

## Legal and social policy developments

### Key practice

**Individual Budgets and Personalisation**  
the next steps

**Direct payments:**  
the New Rules

**Deprivation of Liberty Safeguards (DoLS)**  
The first year

**NHS Continuing Care:**  
the revised regime

**Eligibility Criteria**  
The new FACS guidance

**Disabled children respite care services**  
The 'aiming high' initiative

Dignity, independent living, choice and cost effectiveness are the key horses in the community care legal stakes – with the courts having difficulty deciding which should be the winner. In this newsletter reference is made to significant changes to the **Direct Payments regulations** (permitting payments when the person lacks sufficient mental capacity) and the **NHS Continuing Care guidance**.

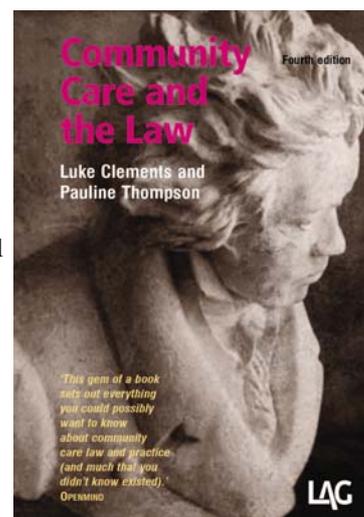
New **ordinary residence guidance** is also expected as is guidance and perhaps new legal obligations in relation to **adult safeguarding**. One of the first cases that the new Supreme Court will consider (replacing the legal role of the House of Lords) will be the duty of councils to protect vulnerable adults, in *X & Y v*

*Hounslow LBC*.

The English Government's review of the **FACS eligibility criteria** has proved inconclusive and FACS is likely to remain for the foreseeable future – although the possibility of going 'critical only' will no longer be permitted.

The first year of the **Mental Capacity Act 2005 DoLS** safeguards appears to have been a damp squib with far fewer applications made than expected. A number of high level judicial reviews are pending in this field, and these (together with action by the regulatory bodies – the Care Quality Commission and the Inspectorate in Wales) may result in the numbers increasing significantly.

The pace of the English **personalisation** initiative looks



likely to slacken as the practical difficulties to implementation become more apparent and the pilot projects come to an end: without new money, it is difficult to see how a major reconfiguration of care services can occur.

## Personalisation and individual budgets cases

The Welfare Reform Act 2009 represents a further important plank of the personalisation programme. It provides for personal budgets for non-community care services such as disabled facilitates grants, Supporting People's and ILF monies. In the consultation paper *Making Choice and Control a Reality for Disabled People* (2009) the proposal is to pilot the new arrangements in a number of 'trailblazer' English local authorities during 2010.

The first cases arising out of the personalisation programme are coming before the courts. *R (JL) v. Islington LBC* (2009) considered the London Borough's new arrangements – which it claimed allocated services on a 'transparent' and 'equitable' basis. This was done by an inflexible banding system with an upper limit (in relation to respite care) of 12 hours a week. The court declared the system unlawful, and that any new Resource Allocation System should be

subjected to a full disability impact assessment (under 49A Disability Discrimination Act 1995) since it was inevitable that it would have a disparate impact on different groups of disabled people.

In *R (B) Cornwall CC* (2009) the key finding, for the purposes of the personalisation programme, was that councils cannot delegate their community care assessment obligations to service users – via so-called 'self assessments'.

*The promotion of independent living is a core - perhaps the core - principle underpinning the community care legislation*

Mr Justice Hickinbottom  
*R (B) Cornwall County Council* (2009)

*There is a duty to address carers' eligible needs but discretion about whether to meet these through carers services or community care services – however, some practitioners appear to think [incorrectly] the discretion is about whether to help carers*

Commission for Social Care Inspection (2008)

## Equality legislation and carers

UK non-discrimination law is in desperate need of codification. Separate laws regulate discrimination based on sex, race, disability, age, religion and sexual orientation. New groups have also won protection eg carers due to the Coleman ruling.

If enacted, the Equality Bill will replace the existing anti-discrimination laws with a single Act with standardised

principles. The Bill also proposes a new duty on authorities to combat health and social inequalities.

