Mental Capacity Law Newsletter November 2014: Issue 51

Court of Protection: Health, Welfare and Deprivation of Liberty

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Introduction

Welcome to the November Mental Capacity Law Newsletters. Highlights this month include:

(1) In the Health, Welfare and Deprivation of Liberty Newsletter: an update on judicial authorisations of deprivation of liberty and two difficult cases, one involving the MHA and the MCA, and the other capacity to consent and to contact;

(2) In the Property and Affairs Newsletter (this month edited by Kelly Stricklin-Coutinho): the first revocation of a digital LPA and an update on necessaries;

(3) In the Practice and Procedure Newsletter: fact-finding against the odds, the limits of the inherent jurisdiction, an escalation of the legal aid debate and the launch of Alex's guidance on litigation friends in the Court of Protection;

(4) In the Capacity outside the COP newsletter: an important case on capacity and s.117 MHA 1983, an update on the new approach adopted by CQC to the MCA 2005 and a round-up of recent guidance on the MCA 2005, as well as call for best practice documentation, new guidance on DNACPR notices, and the Committee on the Rights of Persons with Disabilities' statement on Article 14.

(5) In the Scotland Newsletter: the hotly anticipated Scottish Law Commission report on plugging the *Bournewood* gap, updates on the position relating to powers of attorney, an important case on testamentary capacity and undue influence, and updates on recent reports from the Mental Welfare Commission.

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

Judicial authorisation of deprivation of liberty, part 2

Re X and others (Deprivation of Liberty) [2014] EWCOP 37 (Sir James Munby P)

Article 5 – Deprivation of Liberty

Summary

The President of the Court of Protection has now expanded on the preliminary judgment handed down on 7th August 2014 (*Re X and others: Deprivation of Liberty* [2014] EWCOP 25).

This new judgment does not answer all the questions which were before the President when he heard this case in June 2014, particularly some relating to the possible extension of urgent authorisations by the court (a further judgment addressing these points is still awaited). It does however expand upon three questions

> *"(7) Does P need to be joined to any application to the court seeking authorisation of a deprivation of liberty in order to meet the requirements of Article 5(1) ECHR or Article 6 or both?*
>
> *(9) If so, should there be a requirement that P … must have a litigation friend (whether by reference to the requirements of Article 5 ECHR and/or by reference to the requirements of Article 6 ECHR)*
>
> *(16) If P or the detained resident requires a litigation friend, then: (a) Can a litigation friend who does not otherwise have the right to conduct litigation or provide advocacy services provide those services, in other words without instructing legal representatives, by virtue of their acting as litigation friend and without being authorised by the court under the Legal Services Act 2007 to do either or both …?"*

The President answered the first question in the negative, primarily using the analogy of wardship proceedings, where wards do not always have to be a party. Turning to the Convention jurisprudence, the President noted P's entitlement to the safeguards of Article 5(4) and the UNCRPD, and concluded:

> *"13. Article 6 requires that P be able to participate in the proceedings in such a way as to enable P to present his case 'properly and satisfactorily': see Airey v Ireland (1979) 2 EHRR 305, para 24. More specifically, referring to Article 5, "it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded 'the fundamental guarantees of procedure applied in matters of deprivation of liberty'.": Winterwerp v Netherlands (1979) 2 EHRR 387, para 60. This may require the provision of legal assistance: Megyeri v Germany (1992) 15 EHRR 584, para 23. There is a margin of appreciation (see, for example, Shtukaturov v Russia (2012) 54 EHRR 962, para 68), but this cannot affect the very essence of the rights guaranteed by the Convention. The Strasbourg court has made clear that deprivation of liberty requires thorough scrutiny and that any interference with the rights of persons suffering from mental illness must, because they constitute a particularly vulnerable group, be subject to strict scrutiny. So the process must meet that demanding standard.*
>
> *14. More generally, P should always be given the opportunity to be joined if he wishes and, whether joined as a party or not, must be given the support necessary to express views about the application and to participate in the proceedings to the extent that they wish.*

> *Typically P will also need some form of representation, professional though not necessarily always legal.*
>
> *15. So long as these demanding standards are met, and in my judgment they can in principle be met without P being joined as a party, there is, as a matter of general principle, no requirement, whether in domestic law or under the Convention, for P to be a party*."

