangements and the degree or intensity of any restrictions.

Scottish Government guidance rightly emphasises that factors such as improved choice, contact with the outside world and freedom of movement may all be relevant in judging whether a care intervention amounts to a deprivation of liberty. The combined impact of all the restrictions must be taken into account.

However even where a regime maximises someone's freedom the person may still be deprived of liberty, if, for example, he or she is detained under mental health law, or is not allowed to leave, despite expressing the wish to do so.

Freedom to leave

Some cases suggest that preventing a person from leaving when he or she clearly attempts (or wishes) to do so is a clear deprivation of liberty. Moreover, the fact that staff *intended* to prevent HL from leaving was relevant in *Bournewood*, even though he never attempted to leave.

It is not clear how far this is the case when someone is not legally capable of protecting his or her own interests or of deciding whether to stay in a given situation.

It is suggested that the law should distinguish between a competent and an incompetent request to leave. Preventing someone from leaving who can state their wish to leave (whether or not they can protect their own interests) is perhaps more likely to be detention than stopping someone who makes an 'uninformed' attempt to leave. Preventing an attempt to leave by someone who, for example, does not understand where they are or where the door leads to should be only one factor in determining whether that person has lost his or her liberty.

Where the person consents

Article 5 does not apply where someone consents to losing his or her liberty, provided the consent is clear and unequivocal. Consent may be withdrawn at any time. If someone who has consented later attempts to leave and is prevented from doing so, that may constitute a deprivation of liberty.

Consent is not always conclusive. A person who consents under pressure has not given unequivocal consent. Pressure could come from other people or from the circumstances in which the person finds themselves.

Consent cannot be relied on where someone is legally incapable of consenting to a proposed course of action.

Purpose of restrictions

Restrictions designed, at least partly, to benefit the person concerned may be less likely to be a deprivation of liberty than those aimed solely at the protection of society.

Flexibility of regime

A regime which can adapt as the individual's circumstances or needs change is less likely to amount to deprivation of liberty than an inflexible regime, with no reasonable prospect of change.

Locked wards

A person cared for in a locked ward, or in a care home which is locked at night for residents' safety, has not necessarily lost his or her liberty. What matters are all the circumstances of the case.

Duration of restrictions

The length of time of a person's detention is a factor, but only one factor, in establishing whether there is a deprivation of liberty.

Conclusion

There is no easy test of whether particular care or treatment regime constitutes a deprivation of liberty. All the facts of the individual case must be examined. The underlying test is whether the arrangements are of a degree or intensity to amount to a deprivation of liberty.

A person is not deprived of liberty simply because he or she lacks the physical ability to leave or the mental capacity to intend to leave. The fact that a person lacks the capacity to consent to admission does not of itself amount to a deprivation of liberty. (Although some Scottish cases have suggested otherwise.)

The case law is not always helpful, as it focuses on the facts of individual cases. However the House of Lords (in a case dealing with restrictions on terrorist suspects) stressed the need to consider the *actual lives* people were required to lead, how far they were confined to one place, how much they were cut off from society and how closely their lives were controlled.

A regime which attempts to maximise a person's freedom, within the limitations of his or her impairments, should not, perhaps, be regarded as depriving him or her of liberty. On the other hand, there may be situations where the degree or intensity of controls is such that the person should have the benefit of the human rights law safeguards.

The fact that a person does not have legal capacity to take decisions about his or her welfare is not necessarily a sufficient justification for taking such steps.

Wherever a person is restrained from leaving, or is subject to a regime which routinely restricts his or her freedom of choice, movement and association, those involved should question whether the person is being deprived of his or her liberty, and may need to seek legal advice.

RECOMMENDATION 2: The Mental Welfare Commission should issue guidance to help those involved in possible deprivations of liberty. The Appendix to the paper contains a suggested checklist. Guidance should indicate how to reduce deprivation of liberty, which should be seen as a last resort.

PART 2 DEPRIVATION OF LIBERTY IN CONTEXT: CARE IN HOSPITAL

Part 2 discusses how the deprivation of liberty rules affect mental health care and treatment in hospital.

Voluntary patients

A person who gives clear and unequivocal consent to entering a psychiatric hospital and receiving care which restricts his or her liberty is not unlawfully detained.

There is, however, a distinction between apparent and real consent. A patient may agree to stay in hospital only because he or she knows that the alternative would be the use of compulsory measures. Research shows that most people admitted to psychiatric hospitals 'voluntarily' do not think they are free to leave.