The Bill will entrench the new protection for carers and one way of assessing its likely impact on carers is to consider (if a problem arises) if the following statement is valid—namely '*but for my caring relationship with the disabled person, this would*

*not have happened*' ie 'I would not have been forced to leave my job' – Sharon Coleman's argument; or 'I would have got a bank loan' – a recent case concerned a carer denied a loan because his disabled son lived with him; or 'I would have been able to see my GP' – many carers have such difficulties due to inflexible appointments systems.

## UK ratifies UN Convention with reservations

On the 8<sup>th</sup> June 2009 the UK ratified the UN Disabled Persons Convention subject to four 'reservations':

**On education** – making clear that our education system will continue with both mainstream and special schools;

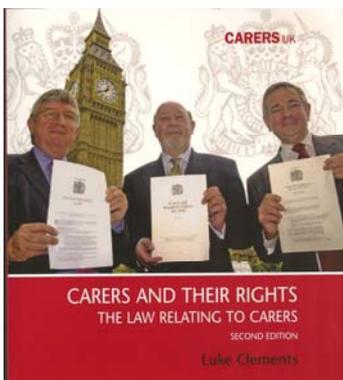
**On freedom of movement** - making clear that this did not impact on our immigration rules or the right to introduce health screening for those entering the UK (ie in a global health emergency);

**Concerning the armed forced** - along the same lines as in the Disability Discrimination Act 1995;

**Social security appointees:** accepting that UK law fails to provide for an appeals process against the imposition of an appointee. The reservation is intended to be of short term whilst the DWP endeavours to amend the law.

There were two surprises. The first, that on 7<sup>th</sup> August 2009 the UK also ratified the optional protocol allowing individual complaints to the UN Committee. The second was the failure of the UK to enter an interpretative reservation challenging an Information Note issued by the UN High Commissioner for Human Rights. Article 14 of the

Convention states that 'the existence of a disability shall in no case justify a deprivation of liberty'. The Information Note advises that any state that has laws permitting the detention of 'persons with mental and intellectual disabilities' because there is a risk that the person might cause harm to himself or to others – is in violation of article 14. On the face of it, this is an extreme interpretation and would mean that the Mental Health Act 1983 and the Mental Capacity Act 2005 would have to be drastically amended.



**Carers and the Law**  
3rd edition (2009)  
Clements, L at  
[www.lukeclements.co.uk/publications/index.html](http://www.lukeclements.co.uk/publications/index.html)

## NHS Direct Payments

In *R (Harrison) v Secretary of State for Health* (2009) the High Court held that the NHS did not have power to make direct payments. A second hearing is pending to consider whether the NHS can make indirect payments – ie by transferring funds to social services via s256 NHS Act 2006 (s194 NHS (Wales) Act 2006).

In earlier proceedings (*Gunter v SW Staffordshire PCT* 2005) the Court held that the NHS can make payments to an Independent User Trust, and pending further litigation (or the implementation of the Health Act 2009 – see below) this may be the best option where a direct payment type arrangement is needed. The Health Act 2009 will allow

the NHS to make direct payments.

The Department of Health in its paper *Personal health budgets: first steps* (2009) proposes to pilot these new powers over the next 3 years. Personal budget pilots will commence immediately but the actual direct payment pilots (ie where cash is paid to the ill or disabled person) will not commence until Summer 2010.

## New NHS Continuing Care Guidance

In July 2009 the Department of Health issued a revised, *National Framework for NHS Continuing Healthcare*. At the same time a revised *Decision Support Tool, Checklist* and *Fast Track Pathway Tool* were also published. Since the introduction of the *National Framework* in October 2007 about 16,000 more people have qualified for NHS Continuing care in England. In Wales, where outdated and discredited guidance is still in force, the situation is less clear.

The July 2009 revisions to the *Framework* are in part cosmetic, but changes to the *Decision Support Tool* have at-

