

Newsletter

Luke Clements Training: socio-legal training

Key practice

Law Reform

A complete reform of the English and Welsh social care legislation

Personalisation and eligibility

The requirement to offer personal budgets and the problems associated with RAS's

Carers

The enhanced policy and legal profile being given to carers rights

Mental Capacity and adult safeguarding

The 'assessment' conflict between: 'best interests' and 'community care needs'

NHS Continuing Care

The impact of NHS budget tightening and the new NHS direct payments regime

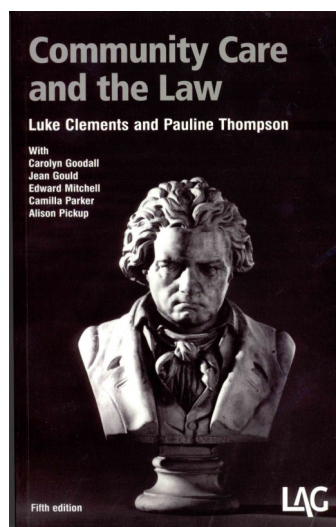
Legal and social policy developments

Cutbacks and law reform are the two factors that dominate social care law. Facing real term budget cuts of 2.3%, councils must now implement a complete reform of social care law. The key reforms are outlined on page 2 of this Newsletter.

Evidence of the severity of the situation is the courts willingness to consider arguments based on the UN Convention on the Rights of Persons with Disabilities (CRPD). In *Burnip v. Birmingham CC* the Court of Appeal struck down Housing Benefit regulations which penalised disabled people who need an extra room (ie for a carer) and in so doing, cited the CRPD whose principles it considered to 'resonate' with the case in question'. The Convention was also cited in *R (South West Care Homes) v*

Devon CC which challenged the council's policy for paying providers of social care services. Although in *R (Bracking) v. DWP* (which concerned the closure of the Independent Living Fund) the court considered that the DWP had acted lawfully, it indicated (referring to the CRPD) that it might change its mind if action to ease the impact of the closure on disabled people turned out 'to be too anaemic'.

In addition to the flow of judgments, – regulations and guidance have continued to be issued: in England new provisions include guidance concerning the identification of a person's 'ordinary residence'; residential accommodation charging regulations which require that earned income to be disre-



garded, and guidance concerning community-based charges which criticises councils that have been taking the mobility component into account when considering what social services they should provide.

... councils have a duty to assess ... [and a] duty to decide ... what, if any, services they should provide to meet the individual's needs. This duty does not change because a particular individual is receiving the mobility component of Disability Living Allowance.

Charging for Residential Accommodation and Non-Residential Care Services LAC (2012) 03

Best interests and community care assessments

The complex interface between a 'best interests' assessment and a 'community care' assessment has been explored in a series of cases.

Put simply, just because it is in a person's best interests to have a particular care package – it does not necessarily follow that a council has to fund that package.

In *R (W) v Croydon LBC* the court held that the outcome of a best interests (BI) assessment was a material factor in a

community care (CC) assessment and so should be undertaken before the CC assessment. In *AH v. Hertfordshire Partnership NHS* it was held that if a BI assessment suggested only one possible care plan then the need would have to be met that way. In *CC v. KK and STCC* it was held that it may not always be possible to decide whether a person has mental capacity until a CC assessment has identified the various care plan options

available to them.

In borderline cases therefore: (1) a provisional CC assessment will be required to identify the care plan options; (2) an mental capacity assessment will then be required to decide if the person is able to decide on these care options; and if not, (3) a best interests assessment must then be undertaken, before; (4) deciding upon what care plan should be put in place.

Law Reform in England and Wales

Luke Clements was the special adviser to the Parliamentary Select Committee that scrutinised the draft Care & Support Bill (2013)

I consider her frank observation that “if I fall over and die on the floor, then I die on the floor” demonstrates to me that she is aware of, and has weighed up, the greater risk of physical harm if she goes home. I venture to think that many and probably most people in her position would take a similar view.

