Mental Capacity Law Newsletter February 2015: Issue 53

Court of Protection: Practice and Procedure

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Introduction

Welcome to the February 2015 Newsletters, revamped to reflect our new name of 39 Essex Chambers. We have taken the opportunity of the launch of our new Chambers website to bring together all our mental capacity resources in one place. There is also a new Twitter Feed for this section of the site, which will be 'Tweeting' all of the newsletters, case reports, articles and guidance notes we produce.

Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: a further chapter in the saga of consent to sex; unlawful removals from the family home; and the new DOLS forms;

(2) In the Property and Affairs Newsletter: failed attempts to prevent the OPG/COP having oversight over an attorney and to get costs against the OPG and the OPG's review of deputy monitoring;

(3) In the Practice and Procedure Newsletter: an important case on declarations and contempt and a rare decision on permission;

(4) In the Capacity outside the COP Newsletter: the new Practice Note for representation before the MH Tribunal; the new MHA Code of Practice; and the new offences of ill-treatment and wilful neglect;

(5) In the Scotland Newsletter: detailed coverage of the Special Case that has resolved the question mark over the validity of powers of attorney raised by Sheriff John Baird, as well as important guidance on vulnerable clients and Practice Rules relating to powers of attorney, and an update on the Mental Health (Scotland) Bill.

We also bid temporary farewell and all best wishes to Anna Biccaregui as she goes on maternity leave, and a very warm welcome to Annabel Lee who joins the editorial team in her place.

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Hyperlinks are included to judgments; if inactive, the judgment is likely to appear soon at www.mentalhealthlaw.co.uk.

Short Note: Declarations and contempt

In *MASM v MMAM & Ors*, [2015] EWCOP 3, Hayden J was required to determine the legal status of declaratory orders in the Court of Protection and the consequences, if any, for deliberate defiance of them, in circumstances where P had been removed from the jurisdiction by a party to proceedings despite a court order declaring that it was in P's interests to remain in a residential care home in this country.

Hayden J held that acting in a way that is not compatible with a best interests declaration, rather than a court order or injunction, does not expose an individual to contempt proceedings:

> *48. Ultimately, a declaration of best interests connotes the superlative or extreme quality of welfare options. It by no means follows automatically that an alternative course of action to that determined in the Declaration, is contrary to an individual's welfare. There may, in simple terms, be a 'second best' option. For this reason, such a declaration cannot be of the same complexion as a Court Order. It lacks both the necessary clarity and fails to carry any element of mandatory imperative...*
>
> *49. Moreover, though my order of 20th February 2015 was expressed to have been made pursuant to section 16, it was drafted in declaratory terms. As such, for the reasons I have set out above, it cannot, in my judgement, trigger contempt proceedings. There cannot be 'defiance' of a 'declaration' nor can there be an 'enforcement' of one. A declaration is ultimately no more than a formal, explicit statement or announcement.*

Comment

This is but an initial comment upon this case, because the question of whether (and when) the Court of Protection should grant declarations is under consideration by the Court of Appeal in *ACCG v MN*, and we hope by the time of the next Newsletter to have judgment in that case (the hearing having been in December), and we will then consider the two cases together.

The status of a best interests declaration was raised but not conclusively answered as long ago as *A v A Health Authority* [2002] EWHC 18 (Fam/Admin), when Munby J (as he then was) noted that '*unless carefully qualified by suitable language, any declaration the court grants...will in principle be conclusive as to the legal rights and presumably also the legal obligations of the...authorities*' but did not decide whether an unqualified declaration in itself would have coercive effect. Hayden's J judgment, which includes an extensive review of authorities outside the Court of Protection, is clear that contempt proceedings cannot be brought in relation to acts that go against a declaration. Careful thought will need to be given to the wording of orders in cases where there is a risk that attempts will be made to thwart the implementation of a best interests declaration.