Such a patient has not given unequivocal consent. If he or she is kept in conditions which could amount to detention, for example in a locked ward or with regular use of restraint, this would be unlawful.

Using compulsory measures would more effectively protect the patient's rights. Involving independent advocacy could help ensure that any consent is freely given.

Where care plan envisages restrictions

A care plan which states that a patient should be restrained and/or detained, should he or she wish or attempt to leave hospital, could amount to effective detention of that patient.

Where a patient is at risk, it would be preferable for the care plan to state that, if the patient attempts to leave, a doctor should urgently assess him or her and consider whether short-term or emergency detention is appropriate. Use of the nurse's holding power could be highlighted. The notes could state the doctor's assessment of whether the patient would have met the Mental Health (Care and Treatment) Act conditions for admission, had he or she not agreed to hospitalisation.

RECOMMENDATION 3: The Mental Welfare Commission should issue guidance on care plans for voluntary patients at risk, to avoid conditions amounting to effective detention.

Patients incapable of giving consent

The law is different when someone is incapable of giving consent to admission to hospital.

Emergency admission

In an emergency, a person who is unable to consent to admission may be admitted to hospital (including a psychiatric hospital) and detained there under the common law of necessity. Where a patient appears to resist or object, the use of Mental Health (Care and Treatment) Act procedures should be considered. Human rights law recognises a medical examination before admission may not be possible in an emergency.

Bournewood makes clear that the law of necessity cannot be used to keep a patient in hospital (or in any other setting) in conditions which amount to a deprivation of liberty, other than in an emergency. Further legal procedures are needed.

Admission under the Adults with Incapacity Act

For non-urgent admissions, the general authority in section 47 of the Adults with Incapacity Act provides the 'lawful procedure' required by human rights law.

The Adults with Incapacity Act does not authorise admission to a psychiatric hospital if an adult resists or appears unwilling. The use of Mental Health (Care and Treatment) Act procedures may be appropriate.

Treatment for physical disorder which the adult resists cannot be authorised by the Mental Health (Care and Treatment) Act. An application for welfare guardianship may be sought. The Mental Health Act and the Adult Support and Protection Act contain procedures for taking someone at risk to hospital.

The Adults with Incapacity Act does not authorise the ongoing use of force or detention. An order under the Mental Health (Care and Treatment) Act or welfare guardianship under the Adults with Incapacity Act might be appropriate.

There is useful Mental Welfare Commission guidance on the medical treatment rules.

Mental Health (Care and Treatment) Act appeal rights

Patients admitted to hospital informally can appeal against any unlawful detention in hospital. This would not absolve a health board from liability for a breach of human rights.

Care in hospital and detention

Locked wards

Being cared for on a locked ward does not, of itself, mean that a patient is being detained. A voluntary patient who is free to come and go on request is unlikely to be seen as detained, provided staff are available to allow this and the patient understands his or her rights.

Being cared for on a locked ward is clearly a major restriction on a patient's movements, and, taken with other factors, may amount to detention. Staff should formally assess the restrictions on every patient cared for on a locked ward. If they are of a degree and intensity to amount to detention, and it is not possible to reduce or modify them,

consideration should be given to applying for an order under the Mental Health (Care and Treatment) Act.

RECOMMENDATION 4: The Mental Welfare Commission should issue guidance on good practice for the care of patients on wards where doors are locked or patients' freedom of exit is otherwise restricted.

Restraint

Mental Welfare Commission guidance deals with the use of restraint in residential care. Restraint does not, of itself, amount to deprivation of liberty, but may be a factor in it and is a clear indicator that the person's wishes are being overridden.

There is official guidance on the use of restraint in hospitals in England and Wales and Northern Ireland but appears to be no such guidance for Scotland.

RECOMMENDATION 5: The Mental Welfare Commission should issue guidance on the use of restraint in hospitals, to ensure that patients' freedom is maximised.

Close observation

Being subject to close or constant observation is a significant restriction on a patient's freedom and privacy. There is no case law to suggest that on its own this would constitute a deprivation of liberty, but it may be a factor in establishing that a patient is effectively detained.

Time out and seclusion

A number of hospitals in Scotland use seclusion (solitary confinement). This is clearly a deprivation of liberty. The Commission has given guidance on good practice. Seclusion should not be used on a voluntary patient. In an emergency, there should be an urgent assessment to consider the use of emergency or short-term detention under the 2003 Act.