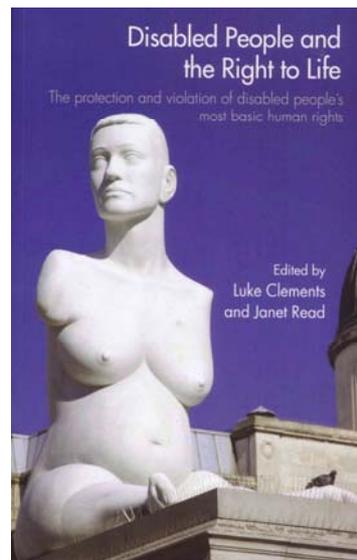
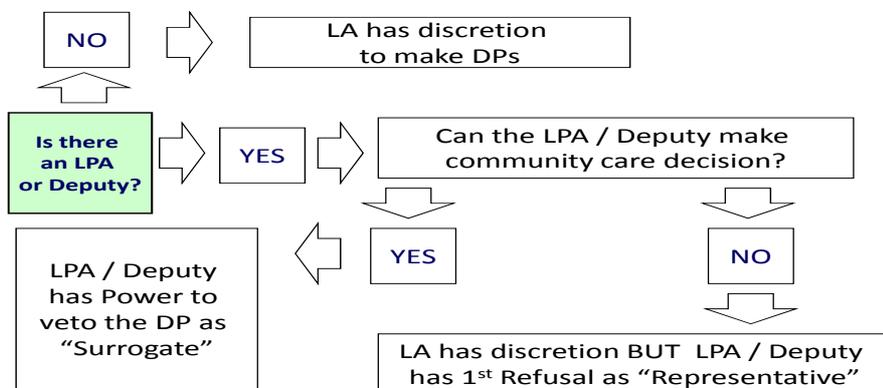
tracted criticism, since they may make it harder for certain groups (eg people with spinal injuries) to qualify. There is a risk therefore, that some of the recent gains may be lost unless there is continued focus on the law. On the basis of the Court of Appeal decision in *Coughlan* the bar for accessing NHS Continuing Healthcare would appear to be significantly lower than that suggested by the revised guidance and where there is conflict between law and guidance – the law (in the form of the *Coughlan* judgment) must take precedence.

In *R v. North and East Devon health authority ex p Coughlan* (1999) the

Court of Appeal laid down the ‘quality / quality’ test, stating that social services could only fund a package if the person’s health care needs were (1) merely incidental or ancillary to the provision of accommodation, and (2) of a nature which it could be expected that an authority whose primary responsibility is to provide social services can be expected to provide. Essentially, that if a person’s health care needs are more than ‘low level’ in terms of quality or quantity, then it is not lawful for the care package to be funded by social services.

## Direct Payments—the new rules

s146 Health & Social Care Act 2008 enables councils to pay direct payments where a person lacks capacity. The flow diagram below explains the basic procedures—these came into force on the 9th November 2009 as a result of the Community Care, Services for Carers and Children’s Services (Direct Payments) (England) Regulations 2009.



## Ordinary residence and portable care packages

Revised guidance on ‘ordinary residence’ is expected as a result of the recent Department of Health consultation on this question. The last guidance was issued in 1993 and although no change in the law is likely, new guidance is needed to take account of changes in practice, - ie the growth in supported housing. Many councils appear to have overlooked the importance of having a clear understanding of the ordinary residence rules. For example, if a person is funded ‘out of borough’ in

a care home, which then deregisters – the presumption is that that person then becomes ordinarily resident (at law) in the council area in which the home is situated – and hence funding responsibility will shift.

The ‘portability’ of care packages is becoming a more pressing issue. At present, people receiving community based care services are handicapped by the lack of portability of their care packages, since entitlement to support changes if they move to another local

authority area. The ‘receiving authority’ may have different eligibility criteria and often there will be delay in re-securing any support. This impediment to free movement violates the UN Disabled Persons Convention (see separate article).

The 2009 English Green Paper on Social Care proposes the introduction (by 2014) of portable assessments – but not portable care plans – a very important difference.

## 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
- Charging for Community Care services
- Community Care Law
- Community Care Law updates
- Deprivation of Liberty Safeguards & Mental Capacity
- Direct Payments, Individual Budgets and the Law
- Disabled Children, the Law and Good Practice;
- Human Rights Law and the UN Convention on the Rights of Persons with Disabilities
- Human Rights and Equality Law in social care
- Mental Capacity, Decision Making and the Law
- NHS Continuing Care responsibilities
- Ordinary residence and the Law
- Personalisation and the modernisation of adult care law
- Young Carers and the Law

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

## 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.

The fee is based upon a maximum class size of 35. For class sizes in excess of 35 an additional fee of £20 per person is payable.

For details of training fees, terms and availability,

Contact Mo Burns at:

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**A PDF copy of this newsletter is at**

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