

## Key practice

**Eligibility Criteria**  
Tightening criteria and legal challenges

**Safeguarding**  
Law Reform and case law developments

**Equality Act 2010**  
The 'public sector equality duty and the new 'indirect' discrimination provisions

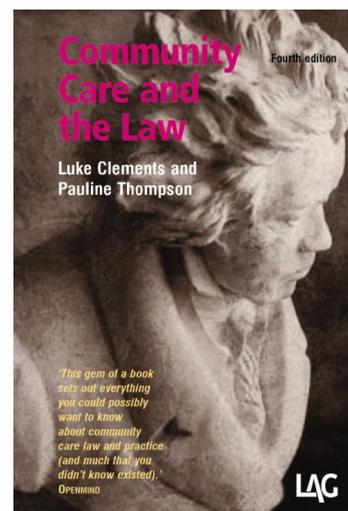
**Mental Capacity Law**  
The courts emphasis on adequate staff training

**NHS Reform**  
The new structures, re-ablement and NHS Continuing Healthcare

## Legal and social policy developments

The impact of the **Spending Review** is becoming apparent. In England the headline 'additional £2bn for social services' is not what it appears. It is not ring-fenced and includes £1bn from NHS budgets, of which £300m is earmarked for NHS **re-ablement** spending. Cuts to the Central Government Grant will, however, result in an annual loss of £3 billion for adult care. After inflation and demographic changes, the net effect will be a **cut to adult social care of 12% - 16%**. Councils that try to set yet higher eligibility criteria, will inevitably be exposed to increased risks of litigation. The influence of the social security changes and the **Welfare Reform Act 2009** on social care is becoming more

apparent. The closure of the **Independent Living Fund**, the transfer of the **Social Fund** to local authorities, the reform of the eligibility rules for **Attendance Allowance** and the **mobility component** of DLA will increase the reliance of disabled and older people on local authority community care assessments. The 2009 Act provides for even more fundamental reform and pilot programmes on these changes are now running in Barnsley, Sheffield; Essex, Greater Manchester, Leicester, Barnet, Newham, Surrey and Redcar & Cleveland. The **Equality Act 2010** implementation continues. The stages being: (1) repeal of the bulk of the Sex Discrimination Act 1975, the Race



Relations Act 1976 and the Disability Discrimination Act 1995 in 2010; (2) codification of the '**public sector equality impact**' duties (s149) in April 2011; and (3) the prohibition of age discrimination outside of employment in 2012.

*The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance ... . What good is it making someone safer if it merely makes them miserable?*

Lord Justice Munby  
Taking Stock Conference  
15 October 2010

## Ordinary residence & care home deregistration

The deregistration of many care homes continues. Deregistration may entitle 'residents' to a range of social security benefits as well as helping councils meet their target of reducing care home payments to less than 40% of total adult care expenditure. Deregistration schemes can have other unintended effects. Generally they rely on former residents qualifying for enhanced rates of housing benefit. In *R (Buckinghamshire CC) v*

*Kingston upon Thames* (2010) the new scheme faltered when it was held that it did not qualify for such payments and the placing council was criticised by the court for its failure to foresee this. The case also illustrates another consequence of deregistration; namely that the 'ordinary residence' of those residents who were funded by outside councils (and so 'deemed' to be ordinarily resident in those councils' areas) will generally

change – legally it will become that of the council in whose area they are actually living.

To obtain housing benefit, a former resident will need to have a tenancy – and in *G v E, a local authority & F* (2010) the court questioned whether the particular applicant had the mental capacity to enter into such an agreement and concluded from the facts, that no tenancy existed in that case.

*I formed the very clear view that the responsibility for what had gone wrong rested at a much higher level within the local authority, and that one of the most damning criticisms ... was it had seemingly failed to provide any or any adequate training to its staff to prepare for the radical changes introduced by the DOLS provisions.*

Mr Justice Baker  
*G v E, Manchester City Council & F (2010)*

## Section 117 Mental Health Act 1983

People detained for treatment under the MHA 1983 have on their discharge a right to free after-care services: these are known as s117 services.

Two recent cases have provided answers to three perennial questions concerning these services: namely (1) what can be provided under s117; (2) when does the s117 duty 'come to an end'; and (3) which council is responsible for providing them?