Baker J
CC v. KK & STCC (2012)

The Care Bill in England and the Social Services and Well-being (Wales) Bill are expected to receive Royal Assent at the turn of the year and to come into force in 2015 (2016 for the Dilnot provisions). They will repeal virtually all the current adult ‘community care’ statutes.

The Bills are similar — the most striking difference being that the English Bill is largely restricted to adults whereas the Welsh Bill also applies to children. The English approach will create significant difficulties for young carers and disabled children — see ‘Young Carers & the Care & Support Bill’ at

www.lukeclements.co.uk/

Guiding principles

Both Bills purport to be underpinned by ‘principles’ — but instead of something like the promotion of ‘dignity’ and/or ‘independent living’, they opt for the promotion of bland ‘well-being’ — which they then define in the most expansive of terms.

In a break with the current arrangements—which provide lists of services that authorities must provide — both Bills merely provide examples of the support that can be funded — such as ‘accommodation in a care home or in premises of some other type; care and support; ... counseling; ... social work; goods and facilities; and information, advice and advocacy’. Whilst there is merit in this approach, there are problems — eg the fact that charges can be levied for this support may open the way for councils to charge for ‘social work, information, advice and advocacy’.

The English Bill (but not the Welsh) requires that every care and support plan must include a personal budget.

Carers

Both Bills provide carers with the same rights to have their support needs met, as they give to disabled people and both remove the requirement that carers have to provide ‘substantial’ care to qualify for an assessment. This may treble the number of carers’ assessments councils have to undertake.

Self-funders

A radical aspect to both Bills is their requirement that councils meet the ‘eligible needs’ of self-funders — which is likely to distort the residential care market (as self funders general pay significantly more for their residential care than people funded by a local authority).

Both Bills also contain modest provisions to support the ‘portability’ of care packages — so that when a person receiving support moves from one council area to another, they do not suffer a material loss of support.

Safeguarding

The safeguarding provisions in the English and Welsh Bills differ. The English Bill provides no new powers to councils, whereas the Welsh Bill gives local authorities the power to seek ‘adult protection and support’ orders (essentially a power of entry to ascertain whether a person is at risk).

Dilnot

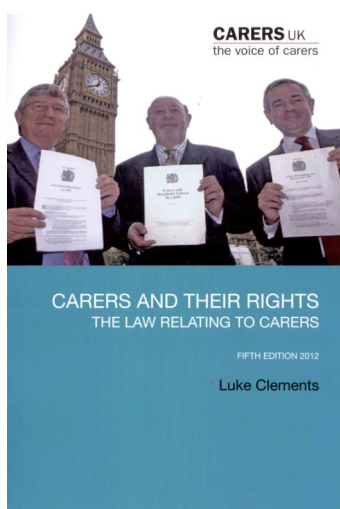
The English Bill incorporates provisions that stem from the 2011 ‘Report of the Commis-

sion on Funding of Care and Support’ (the ‘Dilnot’ proposals): Wales has yet to decide what to do about ‘Dilnot’. These provisions are likely to pose the greatest challenge to councils.

The Dilnot Commission proposed that the lifetime contribution an individual should make to their care costs should be capped at a maximum of £35,000. Instead of this figure, the Care Bill proposes £72,000. The cap will be uprated for inflation each year and will only apply to social care costs. So a self-funding resident in a care home costing £25,000 per annum will only be deemed to have spent £13,000 towards their social care costs (£12,000 being adjudged as the ‘board and lodging’ element). Ignoring the annual inflation uprating, it will take over 5½ years for a person with such costs to hit the cap: then and only then will they feel any benefit from the proposals. There will also be changes to the upper capital limit (rising to £118,000 — if the person is in residential care and has a house counted as capital — otherwise the upper limit will be £27,000). The lower capital limit will be pitched at £17,000.