It is perhaps to be noted that the suggestion that P will "*need some form of representation, professional though not necessarily always legal*" does not appear in the first *Re X* judgment.

In the balance of his judgment, the President then drew a number of further conclusions:

1. That there was no obstacle to P could participating and be represented in proceedings in the COP without being a party;

2. If P was a party, there was no reason in principle why the Court of Protection Rules could not be amended to allow P to act without a litigation friend, the real requirement (enshrined in the ECHR) being to ensure that P's interests are properly represented;

3. (Amplifying the 'headline' conclusion in his first judgment), that a litigation friend may conduct litigation on behalf of P without instructing solicitors – but, unless they otherwise have a right of audience, cannot address the court without permission.

The President noted that all matters he had been considering could properly be regulated by the 2007 Rules. "*They are all issues which, as it seems to me, require urgent consideration by the Committee, both as a matter of principle and also to achieve the necessary clarity for which Mr Cragg appropriately called. Some, it may be, might also merit consideration by both the Civil Procedure Rules Committee and the Family Procedure Rules Committee*."

He concluded:

> "*36. It is not for me in this judgment to advise the Committee how to proceed. There is, however, one aspect of the matter to which the Committee will, I suggest, need to give careful consideration. It is essential that where the issue concerns P's deprivation of liberty the Court of Protection's processes are rigorous, so that the circumstances of the individual case are subjected, as they must be, to the strict scrutiny demanded by the Convention. Both our domestic law and the Convention impose demanding standards. But the need to meet this challenge must not be allowed to lead to a system of technical requirements which may, in the real world, operate to deny P the speedy access to a judicial determination which is the very essence of what is required. To speak plainly, the Committee will have to consider how best to craft a process which, while it meets the demanding requirement of the law, also has regard to the realities consequent upon (a) the legal aid regime and (b) the exposure of a litigation friend to a costs risk. There is no point in a system which requires there to be a litigation friend, let alone which requires the litigation friend to instruct lawyers, if the reality is that there is, because of an absence of legal aid and possible exposure to an adverse costs order, no-one willing and able to accept appointment as litigation friend. Indeed, such a system would be self-defeating. And in this connection it needs to be remembered that the Official Solicitor can never be compelled to accept appointment. Moreover, as I understand it, he is not funded to act as a litigation friend in deprivation of liberty cases, so he is dependent on external*

funding which in many cases will not be available in the absence of legal aid."

Comment

We note that, as at the time of going to press, permission had been sought to appeal by two of the protected parties in the proceedings before the President to appeal his conclusions that: (1) (subject to certain conditions) it is not necessary for P to be a party to proceedings for applications for judicial authorisations for deprivation of liberty; and (2) that a litigation friend is not required to act via a solicitor for purposes both of conducting litigation and acting as advocate before the court. The Law Society has also sought permission to appeal on the first of the points above, and also on the President's decision that an oral hearing is not required in all cases. We anticipate that it is likely that permission will be granted given the importance of the issues, and hence we keep the discussion of this case relatively limited at this stage because it is likely not to be the last word on these difficult questions.

Notwithstanding the developments set out above, the new *Re X* procedure is also in the final stages of implementation, and we will keep you posted as and when we can. In the interim, we have updated our guide to judicial authorisations of deprivation of liberty.

The MCA crashes into the MHA

A NHS Foundation Trust v Ms X [2014] EWCOP 35 (Cobb J)

Best interests – medical treatment

Summary

Ms X was a young woman who suffered from an enduring and severe form of anorexia nervosa and alcohol dependence syndrome which had caused chronic and now "end stage" and irreversible liver disease.

She had been trapped for many years in an increasingly destructive revolving door of treatment and recurrent illness: she was treated for the anorexia but on discharge sought refuge in alcohol and sought to undo the weight gains achieved in hospital. At the date of the application she was in extremely poor health: extraordinarily malnourished and consuming in the region of half a bottle of vodka per day. Her BMI of 12.3 – 12.6 kg/m2 would ordinarily provoke further admission to hospital but the doctors who had treated her in recent years regarded it as "clinically inappropriate, counter-productive and increasingly unethical" to cause her to be admitted for further compulsorily feeding".