'Time out', the removal of a person from a facility for a short period, is generally a planned intervention, to help manage aggressive or violent behaviour. The Commission is aware that some people with learning disabilities or autism and significantly challenging behaviour may require such isolation for a considerable period.

RECOMMENDATIONS 6, 7: The paper recommends two technical amendments to the seclusion guidance when it is next revised.

Detained patients

Emergency detention

A patient subject to emergency detention has no right of appeal. Short-term detention should be the primary route for compulsory admissions to hospital to avoid a breach of patients' human rights.

Conclusion

Human rights law gives an opportunity to review aspects of hospital patients' care and treatment in ways which might improve the outcomes for patients.

RECOMMENDATION 8: The Mental Welfare Commission should issue guidance to help develop good practice.

PART 3: PEOPLE IN CARE HOMES AND COMMUNITY SETTINGS

Introduction

This section looks at how Article 5 affects the care of people in community settings.

Many care home residents (and some people living in the community) do not have the right to liberty and security in any realistic sense. Restrictions on a person's liberty may spring from his or her own impairments or needs. Services should aim to maximise their clients' freedoms and abilities, so that the client can live as full a life as possible.

Where a care regime does this, but also imposes restrictions on the client, it may not be helpful for ECHR to regard this as a deprivation of liberty, provided the restrictions can be justified as necessary and proportionate and for the benefit of the client and there is no evidence that the service user is unhappy with the arrangements.

Assessing need for order

Each case depends on its facts. Sometimes the *degree and intensity* of controls may effectively deprive a person of any autonomy, bearing in mind his or her impairments, and will thus constitute deprivation of liberty. Such controls may operate in a care home, a day centre or in a community setting, such as the person's own home.

Unless the person gives a valid unequivocal consent to the arrangements, or the controls can be reduced or modified, there should be consideration of an application for an order under the Adults with Incapacity Act or the Mental Health (Care and Treatment) Act.

These matters need to be considered both when a major change in an adult's care regime is being proposed, and from time to time as an adult's care and treatment changes, perhaps as his or her condition deteriorates.

RECOMMENDATION 9:

(i) Mental Welfare Commission guidance should stress the need for social care professionals to review any care arrangements involving significant restrictions on an adult's life, in light of the deprivation of liberty criteria.

(ii) The Social Work Inspection Agency should consider giving guidance on these matters when setting standards for annual community care reviews and reassessments.

Where there is a carer or attorney

Unlike the Mental Capacity Act for England and Wales, the Adults with Incapacity Act does not deal with deprivation of liberty issues, which did not come into the forefront of public thinking until *Bournewood* .

Although ECHR does not concern itself with the actions of private individuals, public authorities must protect citizens from breach of their human rights, and take action if a person's human rights are breached by a carer or attorney.

Unfortunately it is not clear whether a welfare attorney can consent to care arrangements which amount to a deprivation of liberty, even if the power of attorney specifically gives him or her this power. (Such powers could clearly not be relied on if the adult appeared to resist or oppose the arrangements.) A welfare attorney needing to clarify the matter could seek instructions from a sheriff.

RECOMMENDATION 10: The Scottish Government Justice Department should consider clarifying the powers of welfare attorneys in relation to restraint and the authorisation of arrangements which might amount to a deprivation of liberty of the granter.

Advance statements and deprivation of liberty

An advance statement, if valid, clear and unequivocal, could constitute consent to arrangements which would otherwise amount to a deprivation of liberty. It is unlikely an advance statement could be relied on if an adult later appears to resist or oppose the proposed arrangements.

RECOMMENDATION 11: Mental Welfare Commission guidance should stress the importance of advance statements, including advance statements refusing treatment.

Guardianship and deprivation of liberty

Does the Adults with Incapacity Act authorise deprivation of liberty?

The paper questions whether it is appropriate to use welfare guardianship to authorise deprivation of an adult's liberty.

Some guardianship orders contain some quite robust powers to restrain and detain adults subject to guardianship, both in care homes, and in individuals' own homes. Some guardians receive authority to use restraint and to keep the adult under 24-hour supervision and control. It is not clear whether such powers were envisaged when the time the Act was passed and whether the Act allows the granting of such robust powers.

RECOMMENDATION 12: The Scottish Government Justice Department should consult about whether it would be helpful to clarify the limits of welfare guardians' powers in relation to deprivation of liberty.

Is detention in the home acceptable under ECHR?