Bureaucracy

The obligation on councils to provide support for self funders and the Dilnot provisions are likely to lead to a very dramatic increase in the numbers of assessments, care plans, complaints and in financial bureaucracy: for more detail see Adult Social Care Law Reform at www.lukeclements.co.uk



Carers and the Law 5th edition (2012) Clements, L at www.lukeclements.co.uk/

Carers

Support for carers continues to be a political priority – not least because the UK's 6.4 million unpaid carers are taking much of the strain resulting from the social welfare cutbacks.

The reform Bills in England and Wales will give carers the same rights to an assessment and to services as disabled people, and remove the requirement on carers to establish they are providing 'substantial' amounts of care.

Draft regulations issued in England (which will replace the FACS eligibility

criteria) are helpful in clarifying the assessment process – stating that decisions about whether a disabled person has eligible needs for support must not 'take into account any support that is being provided by a carer'.

A welcome 2013 report from the Local Government Ombudsman concerned a carer who was in full-time work, but also expected by the local authority to provide 'extensive unpaid care' for his wife. In finding maladministration, the report noted 'Mr Ryan was working in

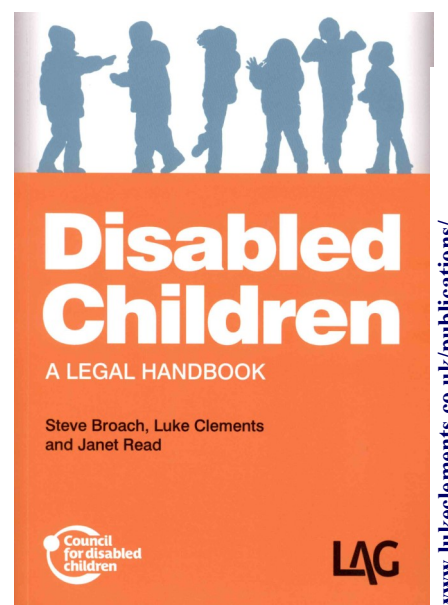
excess of 48 hours which is considered to be the maximum by the Working Time Directives. The Council at the time took no account of this and indeed considered that Mr Ryan could carry out paid work and then support Mrs Ryan when he returned home. This is totally inappropriate'.

For an international overview of the growth of the carers human rights movement see 'Does your carer take sugar?' at www.lukeclements.co.uk/whats-new/

Facts and Figures for 2012- 13 in England

Social Services Activity England 2012-13 [National Statistics]

- 604,000 assessments for new clients of which 67% received services.
- 870,000 completed reviews for existing clients (13% less than in 2011-12 and 35% less than in 2007-08).
- 1.3m people received services (down 9% from 2011-12 and down 25% from 2007-08). Of these, 1.1m received community based services (a fall of 10% from 2011-12), 209,000 received residential care (a fall of 2% from 2011-12) and 87,000 received nursing care (which is less than a 1% change from 2011-12).
- Of those receiving community based services, 151,000 received a direct payment, 485,000 received home care, 374,000 received equipment, 198,000 received professional support, 142,000 received day care, 65,000 received short term residential care (excluding respite care), 41,000 received meals and 80,000 received other services.
- 352,000 carers received services (3% less than in 2011-12) and of these, 48 per cent received a carer specific service and 52 per cent received information only.



NHS Continuing Healthcare

Disputes concerning entitlement to NHS Continuing Healthcare funding continue to be prominent. Common problems include: (1) the mistake of treating the Decision Support Tool as a Decision Making Tool – it does not make decisions: eligibility is based on professional judgment and a consideration of (amongst other things) what the Courts and Ombudsman have said; (2) councils and NHS bodies not having dispute resolution procedures – independent of the panel system. Both the English and Welsh guidance requires such a process; (3) panels acting inap-

propriately – eg by referring cases back for more evidence; by over-ruling MDT recommendations and by failing to be properly trained.