The NHS Trust sought declarations that:

i) It was not in Ms X's best interests to be subject to further compulsory detention and treatment of her anorexia nervosa, whether under the Mental Health Act 1983 or otherwise, notwithstanding that such treatment may prolong her life.

ii) It was in her best interests, and should be declared lawful, for her treating clinicians not to provide Ms X with nutrition and hydration with which she does not comply.

The Trust contended that Ms X did not have capacity to make a decision as to whether it would be in her best interests to receive treatment for anorexia.

The Trust was not seeking authorisation to withhold treatment. Treatment remained on

offer should Ms X wish to avail herself of it. This was, therefore, a case about the lawfulness of not compelling treatment.

Ms X herself supported the application. Her litigation friend, the Official Solicitor, having tested the evidence, did not oppose the application.

Having heard evidence from experts, from a friend of Ms X (Ms Y) and having considered Ms X's own views as expressed in writing, Cobb J concluded that Ms X: (i) lacked capacity to litigate and to make decisions about her eating disorder. He accepted the view of the doctors that she did have capacity to make decisions about alcohol.

Cobb J went on to consider an ADRT in relation to future treatment of her liver disease which Ms X had made in June 2014. He held that she had capacity to make the Advance Decision when she did so and still did have capacity in relation to the matters reflected in the Advance Decision. The ADRT was therefore entitled to the fullest respect.

Cobb J then went on to consider Ms X's best interests. He noted that he was naturally steered to exercise his judgment in a manner which attaches the highest (even if not absolute) priority to the preservation and sanctity of life. As he noted, one might assume therefore that it would be in Ms X's best interests to order that she be forcibly fed:

> *42. Medical treatment is invariably designed to achieve the protection and preservation of life. But there is a paradox in this case: that if I were to compel treatment, I may (and the doctors argue strongly that I would) be doing no more than facilitating or accelerating the termination of her life. I have no jurisdiction to make 'best interests' decisions about Ms X's drinking; that remains wholly within her power. Any treatment for her anorexia (particularly if that is in-patient and compelled) is likely – on past experience – to provoke subsequent increased, sustained and dangerous alcohol consumption which will (in the medical view) hasten Ms X's death.*

The paradox extended further as all the professionals and Ms Y considered that if Ms X retained her autonomy she might access some medical help, even if it were only of a palliative nature. There were also other factors ranged against the compulsion of medical treatment at this stage for Ms X. The process of admitting Ms X and compelling her re-feeding would be highly traumatic (probably requiring restraint). Articles 3 and 8 ECHR were engaged in repeated forcible feeding over a long period of time against her clearly expressed wishes. There were also hazards. The combination of liver disease and previous nasogastric feeding treatments meant that Ms X now had varicose veins in her throat and the process of inserting the tube could lead to bleeding.

The judge also took into account Ms X's expressed wishes and feelings. She wholeheartedly supported the application. The judge also gave weight to the evidence of Ms X's friend Ms Y who he found had brought "*extraordinary wisdom, compassion, objectivity and insight into the current dreadful situation affecting her closest friend*."

Cobb J concluded that the relief sought by the Trust would be in Ms X's best interests. Whilst he described the evidence as unanimous, the decision was clearly not an easy one and he recorded that he was reassured by the fact that it was not just those who knew Ms X well who had concluded that it would be in her best interests but that it was also the view of the independent

and jointly instructed Dr Glover (who had advised the court in 3 similar cases in the past).

Cobb J concluded:

> "*This is an unusual and desperately sad case. I believe that I speak for all those who have had to grapple with the issues – medical professionals and lawyers alike – in expressing the hope that Ms X does indeed access some medical treatments which will have the effect of prolonging her life. I have, faithful to the guidance offered by Baroness Hale in the Aintree case, considered the welfare of Ms X "in the widest sense"; I have reflected on what treatment would mean for her, not just medically but socially and psychologically. So far as I can do so, I have endeavoured to put myself in the place of Ms X, and guided by what she has directly told me and others, I have considered what her attitude to the treatment is or would be likely to be. Having fully reviewed the circumstances of this case, and for the reasons discussed above, I have reached the clear conclusion that I should not compel treatment for Ms X's anorexia.*
>
> *I hope that Ms X will nonetheless realise that it would be of enormous benefit to her to access treatments (at least in the form of palliative care, nursing support and dietetic guidance) which may improve the quality of the limited life she has left to her, if not to render more dignified its passing.*"

Comment

This is in many ways a text book example of a thoughtful and meticulous best interests decision. It does indeed draw on *Aintree* to consider Ms X's welfare in the widest sense and gives clear weight to Ms X's wishes and feelings against the background of what Cobb J described as a judicial instinct to preserve life.