In *R (Mwanza) v. Greenwich*

& *Bromley* (2010) the Court answered the first two, stating (1) s117 covers a wide range of services, provided they are necessary to meet a need arising from the person's mental disorder – including (but only very exceptionally) the provision of 'bare accommodation'; (2) If the local authority and the relevant NHS body decide that a person is no longer in need of s117 after-care services and s/he is no longer receiving such services, then provided the deci-

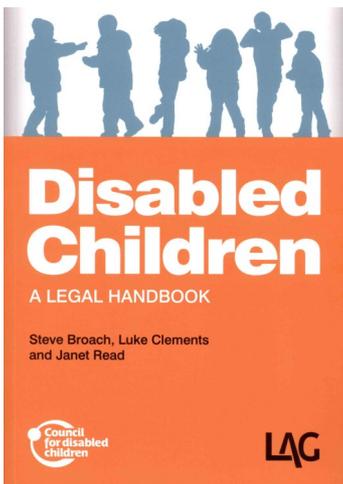
sion is made at a properly constituted meeting the court will not look too closely at the merits of the decision. In *R (M) v Hammersmith & Fulham* (2010) the High Court answered the third question. The responsible local authority is generally the one in which the person was 'ordinarily resident' when detained. Since there is no 'deeming' rule for s117, this means the council area where s/he was actually living when sectioned.

## Carers

Since carers will take much of the strain from the spending cuts, this area of social care is likely to be spared – and may even continue to receive small increases. The Green Paper *A Vision for Adult Social Care* commits the Government to providing carers 'with the support they need' and to 'refreshing' the Carers Strategy to (amongst other things) 'support carers

in their vital role, and ensure they have a life of their own.' The Equality Act 2010 strengthens the rights of carers not to be subjected to discriminatory treatment: most importantly, this protects them from being treated less favourably because of their 'association' with the disabled person - although the new provisions concerning 'indirect discrimination' may

also prove to be crucial. A briefing on the new rights - *The Equality Act 2010 and Carers* can be found at [www.lukeclements.com](http://www.lukeclements.com) ('what's new'). A new Guide on the legal rights of carers *Carers and their Rights – the law relating to carers* is also available at [www.lukeclements.com](http://www.lukeclements.com) ('publications').



### Disabled Children A legal Handbook

Legal Action publishers  
[www.lag.org.uk](http://www.lag.org.uk)  
 November 2010 528pp £40.00

The full text is accessible at  
[www.ncb.org.uk/cdc/resources/  
 legal\\_handbook.aspx](http://www.ncb.org.uk/cdc/resources/legal_handbook.aspx)

## Personalisation and Direct Payments

The Coalition Government proposes an acceleration of the Personalisation Programme in England. The Green Paper *A Vision for Adult Social Care* builds on the performance indicator NI 130 that required 30% of all community based services to be delivered as a direct payment or a personal budget by April 2011. The new target is that all English councils must provide personal budgets to everyone eligible by April 2013. The programme includes the development of a

standardised Resource Allocation System (RAS) - a draft version of which is at [www.puttingpeoplefirst.org.uk/](http://www.puttingpeoplefirst.org.uk/) In a series of judgments, the courts have found nothing unlawful in the notion of a RAS that provides an indication of the likely sum that a service user might receive as a personal budget. However, in *R (JL) v. Islington* (2009) it held that any RAS used in practice must have been subjected to a disability discrimination impact assessment and in *R (Savva) v Kensington &*

*Chelsea* (2010) the Court of Appeal held that a service user must have the opportunity to have explained to him / her how the proposed budget had been calculated. In *R (KM) v Cambridgeshire* (2010) the High Court found in favour of the council since it had (1) explained the process by which it had calculated the direct payment; (2) had not treated its RAS figure as anything more than a starting point; and (3) had not sought to impose any fixed upper limit on payments.

## Of credit crises and demographic bombs

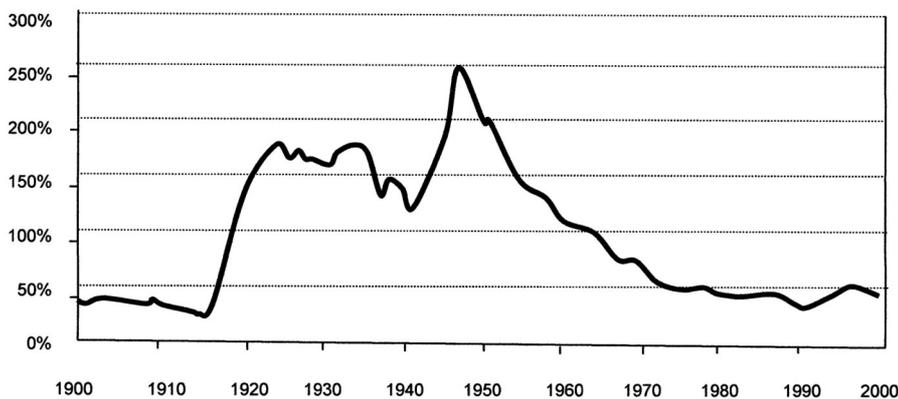
Writing over 10 years ago Mark Drakeford argued that Neoliberal Governments of the kind we now elect do not believe that the social care is a fundamental pillar of the welfare state: indeed that 'primary responsibility for care of this sort should lie not with the state at all, but with families and charitable provision'. If this is true it might explain what is meant by the 'third way' and 'big society' as well as the prolonged underfunding of this sector

and its current savaging in the Spending Review. On the other hand the reform of social care funding could be due to the unaffordable impact of the ageing population and the unprecedented credit crisis. Where does the truth lie? In 1999 the previous Government's Royal Commission on Long Term Care concluded that 'For the UK there is no "demographic timebomb" as far as long-term care is concerned and as a result

