

Luke Clements Training

a socio-legal training partnership

Key practice

Individual Budgets and Personalisation

Direct payments: the New Rules

Deprivation of Liberty Safeguards (DoLS)

NHS Continuing Care

Eligibility Criteria & FACS / UFSAMC

Disabled children respite care services

Legal and social policy developments

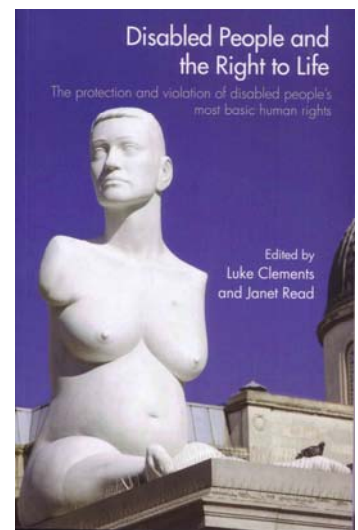
New social care challenges arise in 2009 – most notably the introduction of the **Deprivation of Liberty Safeguards (DoLS)** as a result of the House of Lords judgment in the *Bournewood* case (1998) and the subsequent judgment of the European Convention on Human Rights in 2004.

Major changes are also proposed to implement the **Personalisation** agenda. **Direct Payment** recipients will no longer have to have sufficient mental capacity to accept the payments and it is likely that a Welfare Reform Bill in 2009 will pave the way for a right to Individual Budgets. Significant changes to **NHS Continuing Care** responsibilities will occur, with clarification (via litigation) as to whether the NHS can make Direct Payments, the roll out in Wales of the new Framework and the finalisation in England of

NHS Continuing Care proposals for children.

The *Aiming High* initiative on short breaks case will also be high on **disabled children's** teams' agenda as litigation is scheduled concerning the legality of the eligibility criteria for such support.

Adult social services in England will assume responsibility for most **learning disabled NHS service users** and community care charges for such support will come under particular scrutiny as will the calculation of the funding transfers from the NHS. The reform of **FACS** eligibility criteria in England, without any new funding will prove especially challenging for adult care teams as will the equivalent process for **UFSAMC** in Wales as part of the *Paying for Care in Wales* consultation. And if that were not suf-



ficient, the amendment of the Disability Discrimination Act 1995 looks inevitable to accommodate the European Court of Justice ruling concerning **carers** in *Coleman v Law* (2008).

If the law is obscure to our cleverest legal minds – then how does it fare with the poorly informed, the unassertive, the fearful, the exhausted, the distracted and those with intellectual impairments? Its very complexity constitutes a profoundly disabling barrier to disabled people accessing their civil and statutory rights

Capacity and Deprivation of Liberty (DoLS)

The introduction of the **Deprivation of Liberty Safeguards (DoLS)** will pose major challenges. The procedures set out in amendments to the Mental Capacity Act 2005 are complex. Assessors will need to understand (1) the capacity a person needs in order to decide where to live; & (2) whether any particular situation amounts to a deprivation of liberty (in which case the safeguards are triggered) or a mere

'restriction on liberty' (in which case they are not). The 2005 Act provides 4 routes to legitimise detention, including life saving powers, standard and urgent authorizations and detention by a deputy sanctioned by the Court of Protection. Standard and urgent authorizations are expected to be the usual routes to detention and will require 6 separate assessments: (1) an age assessment; (2) a mental health assessment; (3) a mental capacity assessment; (4) a

best interests assessment; (5) an eligibility assessment and (6) a 'no refusals assessment'. The interplay between the 2005 Act's powers of detention and those existing under the Mental Health Act 1983 is complex and new roles will arise for Independent Mental Capacity Advocates. It is estimated that 21,000 people will need assessing in the first year; leading to authorisations to deprive a quarter of those people of their liberty

We cannot conclude this judgment without expressing our dismay at the complexity and labyrinthine nature of the relevant legislation and guidance, as well as (in some respects) its obscurity.

Court of Appeal
Crofton v. NHS Litigation Authority (2007)

Disabled children and short breaks

The commitment by the Department for Children, Schools and Families in its *Aiming High for Disabled Children* programme has resulted in additional grant support to councils of £430 million to provide short break / respite care support.

A long campaign by the Every Disabled Child Matters (EDCM) coalition of charities has succeeded in achieving statutory underpinning for this support. Section 25 Children and Young Persons Act 2008 places a duty on councils to 'assist individuals

who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring.' Test case litigation listed for 2009, will challenge two particular aspects of council support for disabled children. The first concerns the eligibility criteria for such support – much of which it is argued, is based on an inappropriate child protection model, rather than focussed on the specific needs of disabled children and their families. The second considers the extent to which the duty to provide support derives

from s17 of the 1989 Act as opposed to s20 (the 'duty to accommodate') section.

