Edition 5 2011

Newsletter

Luke Clements Training: socio-legal training

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 associative discrimination provisions

Mental Capacity Law
The assessment of capacity and 'best interests'

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

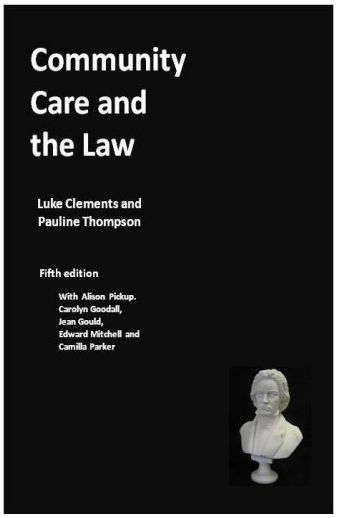
Legal and social policy developments

Two recent reports highlight the impact of the cuts. The Association of Directors of Adult Social Services estimates that next year a further £1billion will be cut from council budgets and a BBC / CIPFA survey found that the cuts were hitting the poorest areas hardest – northern councils having cuts 8% greater than those in the south.

The few councils that have gone '**critical only**' have faced legal challenge: the High Court in ***R (W) v Birmingham CC*** (2011) held that its decision violated the Disability Discrimination Act 1995 (now **s149 Equality Act 2010**). An equally draconian decision by Kensington & Chelsea to cut funding by suggesting that an elderly person wear continence pads rather than have help to get to the toilet, has been challenged before the Supreme Court (***R (McDonald) v Kensington & Chelsea***) with judgment due later this year.

Other more routine legal developments continue. The **NHS Continuing Healthcare Frameworks** in both England & Wales are bedding down, but their **Decision Support Tools** are attracting criticism – due to the 'severe' and 'priority' bands being unrealistically demanding (see '*NHS Funding for continuing care*' at www.lukeclements.com ('what's new').

In England & Wales revised regulations have been issued concerning **Direct Payments**; revised guidance concerning the determination of a person's '**ordinary residence**' has also been issued in England; and Baroness Campbell has launched a Private Members Bill to provide for the portability of care packages.



The question of which local authority is responsible for providing **s117** services looks set for the Supreme Court, given the severe financial implications for some councils of the Court of Appeal judgment in ***R (M) v Hammersmith & Fulham*** (2011).

The end of the delayed discharge fines?

... guideline policies cannot be treated as universal solutions, nor should initiatives designed to personalise care and promote choice be applied to the opposite effect.

Mr Justice Jackson
AH v. Hertfordshire NHS Foundation Trust (2011)

In October 2010 the Department of Health issued guidance re-emphasising that intermediate care and re-ablement services provided for the first six weeks after a person's hospital discharge must be provided free of charge – as must be the cost of making the adaptation if it is £1000 or less (whether as part of a re-ablement package or stand alone).

The Coalition Government intends to make the care support for all patients for the first 30 days after their discharge from hospital, the responsibility of the NHS (and free). This would then be followed by up to six weeks of free intermediate care.

These changes are likely to lead to the abandonment of the current 'delayed discharge' penalty system in England. It seems probable that the NHS will commission social services to provide these services in the first 30 day period. In Wales (where the delayed discharge fines have never applied) it looks like a more flexible arrangement will be implemented - see the Welsh Assembly Government's 2010 policy document '*Sustainable Social Services A Framework for Action*'.

Personalisation must not be seen as a cost-saving exercise ...

There are fears about the possible emergence of an unskilled, casualised, unregulated, and potentially exploited, workforce of Personal Assistants ...

The current social care system is no longer fit for purpose.

House of Commons Health Committee (2010) Third Report Social Care

Funding reductions for care providers

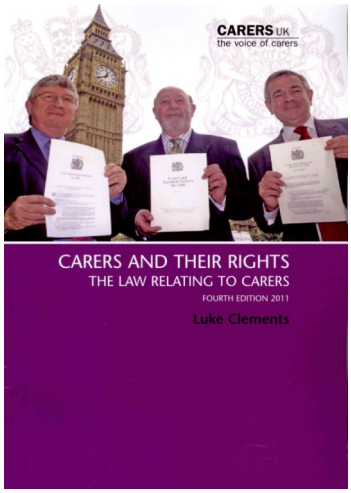
Attempts by local authorities to impose limits (or cuts) on the fees they pay to care providers have resulted in a number of court actions. Historically judges have been largely resistant to care provider claims – but in a landmark judgment *Forest Care Homes Ltd v Pembrokeshire CC* (2010) the Court held that a rigid imposition of a fee limit for care home placements imposed by the council was unlawful, since it had failed to comply with the relevant Welsh Assembly Guidance; had adopted an irrational approach to the setting of the fee limit; and had not properly understood the consequences of what would happen if it continued to impose an upper limit that was below the true costs of the care home. As the Court observed (para 46) this was particularly important because of the:

> *potentially adverse consequences for residents, who are necessarily elderly and vulnerable and whose interests are at the heart of the commissioning of care services. An authority cannot make a decision which potentially has adverse consequences for a resident, such as a move to another home or a reduction in the level of care, without proper consideration and compelling reasons.*

Although the case concerned Welsh Assembly Guidance, similar advice has been issued in England by the Department of Health (*Building Capacity and Partnership* in Care, 2001) which stressed that 'contract prices should not be set mechanistically but should have regard to providers' costs and efficiencies, and planned outcomes for people using services, including patients.'

The court also considered of direct relevant to such disputes, the rights of residents and care homes under article 8 European Convention on Human Rights (the rights to respect for private and family life and one's home).

Law Commission reform proposals



Carers and the Law 4th edition (2010) Clements, L at www.lukeclements.co.uk/publications/index.html

In May the Law Commission published its report on the reform of Adult Social Care Law. The report favours separate statutes for England and Wales (as currently exists in relation to the NHS).

The Commission's proposals include creating a set of statutory principles (similar to those that exist under the Mental Capacity Act 2005); clarifying the legal entitlements of carers; placing duties on councils and the NHS to work together; creating a single assessment and eligibility framework; and enacting legislation to protect adults from abuse. With the exception of the new adult protection provisions, the proposals represent little more than a codification of the current legal regime – and in relation to the 'statutory principles' are disappointing. The principles emphasise the importance of respecting the 'individual's views, wishes and feelings' and their involvement in care planning – but only so far as the local authority considers this to be 'practicable and appropriate'.

By focussing on user involvement and choice, the principles fail to place obligations on the statutory authorities – for example, to ensure that support services maximise independence and do not subject individuals to indignity – of the type experienced by Elaine McDonald – see page 1 article above.

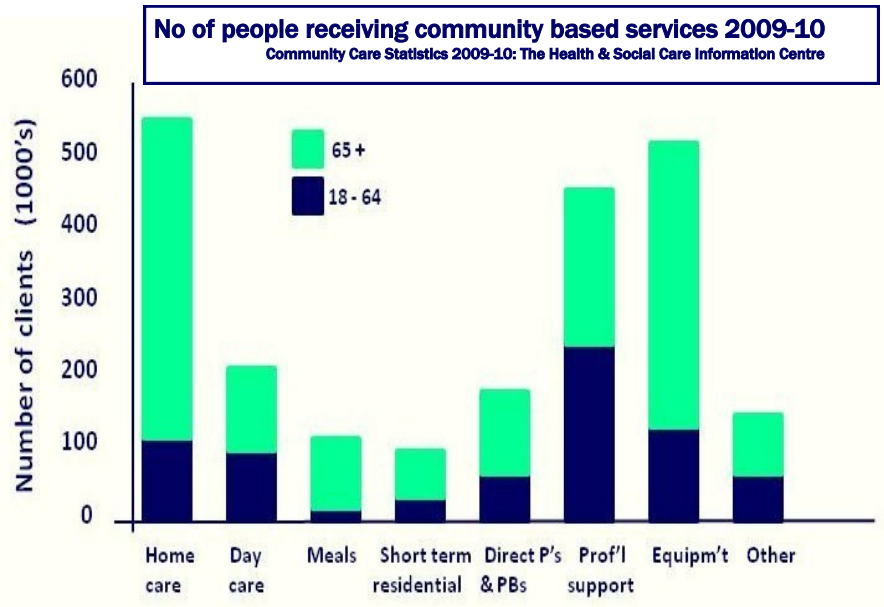
The Dilnot Report on the funding of long term care will be published in the early summer and will recommend that social care continue to be means tested, albeit that the costs in individual cases be limited. The Government has committed itself to publishing an Adult Social Care Bill in 2012, which is expected to incorporate parts of both the Law Commission and the Dilnot reports.