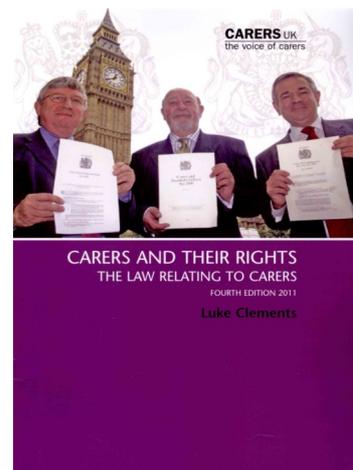
of this, the costs of care will be affordable'.

As to UK public sector net debt, in November 2010 it stood at £863 billion - 58% of National GDP. The table below shows this in its historical context - eg it stood at over 180% at the end of the Second World War. The response then was the creation of the Welfare State—the Education Act 1944, the National Insurance Act 1946, the NHS Act 1946 and the National Assistance Act 1948.

**National Debt as a percentage of GDP over the 20<sup>th</sup> Century**



Bank of England Statistical Abstract Part 1, 2000 edition, Table 15.2 (cited in HM Treasury, Public Finances Databank, October 2001)



*Carers & their Rights* (2011) at [www.lukeclements.com](http://www.lukeclements.com) ('publications').

## The NHS & Community Care

The English Government's plans for the reform of the NHS have been outlined in its White Paper *Equity and excellence: Liberating the NHS*, proposing that the 2011 Health Bill will:

- create a new Public Health Service run by councils which will subsume the PCTs current role in this area;
- give GPs 'and their practice teams working in consortia' the power, (currently in the hands of PCTs) to commission services;
- establish an independent NHS Commissioning Board which will allocate NHS budgets, oversee targets and have a duty to address health inequalities.

The rise in the number of people qualifying for NHS Continuing Healthcare

Funding in England appears to have plateaued – at just over 50,000. Recent practice guidance issued by the Department of Health flags up a number of key issues, including the legal requirement that local authorities and PCTs have a dispute resolution process (separate to the panels process) to resolve inter-authority disagreements concerning (amongst other things) entitlement to NHS CC.

In Wales, the 2010 Framework is beginning to bed down, although there is a pressing need for the training of staff actually operating the system – and for additional Assembly guidance.

The Department of Health has issued re-ablement guidance (LAC (DH) (2010) 6) emphasising that all such care must

be provided free of charge for the first six weeks after a person's hospital discharge, as must be the cost of making an adaptation costing £1000 or less, whether as part of a re-ablement package or stand alone.

The pilot programme for NHS Personal Health Budgets has now commenced (s12A Health Act 2009) with seven of the pilot regions (on occasions extending to more than one PCT) having the power to make direct payments and / or children in transition payments – these being Doncaster PCT, Eastern and Coastal Kent PCT, Central London (Hammersmith and Fulham PCT, Kensington and Chelsea PCT and Westminster PCT) Islington PCT, Oxford PCT and Somerset PCT.

## 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 £1000.00 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 40. For class sizes in excess of 40 an individual quote can be provided.

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

For details of training fees, terms and availability,  
Contact Mo Burns at:  
Luke Clements Training, 7 Nelson Street, Hereford, HR1 2NZ  
Tel: 01432 343430  
Mobile 07802 414 612  
Email: [lukeclementstraining@yahoo.com](mailto:lukeclementstraining@yahoo.com)

A PDF copy of this newsletter is at  
[www.lukeclements.co.uk/training/index.html](http://www.lukeclements.co.uk/training/index.html)



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Museum Ave  
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**Tel: 029 2087 6102**

**Cardiff Law School**  
**Centre for Health & Social Care Law**  
[www.law.cf.ac.uk/chscl/](http://www.law.cf.ac.uk/chscl/)

### Forthcoming Conferences

**October 14<sup>th</sup> 2011**  
***Mental Health & Mental Capacity  
Law Reform***  
Royal Northern College of Music  
Manchester

### Other pending Conferences

- Independent Living and Poverty
- The Children Act & Disabled Children
- The Law & 'Consent'
- Disabled People & the Right to Life

**For Conference details—contact**  
[enquiries@croesoevents.co.uk](mailto:enquiries@croesoevents.co.uk)  
telephone 07891 452260