Disabled children who receive support in the community, do so in general, under s2 Chronically Sick and Disabled Persons Act 1970 and not the Children Act 1989.

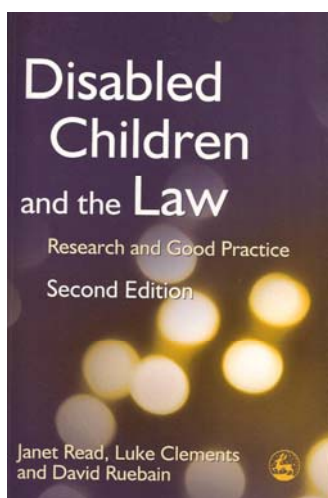
Changes to the Disabled Facilities Grant regime mean that these are no longer means tested for disabled children and that the maximum mandatory grant is now £30,000.

UN Convention, human rights and Law Reform

Section 145 Health & Social Care Act 2008 extends the protection of the Human Rights Act 1998 to include residents in care homes who are supported by social services under s21 National Assistance Act 1948. It does not however protect residents supported under the Children Act 1989, or under s117 Mental Health Act 1983 or those with NHS Continuing Care funding.

The UK's ratification of the UN Convention on the Rights in Persons with Disabilities in 2009 will add to pressure for the reform of adult care law. Of particular relevance will be the removal of local cost ceilings on care packages in the community and the introduction of measures that will allow for portable care plans – so that once assessed, a disabled person can move to another authority without the fear of

a severe reduction in their support on reassessment. Portability will be addressed in a review of the ordinary residence guidance. The Law Commission continues its programme to reform of adult care law, which it has described as 'inadequate, often incomprehensible and outdated ... a confusing patchwork of conflicting statutes enacted over a period of 60 years'. www.lawcom.gov.uk/



Disabled Children and the Law
2nd edition (2006) Read, J
Clements, L and Ruebain, D

NHS Continuing Care

The Department of Health is undertaking a review of the 2007 NHS Framework for Continuing Care and the associated Decision Support Tool (DST). Since its introduction with an additional £219 funding it appears that over 7,000 more patients have qualified for NHS Continuing Care. The Department is additionally formulating guidance on the Continuing Care entitlement of children.

In Wales, a similar version of the English Framework and DST will be rolled out in 2009, to coincide with Local Health Board reconfiguration. The

current DST contains 11 care domains for which an individual's need has to be evaluated into a series of bands ('No Need'; 'Low'; 'Moderate'; 'High'; 'Severe'; or, 'Priority' – although not all have a 'Priority' or 'Severe' category).

Possibly the most important concept embedded in the Framework is the statement that 'the decision making rationale should not marginalise a need because it is successfully managed – well managed need is still need' (para 37).

A series of judicial reviews

listed for 2009 should clarify the extent to which the NHS is permitted to make direct payments – although the Department of Work and Pensions (DWP) in its 2008 Green paper *No one written off: reforming welfare to reward responsibility* has announced that it proposes to pilot 'virtual' direct payments for NHS service users. This initiative may build on an earlier independent report (2007) for the DWP that recommended that ILF users who qualify for continuing health care should not automatically lose their ILF eligibility. .

Direct Payments ~ the New Rules

Significant changes to the Direct Payments regime take effect in consequence of the Health & Social Care Act 2008, s146. The Act enables local authorities to make direct payments where the disabled person lacks capacity. The detailed rules are set out in regulations and – put simply – provide that payments can be made in various situations, including:

1. if the person does not have a Court of Protection appointed ‘deputy’ or Lasting Power of Attorney (LPA), the authority will have discretion to decide whether a third party is suitable to be a recipient of direct payments. This, numerically be by far the largest group.
2. if the person has a deputy or LPA then

the arrangement will depend upon whether the LPA or deputy has authority to make ‘decisions about securing the provision of a community care service’ - known as a ‘surrogate’- whereas if they lack this authority they will be known as a ‘representative’. A surrogate can require or veto support as a direct payment, whereas a representative has the right of ‘first refusal on any such payment.