We should also note that this case could have gone a very different way – there must, at a minimum, have been a very good argument that the Court of Protection retained jurisdiction over P given the fact of his removal from the country in the face of the Court's decision as to where he should reside. In principle, therefore, the local authority could have sought injunctive or other relief directed to bringing about the return of P to this jurisdiction (see, by analogy, *Re PO* [2013] EWCOP 3932, *Re HM* [2010] FLR 1057, the discussion in Alex's paper here, and – for the enthusiasts – the new book on the International

Protection of Adults co-written by Alex to be published imminently by OUP). It is not on the face of the judgment clear why the local authority did not do so. It may – speculating – be in part because, in practical terms, absent the cooperation of MASM's grandson in returning her, that would have required the cooperation of the Saudi authorities, which (in the children context) is sadly not often forthcoming. We would very much hope, though, that the message is not taken from this judgment that the Court of Protection necessarily loses any jurisdiction over an incapacitated individual improperly removed from England and Wales: that is very far from the case.

A rare contest as to permission

LB Hillingdon v PS and CS (unreported, 4 December 2014) (District Judge Marin)

Practice and Procedure – Other

Summary

The dispute in this case concerned whether it was in PS's best interests to have no contact with a friend, M. The local authority had become involved through its safeguarding procedures, and had attempted to resolve the dispute without recourse to the court. The local authority had concluded that it was in PS's interests not to have any contact with M, a view that was recommended by PS's doctor. M did not agree with that view, and the local authority issued proceedings so that the question of contact to be resolved. PS's son and PS's attorneys under an Enduring Power of Attorney opposed the grant of permission to the local authority, arguing that:

- the local authority had no role in PS's life, and since M had not issued an application, it had no standing to bring proceedings;
- the application was an abuse of process, since the local authority was attempting to use the Court of Protection to insure its own best interests decision;
- that there was no benefit to P of the application, and
- that it was a disproportionate use of P's funds.

District Judge Marin rejected these arguments and granted permission to the local authority to bring proceedings, holding that it had a sufficient connection with P for the purposes of s.50(3)(a) MCA 2005, and that there was obviously a dispute which required resolution. It was to P's benefit for that dispute to be resolved, but that should be done in a cost-effective way, through the filing of witness statements, no fact-finding hearing, and the instruction of a Court Visitor to report on P's wishes and feelings, followed by a final hearing.

Comment

This decision is of interest in view of the very small number of judgments addressing the question of permission (the only other one of which we are aware being *NK v VW*). It is perhaps unsurprising that the court would grant permission where there was an unresolved dispute as to whether P could have contact with a long-standing friend. One can sympathise with the concerns of P's son and attorneys as to the likely costs of proceedings, particularly where the only contact in fact sought by M was a weekly social visit – but, as DJ Marin observed, there was an obvious way for those costs to be avoided – through further discussion and negotiation.

A litigation friend is not a guardian

Re M (Republic of Ireland) (Child's Objections)(Joinder of Children as Parties to Appeal) [2015] EWCA Civ 26 (Court of Appeal (Richards, Black and Ryder LJJ)

Practice and Procedure – Other

Summary

This case concerning the 1980 Child Abduction convention is of note for the discussion of the Court of Appeal as to the role of a litigation friend when acting for a child. The discussion was framed in the context of the FPR 2010, but is of potentially wider application, including to the Court of Protection.

At paragraph 153, Black LJ said (in a statement that may possibly have been intended to be drily tongue in cheek): "[t]*he functions of a litigation friend are no doubt fully understood in the usual civil context in which the system operates although the researches of counsel did not produce any authorities to enlighten us further about how they actually carry out their functions or as to the principles that the court should apply when deciding whether to order that a litigation friend is not necessary*."

Noting the absence of guidance as to how a litigation friend should proceed when acting on a behalf of a child in 1980 Convention cases, Black LJ laid down a statement of seemingly wider principle:

> *"155. Children need to know that their views are being listened to and that their particular concerns are not being lost in the argument between their parents but it must be recognised that direct participation in proceedings can be harmful for children. As Lord Wilson said in §48 of Re LC, "[t]he intrusion of the children into the forensic arena….can prove very damaging to family relationships even in the long term and definitely affects their interests". I therefore contemplate that it may be necessary for a litigation friend to guide and regulate the child's own participation in the proceedings, just as a guardian would. He or she will no doubt determine which documents filed in the proceedings should be shown to the child and take decisions, in consultation with the child, about whether the child should attend the court hearing. In the very unlikely event that an intractable issue arises between the litigation friend and the child, there may be no alternative but to ask the court to give directions, but I would expect such a situation to be extremely rare. What I do not think a litigation friend can do is provide a welfare assessment for the court in relation to the child as a guardian would do. However, where the litigation friend is the child's solicitor, as I anticipate will be so in the vast majority of cases, he or she will no doubt assess the case and guide and support the child in their approach to the litigation, as any solicitor would do for an adult client."*