It is against that context that we raise the issue (a little hesitantly) that we struggle to see how Cobb J could grant a declaration as a CoP judge that the MHA 1983 could not be used. The decision whether or not to detain Ms X under the MHA 1983 is not a best interests decision (it is, ultimately, a public law decision by an AMHP whether an application is necessary and proper – see s.13 MHA 1983). Further, the Court of Protection has no jurisdiction to make any decisions in relation to forced treatment under the provisions of Part IV of the MHA 1983 (s.28 MCA 2005). It is therefore difficult, we suggest, to see how Cobb J could – as a Court of Protection judge – make the declarations that he did.

Procedurally, the proper route (in our view) for Cobb J to do what – substantively – he was entirely correct to seek to do would have been to constitute himself as a judge of the High Court and grant a declaration as to the lawfulness of the approach to be adopted by the Trust. This declaration could have been granted, we suggest, either under the provisions of Part 8 of the CPR or, potentially, by Cobb J simply exercising the inherent jurisdiction of the High Court. A similar route, albeit for different purposes, was adopted by Mostyn J in *Nottinghamshire Healthcare NHS Trust v RC* [2014] EWCOP 1317, another case in which the court properly wished to deploy considerations of capacity and best interests in a sphere governed by the MHA 1983. The eagle-eyed will have spotted that, whilst Mostyn J made the requisite findings in respect of RC's capacity and in relation to the provisions of the ADRT in that case wearing his COP hat, he made the declaration that it would be lawful not to administer blood transfusions (even though they could, in theory, be administered under the provisions of s.63 MHA 1983) as a High Court judge.

Some readers might wonder whether these procedural points are not on the arcane side. We venture to suggest not because Parliament has sought – albeit in a horribly messy fashion – to delineate a clear distinction between the functions of decision-makers under the MCA and MHA 1983 (and the factors that are to govern their decisions), and decisions such as the present (and also, arguably, that in *ML*) risk blurring those distinctions. Even if this is for reasons that make sense on the facts, it makes it all more difficult for professionals applying the two regimes to be clear as to when they are to operate one or the other (or, potentially, both in parallel).

We note, finally, that Dr Glover revealed that Ms E (the subject of a hotly contentious decision of Peter Jackson J in 2012) is still alive, receiving treatment as an inpatient in hospital. Whether or not this was information that he could properly impart (which we are not in a position to comment upon), it does provide both a useful corrective to an urban legend that we were aware of that she had died, and also an interesting (and rare) insight into the 'afterlife' of a Court of Protection case.

Sex vs contact

Derbyshire CC v AC, EC and LC [2014] EWCOP 38 (Cobb J)

Mental capacity – contact – sexual relations

Summary

AC was a 22-year-old woman with significant learning disability (IQ of 53), depression, and primary hyperthyroidism. She had a fiery temper and lived with her parents during the week. She spent the weekends with her new boyfriend, described by police as a "serial criminal". With her long history of volatile, abusive and exploitative relationships, an urgent meeting convened by the Local Authority concluded that she required the necessary level of protection she required could only be provided by depriving her of liberty in residential care. At times AC wanted to stay with her family; at other times she indicated a strong wish to leave.

The case is noteworthy for two reasons. The first is that AC was found to lack capacity to decide on contact with others but found to have capacity to consent to sexual relations. Her lack of capacity with regard to contact resulted from her having no real understanding of the consequences of contact decisions. She had limited concept of time and could not therefore process whether something had happened in the recent past or some time ago. She also struggled with the concept of the future and found it difficult to reason or problem-solve. Her consultant psychiatrist, Dr. Milne, opined:

> *"she is clearly unable to judge the intentions of the people with whom she comes into contact and this has led to her being repeatedly exploited and placed in potentially dangerous situations."*

Since May 2014, AC had been in a relationship with a man who had convictions for assault and actual bodily harm against a former partner. The police found them having sex naked in a public park. There were also allegations that he had assaulted her. In fact, only 3 weeks prior to the hearing, she reported to the police that he had struck her in the face, put his hands around her throat and had threatened to kill her. She had also told her family that he had threatened her with a knife. She continued to stay with him.