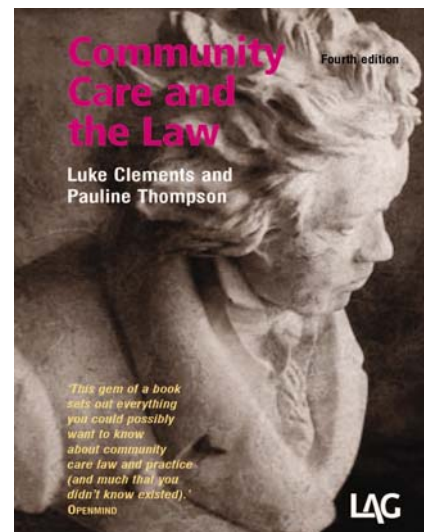
The changes are designed to increase the availability of Direct Payments, since the number of recipients is still small. Since Direct Payments were introduced in 1997, fewer than 75,000 people receive their community care support as Direct Payments –

less than 3% of the total social services spend. Earlier changes have included the option of paying close family members (including spouses) even when living in the same household. In cases of this kind, such relatives can be employed where the local authority ‘is satisfied that securing the service from such a person is necessary to meet satisfactorily the prescribed person’s need for that service’. This is a relatively low threshold and there is no restriction on the direct payment recipient paying any relation to provide care (if they do not live in the same household). With increasing numbers of relatives being employed this way, new legal questions arise, including the extent to which they continue to receive support as ‘carers’ under the Carers Legislation.

Deprivation of Liberty Safeguards

Suggested one day programme

9.30am	Introductions
9.40am	Mental capacity ~ the basic principles
10.00am	Best interests and restraint
10.20am	Capacity to decide on one’s residence
11.00am	Break
11.15pm	Section 5 Acts, restraint and deprivations of liberty
12.00pm	Detention under the 2005 Act: substance and the process
12.30pm	Case scenarios and discussion
1.00pm	Lunch
2.00pm	The 6 assessments ~ overview
2.10pm	Assessments – legal requirements, documentation & conditions
2.45pm	IMCA’s, representatives and reviews
3.00pm	Break
3.15pm	The Court of Protection; deputies & challenging detention
3.30pm	Case scenario and discussion
4.15pm	Evaluations & Close



Community Care & the Law 4th edition (2007) Clements, L & Thompson, P.

Individual Budgets and Personalisation

Putting People First (DH 2007) commits councils in England by 2011 to ensuring that ‘everyone eligible for publicly funded adult social care support has personal budgets (PBs) other than in circumstances where people require emergency access to provision’. This should mean that instead of the current 75,000 Direct Payment recipients, by 2011 all 1.75 million adult social services users will have a PB. Unrealistic as this may be (see L Clements (2008)

Individual Budgets & Irrational Exuberance at www.lukeclements.com) councils have no choice but to prepare for implementation.

Individual budgets (IBs) can be distinguished from PBs and Direct Payments (DPs). IBs include funding from a number of streams (eg community equipment, Access to Work, disabled facilities grants, Supporting People’s monies etc) whereas a PB is only the commu-

nity care element. A DP differs from a PB in that a PB need not be taken as cash by the individual, but can be managed notionally (ie by a broker) and so, for instance, used to obtain local authority services. At present, since there is no legislation underpinning IBs or PBs, these schemes must comply with existing community care law. The Government proposes in its Welfare Reform Bill 2009 to clarify the legal status of such arrangements.

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:

- Carers Rights and the Law
- Community Care Law
- Community Care Law updates
- Deprivation of Liberty Standards & Mental Capacity
- Direct Payments, Individual Budgets and the Law
- Disabled Children, the Law and Good Practice;
- Disabled Children & the Law
- Human Rights Law and the UN Convention on the Rights of Persons with Disabilities
- Mental Capacity, Decision Making and the Law
- NHS Continuing Care responsibilities
- Young Carers and the Law

In relation to specialist **Mental Health Law training**, the partnership arranges training in conjunction with Edge Training Ltd, London.

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Forum

The partnership is able to develop specific training / problem solving sessions. These are either 'in-house' or administered by the Partnership and charged per delegate (the fee, in general being £185.00 per person attending). Events proposed for 2009 include (for the statutory sector) (1) the community care implications for people seeking **Asylum** or otherwise lacking UK residence rights; and (2) the **Ordinary Residence** rules. For the independent and charitable sectors, events proposed for 2009 include (1) **Challenging Community Care decisions**; and (2) **Advocacy, Brokerage and Personalisation**. If you would wish the Partnership to consider convening any similar event or have any interest in one of the above sessions please get in touch.

General Terms

The daily training fee for a single speaker is £950.00 plus travel, and where necessary overnight accommodation.

For voluntary sector training (where the participants are from the voluntary or charitable sectors) the fee for a single speaker is £750.00 plus travel, and where necessary overnight accommodation.

We supply a top set of notes, consisting of a programme and a set of detailed notes. The local organiser is responsible for copying and distributing the notes/programme and any register / appraisal sheets etc.

For details of fees, terms and availability,

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