Comment

A guardian cannot be appointed to act for a child in proceedings in the Court of Protection (or, indeed, under the CPR, save, possibly in the circumstances considered in Re M, where a child had not been joined at first instance to proceedings under the FPR but was to be joined on appeal, where Black LJ contemplated that such might potentially be allowed by CPR r.52.10(1)). However, the distinction between a litigation friend and a guardian outlined by Black LJ is of some importance in outlining what a litigation friend cannot do when acting on behalf of a child under the CPR – and, it is suggested, the COPR.

Whether it can also be said that a litigation friend acting on behalf of either P or an adult protected party before the Court of Protection should be guided by the same principles set down by Black LJ at paragraph 155 is a rather different question. We suggest, though, that whatever else a litigation friend can and cannot do, it is clear that they cannot provide a welfare assessment for the court in relation to P as if they were the guardian appointed for a child joined to proceedings under the FPR.

We would suggest that a careful eye is kept by practitioners on the question of the role of litigation friends in light of:

1. the appeal in the *Re X* litigation to be heard in the middle of February before the Court of Appeal; and

2. the deliberations of the Court of Protection Rules Committee on these (and other topics) which should bear fruit in the very near future now that Royal Assent to the Criminal Justice and Courts Bill is imminent, resolving, inter alia, a technical problem with appeal routes from decisions before the Court of Protection.

Cross-examination and the unrepresented litigant

Re K and H (Children: unrepresented father: cross-examination of child) [2015] EWFC 1 (HHJ Bellamy)

Practice and Procedure – Other

Summary

This judgment concerned the provision of legal aid for legal representation limited to cross-examination.

The proceedings related to M and F's two children, K and H. M's other daughter (Y) alleged that she had been sexually abused by her F. F denied those allegations. The court needed to consider F's future contact with K and H. M was legally aided whereas F was a litigant in person because F was financially ineligible for legal aid. There were two issues in respect of F's representation:

1. Who should cross-examine Y – the victim of F's alleged sexual abuse?

2. Did the court have power to order Her Majesty's Courts and Tribunals Service (HMCTS) to pay for legal representation for F limited to cross-examination?

The judge considered that it would be wholly inappropriate for F to cross-examine Y himself. Y's allegations of sexual abuse against F were pivotal to determining the welfare issues. Where a party is unrepresented, HHJ Bellamy held, the court has a duty to assist that party and the court will itself put questions to a witness if it is satisfied that it is 'necessary and appropriate' to do so. It was not appropriate for the judge, who must determine the facts, to cross-examine the key witness upon the reliability of their evidence on which the fact finding exercise so heavily depends. Cross-examination by the judge would be incompatible with the Art 6 and 8 ECHR rights of the respective participants.

The judge held that whilst the legal aid scheme provided a single, comprehensive, unitary code for the funding of litigation, the comprehensive nature of the scheme did not preclude the State from providing, or the courts from requiring the

State to provide, aspects of 'representation' where it was necessary, appropriate and proportionate in order to safeguard Convention rights. The judge set out the following principles for cross-examination where the litigant is in person:

> *"74 The following principles of approach emerge from the discussion above:*
>
> *(a) It is the first duty of judges sitting in the Family Court to ensure that proceedings are conducted fairly (FPR 2010 rule 1.1). Failure to do so may lead to the court itself acting unlawfully (s.6(1) of the Human Rights Act 1998).*
>
> *(b) Where a party is unrepresented (whether because legal aid is not available or by choice) and is 'unable to examine or cross-examine a witness effectively' the court has a duty to assist that party (s.31G(6) of the Matrimonial and Family Proceedings Act 1984). This requires the court 'to put, or cause to be put' questions to a witness.*
>
> *(c) The court will itself put questions to a witness if it is satisfied that it is 'necessary and appropriate' to do so. It will not normally be appropriate to do so when the case involves issues which are grave and/or forensically complex.*
>
> *(d) Where the court is satisfied that it is not 'appropriate' for the judge to put questions to an alleged victim, the court must arrange for (cause) a legal representative to be appointed to put those questions.*
>
> *(e) The court may direct that the costs of the legal representative be borne by HMCTS.*
>
> *(f) The court may nominate the legal representative who is to be appointed to undertake that task.*
>
> *(g) The extent of the work to be undertaken by a legal representative so appointed should be made clear at the outset and should be proportionate.*
>
> *(h) In those limited cases where legal aid is still available in private law Children Act proceedings there is a detailed regulatory framework governing the calculation of costs payable to (claimable by) a solicitor for undertaking such work. The fees payable by the Legal Aid Agency are less than a solicitor might charge a privately paying client for doing the same work. That has always been so. I can see no cogent argument for suggesting that a legal representative appointed by the court should be entitled to a higher rate of remuneration than if that work were undertaken under the legal aid scheme."*

Comment

The approach set out in this judgment is potentially welcome news for litigants before the Court of Protection suffering under the heavy burden of continued cuts to legal aid. Although limited to 'an order of last resort', the judge was absolutely clear that, in his judgment, the court possessed the power to direct that the cost of certain activities should be borne by HMCTS.

The court could therefore direct that funding be provided for activities that fell within the scope of legal aid, even where the litigant was in fact ineligible for legal aid. The test was whether the work is "necessary, appropriate and proportionate" in order to safeguard Convention rights.

The question for those appearing before the Court of Protection, in which issues of similar gravity of those before HHJ Bellamy may well arise, is whether that the principles derived in this case can be applied directly notwithstanding the absence of an equivalent provision to s.31G(6) Matrimonial and Family Proceedings Act 1984. Given that HHJ Bellamy expressly – and right – framed the duty by reference to the Human Rights Act 1998 and the ECHR, logic suggests that the same principles should also be applicable, and that practitioners and judges in the Court of Protection should be astute to consider when such an order would be appropriate.

Short note: the LAA must shape up

In *Re D (No 2)* [2015] EWFC 2 (a saga that we have reported upon previously), Sir James Munby P (sitting as the President of the Family Division) had further strong words about the delay in the process for obtaining legal aid. Although this is not a COP case, the same concerns will apply equally to COP proceedings.

The parents of D were facing care proceedings from the local authority to decide whether D should live with his parents or family or be adopted. D was removed from his parents on 25 April 2014 and because of ongoing delays in obtaining legal aid, the final hearing would not take place until 9 February 2015.

D's mother suffered from learning disabilities and D's father lacked capacity. The complexity of the process involved in obtaining legal aid for D's parents was manifestly beyond their capabilities. There was no assurance that legal aid would be in place for the final hearing and to require the parents to face the local authority's application without proper representation would involve a breach of their rights under Articles 6 and 8 ECHR.

> *"20 I have set out the parents' legal aid position in paragraph 14 above. It will be noticed that there is, as yet, no assurance that legal aid will be in place for the final hearing. This causes me some disquiet. Whatever view may be taken as to their prospects of success at the final hearing, a matter on which I express no views whatever, though recognising, as I have earlier noted (Re D, para 9), that the report of the independent social worker is unfavourable to the parents, I would view with the very gravest concern any suggestion that they should be denied legal aid on 'merits' grounds. Given the extreme gravity of the issues at stake and their various problems and difficulties, it is, as I said before (Re D, paras 3, 31), unthinkable that the parents should have to face the local authority's application without proper representation. I repeat what I said in my earlier judgment:*
>
> > *'To require them to do so would be unconscionable; it would be unjust; it would involve a breach of their rights under Articles 6 and 8 of the Convention; it would be a denial of justice.'*
>
> *A parent facing the permanent removal of their child must be entitled to put their case to the court, however seemingly forlorn, and that must surely be as much the right of a parent with learning disabilities (as in the case of the mother) or a parent who lacks capacity (as in the case of the father) as of any other parent. It is one of the oldest principles of our law – it goes back over 400 centuries to the earliest years of the seventeenth century – that no-one is to be condemned unheard. I trust that all involved will bear this in mind."*