It is not clear whether ECHR permits the detention of a person in his own home, even under a guardianship order. The Human Rights Court has said that in principle, detention on grounds of mental disorder person as a mental health patient is lawful only if the person is detained in a *hospital, clinic or other appropriate institution authorised for that purpose*.

While this statement pre-dated the development of community care, the matter needs further discussion in Scotland.

RECOMMENDATION 13:

(i) The paper strongly recommends further discussion about how far it is appropriate to use guardianship in Scotland to authorise detention or restraint, particularly where an adult is being cared for in his or her own home or in a small community setting. Such discussion should involve all stakeholders, including service users and carers.

(ii) The Mental Welfare Commission should request the Scottish Government to clarify the legal situation.

(iii) The Mental Welfare Commission should carry out an audit of existing orders where adults are deprived of their liberty in their own homes, with a view to identifying good practice issues and concerns.

(iv) If such practice is determined to be both appropriate and within human rights law, the Scottish Government should amend the Codes of Practice to make clear that where powers of restraint or detention are required, these should always be specifically detailed in guardianship applications. Rules of Court should make it a requirement that a safeguarder be appointed in any such case.

(v) The Code of Practice should consider further possible safeguards for the adult. These might include, (i) setting out the standards required of social work supervision of such guardians (ii) ensuring that access to independent advocacy is a mandatory part of any such order and (iii) a requirement that mental health officers recommending such orders to the sheriff justify them in accordance with the criteria set out in the revised Code of Practice.

Guardianship for indefinite periods

The default term for personal guardianship is three years, but there is a considerable increase in the number of guardianships granted for indefinite periods. There could be human rights law concerns if the arrangements for the adult amount to a deprivation of liberty.

Article 5(4) requires regular review of detention. The Adults with Incapacity Act does not provide this, although an application to the court to cancel the order can be made at any time. The House of Lords held, in an English case, that ECHR does not require automatic review, but we do not know if the Human Rights Court would agree.

It seems unfair that a person detained under guardianship should have less protection than a person detained under the Mental Health (Care and Treatment) Act.

RECOMMENDATION 14:

(i) The Scottish Government Justice Department should consider the need for additional safeguards for adults subject to indefinite guardianship orders which involve a deprivation of liberty.

(ii) The Mental Welfare Commission should consider issuing guidance for local authorities which are considering applying for indefinite guardianship where the arrangements are likely to amount to a deprivation of liberty.

Adults with Incapacity Act appeals

The Act's appeal provisions oblige an adult challenging guardianship to satisfy the sheriff that he or she does not need to be subject to guardianship, instead of requiring those seeking to continue the guardianship to justify this. This could be challenged under human rights law.

RECOMMENDATION 15: The Scottish Government Justice Department should review the provisions for appeals against guardianship under the Adults with Incapacity Act.

Recall of guardianship

Human rights law may mean that the sheriff or the Mental Welfare Commission will be unable to recall a guardianship order which deprives an adult of liberty, unless the adult's condition or care needs change and the person no longer needs such a degree of control. Depending on the numbers of such guardianships, this could have an effect on resources.

RECOMMENDATION 16: The Scottish Government Justice Department should review how the recall provisions of the Act will operate in practice, in light of human rights law.

Community order as alternative to guardianship

A Mental Health (Care and Treatment) Act community-based compulsory treatment order could be an alternative to guardianship involving detention. The safeguards for the patient are greater.

Currently a compulsory treatment order would be used for someone needing specialist psychiatric services and welfare guardianship if the main concern is the person's care arrangements.

RECOMMENDATION 17: There is a need for further discussion between the Mental Welfare Commission, health and social care professionals and users and carers, with a view to developing good practice guidance.

Guidance would consider which procedure might be more appropriate in different circumstances, including arrangements in hospital, care homes, day facilities and people's own homes.

PART 4: PRINCIPLES AND PRACTICE

Respect for liberty is one of the most important human rights. To deprive anyone of their liberty should be done only after a rigorous consideration of the alternatives. There must be respect for the law and human rights, and the service user must have a proper right of challenge.

It is sometimes difficult to balance respect for an individual's autonomy with the need to protect him or her from harm. A human rights based approach (underpinned by the principles in mental health and incapacity law) can ensure respect for the person's autonomy and may remove the need for loss of liberty.

A human rights approach

The human rights principle of autonomy can be a safeguard against excessive paternalism. Article 5's procedural safeguards can ensure that decision-making is open and transparent.

ECHR says that any deprivation of liberty must be *necessary*. There should be no less restrictive alternative, and the risks to the person detained (or others) must make detention appropriate. Detention must be *proportionate*, that is, it must be appropriate for the risk posed.