The English NHS Ombudsman only formally investigated 377 cases in 2012-13 (3% of complaints received). This serious failing has been compensated by some excellent NHS CC reports from the Public Services Ombudsman for Wales – eg: (1) highlighting an erroneous perception that the test for NHS CC eligibility was whether or not a person's 'needs are currently being met'; (2) an over-focus on physical healthcare needs

rather than looking at 'care needs holistically'; (3) a mistaken belief that the test was whether health interventions were needed: the 'test is whether someone has a primary health need, not what interventions they are receiving or who is providing them'; (4) a failure to ensure the family are engaged in the process and provided with relevant information, and to advise carers of right to an assessment; (5) that once a person is eligible for funding there must be no delay (eg by operating a waiting list). For a NHS CC legal update see: www.lukeclements.co.uk

Training courses

Luke Clements Training provides training and consultancy in all areas of adult care (health and social services) and the law relating to disabled children and their carers. Standard courses include:

- Community Care Law
- Carers Rights and the Law
- Equality Law and Human Rights in Social Care
- Mental Capacity, Decision Making and the Law
- Disabled Children, the Law and Good Practice
- NHS Continuing Care Responsibilities
- Ordinary Residence and the Law
- Safeguarding and Adult Social Care
- Young Carers and the Law

For training fees, terms & conditions—see www.lukeclements.co.uk/training/

New resource materials

Cerebra

Luke Clements is collaborating with the National Charity Cerebra and a number of specialist lawyers to produce a series of guides and precedent materials. These are being published on the Cerebra website and include:

- [Disabled Children Parents' Guide: Social Care, Housing and Health](#)
- [Disabled Children Parents' Guide: Employment](#)
- [Disabled Children Parents' Guide: Parent/Carers](#)
- [Transition to Adulthood - A Guide for Practitioners](#)

lukelements.com

New resources on the www.lukeclements.com website include:

- A critique of RAS (Putting the Cart before the Horse);
- The misuse of European Union Structural Funds (European Union Structural Funds and the Right to Community Living);
- Young Carers and the draft Care and Support Bill;
- An international overview of the growth of the carers human rights movement (Does your carer take sugar?);
- An update of NHS Continuing Care guidance and Court / ombudsmen's decisions
- A review of the detail of the English and Welsh Social Care Law Reform Bills (Adult Social Care Law Reform).



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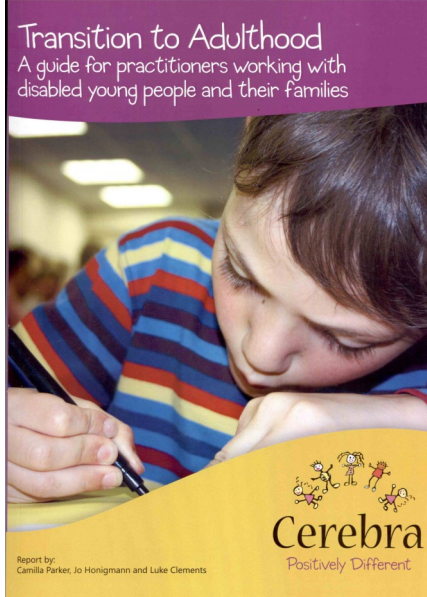
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Cardiff Law School
Law Building, Museum Ave
Cardiff, CF10 3AX**

Tel: 029 2087 6102



**Luke Clements Training is a socio-legal training partnership
Partnership
Luke Clements and Mo Burns**

For details of training fees, terms and availability,
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Tel: 01432 343430
Mobile 07802 414 612
Email: lukeclementstraining@yahoo.com

A PDF copy of this newsletter is at
www.lukeclements.co.uk/training/

Forthcoming Conferences

October 18th 2013
Mental Health & Capacity Law
RNCM, Manchester

February 28th 2014
***Social Care Reform and Resource
Allocation***
Kings Fund, London

**For Conference details—contact
enquiries@croesoevents.co.uk**