The President was at pains to emphasis the human element of this case and the grave issues which were at stake:

> *"21 This is a case about three human beings. It is a case which raises the most profound issues for each of these three people. The outcome will affect each of them for the rest of their lives. Even those of us who spend our lives in the family courts can have but a dim awareness of the agony these parents must be going through as they wait, and wait, and wait, and wait, to learn whether or not their child is to be returned to them. Yet for much of the time since their son was taken from them – for far too much of that time – the focus of the proceedings has had to be on the issue of funding, which has indeed been the primary focus of the last three hearings. The parents can be forgiven for thinking that they are trapped in a system which is neither compassionate nor even humane."*

Comment

All too often, the issue of funding takes away the focus from the very serious substantive issues at stake. This judgment can (and we hope) will be read as a stern warning to the Legal Aid Agency and, more importantly, the Government to ensure that sufficient legal funding is provided in order to safeguard Convention rights. This is particularly relevant where the court is dealing with vulnerable individuals such as the mother, who was suffering from learning disabilities, and the father, who lacked capacity.

The Protection Measures Regulation

The Protection Measures Regulation (Regulation (EU) 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters) came into effect in the UK on 11 January 2015.

The Regulation enables certain protection measures made in one Member State to be applied and enforced directly in another Member State without the need for registration or a declaration of enforceability of for any 'mirror' order. These measures are, in essence, those aimed at protect individuals where there are serious grounds for considering that that person's life, physical or psychological integrity, personal liberty, security or sexual integrity is at risk, for example so as to prevent any form of gender-based violence or violence in close relationships such as physical violence, harassment, sexual aggression, stalking, intimidation or other forms of indirect coercion.

The Family Procedure Rules 2010 were amended from 11 January 2015 to provide for the procedure for dealing with matters in relation to incoming and outgoing protection measures. The principal amendment is the introduction of a new Part 38. A related practice direction has also been made; see PD 38A.

Similar provisions are made in relation to protection measures in civil proceedings: see SI 2014/3299, which inserts a new Section VI in CPR Part 74.

The implementation of the Regulation is supported by regulations under s 2(2) of the European Communities Act 1972 dealing with jurisdiction and enforcement: see SI 2014/3298.

And there is also an amendment to the Family Court (Composition and Distribution of Business) Rules 2014 to cover allocation: see SI 2014/3297.

The Regulation does not apply to protection measures made in criminal proceedings, which

are the subject of separate provision in an EU Directive (Directive 2011/99/EU on the European Protection Order).

It is important to note that, whilst many of the 'incoming' measures that fall within the definition of 'protection measures' could well have been made in relation to those who might fall within the scope of the Court of Protection's jurisdiction, the intention is that any steps required for enforcement of such measures should be taken before the Family Court, rather than the Court of Protection.

It is also important to note that there is now – unfortunately – a somewhat confusing overlap between 'protection measures' that fall within the scope of this Regulation, and 'protective measures' falling within the scope of Schedule 3 to the MCA 2005 (i.e. measures falling within the scope of the 2000 Hague Convention on the International Protection of Adults).

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Conferences at which editors/contributors are speaking

Grasping the Thistle: A Discussion about Disabled People's Rights within the United Nations Disability Convention and Scottish Public Policy

Jill will be speaking at this roundtable arranged by Inclusion Scotland on 6th February.

Capacity and consent: complex issues

Jill is chairing, and Adrian will be speaking at, the next workshop of the Centre for Mental Health and Incapacity Law, Rights and Policy on 11th February, which will be addressing complex issues in capacity and consent. For further details, see here.

Royal Faculty of Procurators in Glasgow

Adrian is speaking at conferences convened by the RFPG on 11 February (Private Client) and 25th February ('Demand-led' – i.e. on topics selected in advance by attendees). Details available here.

The National Autistic Society's Professional Conference

Tor will be speaking at this conference, to be held on 3 and Wednesday 4 March in Harrogate. Full details are available here.

DoLS Assessors Conference

Alex will be speaking at Edge Training's annual DoLS Assessors Conference on 12 March. Full details are available here.

Elderly Care Conference 2015

Alex will be speaking at Browne Jacobson's Annual Elderly Care Conference in Manchester on 20 April. For full details, see here.