In 2012, AC had given birth to a girl who was ultimately made the subject of a placement

order. Dr Milne found that AC was able to discuss the basic mechanics of sexual intercourse, understood the risk of pregnancy and sexually transmitted disease, but was unable to demonstrate that she would be able to refuse to have sexual relations: "she said that even if she didn't want sex she would have to go along with it as she wants to be 'lovey dovey". Dr Milne concluded that her capacity was probably fluctuating but that she was currently probably capacitous. The Local Authority and the Official Solicitor agreed that she had capacity to consent to sexual relations.

Cobb J. summarised the relevant law, including *IM & LM v Liverpool City Council* [2014] EWCA Civ 37, and noted:

> *"The distinguished line of judges sitting in the jurisdictions of the Family Division and Court of Protection who have opined on the question of what 'relevant information' should inform the test of capacity in this vexed area have not sought to include within the scope of information the understanding of 'P' that she (or he) may at any time change her (or his) mind about consenting to sexual relations. Hedley J. considered that it would be legitimate to ask the question whether "the person whose capacity is in question understand[s] that they do have a choice and that they can refuse.""*

This was important because the evidence suggested that AC might not always fully understand that she did have a choice, and/or that she could change her mind in relation to consent to sex. Given the extent to which she had been exploited, this gave his Lordship considerable anxiety and some misgivings about the consensus of opinion between the parties as to her capacity. However, on the established test, he held that she had capacity but that the issue should be kept under careful review, given its fluctuating nature.

The second feature of the case which may assist capacity assessors concerns the identification of the information relevant to the decision as to residence. On the facts of this case, the salient details were:

- That she would live with other people;
- That she would not live with her parents;
- That she would be supported by workers;
- The location of Pennine House;
- That she had considered the age and gender of the fellow residents;
- That she would need to abide by house rules;
- Whether the placement was envisaged as long-term or short-term; and
- In general terms, that one of the residential options has a therapeutic component.

Comment

Given that sex involves contact, we must confess that we consider it remains a conceptual struggle that P can in law lack capacity to decide on contact with D but yet retain capacity to have sexual relations with D. Whilst the courts' eagerness not to set the threshold for sexual capacity too high is understandable, the facts of this case demonstrate that the current test may be failing to safeguard the vulnerable from sexual abuse. If, because of significant learning disability, P feels unable to say "no" to sex with a serial criminal as she wants to be 'lovey dovey', this does raise serious misgivings as to why the risks posed by D should be relevant to contact decisions but not to sexual decisions.

Regional variations in DoLS

One article in the recent excellent series in

Community Care on *Cheshire West* caught our attention in particular, namely this mapping of variations in referral rates and timescale breaches. It provides a vivid illustration of the difficulties faced by local authorities.

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Conferences at which editors/contributors are speaking

Edge AMHP Conference

Neil will be speaking at Edge Training's Annual AMHP conference on 28 November. Full details are available here.

Talks to local faculties of solicitors

Adrian will be addressing local faculties of solicitors on matters relating (inter alia) to adult incapacity law in Aberdeen on 20 November and Wigtown on 10 December.

Borderline Personality Disorder and Self Harm

Jill is chairing a jointly hosted seminar (the Centre for Mental Health and Incapacity Law, Rights and Policy NHS Tayside and Perth and Kinross Council) on "Borderline Personality Disorder and Self Harm" in Perth on 25 November

LSA Annual Conference

Jill is speaking about the Mental Health (Scotland) Bill 2014 at the Legal Service Agency's Annual Conference in Glasgow on 27 November. For details, see here.

Intensive Care Society State of the Art Meeting

Alex will be speaking on deprivation of liberty safeguarding at the Intensive Care Society's State of the Art Meeting on 10 December 2014. Details are available here.

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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 December. 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, 2014, 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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Anna regularly appears in the Court of Protection in cases concerning welfare issues and property and financial affairs. She acts on behalf of local authorities, family members and the Official Solicitor. Anna also provides training in COP related matters. Anna also practices in the fields of education and employment where she has particular expertise in discrimination/human rights issues. 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.