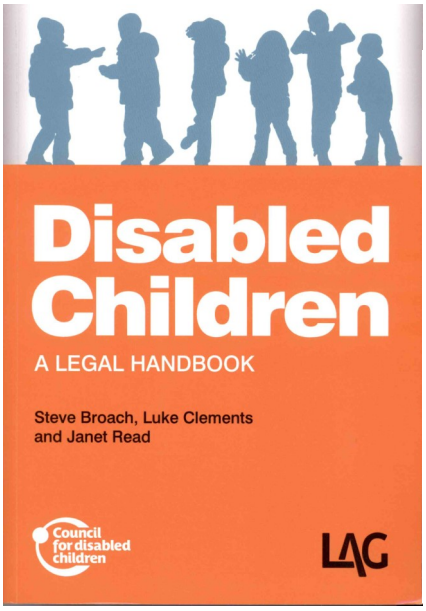
Personal budgets and RAS's

Despite warnings that 'Personalisation must not be seen as a cost-saving exercise' (see page 2) it appears that it is being used for this purpose in many localities. Typically, the process involves a disabled or older person or a carer being advised that instead of a traditional 'community care assessment' the council is adopting a self assessment process (where the person is given a 'tick-box' form to complete). This is then fed into a computerised system (known as a Resource Allocation System – RAS). The system then provides an 'indicative' amount which is commonly less than the person is currently receiving in funding support.

What people are not always being told is that the law has not changed and that these new systems cannot be used to take away existing legal rights: indeed the courts have held that 'self-assessment' is not recognised by the law (not for disabled or older people and not for carers – see *R (B) v. Cornwall CC* (2009). Councils must meet assessed needs – and if a council is proposing to cut a care package then the court and ombudsmen require that the individual be given a detailed and convincing explanation as to why this is happening.

The fact that a local authority has decided to re-label its care plans and call them 'personal budgets' using a 'RAS' is not a valid reason: a person's assessed needs must be met. For further analysis – see ' *Social Care Law Developments: A Sideways Look at Personalisation and Tightening Eligibility Criteria'* at www.lukeclements.com ('what's new').





www.ncb.org.uk/cdc/resources/legal_handbook.aspx

Care plan changes —adults with limited capacity

In two recent cases, the courts have had to consider the legality of proposals by councils to make significant changes to the care packages of adults with limited mental capacity.

In ***R (W) v Croydon LBC*** (2011) the council decided in principle to move a young adult (who lacked capacity to decide where to live) from his placement and convened a best interests meeting with his parents to discuss this. It did not however alert the parents to the fact that it had formed a very strong view that the placement was unsuitable (in part because of its high cost). The court held that process was unlawful, for a number of reasons, not least that the parents (and the service provider) should have been informed and been involved at a much earlier time (when the assessments were being undertaken) and given time to consider and make representations on the proposals.

In the second case, ***AH v. Hertfordshire Partnership NHS Foundation Trust & Ealing PCT*** (2011) the council proposed to move a 48 year old man back to its area and into a ground floor flat (with 1:1 care). The man in question had not lived in the borough for 40 years and had for the last 10 had lived in a small rural residential unit. The evidence was that any change in his address caused him significant distress.

Putting it charitably, the Court of Protection, in ruling the action unlawful, took a fairly dim view of the idea that his care would be determined by dogma rather than on the basis of a 'best interests' assessment. It noted that the council was unable 'to identify a single dependable benefit' from the move.

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 (non-voluntary sector) 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
Partners
Luke Clements and Mo Burns

For details of training fees, terms and availability,
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A PDF copy of this newsletter is at
www.lukeclements.co.uk/training/index.html

Cardiff Law School
Centre for Health & Social Care Law
www.law.cf.ac.uk/chscl/

Forthcoming Conferences

October 14th 2011
Mental Health & Mental Capacity Law
Royal Northern College of Music
Manchester

Speakers include:
Professors Genevra Richardson, Richard Jones and Philip Fennell

Other pending Conferences

- **Independent Living and Poverty**
- **The Children Act & Disabled Children**
- **The Law & 'Consent'**

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