'In Whose Best Interests?' Determining best interests in health and social care

Alex will be giving the keynote speech at this inaugural conference on 2 July, arranged by the University of Worcester in association with the Worcester Medico-Legal Society. For full details, including as to how to submit papers, see here.

Advertising conferences and training events

If you would like your conference or training event to be included in this section in a subsequent issue, please contact one of the editors. Save for those conferences or training events that are run by non-profit bodies, we would invite a donation of £200 to be made to Mind in return for postings for English and Welsh events. For Scottish events, we are inviting donations to Alzheimer Scotland Action on Dementia.

Chambers Details

Our next Newsletter will be out in early March. Please email us with any judgments or other news items which you think should be included. If you do not wish to receive this Newsletter in the future please contact marketing@39essex.com.

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THE QUEEN'S AWARDS FOR ENTERPRISE INTERNATIONAL TRADE 2013

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Alex been recommended as a leading expert in the field of mental capacity law for several years, appearing in cases involving the MCA 2005 at all levels up to and including the Supreme Court. He also writes extensively about mental capacity law and policy, works to which he has contributed including 'The Court of Protection Handbook' (2014, LAG); 'The International Protection of Adults' (forthcoming, 2015, Oxford University Press), Jordan's 'Court of Protection Practice' and the third edition of 'Assessment of Mental Capacity' (Law Society/BMA 2009). He is an Honorary Research Lecturer at the University of Manchester, and the creator of the website www.mentalcapacitylawandpolicy.org.uk. To view full CV click here.

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Victoria regularly appears in the Court of Protection, instructed by the Official Solicitor, family members, and statutory bodies, in welfare, financial and medical cases. She previously lectured in Medical Ethics at King's College London and was Assistant Director of the Nuffield Council on Bioethics. Together with Alex, she co-edits the Court of Protection Law Reports for Jordans. She is a contributing editor to Clayton and Tomlinson 'The Law of Human Rights', a contributor to 'Assessment of Mental Capacity' (Law Society/BMA 2009), and a contributor to Heywood and Massey Court of Protection Practice (Sweet and Maxwell). To view full CV click here.

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Neil has particular interests in human rights, mental health and incapacity law and mainly practises in the Court of Protection. Also a lecturer at Manchester University, he teaches students in these fields, trains health, social care and legal professionals, and regularly publishes in academic books and journals. Neil is the Deputy Director of the University's Legal Advice Centre and a Trustee for a mental health charity. To view full CV click here.

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Annabel appears frequently in the Court of Protection. Recently, she appeared in a High Court medical treatment case representing the family of a young man in a coma with a rare brain condition. She has also been instructed by local authorities, care homes and individuals in COP proceedings concerning a range of personal welfare and financial matters. Annabel also practices in the related field of human rights. To view full CV click here.

Simon Edwards
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Simon has wide experience of private client work raising capacity issues, including *Day v Harris & Ors* [2013] 3 WLR 1560, centred on the question whether Sir Malcolm Arnold had given manuscripts of his compositions to his children when in a desperate state or later when he was a patient of the Court of Protection. He has also acted in many cases where deputies or attorneys have misused P's assets. To view full CV click here.

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Adrian is a practising Scottish solicitor, a partner of T C Young LLP, who has specialised in and developed adult incapacity law in Scotland over more than three decades. Described in a court judgment as: "*the acknowledged master of this subject, and the person who has done more than any other practitioner in Scotland to advance this area of law*," he is author of *Adult Incapacity*, *Adults with Incapacity Legislation* and several other books on the subject. To view full CV click here.

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Dr Jill Stavert is Reader in Law within the School of Accounting, Financial Services and Law at Edinburgh Napier University and Director of its Centre for Mental Health and Incapacity Law Rights and Policy. Jill is also a member of the Law Society for Scotland's Mental Health and Disability Sub-Committee, Alzheimer Scotland's Human Rights and Public Policy Committee, the South East Scotland Research Ethics Committee 1, and the Scottish Human Rights Commission Research Advisory Group. She has undertaken work for the Mental Welfare Commission for Scotland (including its 2013 updated guidance on Deprivation of Liberty) and is a voluntary legal officer for the Scottish Association for Mental Health. To view full CV click here.