Procedural safeguards, (ensuring the *input of doctors*; giving the adult *information* / the *right to challenge*) can usefully be incorporated into good practice.

Human rights can help challenge discrimination, disadvantage or exclusion. Using human rights ideas of dignity, equality, respect and fairness can lead to real changes in policies and practice.

RECOMMENDATION 18: Mental Welfare guidance should stress the importance of a human rights approach. Such an approach should not be an optional extra but should be fundamental to all decision-making relating to vulnerable adults.

Principles in Scottish legislation

The principles in Scottish mental health and incapacity law are well known and appear to be influencing practice. The Principles into Practice Network aims to develop good practice. The Mental Capacity Act is not legally binding in Scotland but contains some useful ideas.

Benefit

The benefit test could be seen as paternalistic but was intended to be less so than the 'best interests' test it replaced. The other principles attempt to mitigate this, for example by requiring decision makers to take account of the adult's wishes and feelings.

The Mental Capacity Act for England and Wales adds three new elements, which could influence practice in Scotland.

- (i) The person should be encouraged to **participate** as fully as possible in any decision, so far as this is reasonably practicable.
- (ii) A potential intervener must consider the adult's **beliefs and values**, if these would be likely to influence the person's decision, as far as it is possible to ascertain these.
- (iii) A person should not be treated as unable to make a decision merely because he or she makes an **unwise decision**.

This goes further than the Adults with Incapacity Act, which simply says unwise decisions do not of themselves mean a person has a mental disorder. The Mental Capacity Act says that, even where a person has a mental disorder, an unwise decision should not, of itself, mean he or she is *unable* to take the decision.

The Adults with Incapacity Act explicitly treats unwise decisions as a type of incapacity. A sheriff may authorise guardianship if someone is unable to protect his or her own interests. People making unwise decisions or living unwise lifestyles are sometimes made subject to guardianship on this basis.

Research on the use of guardianship in such cases would be helpful, with a view to further discussion about its appropriateness.

RECOMMENDATION 19: The Mental Welfare Commission may wish to give further guidance on how to assess the benefit of a proposed detention in the light of these principles.

Least restrictive alternative Before detention is considered, other possible solutions must be examined.

Respect for wishes and feelings Guidance should stress the importance of respect for the adult's past and present wishes, any advance statement he or she has made and any wishes expressed by a duly authorised attorney. This can reduce the likelihood of deprivation of liberty.

Participation This principle should represent good practice for Adults with Incapacity Act decisions. It means involving the adult in decision-making, improving communication, and maximising the person's existing abilities.

Reciprocity The principle that services provided to a person subject to compulsion should be adequate and appropriate, can be useful in deprivation of liberty cases.

Conclusion

Respect for the principles may reduce the occasions where an individual loses his or her liberty. Concepts from the Mental Health (Care and Treatment) Act and the Mental Capacity Act can help develop good practice.

RECOMMENDATION 20: The Mental Welfare Commission should give further good practice guidance for those contemplating arrangements which might constitute a deprivation of liberty. Part 2 of the Appendix to the paper sets out some suggestions.

PART 5: CONCLUSION: A HUMAN RIGHTS CULTURE

Human rights concepts, together with the principles set out in incapacity and mental health law, can provide an ethical framework for decision-making.

Respect for human rights should be integral to the work of health and social care professionals. A human rights culture would embed respect for dignity and autonomy in care practice. Human rights principles can both strengthen the principles in the Scottish legislation and reduce undue paternalism.

Above all, this approach might help ensure that people with mental health conditions or learning disabilities in Scotland do not lose their liberty unnecessarily.

RECOMMENDATION 21:

(i) The Scottish Government should consider the need for further training on the impact of human rights law for those who work with vulnerable people.

(ii) The Scottish Government should give further guidance to all those involved in inspection, regulation or monitoring of services to ensure that human rights concerns form part of their inspection and regulation focus. This would apply to, among others, the Mental Welfare Commission, the Care Commission and the Social Work Inspection Agency.

(iii) The Care Commission and the Social Work Inspection Agency should include issues of deprivation of liberty in their regular inspections of facilities and services, including those providing support in the service user's home.

(iv) The Scottish Government should satisfy itself that human rights concerns feature adequately in the training of sheriffs dealing with Adults with Incapacity Act cases, the Mental Health Tribunal for Scotland, solicitors, safeguarders and curators *ad litem*.